

 Edrolo

VCE LEGAL STUDIES

Units 1 & 2





VCE LEGAL STUDIES

Units 1 & 2

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FEATURES OF THIS BOOK

Edrolo's VCE Legal Studies Units 1 & 2 textbook has the following features.

Theory

Hooks introduce the main themes of the lesson in an engaging way.

Study design dot points provide explicit links between the content covered in each lesson and the VCAA curriculum.

Definitions are provided for the key terms that are explicitly included in the curriculum.

Other useful terms are defined to assist students to develop their legal vocabulary and to understand the context of the theory.

Key knowledge units break down the theory into smaller chunks reflecting the key elements of the study design dot point.

2B The presumption of innocence

STUDY DESIGN DOT POINT

2B-1-2-1 The presumption of innocence

Lesson introduction

The Australian legal system relies on key principles. A central principle is the presumption of innocence. This principle states that every person is innocent until proven guilty. The burden of proof is on the prosecution to prove beyond reasonable doubt that the accused is guilty. This principle is fundamental to the Australian legal system and is enshrined in the common law. It is a cornerstone of the criminal justice system and is essential for protecting individual rights and freedoms. The presumption of innocence is a key feature of the Australian legal system and is a fundamental principle of the rule of law. It is a principle that is deeply embedded in the Australian legal system and is a cornerstone of the criminal justice system. It is a principle that is essential for protecting individual rights and freedoms and for ensuring that the criminal justice system is fair and just. The presumption of innocence is a key feature of the Australian legal system and is a fundamental principle of the rule of law. It is a principle that is deeply embedded in the Australian legal system and is a cornerstone of the criminal justice system. It is a principle that is essential for protecting individual rights and freedoms and for ensuring that the criminal justice system is fair and just.

LEGAL VOCABULARY

Presumption of innocence A legal principle that states that every person is innocent until proven guilty. The burden of proof is on the prosecution to prove beyond reasonable doubt that the accused is guilty.

LESSON LINK

This lesson links to the study design dot point 2B-1-2-1, which requires students to understand the presumption of innocence and the burden of proof.

PROTECTION OF THE PRESUMPTION OF INNOCENCE

The presumption of innocence is a fundamental principle of the Australian legal system. It is a principle that is deeply embedded in the Australian legal system and is a cornerstone of the criminal justice system. It is a principle that is essential for protecting individual rights and freedoms and for ensuring that the criminal justice system is fair and just. The presumption of innocence is a key feature of the Australian legal system and is a fundamental principle of the rule of law. It is a principle that is deeply embedded in the Australian legal system and is a cornerstone of the criminal justice system. It is a principle that is essential for protecting individual rights and freedoms and for ensuring that the criminal justice system is fair and just.

LEGAL VOCABULARY

Presumption of innocence A legal principle that states that every person is innocent until proven guilty. The burden of proof is on the prosecution to prove beyond reasonable doubt that the accused is guilty.

LESSON LINK

This lesson links to the study design dot point 2B-1-2-1, which requires students to understand the presumption of innocence and the burden of proof.

EXPLORE BOXES

Explore boxes include useful tips, lesson links, and extension opportunities.

Want to know more? provide opportunities for students to learn more about something beyond the scope of the course if they are interested.

Hypothetical examples provide interesting context for theory and add to student engagement

Legislation titles are provided to enable students and teacher to refer to the primary source of information.

Legal cases have a focus on the facts, issues, decision and significance of a case.

Real-world examples provide context for understanding legal principles, processes and institutions.

Want to know more?

This section provides opportunities for students to learn more about something beyond the scope of the course if they are interested.

LEGAL CASES

James v Green Pty Ltd (2022) 1 VR 156

This case involves a dispute between a plaintiff and a defendant over a contract. The plaintiff claims that the defendant breached the contract and is seeking damages. The defendant denies the claim and argues that the contract was not breached. The court is required to determine the facts of the case and apply the law to those facts. This case is a good example of a contract dispute and the importance of clear evidence and legal argument.

REAL-WORLD EXAMPLES

This section provides context for understanding legal principles, processes and institutions.

DEEP DIVES

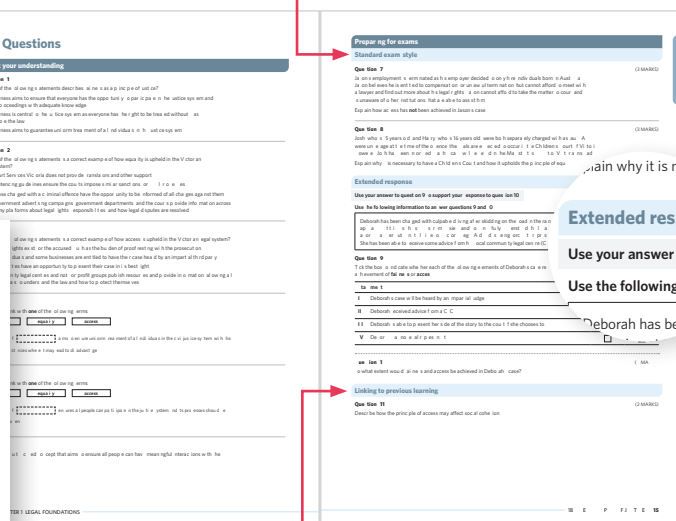
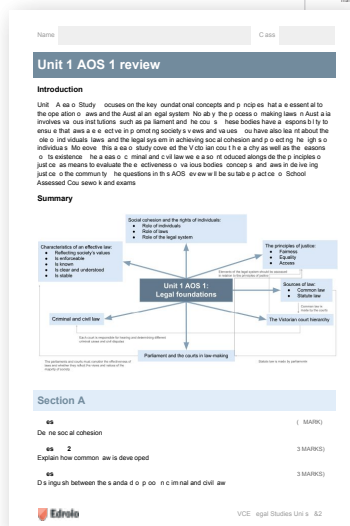
Deep dives provide in-depth information about a concept from the course, which may go beyond the scope of the curriculum to provide extension opportunities.

Questions and Reviews

Check your understanding test if students have understood the fundamental concepts within the lesson.

Standard exam-style questions reflect the style of 2-4 mark questions presented in past VCAA VCE exams.

Extended-response questions reflect the style of VCAA VCE exam questions and are usually 5 or 6 marks.



Extended response

Use your answer to question 1 to answer question 2

Use the following information to answer question 2

Scaffolding questions provide the content and phrasing support to better enable students to approach extended-response questions.

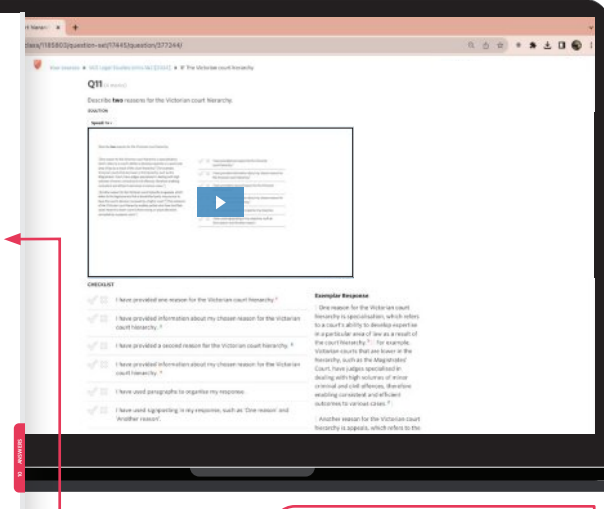
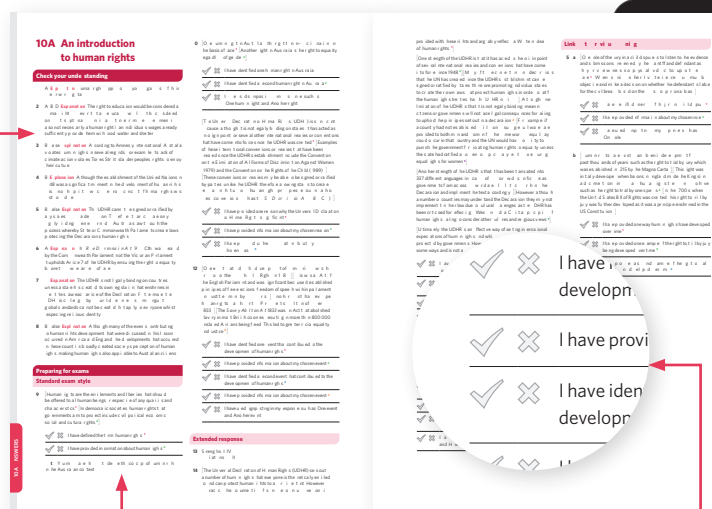
'Linking to previous learning' questions promote continuous revision and encourage students to see the relationships between concepts and topics.

Reviews are found online and replicate the common format and length of School Assessed Coursework (SAC) tasks and end-of-unit exams.

Answers

Explanations are provided for each 'Check your understanding' question to help students understand the answer in greater detail.

Online video solutions provide an exemplar response and guidance for students to assess their own responses.



Notes are included when it is necessary to explain alternative approaches to a question, or why a certain response would not be appropriate.

Checklists break down exemplar answers to exam-style questions to assist students to understand how to best structure their responses.

Exemplar responses are provided for every exam-style question to demonstrate what a full mark response could look like.

Where to get help



VCE Legal Studies is a fascinating course, with strong connections to real-world events and lived experiences of people in our communities. The relevance of the content to our lives is what makes it such an interesting and important subject to study. To understand the operation of the justice system and the social, political and legal issues that exist in our democratic society, it is important that realistic examples are provided for context.

This textbook contains theoretical information, real-world examples, and hypothetical scenarios that may be triggering for some students, due to their personal experiences or a mental health condition. For instance, there will be examples involving criminal acts that may be confronting for some students. Where content is identified as being potentially triggering, you will see a content warning beside specific examples, or at the beginning of a particular lesson or chapter.

If any of the concepts or examples you learn about in this course triggers any negative emotions and you need access to mental health support to cope with these feelings, it may be beneficial to reach out for support. Whilst you can seek the support of family, friends, teachers and other people in your life, sometimes talking to an independent professional can also help. This page provides a list of mental health resources and services to support students who may need it. There are also links to legal information and advice services, in case students are facing any legal issues in their own lives.

The resources and services listed below are not the only sources of help available. More resources can be accessed via an online search, or through referral from one of the services listed here. You should reach out to trusted adults and friends too, when you need to.

Legal information and advice

Web addresses and phone numbers are correct as of 2023. In the event that the links or phone numbers do not work, please search online for the relevant organisation to find their most up-to-date contact details.

Community legal centres (CLCs)

CLCs are independent community organisations that provide free legal services to those who need it. You can search for your local CLC online.

www.fclc.org.au

JobWatch

An employment rights community legal centre. JobWatch provides a free Telephone Information Service and provides employment law resources online.

jobwatch.org.au

Melbourne: (03) 9662 1933;
Regional Victoria: 1800 331 617

Victoria Legal Aid

A source of free legal information, advice and representation.

www.legalaid.vic.gov.au

1300 792 387

YouthCentral

Youth Central is the Victorian Government's website for young people aged 12-25, providing information about life from every angle, including the rights of young people.

www.youthcentral.vic.gov.au

Youthlaw

Victoria's free community legal centre for young people under 25 years of age. Youthlaw services include legal advice by phone and email, a drop in clinic, legal education, and more.

youthlaw.asn.au

(03) 9113 9500

Mental health support

Web addresses and phone numbers are correct as of 2023. In the event that the links or phone numbers do not work, please search online for the relevant organisation to find their most up-to-date contact details.

Beyond Blue

A reliable source of mental health information, support, and hope. Offers free telephone and online counselling services 24 hours a day, seven days a week.

www.beyondblue.org.au **1300 224 636**

Headspace

A national youth mental health foundation, providing mental health services to 12–25-year olds. Their services include in-person, online and phone support.

headspace.org.au **1800 650 890**

Kids Helpline

A free, confidential 24/7 online and phone counselling service for your people aged five to 25. Qualified counsellors at Kids Helpline are available via WebChat, phone or email anytime and for any reason.

kidshelpline.com.au **1800 55 1800**

Lifeline

A national charity providing all Australians experiencing emotional distress with access to 24 hour crisis support and suicide prevention services.

www.lifeline.org.au **13 11 14**

ReachOut

A 100% online, anonymous and confidential service. ReachOut provides one-to-one peer support, moderated online communities, tips, stories and other resources.

au.reachout.com

SANE

Free support services, including counselling, community forums, peer support and groups, information and resources.

www.sane.org **1800 187 263**

1800Respect

A national domestic, family, and sexual violence counselling service. Confidential information, counselling and support service is available 24 hours a day, 7 days a week, for free.

1800respect.org.au **1800 737 732**

Approaching exam-style questions

The VCE Legal Studies Study Design (VCAA, n.d.-b) specifies that a student's level of achievement in Units 1 and 2 is a matter for schools to determine through a variety of assessment tasks. There are many suitable assessment tasks listed in the study design, including a folio of exercises, structured questions, and essays. Many schools choose to assess students with these types of tasks under test conditions in preparation for the VCE Legal Studies examination at the conclusion of Units 3 and 4. The exam-style questions in this Edrolo resource are designed to replicate the same style of question used in the Units 3 and 4 exam, which many Unit 1 and 2 school assessments are also based on.

This resource will help you understand how to interpret the requirements of exam-style questions, how to structure your response, and how to best meet the requirements of a question when there might be multiple ways to approach it. The Edrolo approach to planning and self-assessing responses is explained below, and there are examples of this throughout the textbook.

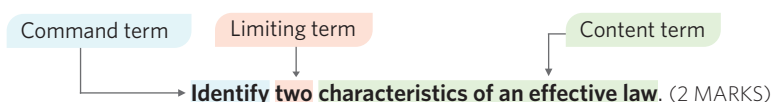


Figure 1 Preparation is the key to success in exams

Dissecting a question

Before approaching an exam-style question, it is necessary to break down the question into its parts and understand what you are required to do. For higher-mark questions, this sometimes allows you to assess how many marks are available for each part of the question. This can then inform you of the amount of time you should spend on each part accordingly. Exam-style questions contain the following features: command terms, limiting terms, and content terms. It should be noted that not all questions have limiting terms.

Example A



Command terms

The Victorian Curriculum and Assessment Authority (VCAA) has published a glossary of 'command terms', which are instructional words commonly used across the Victorian curriculum, including in VCE exams. These terms are often referred to as 'task words' and they communicate instructions. In the context of VCE exams, command terms instruct you on how to respond to a question. Some common examples of command terms used in Legal Studies include outline, describe, explain, justify, analyse, discuss, and evaluate. You should refer to the VCAA website for the most up-to-date information about command terms. In Example A, the command term is 'identify'.

Limiting terms

Limiting terms are words that provide further clarification about what you need to do, or how you need to respond to the question. Limiting terms often quantify the instructions by specifying a particular amount of information that you need to limit your answer to, or provide a choice you must make in your answer, with a term such as 'either'. In Example A, the limiting term is 'two', indicating you must limit your answer to only providing two characteristics of an effective law.

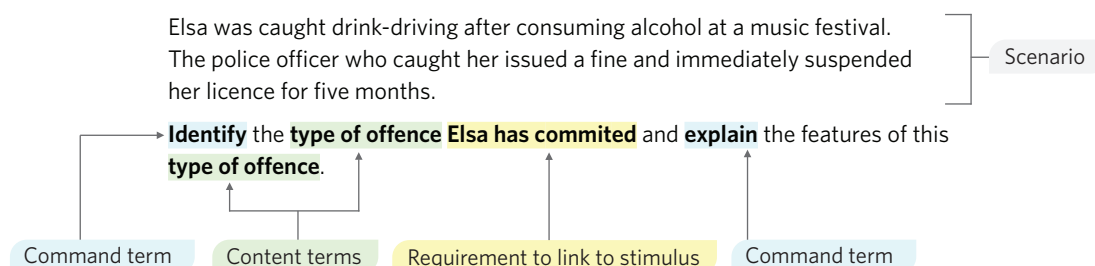
Content terms

Content terms are the words that come from the VCE Legal Studies Study Design. These are the topics and concepts you will study in this course. In Example A, the content term is 'characteristics of an effective law' as this is a key legal concept from the Study Design.

Approaching exam-style questions with stimulus material

Many questions in past VCE Legal Studies Units 3 and 4 exams contain scenarios or other stimulus material, such as quotes, extracts from legislation, or other legal material. These require students to link their theoretical understanding of legal concepts to the stimulus when responding to the question. Units 1 and 2 assessments often replicate the VCAA exams, allowing students to become familiar with the style of questions, including the use of stimulus material. When faced with a question like Example B, it is necessary to reference to the stimulus material and make a link between the scenario and the theory.

Example B



The following is an exemplar response with an associated checklist to demonstrate an appropriate approach to this question. Checklists like this are provided throughout the textbook and online resource as guidance to demonstrate one possible way of structuring responses. The checklists are not marking guides and do not necessarily represent how each mark would be awarded in a question.

Answer

[Elsa was caught drink-driving, which is considered a summary offence.¹] [One feature of summary offences is that they are less severe and are, consequently, heard in the Magistrates' Court where a fine or small term of imprisonment would be issued as the sanction to Elsa if she were found guilty.²] [Another feature of summary offences is that they are mostly established in the Summary Offences Act 1966 (Vic) and include driving offences, like driving whilst under the influence of alcohol in the case of Elsa.³] [Finally, a third feature of summary offences is that there is no option to trial by jury, meaning the magistrate will determine the guilt of Elsa if her case is taken to court.⁴]

☒ ☐ I have identified the type of offence Elsa has committed.¹

☒ ☐ I have provided one feature of summary offences.²

☒ ☐ I have provided a second feature of summary offences.³

☒ ☐ I have provided a third feature of summary offences.⁴

☒ ☐ I have linked my answer to the scenario where appropriate.

☒ ☐ I have used connecting words, such as 'Finally'.

☒ ☐ I have used signposting in my response, such as 'One feature' and 'Another feature'.

USEFUL TIP

Many VCE Legal Studies questions can be answered in a variety of ways, using many alternative examples or statements to demonstrate knowledge. There is rarely one correct approach to any given question. As such, you should treat the exemplar responses in this Edrolo resource as simply one example of how to answer a question. Occasionally, you may see a 'Note' beneath a particular exemplar response to indicate that other responses may or may not be acceptable. These notes are not included for all questions that have multiple acceptable responses; they are only included when there is potential for confusion to arise as to what might be acceptable.

Extended-response questions

Past VCE Legal Studies exams contain many questions requiring an extended response that is usually worth at least five marks and requires higher-level thinking skills, such as analysis and evaluation. These questions are often expressed in a similar way to an English essay question. Extended-response questions often require you to consider the strengths and limitations of a concept or explore circumstances where a particular legal process or institution may be appropriate or inappropriate.

You need to develop your skills in answering extended response questions in Units 1 and 2 of VCE Legal Studies. This Edrolo resource provides you with guidance when answering these questions. Consider Example C.

Example C

Extended-response question

Command term

To what extent does the **Universal Declaration of Human Rights (UDHR)** protect **human rights**?
→ **Justify** your response.

Content terms

This question could also be asked in a different way: 'Discuss the extent to which the *Universal Declaration of Human Rights* (UDHR) protects human rights.' Both versions require you to consider ways in which the UDHR protects human rights, but also limitations of the Declaration's ability to protect human rights.

A question like Example C, asking you 'to what extent', requires you to consider arguments in support of, and against a proposition. In this case, the proposition is that the UDHR protects human rights. Therefore, to answer this question, you need to make arguments in support of this proposition, and arguments against it. These arguments can be drawn from the strengths and limitations of the UDHR, which are detailed in the 'strengths and limitations' tables within the relevant lesson (10A An introduction to human rights).

USEFUL TIP

The command term 'justify' requires you to 'show, prove or defend, with reasoning and evidence, an argument, decision and/or point of view using given data and/or other information' (VCAA, n.d.-a).

In Example C, you must justify the extent to which the UDHR protects human rights, so you should establish a point of view, such as 'The UDHR protects human rights to a large/moderate/small extent', and then justify this judgement with evidence. The evidence in this question would be the strengths and limitations of the UDHR in protecting human rights, preferably with relevant supporting examples.

For other questions requiring you to 'justify your response', there may be a clear answer to justify, such as yes or no, and in that case, you will need to provide reasons to support your answer, which should include evidence and/or examples.

This Edrolo resource also provides support for extended-response questions by first providing a small question, known as a 'scaffolding question', to help you identify relevant factors, arguments, or examples that could form part of your extended response. For example, some scaffolding questions require you to identify which statements represent strengths, and which represent limitations. Having a list of strengths and limitations can be a great foundation for building a discussion or making arguments as part of an evaluation. These questions are referred to as scaffolding questions because they support you in approaching the associated extended-response question.

Scaffolding question

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the *Universal Declaration of Human Rights* (UDHR) in protecting human rights.

Statement	Strengths	Limitations
I. The UDHR acted as the origin point of several international treaties and conventions that have come into force since 1948.	☒	☐

Statement	Strengths	Limitations
II. International declarations, including the UDHR, are not legally binding. This means citizens or governments will not face legal consequences for failing to uphold the principles set out in a declaration.	☐	☒
III. Although a number of countries may understand the Declaration, they may not implement it into their law due to cultural challenges it poses. The UDHR has been criticised as reflecting a Western, Judea-Christian perception of human rights and failing to consider other cultures and religious views.	☐	☒
IV. The UDHR has been translated into 337 different languages, indicative of its worldwide significance as governments from across the world are all able to comprehend the Declaration and implement the text accordingly.	☒	☐
V. Many conventions and declarations that the UN has created since the UDHR's establishment have been signed or ratified by Member States, therefore encouraging or requiring individual States to create their own laws that protect human rights in order to ratify the human rights treaties that the UDHR inspired.	☒	☐

Strengths and limitations identified in the scaffolding question can be included throughout the answer to the extended-response question.

Answer

[The *Universal Declaration of Human Rights* (UDHR) sets out a number of human rights that everyone is theoretically entitled to and can protect human rights to a certain extent. However, in practice, the document itself is unable to ensure everyone is provided with these rights and arguably reflects a Western idea of 'human rights'.¹]

[One strength of the UDHR is that **it has acted as the origin point of several international treaties and conventions that have come into force since 1948.**²] **Many of these conventions and declarations that the UN has created since the UDHR's establishment have been signed or ratified by Member States, therefore encouraging or requiring individual States to create their own laws that protect human rights in order to ratify the human rights treaties that the UDHR inspired.**³] [Although, one limitation of the UDHR is that **it is not legally binding, meaning citizens or governments will not face legal consequences for failing to uphold the principles set out in a declaration.**⁴] [For example, if a country had not established legislation ensuring equal wages are provided to both men and women for the same work, unequal pay could occur in that country and the UN would have no ability to sanction the government for violating human rights to equality, unless the State had ratified a convention specifically related to ensuring equal rights for women.⁵]

[Another strength of the UDHR is that **it has been translated into 337 different languages, indicative of its worldwide significance as governments from across the world are all able to comprehend the Declaration and implement the text accordingly.**⁶] [However, **although a number of countries may understand the Declaration, they may not implement it into their law due to cultural challenges, as the UDHR has been criticised for reflecting a Western, Judea-Christian perception of human rights, failing to consider other cultures and religious views.**⁷]

A checklist associated with the given exemplar response is shown on the next page. It is important to remember the numbers beside each phrase within the exemplar response align with a checklist item, but these checklist items do not necessarily represent marks that would be awarded by assessors. As you can see from the following checklist, there are eleven identified elements of the exemplar response, but this question is only worth six marks. The response would be awarded a mark out of six, according to the overall quality of the response, rather than a mark for each element of the response. For higher mark questions in particular, marks are often awarded holistically, meaning the answer is marked as a whole rather than by quantifying specific elements of the response.

USEFUL TIP

When using Edrolo-style answer checklists in VCE Legal Studies, it is important to understand that the number of checklist items does not always correlate with the number of marks allocated to the question. The numbered checklist items identify phrases within the exemplar response, and there are often more identified phrases than marks, particularly for extended-response questions. This is because in VCE Legal Studies, assessors do not mark with a marking guide that identifies a specific element required for each mark to be allocated for every question.

Instead, extended-response questions are marked 'globally' or 'holistically', which means a judgement is made by the assessor about the overall quality of the response, in order to allocate it a mark in total. This is necessary because there are often many alternative ways that a given question could be approached, rather than one 'formula' that must be followed precisely.

Checklist

☒	☐	I have provided an introduction to summarise my answer to the question. ¹
☒	☐	I have identified one strength of the UDHR in protecting human rights. ²
☒	☐	I have provided information about my chosen strength. ³
☒	☐	I have identified one limitation of the UDHR in protecting human rights. ⁴
☒	☐	I have provided information about my chosen limitation. ⁵
☒	☐	I have identified a second strength of the UDHR in protecting human rights. ⁶
☒	☐	I have identified a second limitation of the UDHR in protecting human rights. ⁷
☒	☐	I have provided a conclusion to my response that links back to the question. ⁸
☒	☐	I have used paragraphs to organise my response.
☒	☐	I have used signposting in my response, such as 'One strength' and 'Another strength'.
☒	☐	I have used connecting words, such as 'Although' and 'However'.

Following a checklist like this can help you structure an extended response. When approaching exam-style questions, you can create your own checklists to guide your writing.

USEFUL TIP

The 2022 VCE Legal Studies external assessment report provided advice regarding general examination techniques. This report, along with other years' reports, is available on the VCAA website. Some of this advice is summarised below:

- Where applicable, paragraphing, signposting, and the use of topic sentences are important to ensure clarity and to allow points to be easily identified.
- Time management is important. You should not spend too much time on straightforward questions. This will ensure you have enough time for planning and writing extended responses.

Even though this advice applies to the Units 3 and 4 exam specifically, it is useful to begin developing these skills when studying Units 1 and 2, and completing your own School Assessed Coursework (SACs).

Summary

VCE Legal Studies exam questions are not always straightforward. Often there are many approaches you could take to achieve high marks. The scaffolding questions, exemplar responses, and checklists provided in this textbook can help you understand how to plan and write responses to questions in the end-of-year examination and in your School Assessed Coursework (SACs).



UNIT 1

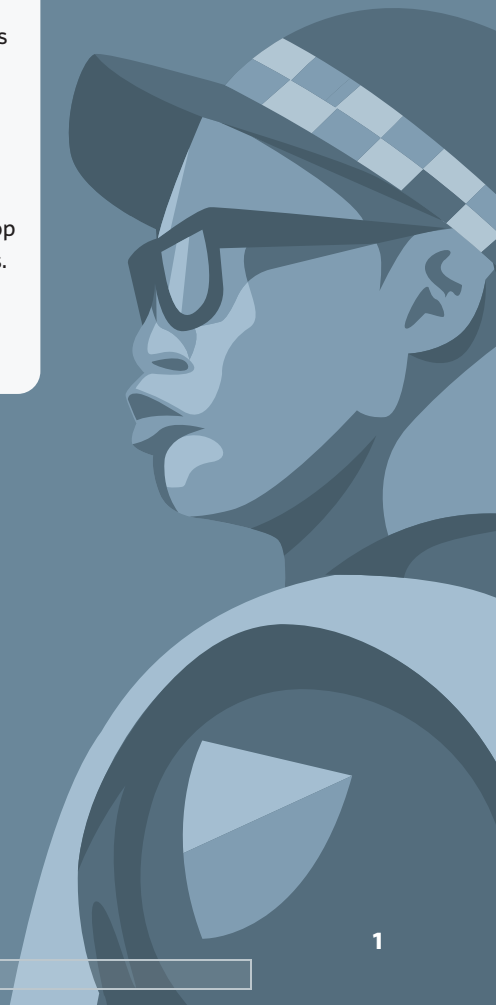
The presumption of innocence

Laws, including criminal law, aim to achieve social cohesion and protect the rights of individuals. Criminal law is aimed at maintaining social order. When a criminal law is broken, a crime is committed which is punishable and can result in criminal charges and sanctions.

In this unit, students develop an understanding of legal foundations, such as the different types and sources of law, the characteristics of an effective law, and an overview of parliament and the courts. Students are introduced to and apply the principles of justice. They investigate key concepts of criminal law and apply these to actual and/or hypothetical scenarios to determine whether an accused may be found guilty of a crime. In doing this, students develop an appreciation of the manner in which legal principles and information are used in making reasoned judgments and conclusions about the culpability of an accused. Students also develop an appreciation of how a criminal case is determined, and the types and purposes of sanctions. Students apply their understanding of how criminal cases are resolved and the effectiveness of sanctions through consideration of recent criminal cases from the past four years.

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UNIT 1 AOS 1

Legal foundations

This area of study provides students with foundational knowledge of laws and the Australian legal system. Students explore the role of individuals, laws and the legal system in achieving social cohesion and protecting the rights of individuals. Students consider the characteristics of an effective law, and sources and types of law. They examine the relationship between parliament and the courts in law-making, and the reasons for a court hierarchy in Victoria, they also develop an understanding of the principles of justice.

Outcome 1

On completion of this unit the student should be able to describe the main sources and types of law, and evaluate the effectiveness of laws.

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KEY SKILLS

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

Image: Jason Benz Bennee/Shutterstock.com

CHAPTER 1

Legal foundations

LESSONS

- 1A** Social cohesion and the rights of individuals
- 1B** The principles of justice
- 1C** Characteristics of an effective law
- 1D** Parliament and the courts in law-making
- 1E** Sources of law
- 1F** The Victorian court hierarchy
- 1G** Criminal and civil law

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 reflecting society's values; is enforceable; is known; is clear and understood; and is stable
- an overview of the roles of the parliament and the courts and their relationship in law-making
- sources of law such as common law and statute law
- an overview of, and reasons for, the Victorian court hierarchy
- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law.

1A Social cohesion and the rights of individuals



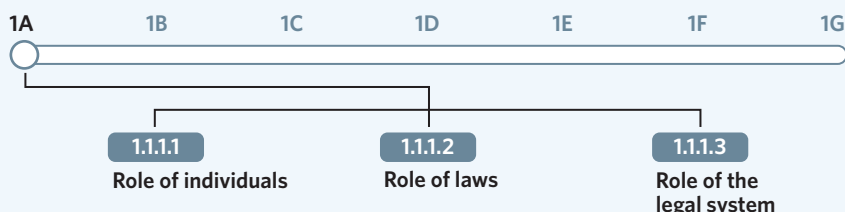
Image: Sergey Goryachev/Shutterstock.com

'We are one, but we are many.'—The Seekers (Australian band, 'I Am Australian', 1987)

In the same way The Seekers sought to unite Australians through their song 'I Am Australian', individuals, laws, and the legal system each play a role in shaping Australian society and ensuring social cohesion.

STUDY DESIGN DOT POINT

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



Lesson introduction

As a multicultural and diverse country, individuals, the law, and the legal system all have interconnected responsibilities to establish, maintain, and protect social cohesion in Australia. While the law establishes societal codes of moral and acceptable behaviour, the legal system plays a crucial role in protecting the rights of individuals and enforcing legislation.

Role of individuals 1.1.1.1

In Australian society, individuals are responsible for enacting lawful behaviour, obeying moral values and guidelines, and ultimately achieving **social cohesion**. By doing so, individuals can ensure all people live in a safe environment where their rights and needs are respected and protected from harm by others.

Individuals may be encouraged to follow legislation:

- out of fear of legal consequences, such as fines or imprisonment.
- due to their personal morals and values, which may encourage them to behave and interact with others in a respectful manner.
- to maintain a positive public reputation and ensure they are perceived favourably in society, including with friends, family members, and in the workplace.
- to avoid causing physical, emotional, or psychological harm and trauma to others in society.

Individuals can also ensure their rights are upheld in society by bringing matters to the courts when they feel that social cohesion is being disrupted, or to try to instigate social change.

KEY TERM

Social cohesion the presence of strong relationships and bonds that unite society and encourage cooperation, alongside an absence of war and conflict.

LESSON LINK

You will learn more about fines and imprisonment in **5B Types of sanctions**.

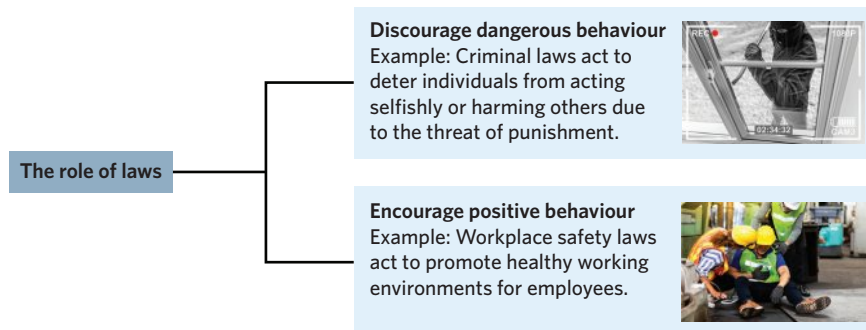
HYPOTHETICAL SCENARIO

Pascal's palpable pickle

Pascal recently quit his part-time job and has been unable to find work since. Pascal does not have enough money to pay for all his grocery items this week and is considering stealing some extra goods at the self-service checkout. However, he is at a crossroads. Does he steal the items and risk the punishment? Would his parents be proud of him for such behaviour? Or should he do the right thing and only pay for what he can afford?

Role of laws 1.1.1.2

Laws exist in Australia to protect the rights of individuals and promote community safety. As a **democratic society**, Australian and Victorian laws are established in parliament, by elected politicians, and applied equally and coherently across the country or state. These laws are enforced by the courts and public authorities, and aim to promote moral values and social cohesion amongst individuals, while simultaneously regulating behaviour.



Images (top to bottom): BigPixel Photo, Brian A Jackson/Shutterstock.com

Figure 1 The role of laws

LEGAL VOCABULARY

Democratic society an organised system of people living in a community, in which the laws and processes that govern the peoples' lives are created by elected representatives.

LESSON LINK

You will learn more about laws in **1C Characteristics of an effective law.**

REAL WORLD EXAMPLE

Technology blitz for the safety of citizens

On 31 March 2023, new Victorian road laws were introduced to regulate the use of technological devices while operating a motor vehicle. These laws aim to promote road safety and protect drivers from the dangers and distractions that in-vehicle and portable technologies can pose while driving. Previously, road safety laws had only included regulations on mobile phone and visual display usage. The new rules include:

- not interacting with any devices.
- not displaying text messages, social media, emails, or photos.
- not resting a device on a body part.
- not passing a device to a passenger.
- not touching a portable device, even if it is turned off.

Hence, these new laws intend to encourage road safety in Victoria.

Adapted from 'Drivers with full licences' (VicRoads, 2023)



Image: Ground Picture/Shutterstock.com

Figure 2 New Victorian road rules were established on 31 March 2023 to address the use of various technological devices while driving

Role of the legal system 1.1.1.3

Legal systems are composed of various institutions, rules, and procedures that aim to maintain social cohesion and order by creating and enforcing laws.

Australia's legal system includes:

- parliaments, which are the elected bodies responsible for creating laws.
- judges, who are independent legal experts that preside over trials, and ensure procedural fairness by overseeing all personnel and evidence.
- the courts, which are the institutions in which a trial is held, the judge resides, and the jury may sit.
- police, who are the people tasked with enforcing the law.

For a legal system to be successful in promoting social cohesion, it must be consistent and transparent. This means the system must be fair, just, and equally applied to all members of society, whilst also remaining open and honest about its proceedings and purpose. When making laws, parliaments will aim to promote these principles to represent the best interests of the public, whilst the courts will also attempt to uphold these principles through their interpretations and applications of the law.

LESSON LINK

You will learn more about the role of parliament and the courts in law-making in **1D Parliament and the courts in law-making.**

LEGISLATION*National Health Act 1953 (Cth)***WANT TO KNOW MORE?**

The Pharmaceutical Benefits Scheme (PBS) is an Australian Government program that subsidises medications for Australians under the *National Health Act 1953 (Cth)*. On 1 January 2023, the Australian Government amended the scheme, making it more affordable and allowing Australians to save up to 29% on approved medications. This change reflects the willingness of parliaments to align laws with the interests of the public and the right to accessible healthcare. If the Australian Government failed to implement these changes, Australians may have compromised their health to reduce their expenses. Thus, this amendment to the PBS aimed to protect the health and wellbeing of individuals and encourage the operation of an effective healthcare system. You can find out more about the 2023 changes to the PBS by searching 'Changes to the PBS to make medicines more affordable' and clicking the 'PBS' webpage (Australian Government Department of Health and Aged Care, 2023).

Lesson summary

In order to promote social cohesion and protect rights:

- individuals enact lawful behaviours, obey moral standards, and instigate social change.
- laws are established that promote community and societal wellbeing, whilst supporting the implementation of societal norms.
- the legal system maintains order through the establishment and enforcement of laws.

1A Questions

Check your understanding

Question 1

The legal system is the only mechanism by which the rights of individuals can be protected and upheld.

- A. True
B. False

Question 2

Fill in the blanks with the following terms:

individuals

law

the legal system

Through [], parliaments establish legislation, whilst the courts ensure laws are enforced in a just manner.

The [] can influence the actions and values of [].

Question 3

Social cohesion is:

- A. when a society exists in harmony without the presence of conflict.
B. the process by which laws are created and enforced.
C. how the police navigate individuals who are disobeying the law.

Question 4

The role of individuals in social cohesion and rights protection include:

(Select all that apply)

- A. following moral guidelines and social norms.
- B. preventing and protecting others from harm.
- C. ignoring the presence of the law.
- D. challenging existing social injustices.

Question 5

Fill in the blanks with the following terms:

encourage

discourage

The role of the law is to [] dangerous behaviours, such as armed robbery and assault, whilst it aims to [] positive behaviours, such as workplace safety and paying taxes.

Question 6

The legal system should avoid disclosing information about laws and its formal processes to ensure individuals do not engage in terrorist or rebellious behaviours.

- A. True
- B. False

Question 7

Disharmony between individuals, laws, and the legal system can:

- A. encourage social cohesion and the protection of rights.
- B. encourage social cohesion but discourage the protection of rights.
- C. discourage social cohesion but encourage the protection of rights.
- D. discourage social cohesion and the protection of rights.

Preparing for exams

Standard exam-style

Question 8

(1 MARK)

Identify the role of **either** laws or the legal system in achieving social cohesion and rights protection.

Question 9

(2 MARKS)

Outline the role of individuals in achieving social cohesion and rights protection.

Question 10

(3 MARKS)

Describe how the legal system influences the role of the laws in achieving social cohesion and rights protection.

Question 11

(3 MARKS)

In a country facing an environmental crisis, the government is aiming to maintain social cohesion and has passed a new law that mandates all people to engage in community service each week. The community service will involve participating in beach and city clean-ups for one hour per week.

With reference to the scenario, distinguish between the role of individuals and the role of the legal system in achieving social cohesion and rights protection.

Question 12

(4 MARKS)

A police officer was called to the scene of an armed robbery at a family-owned jewellery store. A month later at the trial of the accused robber, a judge handed down a final verdict to imprison the offender.

Explain the role of the legal system in achieving social cohesion and rights protection in this scenario.

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether each of the following statements are **true** or **false** about the achievement of social cohesion and rights protection.

Statement	True	False
I. Individuals can be governed by laws that encourage and discourage certain behaviours for social cohesion to be achieved.	☐	☐
II. Without the legal system, laws would be unable to be established and enforced, and rights protection would not be achieved.	☐	☐
III. The roles of individuals, laws, and the legal system rarely rely on each other.	☐	☐
IV. If laws and the legal system did not exist, individuals would likely live with greater social cohesion and rights protection.	☐	☐
V. The legal system relies on individuals and laws to contribute to social cohesion and rights protection.	☐	☐

Question 14

(5 MARKS)

'Individuals, laws, and the legal system must all work together for social cohesion and rights protection to be achieved.'

Do you agree with this statement? Justify your response.

1B The principles of justice

STUDY DESIGN DOT POINT

- the principles of justice: fairness, equality and access

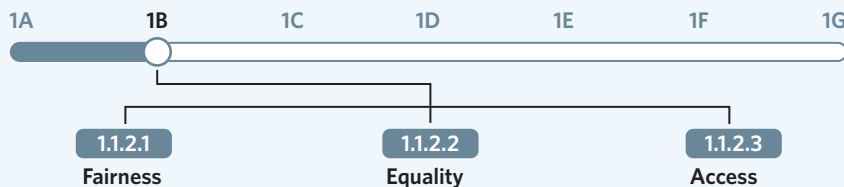


Image: RYO Alexandre/Shutterstock.com

'No justice, no peace.'—Slogan of the US Civil Rights Movement

Justice cannot exist without peace and vice versa. In today's society, which faces many injustices and inequalities, the law and legal institutions must attempt to combat such issues and encourage fairness and equality. Additionally, ensuring justice within a community not only fosters harmony but also ignites hope and action for a better future.

Lesson introduction

The justice system relies on the fundamental principles of justice, which form the basis for assessing whether justice has been achieved in the legal system. These principles are designed to encourage equal access to the justice system for all individuals, regardless of their background. To uphold these principles, the Victorian justice system is composed of a range of legal principles, mechanisms, and processes.

Fairness 1.1.2.1

The principle of **fairness** is central to the justice system as everyone has the right to be treated without bias before the law. Fairness in the legal system is centred around the idea that all individuals have the right to unbiased court processes and a fair trial. This provides individuals and groups with the right to have their cases heard by an unbiased third party.

Fairness is promoted in the Victorian legal system in a variety of ways.

- 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.
- 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. This ensures 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 and civil trials, the accused or defendant has the right to have their case determined by a jury consisting of impartial members of the community.

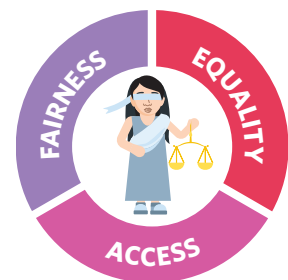


Figure 1 The principles of justice



KEY TERM

Fairness the principle that all people can participate in the justice system and its processes should be impartial and open.

USEFUL TIP

In your responses to questions in assessments, avoid using the word 'fair' to define 'fairness'. Instead, try using words such as 'impartial' or 'just', and when describing fairness you could refer to processes that are open and impartial.

HYPOTHETICAL SCENARIO

Silent confessions

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 by the police with physical harm. By denying her the chance to defend her innocence, Sophie's right to a fair trial has been undermined. The justice system should ensure accused individuals have the opportunity to present their case, without fear. A just legal system must safeguard the rights of individuals, even those accused of serious crimes, to ensure fairness and uphold the principles of justice.



Figure 2 Even if a person has committed a crime, they deserve to be treated fairly

Equality 1.1.2.2

The principle of **equality** aims to guarantee the uniform treatment of all individuals in the justice system. However, equal treatment does not necessarily lead to equal outcomes. In such circumstances, appropriate actions should be taken, or policies established, to rectify these inequalities. In the justice system, the principle of equality is crucial to prevent discrimination based on personal characteristics, such as age, gender, wealth, native language, ethnicity, and religion. Victoria's justice system contains several legal principles and procedures to facilitate equality.

Equality is promoted in the Victorian legal system in a variety of ways.

- The state, who acts as the prosecution in criminal cases, is more powerful than the individual accused in terms of funding, 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 being a high threshold in criminal cases, requiring the prosecution to prove the accused committed the crime beyond reasonable doubt.
- Sentencing guidelines exist to ensure the courts impose similar sanctions for similar offences. These guidelines often establish sentencing parameters, including a minimum and maximum sentence for particular crimes.
- The compensation for injured parties or sanctions imposed on offenders are based upon the law and the facts. Decisions are not based on bias 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 Court, allows groups within society who may have specific needs or requirements to have their case heard in a court specialised to handle those needs.

The **rule of law** dictates that all persons, businesses, and governments are equal before the law, therefore, all individuals are bound by the law in the same manner and no one is above the law. However, this can become complex where, for example, children are held to the same standard as the average adult. Consequently, the Children's Court was introduced to provide different sentencing practices to minors.



KEY TERM

Equality the principle that all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage.

LEGAL VOCABULARY

Rule of law the principle that the law applies to everyone equally regardless of status.

LESSON LINKS

You will learn more about the burden of proof and the standard of proof in **2C Key concepts of criminal law**.

You will learn more about the prosecution in **1G Criminal and civil law**.

You will learn more about individual rights in **4C Institutional powers and individuals rights**.

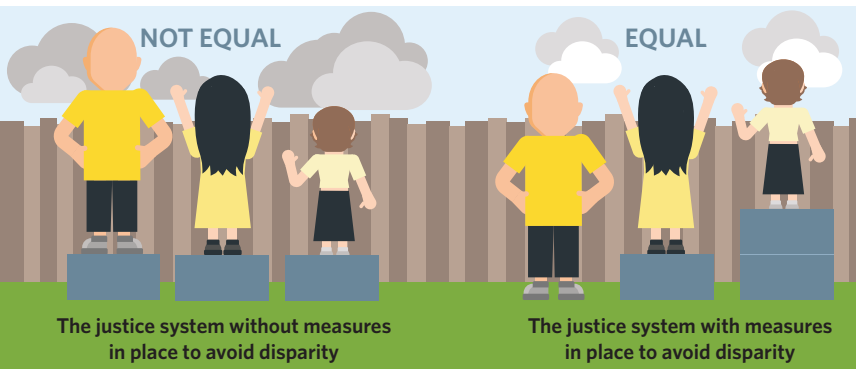


Figure 3 The principle of equality

The approach of the justice system emphasises the importance of focusing on just results rather than purely equal treatment. In order to prevent discrimination against individuals who may be disadvantaged, it is essential to establish mechanisms that acknowledge and accommodate the natural differences among people. These mechanisms aim to ensure the law treats all individuals fairly, regardless of their personal circumstances.

USEFUL TIP

In your responses to questions in assessments, avoid using the word 'equal' to define 'equality'. Instead, try using words such as 'same' or 'comparable outcomes', and when describing equality you should refer to the use of equitable measures, whereby people are treated differently in some cases in order to remove disparity and disadvantage.

LESSON LINK

You will learn more about the Koori Court in **5D Alternative approaches to sentencing**.

DEEP DIVE

The Koori Courts in Victoria

In 2002, a specialist division of the Magistrates' Court was established in Victoria. One of the aims of the Koori Court is to provide culturally-relevant legal processes and encourage culturally-responsive sentencing practices for First Nations persons who committed an offence in Victoria.

The Koori Court has several features, including:

- only dealing with the sentencing of First Nations offenders, and not having any role in determining the verdict of the case.
- using a less formal process, in which respected community leaders from the Indigenous community are present.
- involving discussions between the offender and a respected Elder about the impact of their crime upon the victim and their family, the offender and their family, and their broader First Nations community.

Once discussions with First Nations Elders or Respected Persons have occurred, the magistrate or judge will impose a sanction. These are no more or less severe than the sanctions given using traditional sentencing methods.

The Koori Court system is effective in reducing reoffending. It is an example of the criminal justice system being modified to reflect the differences between Indigenous and non-indigenous Australians, promoting equality in the law.

Adapted from 'Koori Court' (Magistrates' Court of Victoria, 2023)



Image used with permission from YardFurniture.com.au

Figure 4 The Koori Court

Access 1.1.2.3

The principle of **access** aims to ensure everyone has the opportunity to participate in the justice system and its proceedings with adequate knowledge. It is a requirement in Australian society that individuals and businesses inform themselves of, and understand, the law. If a person is charged with drink-driving or civil action is taken against a business for 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 publish information about the law and resolving legal disputes, whilst also providing 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.

- **Victoria Legal Aid (VLA)** 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 (CLCs)** and not-for-profit groups publish resources and provide information to people of all ages, cultures, and languages to assist them in understanding 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.

KEY TERM

Access the principle that all people should be able to engage with the justice system and its processes on an informed basis.

LEGAL VOCABULARY

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

Community legal centres (CLCs)

not-for-profit community organisations that provide free legal information, advice, education, and casework services.

HYPOTHETICAL SCENARIO



Figure 5 Consumer Affairs Victoria (CAV) enabled Xue to understand her consumer rights after purchasing a defective TV

Access denied

Xue finds herself in a predicament when she purchases a defective TV. Thankfully, a friend advises her to seek assistance from a governmental organisation known as Consumer Affairs Victoria (CAV). However, Xue faces a significant obstacle as she is not proficient in English and her first language is Mandarin. Luckily, the Consumer Affairs Victoria website has resources in Mandarin and she is able to understand the online advice. She realises she is entitled to a refund and is able to get her money back. Through CAV, Xue is able to access justice.

USEFUL TIP

In your responses to questions in assessments, avoid using the word 'access' to define 'access'. Instead, try using words such as 'informed' and 'able to engage with the justice system'.

WANT TO KNOW MORE?

There are interpreters available for many different languages including Australian Sign Language. You can find out more about translators in the courts by searching 'Magistrates' Court of Victoria, Interpreters' and clicking the relevant link.

Lesson summary

The principles of justice are an essential aspect of the Victorian justice system. All three principles of justice overlap and interconnect to ensure justice is achieved.

- Fairness requires all processes to be impartial and open to ensure a just outcome in a legal case.
- Equality requires all individuals engaging with the justice system to be treated the same, regardless of personal characteristics such as gender or religion. However, if the same treatment creates disparity or disadvantage, adequate measures should be taken to prevent this.
- Access requires all individuals being able to engage with, and remain informed about, the justice system with as few barriers as possible.



Figure 6 The three principles of justice are all interrelated

1B Questions

Check your understanding

Question 1

Which of the following statements describes fairness as a principle of justice?

- A. Fairness aims to ensure that everyone has the opportunity to participate in the justice system and its proceedings with adequate knowledge.
- B. Fairness is central to the justice system as everyone has the right to be treated without bias before the law.
- C. Fairness aims to guarantee uniform treatment of all individuals in the justice system.

Question 2

Which of the following statements is a correct example of how equality is upheld in the Victorian legal system?

- A. Court Services Victoria does not provide translators and other support.
- B. Sentencing guidelines 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.

Question 3

Which of the following statements is a correct example of how access is upheld in the Victorian legal system?

- A. Certain rights exist for the accused, such as the burden of proof resting with the prosecution.
- B. All individuals and some 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, allowing all individuals to understand the law and how to protect themselves.

Question 4

Fill in the blank with **one** of the following terms:

fairness

equality

access

The principle of [] aims to ensure uniform treatment of all individuals in the civil justice system, with the exception of instances where it may lead to disadvantage.

Question 5

Fill in the blank with **one** of the following terms:

fairness

equality

access

The principle of [] ensures that all people can participate in the justice system and its processes should be impartial and open.

Question 6

Justice is a multifaceted concept that aims to ensure all people can have meaningful interactions with the legal system.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Jason's employment is terminated as his employer decided to only hire individuals born in Australia. Jason believes he is entitled to compensation for unlawful termination, but cannot afford to meet with a lawyer and find out more about his legal rights. Jason cannot afford to take the matter to court and is unaware of other institutions that are able to assist him.

Explain how access has **not** been achieved in Jason's case.

Question 8

(3 MARKS)

Josh, who is 15 years old, and Harry, who is 16 years old, 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.

Explain why it is necessary to have a Children's Court and how it upholds the principle of equality.

Extended response

Use your answer to question 9 to support your response to question 10.

Use the following information to answer questions 9 and 10.

Deborah has been charged with culpable driving after skidding on the road in the rain. She is nervous about appearing at trial as she suffers from anxiety and does not fully understand the legal process. She cannot afford a lawyer but is not eligible for Victoria Legal Aid and is being forced to represent herself in court. She has been able to receive some advice from her local community legal centre (CLC).

Question 9

Tick the box to indicate whether each of the following statements are elements of Deborah's case that relate most to the achievement of **fairness** or **access**.

Statement	Fairness	Access
I. Deborah's case will be heard by an impartial judge.	☐	☐
II. Deborah received advice from a CLC.	☐	☐
III. Deborah is able to present her side of the story to the court if she chooses to.	☐	☐
IV. Deborah has no legal representation.	☐	☐

Question 10

(6 MARKS)

To what extent would fairness and access be achieved in Deborah's case?

Linking to previous learning

Question 11

(2 MARKS)

Describe how the principle of access may affect social cohesion.

1C Characteristics of an effective law

STUDY DESIGN DOT POINT

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

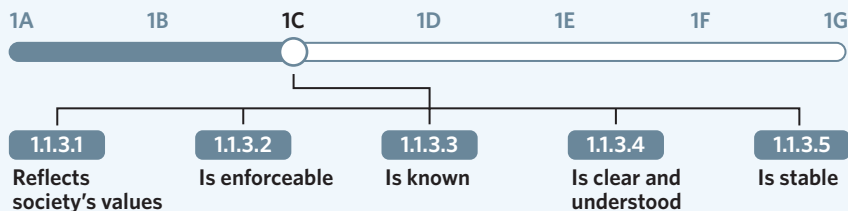


Image: Fishman64/Shutterstock.com

Imagine you are a member of the Australian Government and a new law is being proposed. The law would allow drivers to travel at any speed on all roads and highways, in an effort to reduce traffic congestion. The government is not proposing any campaigns to inform the population of this law and it would be implemented immediately. How effective do you think this law would be?

Lesson introduction

Laws exist to discourage unsafe conduct and promote positive societal behaviours. For a law to achieve these aims, it must possess particular characteristics that ensure it is effective, such as reflecting society's values and being enforceable, known, clear, understood, and stable. Without all of these characteristics, the effectiveness of a law may be compromised.

Reflects society's values 1.1.3.1

For a law to be effective, it must **reflect society's values**, meaning it aligns with the current views and opinions of the general public.

Since Australia has a government that is elected to represent voters' interests, laws should be reflective of societal ideals and moral principles. If parliament passes a law that disregards or opposes commonly held beliefs, it is unlikely to be supported. Therefore, a government can ensure a law is accepted and followed by aligning it with current societal values and beliefs.

For example, s 1(a) of the *Litter Act 1987* (Vic) serves 'to prohibit and regulate the deposit of litter in the environment of Victoria', therefore reflecting a common societal value of protecting the environment.

KEY TERM

Reflect society's values a characteristic of an effective law in that the law upholds what the majority of society accepts and believes in.

LEGISLATION

Litter Act 1987 (Vic)

HYPOTHETICAL SCENARIO

Naut what Nauticana wanted

Cruz is the Prime Minister of Nauticana, a coastal country on Europe's southern border. The country is renowned for its boating, fishing, and seafood industries with most citizens spending their time working and living on their own yachts. Last month, Cruz wanted to pass legislation through parliament to limit sailing hours across the country in an effort to prevent noise after-hours. This limit was planned to restrict locals and only allow them to enter and exit the marina at 8:00 am or 8:00 pm, therefore preventing Nauticana citizens from enjoying their usual activities. However, as this law did not reflect society's values associated with their inherent love for boating and fishing, the legislation was rejected by Cruz's politicians as they recognised that it would be ineffective in Nauticana. Therefore, the law failed to pass through parliament.



Figure 1 Parliamentary members of Nauticana rejected legislation imposing changes to sailing hours as it did not reflect its society's values

Is enforceable 1.1.3.2

KEY TERM

Enforceable a characteristic of an effective law, in that it is possible to monitor whether people abide by a law, allowing consequences to be provided to those who do not.

For a law to be effective, it must be **enforceable**, meaning adherence to the law is able to be determined and measured, whilst failure to abide can be met with negative repercussions.

If a law is not enforceable then people are less likely to abide by it. For example, enforcing laws related to underage drinking, which prohibit individuals under 18 from consuming alcohol at someone else's house without parental consent, presents challenges due to such behaviours occurring within private residences where the presence of law enforcement officials is limited.

REAL WORLD EXAMPLE



Image: FMonkey Photo/Shutterstock.com

Figure 2 The Victorian Government invested in new, high-tech driver distraction cameras across the state to improve the enforceability of road safety laws

Caught on camera

Mobile phone use while driving and travelling with no seatbelt are major risks for serious and life-threatening road accidents. In Victoria, using various technological devices and not wearing a seatbelt when travelling in a motor vehicle is illegal and enforceable by law, with consequences, such as fines and demerit point loss, being issued to those who fail to comply. Prior to 2023, it was difficult to enforce these laws as monitoring systems relied on the presence of police officers. However, as part of the Victorian Road Safety Strategy 2021-2023, the Andrews Labour Government invested \$33.7 million into introducing new mobile phone and seatbelt detection cameras across the state. The artificial intelligence-enabled cameras have been estimated to prevent 95 crashes per year as motorists caught by the cameras will be issued a \$555 fine and lose four demerit points. Therefore, investment in such technology has improved the enforceability of Victorian Road Safety Laws and consequently, their overall effectiveness.

Adapted from 'New Driver Distraction Cameras Switched On' (Premier of Victoria, 2023)

Is known 1.1.3.3

KEY TERM

Known a characteristic of an effective law in that people are aware of a law and any changes to it, with adequate time being provided to become familiar with any new laws or changes.

For a law to be effective, it must be **known**, meaning society is well-informed about the law. Any new or changed laws must be introduced with sufficient time for people to become familiar with them. Governments are responsible for ensuring the public is aware of any new laws that are passed.

Although ignorance of the law is not an excuse for illegal behaviour, 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 phone use in cars via Bluetooth connection, then a large advertising campaign would be necessary to ensure all motorists were made aware of the change.

WANT TO KNOW MORE?

Did you know it is illegal in Victoria to make unreasonable noise with a vacuum cleaner after 10 pm or before 7 am on weekdays and 9 am on weekends? This law is unlikely to be effective as it is not well-known in Victoria, therefore limiting the likelihood of it being abided by.

You can find out more about some of Australia's strangest and most unknown laws by searching '14 of the most obscure Australian laws you've never heard of' and clicking the 'Slater and Gordon Lawyers' webpage (Slater and Gordon Lawyers, 2027).

REAL WORLD EXAMPLE

Consent campaign for legislative changes

On 23 November 2021, the NSW Government passed a number of major reforms to its sexual consent laws. These laws were to come into effect on 1 June 2022, so in the lead-up to this change, the NSW Government launched the 'Make No Doubt' campaign, 'a new community education campaign empowering young people to check consent before engaging in sexual activity'. The campaign was launched on social media platforms to target the appropriate age demographic of 16 to 24-year-olds and ensure the law changes were appropriately communicated to them. Hence, the 'Make No Doubt' campaign enabled young individuals to become aware of the new consent reforms, therefore making this law 'known' in the community.

Adapted from 'New campaign as consent laws about to go live' (NSW Government, 2022) and 'Social media campaign launches in NSW ahead of new consent laws taking effect' (Meacham, 2022)



Image: George Rudy/Shutterstock.com

Figure 3 The NSW Government's 'Make No Doubt' campaign aimed to make the community, particularly young people aware of changes to consent law

Is clear and understood 1.1.3.4

For a law to be effective, it must be **clear and understood** in the community, meaning people are able to accept and implement the law as there is clarity about its requirements and how to remain compliant.

If a law is overly complex or lacks clarity, it may be difficult for people to understand and follow. Laws are drafted in parliament 'in futuro' or ahead of time, therefore they are often written broadly to capture unforeseen circumstances. However, this often causes laws to become long and complex. Therefore, governments will usually attempt to clearly explain laws to the community to ensure they are clear, understood, and can be effectively enforced.

KEY TERM

Clear and understood a characteristic of an effective law in that individuals can comprehend the requirements of a law and are able to abide by it.

DEEP DIVE

Preparing for the future

The term 'in futuro' is used to describe the way in which laws are written to account for changes in the future, sometimes called 'future proofing'. According to KPMG, a global network of professional firms providing audit, tax, and advisory services, 'future proofing' legislation 'can encourage greater flexibility in regulation, lower compliance burdens, and reduce legal obscurities'. Creating laws 'in futuro' can also enable governments to keep up with societal developments and avoid having to constantly change laws, therefore enhancing the clarity and understandability of laws.

You can find out more about the 'in futuro' nature of law-making by searching 'Unlocking the time vault: Designing legislation for the future' and clicking the 'KPMG' webpage.

Adapted from 'Unlocking the time vault: Designing legislation for the future' (KPMG, 2020)

HYPOTHETICAL SCENARIO

The legal labyrinth

Margo is a politician who wanted to implement a new law allowing all restaurants to convert roadside parking spaces into outdoor seating areas after 6:00 pm. She developed the following explanation for the law:

'Upon the commencement of 6:00 pm, it is mandated that motor vehicles occupying roadside parking spaces vacate their positions to facilitate the allocation of said spaces for the purpose of establishing designated sites for food and beverage service by restaurants, catering to their respective customers.'

Unfortunately, many of her fellow parliamentarians believed this law was difficult to understand and relatively unclear due to the complexity of the wording. Consequently, they suggested a revised explanation of the law that they believed would be more effective at implementing it into society:

'After 6:00 pm, all restaurants are permitted to use roadside parking spaces for outdoor dining areas.'

Continues →

HYPOTHETICAL SCENARIO

The legal labyrinth - Continued

Last month, the law with the revised explanation passed through parliament and was recently implemented into a new advertising campaign in communities. The law was well-received in the community and law enforcement, such as the police, have seen a large degree of compliance. Thus, the revised wording of the law to make it clear and understood likely contributed to the overall effectiveness of Margo's outdoor dining law.



Figure 4 Margo's outdoor dining law was revised to make it clear and understood, enhancing its overall effectiveness

Is stable 1.1.3.5

For a law to be effective, it must be **stable**, meaning it remains relatively consistent and constant with few or no regular changes occurring.

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

KEY TERM

Stable a characteristic of an effective law in that a law should not change so frequently that it is difficult to keep up with.

LEGISLATION

Environment Protection Act 2017 (Vic)

USEFUL TIP

An important key skill in Area of Study 1 of Unit 1 VCE Legal Studies is to 'evaluate the effectiveness of laws'. You may be asked to evaluate or discuss the effectiveness of a given law. To respond to a question like this, you should apply the five characteristics of an effective law to the given law. Consider to what extent the law fulfils the five characteristics to make a judgement about the degree to which the law is effective.

DEEP DIVE

No release on environmental balloon laws

Under section 115 of the *Environment Protection Act 2017 (Vic)*, there are various penalties for releasing balloons into the environment. This law was passed to protect wildlife and the environment from balloon litter. Imagine if the Victorian Government continually changed the circumstances under which balloon releases were allowed, such as at a wedding or funeral. In this case, it would become confusing for the public to understand when they are allowed to release balloons into the environment and, therefore, would likely cause a number of individuals and companies to completely disregard the law altogether. Hence, making the balloon release law consistent across all situations by prohibiting it entirely ensures the law remains stable and effective in society.

Adapted from 'Report helium balloon releases' (EPA Victoria, 2021)

Lesson summary

Laws are implemented to establish appropriate behaviours and codes of conduct in society, therefore encouraging peaceful, secure, and harmonious relationships with one another. For laws to be effective, they should:

- reflect society's values
- be known
- be stable.
- be enforceable
- be clear and understood

Ensuring laws have each of these characteristics increases the likelihood that they will be accepted and followed in society.

1C Questions

Check your understanding

Question 1

For a law to be considered effective, it must only satisfy one characteristic of an effective law.

- A. True
- B. False

Question 2

A law reflects society's values when:

- A. it only considers the opinions of law-makers.
- B. it aligns with the views and beliefs of the general population.

Question 3

Fill in the blanks with the following terms:

known

stable

When a law is , it does not frequently change. This can enhance the law's ability to be in society.

Question 4

The government implementing an advertising campaign to raise awareness about a change in legislation is an example of a law being:

- A. known.
- B. enforceable.

Question 5

Which of the following statements are correct about the characteristic of being enforceable?

(Select all that apply)

- A. It is possible to monitor whether the law is being abided by.
- B. Laws associated with underage drinking are often adhered to due to their high enforceability.
- C. Individuals who disobey highly enforceable laws often face consequences as a result of their illegal behaviour.

Question 6

Laws may be described in a simpler and more straightforward manner to ensure they are:

- A. known.
- B. clear and understood.

Question 7

The characteristics of an effective law enable law-makers to create legislation that is relevant to society and therefore, more likely to be known, understood, and abided by.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Identify **two** characteristics of an effective law.

Question 9

(2 MARKS)

Outline 'reflects society's values' as a characteristic of an effective law.

Question 10

(3 MARKS)

Dan and Murphy are politicians who are advocating for the implementation of a new law that allows people to consume alcohol while driving as long as their blood alcohol reading is at or below 0.05.

Explain how Dan and Murphy could ensure this law is clear and understood in society.

Question 11

(4 MARKS)

Zen is the president of Dayerville, a prosperous island nation in the Atlantic Ocean. Last month, Zen's son, Tom, was charged with trespassing, after performing parkour on skyscrapers in the CBD. Following this incident, Zen sought to update existing legislation to allow recreational activities, such as parkour, to be exempt from trespassing laws. The bill for this reform was recently passed in parliament in July 2023 and Zen is now preparing for its full implementation by January 2024.

Describe how Zen can ensure this law is known and stable.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

As the mayor of Sustainia, Greta has just implemented a new law that bans all plastics across the entire city. Prior to implementing this plastic ban, a survey was held to gauge the city's stance and ensure the law would reflect society's values. Following affirmative responses for its implementation, Greta immediately invested in a social media advertising campaign to inform the city of the changes and ensure the ban was communicated in an understandable manner. However, Greta has identified that monitoring the effectiveness of this new law may be challenging, so she is planning a number of changes to this law over the next months and years to improve its enforceability.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of Greta's new law.

Statement	Strengths	Limitations
I. There are currently minimal methods for monitoring adherence to the new law, therefore compromising its enforceability.	☐	☐
II. The government conducted a survey prior to implementing the new law and received affirmative responses for its establishment.	☐	☐
III. An advertising campaign has been conducted on social media to inform the population of the new legislation and ensure it is clearly communicated in society.	☐	☐
IV. Following its initial implementation, the law is undergoing several changes.	☐	☐

Question 13

(5 MARKS)

Discuss the effectiveness of this new legislative ban with regard to the characteristics of an effective law.

Linking to previous learning**Question 14**

(3 MARKS)

Define equality as a principle of justice and describe how this principle relates to **one** characteristic of an effective law.

1D Parliament and the courts in law-making

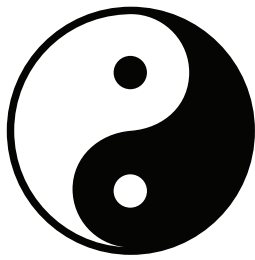
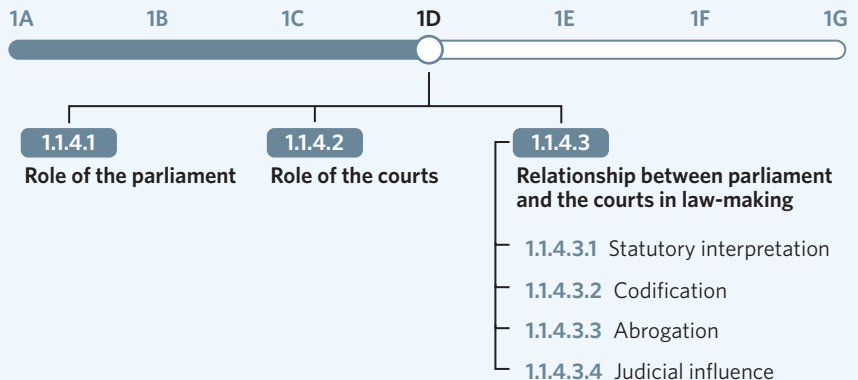


Image: mrjohnblack/Shutterstock.com

Yin-yang is a Chinese philosophy that involves the belief of two complementary, yet opposing natural forces that interact to create and maintain harmony in the universe. In a similar fashion, the parliaments and the courts maintain a relationship that seeks to bring harmony to the legal system. Whilst they hold contrasting primary functions, both are united in their aim to achieve justice and complement each other in law-making.

STUDY DESIGN DOT POINT

- an overview of the roles of the parliament and the courts and their relationship in law-making



Lesson introduction

Although the parliaments and the courts are separate legal bodies, the process of law-making in Australia relies on a complimentary relationship between the two institutions. Parliament is the supreme law-making body in the Australian legal system and is best equipped to create new laws. The courts, therefore, have the responsibility of interpreting and upholding the laws made by parliament. Hence, both institutions have a role in promoting the welfare of society through the process of law-making.

Role of the parliament 1.1.4.1

Australia is a **democratic society**, meaning Australian citizens vote for who they wish to represent them in **parliament**. Regular **elections** allow the community to either re-elect law-makers who are representing the community's values, or replace them with different law-makers who offer new ideas for governing society.

The Commonwealth Parliament, located in Canberra, creates laws that apply to all Australians regardless of the state they live in. The parliament that is concerned with Victorian laws is the Victorian Parliament and is located in Melbourne CBD.

Elected representatives are members of a **bicameral parliament**, a law-making body with two houses or chambers that must collaboratively approve new laws. Laws created by a parliament are known as **statute law**, and are sometimes referred to as Acts of Parliament.

In order for a proposed law to come into effect, it must receive approval from a majority of the members in both houses and then receive final approval from the King's representative, known as the Governor at the state level and the Governor-General at the federal level.

KEY TERMS

Parliament a legislative body, comprised of elected representatives, that is primarily concerned with creating the laws of the society it represents.

Statute law the body of law that comprises laws made by parliament, also known as legislation.

LEGAL VOCABULARY

Democratic society an organised system of people living in a community, in which the laws and processes that govern the peoples' lives are created by elected representatives.

Election a public voting process in which new representatives are chosen to be part of parliament, and from which a government is determined.

Bicameral parliament a law-making body with two houses or chambers that must approve of both new laws and bills.

The Commonwealth Parliament

The Crown – The Governor-General

The Upper House – The Senate

Made up of 76 senators, with 12 members from each of the six states and two from each of the territories. Senators are elected every six years for states and every three years for territories.

The Lower House – The House of Representatives

Made up of 151 members, with each member representing one geographic area of Australia. Members are elected every three years.

USEFUL TIP

The laws made by the Commonwealth Parliament are often referenced in a variety of ways. Commonwealth law, Federal law, and Australian law all hold the same meaning and can be used interchangeably in your responses.

Figure 1 Composition of the Commonwealth Parliament

The Victorian Parliament

The Crown – The Governor

The Upper House – The Legislative Council

Made up of 40 members, each elected every four years, to represent a larger region of Victoria.

The Lower House – The Legislative Assembly

Made up of 80 members, each elected every four years, to represent a smaller geographic area of Victoria.

Figure 2 Composition of the Victorian Parliament

DEEP DIVE

The 47th Commonwealth Parliament

The 2022 Federal Election saw Australia establish its 47th Commonwealth Parliament. As of 2023, the Commonwealth Parliament is led by the Prime Minister, Anthony Albanese, and sits in Canberra. Of the 151 **Members of Parliament (MPs)** in the lower house, the House of Representatives, Anthony Albanese's Labor government holds 78 of these seats.

All of the members meet in both the upper and lower house for around 18 to 20 weeks each year. During these sitting weeks, the MPs and Senators discuss new, proposed laws, and raise issues brought to them by their communities.

When parliament is not sitting, MPs use this time to prepare for the next sitting week, draft laws of their own, and connect with their communities.



Image: Dan Breckwoldt/Shutterstock.com

Figure 3 The Commonwealth Parliament sits in Parliament House in Canberra

LESSON LINK

You will learn more about the parliamentary law-making process and statute law in **1E Sources of law**.

LEGAL VOCABULARY

Member of Parliament (MP)

an elected, political representative of people who live in a certain area, such as a district or state.

KEY TERMS

Court a legal institution concerned with the interpretation and application of laws, in order to make legal decisions involving crimes or legal disputes.

Common law the body of law that is derived from judicial reasoning and decisions in past cases.

Parliamentary supremacy the legal concept that parliament has the freedom to make, amend, or abolish laws, subject to limitations outlined in the Australian Constitution, and is supreme over other arms of government, such as the executive and the judiciary.

LEGAL VOCABULARY

Social cohesion the presence of strong relationships and bonds that unite society and encourage cooperation, alongside an absence of war and conflict.

Judge an independent authority who presides over a trial, ensuring procedural fairness by overseeing all personnel and evidence.

Magistrate an independent authority who presides over hearings in the Magistrates' Court for less serious matters such as summary offences, committal proceedings, and some civil disputes.

Jurisdiction the legal power of a court or other authority to make decisions.

High Court of Australia the most superior court in Australia that hears matters of federal significance and appeals from federal, state, and territory courts.

LESSON LINKS

You will learn more about the court hierarchy in **1F The Victorian court hierarchy**.

You will learn more about common law in **1E Sources of law**.

LEGISLATION

County Court Act 1958 (Vic)

USEFUL TIP

The laws made by the courts are also often referenced in a variety of ways. Common law, judge-made law, and precedent all hold the same meaning and can be used interchangeably in your responses.

Role of the courts 1.1.4.2

The main role of a **court** is to uphold **social cohesion** by determining criminal cases and civil disputes between parties. **Judges** and **magistrates** do this by interpreting and applying the relevant law to the facts of the case before them.

In some cases, a legal issue arises where there is no existing law and the facts of the case are different to any previous cases. In this situation, a court creates a new principle of law to resolve the issue, which will then be followed in future cases of a similar nature. This is referred to as **common law**.

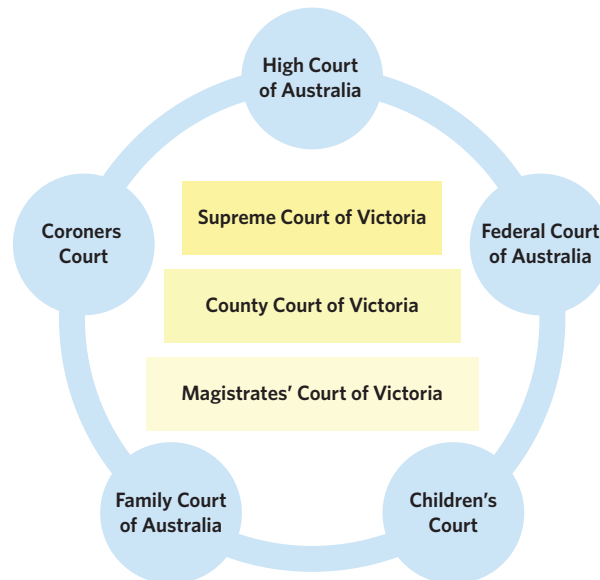


Figure 4 The various courts of Victoria

There are a number of courts that operate in Victoria and Australia. Each court has its own **jurisdiction** and the courts are arranged in a hierarchy of superiority and responsibility.

Relationship between parliament and the courts in law-making 1.1.4.3

Parliamentary supremacy refers to the fact that parliament is the superior law-making body, meaning it can make and alter any law within its constitutional power. For example, parliament can override the laws of other law-making bodies, such as the courts.

As parliament is comprised of members elected by the people, its primary role is to create legislation that reflects the views of society and promotes social cohesion. On the other hand, the primary role of the courts is to apply legislation to resolve matters before them.

As a component of this supremacy, the functions of the courts are established by parliament. Chapter III of the Constitution establishes the **High Court of Australia** as the most superior court in the country. All other courts were created by an Act of parliament. Each of these Acts establishes a particular court and sets out the jurisdiction of this court. As an example, the *County Court Act 1958 (Vic)* establishes the County Court of Victoria and sets out the kinds of trials and appeals it can hear.

As a result of parliament establishing most of the courts, there is a strong connection between the two in law-making.

Some of the features of their relationship include:

- statutory interpretation
- codification
- abrogation
- judicial influence.

Statutory interpretation 1.1.4.3.1

Laws made by parliament, also referred to as statutes, often do not have the scope nor ability to cover every specific scenario that they may apply to. In these cases, where a judge is unsure of how a specific law applies to a specific situation, they may engage in **statutory interpretation**, in order to resolve the case. In this process, judges give a specific meaning to the words written in a statute.

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

There are a number of situations and in turn, reasons why a court may have to interpret a statute, such as:

- sections of a statute being drafted in very broad, general terms, yet need to be applied to a specific scenario.
- the meanings of certain words in the statute have changed over time.
- the parliament has been unable to foresee a particular situation and the law must be clarified so it is applicable to the case.

Codification 1.1.4.3.2

When the parliament chooses to codify common law, it incorporates and confirms the legal principles established in the court setting into legislation. **Codification** 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.

WANT TO KNOW MORE?

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this section may be culturally sensitive. Examples of this include references to people who have passed.

Eddie Mabo is recognised as one of Australia's most renowned Indigenous activists, best known for 'the Mabo case' in which he fought for official recognition of Indigenous Australians, as traditional owners of the land.

His case, *Mabo v Queensland (No. 2)* [1992] HCA 23, is considered a landmark case of the High Court and a powerful example of codification. As a result of the case, the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) in recognition of the common law principles established by the High Court case.

You can find out more about the Mabo case by searching 'Mabo case' and clicking the 'AIATSIS (Australian Institute of Aboriginal and Torres Strait Islander Studies)' link (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2023).

LEGAL VOCABULARY

Statutory interpretation a process whereby the courts give meaning to the words in legislation when applying the legislation to a case.

KEY TERM

Codification the process of parliament confirming common law precedent by enacting legislation to give effect to the legal principles.

LESSON LINK

You will learn more about the Mabo case in **10C Australia's protection of human rights – statute and common law**.

LEGISLATION

Native Title Act 1993 (Cth)

Abrogation 1.1.4.3.3

As opposed to codification, **abrogation** of common law may occur, whereby parliament renders the law invalid by passing legislation that overrides it. In this situation, the common law is superseded by the legislation passed by parliament.

USEFUL TIP

Parliament cannot abrogate common law in cases where the High Court of Australia has ruled on a matter relating to the Australian Constitution. The High Court has ultimate authority regarding the interpretation of the Constitution.

KEY TERM

Abrogation the process of parliament overruling common law by creating a statute contrary to a decision of the courts.

LEGAL VOCABULARY

Obiter dictum a Latin term meaning 'it was said by the way'; refers to a judge's comments made in passing to provide context to a legal decision.

Judicial influence 1.1.4.3.4

When handing down their final judgment, judges and magistrates may leave **obiter dictum**, which can often involve an opinion on the current state of the law that applied to the case. These comments have proven to be influential on parliament as the aim is to create laws that are easily applicable to current-day society by the justice system.

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 this common law. A court may also remark that a particular legal principle is confusing or poorly drafted when interpreting or applying a statute.

LEGAL CASE

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

Facts

The Trigwell family were seriously injured in a car accident caused by roaming sheep on the road. They decided to commence legal action against the farmer who owned the sheep.

Legal issue

The Trigwell's argued that the farmer who owned the sheep should be responsible for their sheep's actions, especially in preventing them from roaming onto a public road.

Decision

The case was heard on appeal in the High Court. It found that the farmer was not responsible for their sheep and therefore, not responsible for the accident and injuries. The court decided to follow an old common law, that originated in Britain, at a time when people riding horses and carriages could easily avoid livestock.

Significance

In the obiter dictum of Justice Mason's judgment, he stated that 'such law-making should be left to parliament'. Five years later, influenced by the courts, the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984 (Vic)*. As a result, this abrogated the common law and meant that farmers and landowners were now responsible for their livestock and any damage they may cause.

LEGISLATION

Wrongs (Animals Straying on Highways) Act 1984 (Vic)



Image: Nataliia Melnychuk/Shutterstock.com

Figure 5 The Trigwell family was injured after a car accident involving loose sheep on the road

Lesson summary

- Parliament is the supreme law-making body in Australia. It holds supremacy over the courts and therefore, has the ability to make, change, and abolish laws.
- The courts uphold order in society and promote social cohesion by resolving legal matters in a just manner. In addition to applying the law, they may also create laws through their interpretation of existing laws.
- Parliament is responsible for statute law while the courts are responsible for common law.
- There are four main features of the relationship between the parliament and the courts in law-making:
 - Statutory interpretation
 - Codification
 - Abrogation
 - Judicial influence

1D Questions

Check your understanding

Question 1

The parliament and the courts do not interact in law-making.

- A. True
- B. False

Question 2

Which of the following statements is **not** correct about the parliament in law-making?

- A. The parliament is composed of MPs who are elected representatives of the community.
- B. MPs are determined through regular elections.
- C. Proposed laws in parliament only need to pass through one house before it becomes a statute.
- D. The Commonwealth Parliament is located in Canberra.

Question 3

Fill in the blanks with **three** of the following terms:

judge

common law

jury

pyramid

hierarchy

statute law

In Victoria, the courts are arranged in a [] . In each court, a [] may have to create [] .

Question 4

Parliament can alter any law, even if the Constitution prohibits it from doing so, as it has supremacy.

- A. True
- B. False

Question 5

Tick the box to indicate whether each of the following statements are **true** or **false** about codification and abrogation.

Statement	True	False
I. The parliament demonstrates their approval of a common law principle through abrogation.	☐	☐
II. The parliament demonstrates their disapproval of a common law principle through codification.	☐	☐
III. The parliament demonstrates their approval of a common law principle through codification.	☐	☐
IV. The parliament demonstrates their disapproval of a common law principle through abrogation.	☐	☐

Question 6

When a judge wishes to make a statement of opinion that does not inform their decision on the case at hand, they may make these comments as:

- A. extra notes.
- B. actus reus.
- C. obiter dictum.
- D. ratio decidendi.

Question 7

Judge Indi is presiding over a case involving the use of PinBoard, a new social media platform. When they consult the relevant statute law, they do not see any regulation in regards to PinBoard.

What might Indi do, as a judge, to resolve the case before them?

- A. Ask the parliament
- B. Statutory interpretation
- C. Write their own legislation
- D. Mark the case as unresolvable

Preparing for exams**Standard exam-style****Question 8**

(1 MARK)

Identify **one** feature of the relationship between the parliament and the courts in law-making.

Question 9

(2 MARKS)

Outline the role of the courts.

Question 10

(3 MARKS)

Describe statutory interpretation and provide **one** reason why the courts may need to interpret statutes.

Question 11

(3 MARKS)

Distinguish between codification and abrogation.

Question 12

(4 MARKS)

Cooper is the MP, in Commonwealth Parliament, of an area in the inner-north of Melbourne. Residents in his community have been complaining about road safety in the area and have requested a new law that requires all roads to pass a safety test.

Explain Cooper's role as a Member of Parliament in this scenario.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

A complex criminal case is heard in the Supreme Court. The ruling judge acknowledges that the circumstances of the crime are not specifically defined in the relevant statute law and therefore, through its interpretation, creates a new common law principle. Following the resolution of the case, another case of similar nature comes before the Supreme Court and the ruling judge decides to follow the recently established common law principle. However, in their judgment, through obiter dictum, they note that they do not believe this common law establishes the best resolution for such cases. Parliament is unhappy with the common law and decides to take action.

Question 13

Tick the box to indicate whether each of the following statements relate to **abrogation**, **statutory interpretation**, or **judicial influence** in this scenario.

Statement	Abrogation	Statutory interpretation	Judicial influence
I. Parliament has taken note of the judge's obiter dictum and acted accordingly in law-making.	☐	☐	☐
II. Parliament has demonstrated its disapproval of the common law created by the first judge, through legislation.	☐	☐	☐
III. The judge in the initial case had to give meaning to the words of the statute, in applying it to the case at hand.	☐	☐	☐

Question 14

(6 MARKS)

Analyse the relationship between the parliament and the courts, using examples from the scenario where possible.

Linking to previous learning

Question 15

(3 MARKS)

Explain how parliament may assist in the achievement of social cohesion.

1E Sources of law



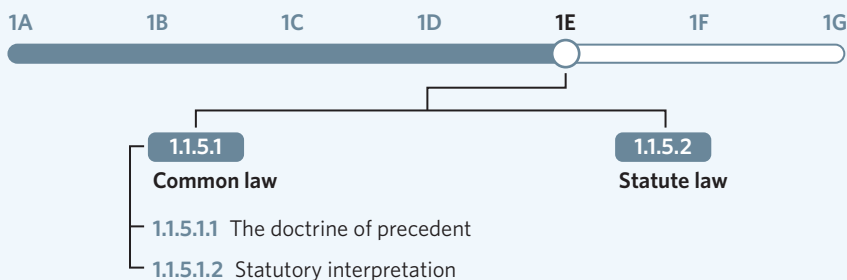
Image: Nor Gal/Shutterstock.com

'A prohibited item is defined as; laser pointers, spotlights, and other light-emitting devices.'

Imagine this statement was in a section of legislation. There is no clear definition of what an 'other light-emitting device' is. Who is in charge of dictating whether a light-emitting device encompasses a match, flashlight, night light, all of the above, or none of the above?

STUDY DESIGN DOT POINT

- sources of law such as common law and statute law



USEFUL TIP

The terms 'judge-made law' and 'common law' are interchangeable in that they both refer to law made by the courts.

KEY TERMS

Common law the body of law that is derived from judicial reasoning and decisions in past cases.

Doctrine of precedent a rule in which judges must follow the reasons for decisions given by superior courts in the same court hierarchy when deciding a case before them with similar facts.

LEGAL VOCABULARY

Ratio decidendi a judge's reason for a decision in a case, which establishes a new legal precedent.

Obiter dictum a Latin term meaning 'it was said by the way'; refers to a judge's comments made in passing to provide context to a legal decision.

LESSON LINK

You learnt about common law and statute law in **1D Parliament and the courts in law-making**.

Lesson introduction

The legal system is a complex network of laws and regulations. These laws stem from a variety of sources, including the courtroom, through the operation of judge-made laws, as well as legislation created by parliament. These different types of law are broadly categorised as common law when created by the courts, and statute law when established by parliament.

Common law 1.1.5.1

In cases where a legal issue or dispute arises in which there is no law regarding the issue, **common law** is developed to resolve the situation within the courts. Common law requires a court to create legal principles to resolve the dispute at hand. This law will then be followed in future cases of a similar nature. The courts establish common law by interpreting and providing meaning to statutes when applying them to a case.

The doctrine of precedent 1.1.5.1.1

When adjudicating cases with similar circumstances, judges must adhere to the **doctrine of precedent**, meaning they have to follow the decisions made by higher courts within the same court hierarchy. A current case with similar facts is decided in a similar manner to former cases to ensure consistency, predictability, and the provision of justice. To uphold this principle, the courts are arranged in a hierarchy according to their jurisdiction. Therefore, lower-ranked courts must follow the reasoning for decisions made by the superior courts in the hierarchy.

Judges' written reasons for their decisions are divided into two parts:

- Ratio decidendi**, meaning 'the reason for the decision'. This is the legal reason for the decision. It is the binding part of the judgment and forms the principle of law that must be followed by courts lower in the hierarchy.
- Obiter dictum**, meaning 'by the way'. These are comments made by the judge to provide context to the judgment or legal suggestions. This is the persuasive part of the judgment that does not have to be followed but can provide guiding principles for judges and other law-makers in the future.

LEGAL CASE

Donoghue v Stevenson [1932] AC 562**Facts**

May Donoghue met a friend at a cafe who ordered her a ginger beer. Mrs Donoghue was pouring the ginger beer, which was in a dark, opaque bottle, into a glass. After she drank half the contents of the bottle, a decomposed snail was poured into her glass. Diagnosed with severe gastroenteritis and shock, she alleged the presence of the snail caused her illness and sued Mr Stevenson, the manufacturer, seeking compensation.

Legal issue

The main issue for the court to determine was whether Mr Stevenson owed a duty of care to Mrs Donoghue. At the time, there was no established legal precedent on a manufacturer's duty of care towards consumers. The court had to decide whether a manufacturer was under a duty of care to the end users of its products.

Decision

The court ruled in favour of Mrs Donoghue, affirming that Mr Stevenson owed a duty of care. This established the 'neighbour principle', stating that one must owe a duty of care to those directly affected by their actions. The court also established the principle of negligence, holding that breaching this duty of care and causing harm makes one liable for compensation.

Significance

Although this case was heard in the United Kingdom, many courts in Australia, including Victorian courts, treated this legal principle as a persuasive precedent and chose to adopt it into civil law. It now forms the foundation of modern negligence law and ensures manufacturers remain strictly liable for their products in negligence cases.



Image: Oleg Troino/Shutterstock.com

Figure 1 The UK 'Snail in the Bottle' case established one of the most famous precedents.

Table 1 Features of the doctrine of precedent

Feature	Explanation
Binding precedent	The legal reasoning that must be followed by all lower courts in the same court hierarchy if the material facts are similar.
Persuasive precedent	When deciding on a case, judges may consider persuasive precedents to guide their decisions. However, they are not required to follow such precedent. For example, persuasive precedents may include: • comments that are obiter dictum • decisions made by the same court or courts at a lower level in the hierarchy • decisions made by a court in a different hierarchy, such as NSW or England.
Reversing a precedent	When a case is appealed and the superior court alters the precedent set by a lower court. Reversing the precedent set by a lower court means a new precedent is established by the superior court.
Overruling a precedent	When a superior court invalidates a previous decision of a lower court by establishing a new precedent in a different case with similar facts. Courts can also overrule their own decisions.
Distinguishing a precedent	When a lower court avoids applying a binding precedent by demonstrating the case before it has different material facts to the case in which the precedent was established.
Disapproving a precedent	When a lower court expresses its disapproval for a precedent established by a higher court through its written judgment, but is still bound to follow it.

LESSON LINKS

You will learn more about negligence in **7A Negligence – elements**.

You will learn more about the court hierarchy in **1F The Victorian court hierarchy**.

HYPOTHETICAL SCENARIO



Figure 2 Michael receives after-school detention for not handing in his homework

From classrooms to society

Michael fails to hand in his homework on time. There are no firm rules about not handing in homework on time as the teacher is new, so the teacher decides to create a new rule that Michael must serve after-school detention. Scarlett also fails to hand in her homework and the teacher advises Scarlett she must also serve an after-school detention. In all future cases where the circumstances are similar, the teacher should apply the same rules to all students, so they are treated fairly. All students should know the rules and consequences of handing in their homework late. Just like in this classroom, laws within society should be equally applied to all citizens, providing certainty and predictability in the way cases are decided.

KEY TERM

Statutory interpretation a process whereby the courts give meaning to the words in legislation when applying the legislation to a case.

LEGAL VOCABULARY

Standing the requirement that, in order to bring a case to court, an individual or group must be affected by, or have a special interest in, the issues involved in the case.

LEGISLATION

Control of Weapons Act 1990 (Vic)

LESSON LINK

You learnt about statutory interpretation in **1D Parliament and the courts in law-making**.

Statutory interpretation 1.1.5.1.2

Statutory interpretation occurs when the courts interpret and apply legislation to the case presented before them. As legislation is created to suit a wide range of circumstances, the wording can often be broad and ambiguous. Consequently, the courts may be required to clarify the meaning of legislation to better apply it to a particular case. A court's interpretation of words and phrases in legislation forms a precedent, a principle of law that can be applied in similar cases in future. However, judges cannot choose which laws to interpret. Rather, a person with **standing** must bring a case before a judge for it to be interpreted.

LEGAL CASE

Deing v Tarola [1993] 2 VR 163

Facts

Deing was wearing a belt with raised metal studs and was arrested, charged, and found guilty in the Magistrates' Court for possessing a regulated 'weapon'. Deing appealed the conviction in the Supreme Court.

Legal issue

Deing was charged under s 6 of the *Control of Weapons Act 1990 (Vic)*, which states it is illegal to 'possess, carry or use any regulated weapon without lawful excuse'. Section 5 of the Act outlined a list of weapons that are considered 'regulated'. The court had to interpret the words, 'regulated weapon', from the *Control of Weapons Act*, and determine if studded belts were included in that category.

Decision

The term 'regulated weapon' is a broad term covering a wide range of items. Justice Beach determined that a 'regulated 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 fall within the definition of a weapon and his conviction was overturned.

Significance

The judge, through his statutory interpretation of the *Control of Weapons Act*, narrowed the definition of 'weapon' by excluding items, such as studded belts, thus clarifying the specific meaning of the words in the Act. In turn, he also created a precedent for similar, future cases.



Image: Bussakorn Ewesakul/Shutterstock.com

Figure 3 The case of *Deing v Tarola* found a studded belt did not constitute a 'weapon'

Statute law 1.1.5.2

Statute law refers to laws made by parliament and is also known as legislation. When establishing legislation, a **Member of Parliament (MP)** will introduce a **bill**. To be legislated, this bill must pass through the house of parliament it was first introduced in, with the approval of the majority of its members. It is then reviewed, scrutinised, and approved by the other house of parliament, before receiving royal assent from the state **Governor** or **Governor-General**. Although the majority of bills are introduced in the lower house, they may also be introduced in the upper house. Whilst not identical, the legislative process in the Victorian Parliament is very similar to that of the Commonwealth Parliament.

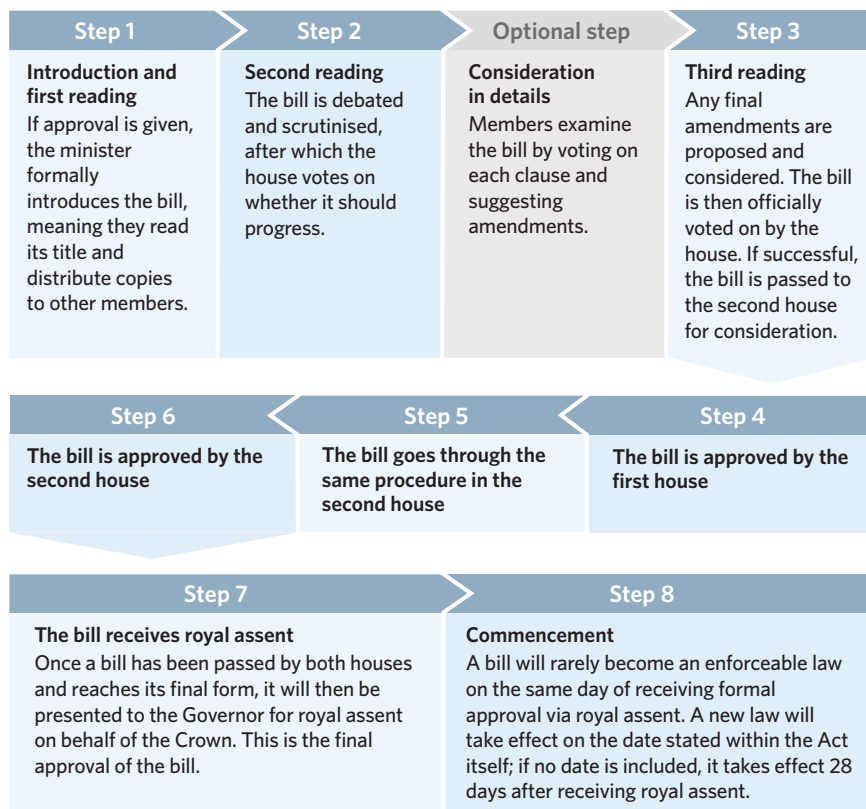


Figure 4 The legislative process

KEY TERM

Statute law the body of law that comprises laws made by parliament, also known as legislation.

LEGAL VOCABULARY

Member of Parliament (MP) an elected, political representative of people who live in a certain area, such as a district or state.

Bill a proposed law introduced in a parliament by a member of one of its houses.

Governor the representative of the monarch in each of the six Australian states.

Governor-General the representative of the monarch in the Commonwealth Parliament.

USEFUL TIP

A statute can also be referred to as 'legislation' or an 'Act'. They are interchangeable terms that refer to laws made by parliament.

LEGISLATION

Marriage Amendment Act 2017 (Cth)
Marriage Act 1961 (Cth)

REAL WORLD EXAMPLE

Australia's same-sex marriage victory!

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

This legalisation of same-sex marriage was considered to be a long time coming in Australia. What began as a gradual shift in beliefs and attitudes towards same-sex relationships over many decades officially culminated in a nationwide postal survey in 2017. Of the eligible respondents, 61.6% were in favour of legalising same-sex marriages, demonstrating the great public support for law reform. In response, the parliament passed legislation to change the definition of 'marriage' in the *Marriage Act 1961 (Cth)*.

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

Adapted from 'Same-sex marriage is now legal in Australia' (Chang, 2017)



Image: Ink Drop/Shutterstock.com

Figure 5 The legalisation of same-sex marriage through the *Marriage Amendment Act 2017 (Cth)* is an example of statute law

LEGAL VOCABULARY

Delegated legislation law that is not made directly by an Act of Parliament but under the authority of an Act of Parliament.

Parliament also has the power to delegate elements of its law-making power to other bodies, including:

- 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 greater specialised knowledge of how a law would effectively function in their respective community. For example, laws relating to rubbish collection and disposal are usually established and overseen by local councils. Where this occurs, **delegated legislation** is created, which refers to laws or regulations that are passed by these bodies after the power to do so is granted to them by an Act of Parliament.

Lesson summary

There are two sources of law:

- Common law is made by judges in the courts and is formed by court decisions that become rules to be followed in future similar cases.
- Statute law is made by parliament after a bill is passed by both houses and the King's representative, after which it becomes an Act of Parliament.

1E Questions

Check your understanding

Question 1

Which of the following are sources of law? **(Select all that apply)**

- A. Common law
- B. Statute law
- C. King's law
- D. Council law

Question 2

Fill in the blanks with the following terms:

superior

lower

The doctrine of precedent requires judges in [] courts to follow the reasons for the decisions given by [] courts in the same court hierarchy when deciding on cases with similar facts.

Question 3

Tick the box to indicate whether each of the following statements are **true** or **false** about features of the doctrine of precedent.

Statement	True	False
I. A lower court may avoid applying a precedent by demonstrating the case before it has different material facts, therefore distinguishing the precedent.	☐	☐
II. A superior court can overrule a precedent established in a lower court by setting a new precedent in a different case.	☐	☐
III. A lower court can disapprove of a precedent set by a superior court so they do not have to follow it.	☐	☐
IV. On appeal, a higher court may reverse a precedent set by a lower court and, consequently, establish a new precedent.	☐	☐

Question 4

Statutory interpretation is not considered law as the judge's interpretation of the meaning of a word or phrase has not passed through parliament.

- A. True
- B. False

Question 5

Which of the following is **not** a step involved in the standard process of a bill becoming a law?

- A. The bill is introduced and undergoes a first reading.
- B. The bill undergoes a fourth reading in each house.
- C. The bill is approved by each house.
- D. The bill receives royal assent from the representative of the Crown.

Question 6

Delegated legislation is not statute law as such laws are passed by bodies other than parliament, including local councils.

- A. True
- B. False

Question 7

Fill in the blanks with the following terms:

statute law

common law

Law made by parliament is referred to as , whereas law made by the courts is referred to as

 .

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify **two** sources of law.

Question 9

(2 MARKS)

Describe what is meant by 'statute law'.

Question 10

(3 MARKS)

Distinguish between common law and statute law.

Question 11

(6 MARKS)

Kiki was charged with carrying a 'prohibited item' into a school carnival after she dressed up as a wizard and used a walking stick as a wizard's staff. Section 5 of the *Public Places Regulation Act 2022* (Vic) classifies 'a baton or similar weapon' as a 'prohibited item' to carry. Therefore, the court must determine whether the walking stick is a 'prohibited item' under s 5 of the *Public Places Regulation Act 2022* (Vic).

- a. Describe the term 'doctrine of precedent'. 2 MARKS
- b. With reference to Kiki, explain the role of statutory interpretation in shaping common law. 4 MARKS

Extended response

Use your answer to question 12 to support your response to question 13.

Question 12

Which of the following statements are correct about the development of common law and statute law?

(Select all that apply)

- A. Common law is developed by the courts through the process of statutory interpretation when resolving a dispute.
- B. For a bill to become an Act, it only needs to pass through one house of parliament.
- C. Common law can be developed by the courts at any time they see fit.
- D. Statute law is developed by parliament after a bill is introduced, passed by both houses of parliament, and given royal assent to become an Act.

Question 13

(6 MARKS)

Analyse how common law and statute law are developed.

Linking to previous learning

Question 14

(3 MARKS)

'Parliament cannot override common law.'

With reference to the abrogation of common law, explain whether or not this statement is correct.

1F The Victorian court hierarchy

STUDY DESIGN DOT POINT

- an overview of, and reasons for, the Victorian court hierarchy



Image: Andrei Armiagov/Shutterstock.com

You are an aspiring swimmer who has their eyes set on winning a gold medal at the Olympic Games for Australia. However, to make it to the Olympics, you must first compete at lower, less serious levels, such as suburban and state events, before progressing to the higher-stakes competitions. In a similar way to the organisation of swimming competitions from least to most prestigious, the Victorian courts are ranked from highest to lowest based on their superiority and formality.

Lesson introduction

In the Victorian justice system, there are various courts that each hear different criminal cases and civil disputes based on their formality and expertise. Therefore, the courts are arranged in a hierarchy that is reflective of their power to hear and determine different legal matters, with more serious and complex cases and disputes being heard by higher courts, whilst the lower courts deal with the less serious ones. This hierarchical court system ensures Victoria has an efficient and cohesive means of providing justice to society.

An overview of the Victorian court hierarchy 1.1.6.1

The Victorian **court hierarchy** refers to the ranking of Victorian courts from least to most formal and superior based on their status and authority in hearing various matters. This ranking is largely related to each court's **jurisdiction**. The Victorian court hierarchy is composed of, from lowest to highest rank, the Magistrates' Court, County Court, Supreme Court – Trial Division, Supreme Court – Court of Appeal, and the **High Court of Australia**, which is most superior in all state and territory court hierarchies. The lower-ranked courts, such as the Magistrates' Court, hear a high volume of less serious cases, whilst more superior courts hear fewer but more complex, time-consuming, and serious cases and disputes.

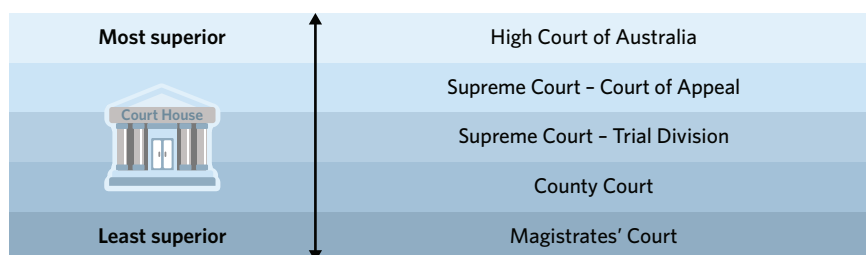


Figure 1 The Victorian court hierarchy

KEY TERMS

Court hierarchy the arrangement of courts in order of superiority.

High Court of Australia the most superior court in Australia that hears matters of federal significance and appeals from federal, state, and territory courts.

LEGAL VOCABULARY

Jurisdiction the legal power of a court or other authority to make decisions.

LEGAL VOCABULARY

Original jurisdiction the legal power of a court or other authority to hear a case for the first time.

Appellate jurisdiction the legal power of a court to review a decision of a lower court or tribunal on appeal.

Criminal jurisdiction a court's power to hear criminal matters initiated by the police and Office of Public Prosecutions.

Civil jurisdiction a court's power to hear civil disputes, such as matters initiated by a party who claims their rights have been breached by the action of a defendant.

Question of fact an issue within a case whereby the material facts of the case need to be determined by weighing up the credibility of the evidence.

Question of law an issue of law that is resolved by a judge, often concerning the interpretation and application of legal principles or legislation.

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes.

LESSON LINKS

You will learn more about criminal and civil jurisdiction in **1G Criminal and civil law**.

You will learn more about summary and indictable offences in **2E Summary offences and indictable offences**.

USEFUL TIP

The Supreme Court – Trial Division and the Supreme Court – Court of Appeal are two divisions of the same court. The difference between these courts is that the Supreme Court – Trial Division has unlimited original jurisdiction in both criminal and civil matters, whereas the Supreme Court – Court of Appeal only conducts appeals.

Within the hierarchy, some courts have both **original** and **appellate jurisdiction**, as well as a **criminal** and **civil jurisdiction**.

Table 1 The jurisdiction of each court in the Victorian court hierarchy

	Original jurisdiction:	Appellate jurisdiction:
	What criminal cases and civil disputes can this court hear at first instance?	What criminal cases and civil disputes can this court hear on appeal?
Magistrates' Court	Criminal	
	- Summary offences, including minor criminal offences, such as speeding and theft. - Indictable offences heard summarily, meaning the offence is more serious but is determined in a similar manner to summary offences. - Bail hearings.	No appellate jurisdiction.
	Civil	
	Claims up to \$100,000 including: - negligence claims - contract disputes - repair and injury compensation claims.	No appellate jurisdiction.
County Court	Criminal	
	Trials for most indictable offences, including: - rape - armed robbery - drug trafficking - manslaughter.	Appeals from the Magistrates' Court, including: - when an accused is appealing their sentence as a question of fact. - when an accused or prosecution is appealing the sanction imposed.
	Civil	
	Civil claims of any amount can be heard but usually those greater than \$100,000, such as: - defamation claims - workplace injury claims.	No appellate jurisdiction.
Supreme Court – Trial Division	Criminal	
	Any criminal case can be heard in this court but it is usually reserved for the most serious indictable offences, such as: - murder - attempted murder - terrorism offences.	Appeals from the Magistrates' Court on questions of law .
	Civil	
	Civil claims of any amount can be heard but usually those greater than \$100,000. This court also hears class actions, whereby large groups of people seek a remedy for a breach of their civil rights.	Appeals from the Victorian Civil and Administrative Tribunal (VCAT) and Magistrates' Court on questions of law.
Continues →		

Table 1 Continued

	Original jurisdiction:	Appellate jurisdiction:
	What criminal cases and civil disputes can this court hear at first instance?	What criminal cases and civil disputes can this court hear on appeal?
Supreme Court – Court of Appeal	Criminal	
	No original jurisdiction.	Appeals from the County Court and Supreme Court – Trial Division.
	Civil	
	No original jurisdiction.	Appeals from the County Court and Supreme Court – Trial Division.
High Court of Australia	The High Court is a federal court and its jurisdiction is not divided into criminal and civil matters. Instead, the High Court hears a limited number of cases relating to: - constitutional matters - disputes between states and territories - disputes in which the Commonwealth is a party.	Appeals from the Supreme Court – Court of Appeal.

Reasons for the Victorian court hierarchy 1.1.6.2

The Victorian court hierarchy serves a number of purposes and exists for various reasons, including:

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

Specialisation 1.1.6.2.1

Courts are able to develop expertise in various areas of law through **specialisation** due to the hierarchical nature of the Victorian system. Specialisation is facilitated by the assigned jurisdiction of each court, consequently enabling the courts to become familiar and quicker with hearing certain types of cases. Ultimately, this creates a more efficient, timely, and consistent justice system. For example:

- judges within the Supreme Court – Trial Division have expertise in criminal and civil laws and past cases relating to serious offences, such as murder, and claims over \$100,000.
- magistrates within the Magistrates’ Court are specialised in dealing with high volumes of minor criminal offences and civil disputes, such as theft and claims up to \$100,000.

KEY TERM

Specialisation the process of a court developing expertise in a particular area of law as a result of hearing similar matters regularly.

KEY TERM**Administrative convenience**

the systematic benefit derived from legal matters being distributed amongst the courts according to their complexity and severity.

USEFUL TIP

Whilst they may appear similar, specialisation and administrative convenience are not the same concept.

- Specialisation refers to the expertise that the courts develop in hearing certain, similar cases repeatedly.
- Administrative convenience refers to the ability of the courts to distribute resources more effectively by organising disputes according to how serious or complex they are.

Administrative convenience 1.1.6.2.2

The arrangement of the courts in the Victorian court hierarchy enables **administrative convenience** to be achieved. By separating minor offences and disputes, heard by lower courts, from the more serious and complex cases heard in the higher courts:

- the superior courts, such as the Supreme Courts, are free to devote time and resources to long, complex cases and disputes as they are not delayed resolving minor matters.
- the lower courts, such as the Magistrates' Court, can quickly resolve a large number of relatively minor offences and disputes, minimising delays for all parties involved.

HYPOTHETICAL SCENARIO**A Kindle, Kylie, and convenience**

Jenner stole a Kindle from a bookstore. At a similar time, Kylie entered a class action against a beauty corporation called Darkashian, after her face, along with many other clients, was permanently paralysed from using a cosmetic product. Kylie's class action is seeking \$10 million in compensation for the loss each client endured.

Given the existence of administrative convenience, Jenner's relatively minor, petty theft offence of stealing the Kindle would be heard in a low-ranked court of the Victorian court hierarchy, such as the Magistrates' Court. On the other hand, as Kylie's class action is a serious civil dispute, it would be heard in a more superior Victorian court, such as the Supreme Court – Trial Division. Therefore, administrative convenience enables Jenner and Kylie's cases to be heard in a more efficient and consistent manner, whereby minor offences, like Jenner's, are not delaying more serious cases, such as Kylie's.



Figure 2 Jenner's stolen Kindle case would be heard in a lower-ranked court than Kylie's class action

KEY TERM

Appeal a legal process that a dissatisfied party may pursue to have a court's decision reviewed by a higher court.

Appeals 1.1.6.2.3

If a party is unsatisfied with the outcome of their trial, they may **appeal** the decision in a superior court. Therefore, an appeal is the second, or third, time a case is being heard within a court in the Victorian court hierarchy. The existence of the Victorian court hierarchy enables parties who have had their cases heard in a lower court to have wrong or unjust decisions corrected by a superior court.

For an appeal to be heard, the party pursuing the appeal must prove they have the 'grounds' for this process to occur. Grounds for an appeal include:

- questions of law
- questions of fact
- an allegedly unjust sanction imposed in a criminal case or remedy awarded in a civil dispute.

The doctrine of precedent 1.1.6.2.4

The **doctrine of precedent** is the legal mechanism by which past decisions made in higher courts must be followed by the lower courts when similar cases arise. The existence of the Victorian court hierarchy and the doctrine of precedent ensures judges in lower courts follow the reasoning behind decisions made in more superior courts. This can enable consistency and fairness to be achieved when applying the law in a similar fashion.

KEY TERM

Doctrine of precedent a rule in which judges must follow the reasons for decisions given by superior courts in the same court hierarchy when deciding a case before them with similar facts.

HYPOTHETICAL SCENARIO

The doctrine for drugs

Tom was involved in a drug-trafficking scheme, where he orchestrated the import of \$12 million worth of cocaine into Australia. His case was heard in the County Court and he was sentenced to 15 years imprisonment, with a seven-year non-parole period, alongside a large fine.

Recently, Brady was also caught smuggling \$12 million worth of heroin into Australia. His case was also heard in the County Court and the judge followed and applied similar reasoning to that of Tom's case under the doctrine of precedent. As both Tom and Brady smuggled illicit drugs into Australia, both worth \$12 million, Brady was sentenced to 15 years imprisonment with a seven-year non-parole period and the identical large fine.



Figure 3 Tom and Brady's cases were similar, so the judge applied the doctrine of precedent and handed down a similar sentence

Evaluating the Victorian court hierarchy's ability to achieve the principles of justice

STRENGTHS

- Specialisation promotes fairness in the justice system as individual courts develop relevant expertise, based on their jurisdiction, to deal with particular areas of law. This encourages skilled and knowledgeable judges to deliver just and fair outcomes.
- Theoretically, appeals are available to everyone. All parties have the same opportunity to appeal a court's decision provided they have legal grounds to do so. This ensures any errors are corrected, achieving fairness.
- The court hierarchy achieves administrative convenience and minimises delays. The organisation of the hierarchy, therefore, promotes the fair treatment of parties by avoiding prolonged stress.

LIMITATIONS

- In some cases, parties may be unable to appeal an outcome to a higher court if they cannot afford the fees associated with an appeal. Therefore, the ability of a party to receive a fair outcome is limited if the lower court did not deliver a just outcome.
- Although the arrangement of the court hierarchy minimises some delays, they still exist and cause backlogs, reducing fairness to parties, especially in sensitive and vulnerable cases.
- If an unjust verdict is delivered in a more superior court, a lower court may be forced to follow this decision due to the doctrine of precedent.



STRENGTHS

- All parties have the right to appeal the outcome of a case, regardless of race, sex, or gender, provided they have valid grounds to do so.
- Each case or dispute is heard in the appropriate court and similar matters are resolved in the same way within a given court, under the doctrine of precedent. This contributes to equality, as all people are treated the same despite characteristic differences.

LIMITATIONS

- Appeals are not equally accessible to all parties due to their high cost. In some cases, one party may have greater financial means to appeal a decision than another. This can cause socioeconomic discrimination if some parties are unable to appeal an unjust decision as a result of their financial position.



**STRENGTHS**

- The court hierarchy promotes access to justice by providing an appeal process that facilitates the review of judicial decisions. Appeals ensure mistakes are corrected and provides access to reviews from judges of a superior court.
- The specialisation of courts enhances access to justice as it allows cases to be resolved in a more efficient and consistent way.
- Information about the Victorian courts is readily available and accessible online, therefore assisting parties to understand where they should commence proceedings and ensuring parties have access to the relevant information regarding their legal matters.
- Past decisions made by all of the courts, except for the Magistrates' Court, are available on their respective websites.

LIMITATIONS

- The grounds for an appeal must exist. Therefore, some cases may be ineligible for a review by a higher court, meaning access to appeals can be limited.
- The cost of engaging legal representation for the appeals process can also be inaccessible to those who do not have the financial means. This can decrease a party's access to the justice system.
- Decisions made in the Magistrates' Court are not published and therefore, are inaccessible to parties.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 1 VCE Legal Studies is to 'justify the existence of the Victorian court hierarchy'. The command term 'justify' in this context requires you to show why the court hierarchy is necessary or beneficial. To respond to a question like this, you should provide reasons for the Victorian court hierarchy, and outline how that reason reflects a benefit for the justice system. You can refer to the reasons outlined in this lesson, and the strengths of the court hierarchy's ability to achieve the principles of justice, in order to justify the hierarchy's existence.

Lesson summary

- Each court in the Victorian court hierarchy has its own jurisdiction, which reflects its formality and superiority. The courts of the Victorian court hierarchy, from least to most superior, are the:
 - Magistrates' Court
 - County Court
 - Supreme Court – Trial Division
 - Supreme Court – Court of Appeal
 - The High Court of Australia.
- There are various reasons for the existence of the Victorian court hierarchy, including:
 - specialisation
 - administrative convenience
 - appeals
 - the doctrine of precedent.

1F Questions

Check your understanding

Question 1

The Victorian court hierarchy ranks courts based on their formality and superiority, with lower-ranked courts hearing a large volume of minor cases, whilst superior courts hear fewer, more serious cases.

- True
- False

Question 2

Fill in the blanks with **two** of the following terms:

Magistrates' Court

County Court

Supreme Court – Trial Division

Supreme Court – Court of Appeal

High Court of Australia

The lowest ranked court in the Victorian court hierarchy is the , whilst the highest ranked court is the .

Question 3

Which of the following courts can hear civil claims for the first time, greater than \$100,000 in its original jurisdiction? **(Select all that apply)**

- A. Magistrates' Court
- B. County Court
- C. Supreme Court – Trial Division
- D. Supreme Court – Court of Appeal

Question 4

The Victorian court hierarchy enables courts to develop expertise in various areas of law. This is facilitated by the court's jurisdiction and is known as:

- A. specialisation.
- B. administrative convenience.
- C. appeals.
- D. the doctrine of precedent.

Question 5

Fill in the blanks with the following terms:

an appeal

administrative convenience

The benefit of separating minor and more serious offences is associated with , whereas the process of a dissatisfied party pursuing a review of the court's previous decision on their case in a higher court is .

Question 6

A judge in a superior court that follows the reasons for a decision given by a lower court is abiding by the doctrine of precedent.

- A. True
- B. False

Question 7

The Victorian court hierarchy enables the principles of justice to be upheld as:

(Select all that apply)

- A. specialisation promotes the achievement of fairness by ensuring knowledgeable and skilled judges are deciding the outcome of a case.
- B. appeals are expensive to pursue, therefore limiting access to justice for people of a lower socioeconomic status.
- C. the doctrine of precedent ensures consistent and equal judgements are handed down, regardless of personal characteristics.
- D. only superior courts publish their decisions online for public access, limiting access.

Question 8

The four reasons for the Victorian court hierarchy are:

- A. specialisation, administrative convenience, appeals, and the doctrine of precedent.
- B. specialisation, administrative consent, appeals, and the doctrine of precedent.
- C. specialisation, administrative convenience, reviews, and the doctrine of precedent.
- D. specialisation, administrative convenience, appeals, and doctoring precedent.
- E. special cases, administrative convenience, appeals, and the doctrine of precedent.

Preparing for exams**Standard exam-style****Question 9**

(2 MARKS)

Outline the Victorian court hierarchy.

Question 10

(3 MARKS)

Identify **one** court in the Victorian court hierarchy and explain its jurisdiction.

Question 11

(4 MARKS)

Describe **two** reasons for the Victorian court hierarchy.

Extended response

Use your answer to question 12 to support your response to question 13.

Question 12

Which of the following statements are correct about the reasons for the Victorian court hierarchy?

(Select all that apply)

- A. The Victorian court hierarchy ensures the doctrine of precedent is upheld as judges in lower courts must follow the reasoning behind decisions made in more superior courts on similar matters in the same hierarchy.
- B. The court hierarchy enables specialisation, which allows courts to develop expertise in a particular area of law, thus facilitating a more efficient, timely, and consistent justice system.
- C. The Victorian court hierarchy enables appeals, which is the systematic benefit derived from the organisation of offences and disputes according to how serious or complex the matters are.
- D. The court hierarchy enables parties who have had their cases heard in a lower court to have wrong or unjust decisions corrected by a superior court through administrative convenience.

Question 13

(6 MARKS)

'The only reason the Victorian court hierarchy exists is to uphold the doctrine of precedent.'

To what extent do you agree with this statement? Justify your response.

Linking to previous learning**Question 14**

(2 MARKS)

Outline **one** way the Victorian court hierarchy protects the rights of individuals.

1G Criminal and civil law

STUDY DESIGN DOT POINTS

- types of law such as criminal law and civil law
- the distinction and relationship between criminal law and civil law

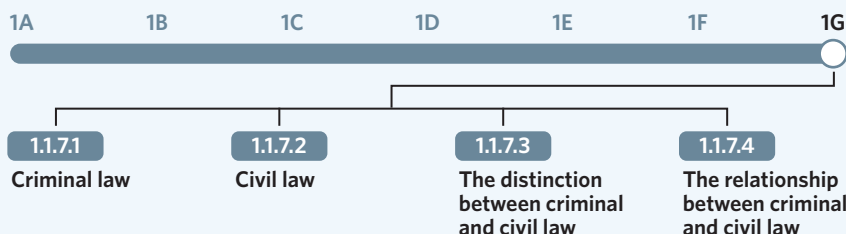


Image: Pressmaster/Shutterstock.com

You are hosting a birthday party and a fight breaks out over some rumours that one friend spread about another. One of your friends is injured, and your parents' house is trashed! Who has engaged in criminal behaviour here and might be charged by the police? Is it possible that your parents might sue the people responsible for the damage to your house, and could that friend sue the other for spreading false rumours? It appears that both criminal law and civil law are relevant to the events of your party.

Lesson introduction

The legal system is divided into two main branches: criminal and civil law. Both types of law aim to regulate behaviour and uphold justice within society. The consequences for breaking the law, and the way in which they are enforced, will vary depending on the type of law that has been broken.

Criminal law 1.1.7.1

Criminal law refers to the laws that establish and deal with behaviours that harm or threaten to inflict suffering upon others, ultimately disturbing social cohesion. This type of law also outlines the sanctions, or legal consequences, an offender can receive. Most **crimes** in Victoria are set out in the *Crimes Act 1958* (Vic) and include acts such as assault, murder, culpable driving, manslaughter, and theft.

WANT TO KNOW MORE?

CONTENT WARNING This section explores content that is sensitive in nature, relating to violence and death.

Every year, there are hundreds of real crimes that occur in Australia. These criminal acts range from small offences, such as petty theft, to extremely serious offences, including murder and manslaughter. You can find out more about the latest Australian crimes by searching 'Crimes Australia' and clicking the relevant news webpages.

KEY TERM

Criminal law an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.

LEGAL VOCABULARY

Crime an act or omission that violates an existing law, causes harm to an individual, or society as a whole, and is punishable by law.

LEGISLATION

Crimes Act 1958 (Vic)

LESSON LINKS

You learnt about social cohesion in **1A Social cohesion and the rights of individuals**.

You will learn more about assault, murder, and culpable driving in **Chapter 3: Criminal offences**.

LEGAL VOCABULARY

Prosecution the party that acts on behalf of the Commonwealth or the state and brings a criminal case to court.

Office of Public Prosecutions (OPP) the public body responsible for initiating, preparing, and conducting legal proceedings for serious criminal matters in Victoria, on behalf of the Victorian community.

Accused the party who is charged with a criminal offence.

Beyond reasonable doubt the standard of proof applicable in criminal proceedings, which requires the prosecution to prove that there is no reasonable doubt that the accused is guilty of the crime(s) they have been charged with.

Table 1 Features of criminal law

Feature of criminal law	Explanation
Parties	1. The prosecution, which can include the police, Office of Public Prosecutions (OPP), or both. For state offences, the prosecution represents the state, and for federal offences the prosecution represents the Crown. 2. The accused, which is the person who allegedly committed the crime.
Burden of proof	The burden of proof is on the prosecution in a criminal case, meaning they bear the responsibility of proving the facts of the case and the guilt of the accused.
Standard of proof	The prosecution must prove the accused is guilty beyond reasonable doubt . This means there can be no other logical or rational possibility, based on the evidence presented, that the accused is innocent.
Sanctions	If an accused is found guilty, the judge will impose a criminal sanction as a consequence for their offending, such as a fine or a term of imprisonment, to protect society or punish the offender, and uphold the principles of justice. The sanction imposed will reflect the severity of the accused's crime and its impact upon victims, the victim's family and friends, witnesses, and general society.

LESSON LINKS

You will learn more about the burden of proof and the standard of proof in **2C Key concepts of criminal law**.

You will learn more about criminal sanctions in **5B Types of sanctions**.

You will learn more about the difference between murder and manslaughter in **3A Murder – elements**.

You will learn more about negligence, defamation, and misleading or deceptive conduct in **Chapter 7: Types of civil disputes**.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to death, violence, and crime.

The criminal case of Borce Ristevski

After his wife, Karen Ristevski, went missing in 2016 and was later found buried in bushland, Borce Ristevski was accused of killing Karen and covering up his crimes. Prior to the police's recovery of Karen's body, Borce repeatedly pledged his innocence. However, after being arrested and appearing in the Supreme Court of Victoria, Borce pleaded guilty to manslaughter, repealing his innocence. By pleading guilty to manslaughter, Borce was not only accepting his guilt but also reducing the maximum possible length of his sentence, as manslaughter has a less severe sanction than murder.

Whilst the Office of Public Prosecutions was not required to prove Borce was guilty of manslaughter beyond reasonable doubt, due to this admission, if the prosecution wanted to pursue a murder charge, they would need to prove there was no reasonable doubt that Borce killed his wife Karen, in order to find him guilty. Borce was initially sentenced to nine years in prison with a six year non-parole period for his manslaughter charge. This sentence was later increased to 13 years in prison after the prosecution appealed the sentence.

Adapted from 'The Cry' & Borce Ristevski – murder vs manslaughter' (Fleur Bitcon Legal, 2022) and 'Borce Ristevski's prison sentence increased to 13 years by Court of Appeal for manslaughter of wife' (Percy, 2019)

Civil law 1.1.7.2

Civil law refers to the laws that protect individuals, businesses, and organisations, providing them with the right to seek compensation when their rights have been breached by another party. Claims in civil law can include negligence, defamation, misleading or deceptive conduct, and disputes associated with divorce and child custody.

KEY TERM

Civil law an area of law that defines the rights and responsibilities of individuals, government entities, and organisations, and provides a legal framework for when these parties interact with each other.

Table 2 Features of civil law

Feature of civil law	Explanation
Parties	1. The plaintiff, which is the party making the claim that their rights have been allegedly breached 2. The defendant, which is the party who allegedly inflicted the plaintiff's suffering or loss.
Burden of proof	The burden of proof is on the plaintiff in a civil dispute , meaning they have the responsibility of proving the defendant is liable for the action that has caused harm, loss, or damage.
Standard of proof	The plaintiff must prove the defendant is liable on the balance of probabilities , meaning it is more probable than not that the defendant was responsible for the plaintiff's loss or suffering.
Remedies	If the defendant is found liable for the loss or suffering of the plaintiff, the judge will usually award the plaintiff a remedy to compensate them for their loss and return them to their original position. Remedies often include some form of financial compensation for the plaintiff.

LEGAL VOCABULARY

Plaintiff the party that initiates a civil claim against another person, the defendant, in court.

Defendant the party that is defending themselves against a claim by another person, the plaintiff, for an alleged breach of civil law.

Civil dispute a disagreement between two parties where one party believes their rights have been infringed by the actions of the other party and is seeking compensation.

Balance of probabilities the standard of proof in civil cases that requires the plaintiff to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.

LESSON LINK

You will learn more about remedies in **Chapter 9: Remedies**.

REAL WORLD EXAMPLE

The million dollar mistake

In June 2020, Nik Dimopoulos initiated legal action under civil law against the state government after he was falsely arrested by the police in May 2019 and seriously injured his shoulder as a result of the altercation.

At the time of the incident, Dimopoulos had been sleeping in an apartment above a bookstore in Fitzroy, Hares & Hyenas, when the police entered the building looking for a suspect. Dimopoulos was mistakenly identified as the suspect, falsely imprisoned, and assaulted by police.

Various documents revealed that Dimopoulos was set to lose \$1.1 million in earnings as a result of his serious shoulder injury, whilst, as the plaintiff, he also sought an additional \$1.8 million in special damages. While the case did not proceed to the Supreme Court of Victoria, as the matter was resolved through negotiations, Dimopoulos was awarded compensation for the breach of his rights.

Adapted from 'Two Greek Australians among \$42 m Victoria Police misconduct settlements for 2018-2023' (Neos Kosmos, 2023)



Image: Christie Cooper/Shutterstock.com

Figure 1 The state government was required to compensate Nik Dimopoulos after a breach of civil rights

The distinction between criminal and civil law 1.1.7.3

Table 3 The distinction between criminal and civil law

Feature	Criminal law	Civil law
Purpose	Protecting society from behaviours that disturb social cohesion or inflict harm upon others.	Protecting individuals, businesses, and organisations by providing them with a means of seeking compensation for loss or suffering inflicted upon them by another party.
Party bringing the case	Prosecution	Plaintiff
Party defending the case	Accused	Defendant
Bears the burden of proof	Prosecution	Plaintiff
Standard of proof	Beyond reasonable doubt	Balance of probabilities

Continues →

Table 3 Continued

Feature	Criminal law	Civil law
Outcome	A sanction, such as a fine, imprisonment, or community corrections order.	A remedy, such as financial compensation or a repair or replacement of a product.
Examples	• Assault • Murder • Culpable driving • Manslaughter • Theft	• Negligence • Defamation • Misleading or deceptive conduct • Disputes associated with divorce or child custody

The relationship between criminal and civil law 1.1.7.4

When a person commits a crime, another person may be harmed or suffer a civil loss as a result. The offender will be prosecuted by the state through the criminal justice system and may be convicted of the crime and sentenced accordingly. Simultaneously, the victim's rights can also be protected as they have the ability to initiate a case for compensation, under civil law. Therefore, the offender can be found guilty and liable in a criminal case and civil dispute, respectively. Ultimately, criminal and civil law can apply within the same situation under certain circumstances to protect society and uphold justice.

Table 4 Examples of the relationship between criminal and civil law

	Example	Application of criminal law	Application of civil law
LEGISLATION <i>Occupational Health and Safety Act 2004 (Vic)</i>	An individual was threatened to be seriously harmed by their employer if they failed to work for 24 hours straight.	Under section 76(1)(b) of the <i>Occupational Health and Safety Act 2004 (Vic)</i> , the employer could be criminally charged with discrimination against an employee.	The individual could sue the employer for mental and emotional damages as a result of their threatening behaviour.
	A person suffered a debilitating back injury after a drug-induced driver crashed into their car at high-speed.	The drug-induced driver could be criminally charged for operating a motor vehicle while under the influence of drugs and instigating a car accident.	The injured person could sue the drug-induced driver for causing the physical and emotional loss and suffering associated with the car crash.
LEGISLATION <i>Summary Offences Act 1966 (Vic)</i>	A shop owner who had their property damaged as a result of trespassers.	Under section 9(1)(e) of the <i>Summary Offences Act 1966 (Vic)</i> , the trespasser could be criminally charged with entering a private place without consent. They could also be charged with property damage.	The shop owner could initiate civil action against the trespassers for the damage caused to their property.
	A scammer was caught after obtaining the private information of various high-profile individuals and selling the data online.	The scammer could be charged with various cybercrimes, including breaches of privacy.	The high-profile individuals could initiate a civil claim against the scammer to compensate them for any loss or suffering incurred.

HYPOTHETICAL SCENARIO

Bottle bandits bear the burden

Jenny was serving a customer in her shop when two 22-year-old men attempted to steal a bottle of wine. In an attempt to stop the robbers, Jenny locked the door of her shop but upon doing so the men produced a knife and slashed her hand before fleeing. Many witnesses stopped to help Jenny and the men were caught by the police.

Jenny was later taken to hospital for her hand injuries and suffered major nerve damage, permanently losing sensation in three of her fingers.

Under criminal law, the Office of Public Prosecutions was successful in its case against the two men and they were sentenced to three years imprisonment for theft and causing injury intentionally. Whilst Jenny was grateful that she would be protected from the men due to their sentencing, she felt she had suffered a great deal of emotional and physical loss. Therefore, she initiated a civil claim against the two men and was successful.

Remedies were awarded to Jenny and the men were required to pay \$5,000 in damages for her medical bills and compensation for the emotional distress they caused her.



Figure 2 The 22-year-old men were found guilty under criminal law and liable under civil law

Lesson summary

The legal system has two main branches:

- Criminal law aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.
- Civil law defines the rights and responsibilities of individuals, entities, and organisations.

Criminal and civil law differ in various ways, including the parties involved and the outcomes the parties may receive. However, these types of law ultimately complement each other in their ability to apply consequences to a wrongdoer and deliver justice to the harmed party.

1G Questions

Check your understanding

Question 1

The two main types of law in the legal system are:

- civil and criminal.
- societal and criminal.
- civil and societal.

Question 2

The parties involved in criminal law are:

- the plaintiff and the defendant.
- the plaintiff and the accused.
- the prosecution and the defamed.
- the prosecution and the accused.

Question 3

Fill in the blanks with the following terms:

beyond reasonable doubt

on the balance of probabilities

In civil law, the plaintiff must prove the defendant is liable [], whereas the standard of proof in criminal law requires the prosecution to prove the accused is guilty [].

Question 4

Tick the box to indicate whether each of the following statements are characteristics of **criminal law** or **civil law**.

Statement	Criminal law	Civil law
I. The burden of proof is on the plaintiff.	☐	☐
II. The outcome of the case is a sanction if the prosecution is successful in proving their case.	☐	☐
III. A party can be found liable for negligence in this branch of law.	☐	☐
IV. The outcome of the case is a remedy if the plaintiff is successful in proving their case.	☐	☐
V. A theft case would be classified under this branch of law.	☐	☐

Question 5

A person can only face consequences in one branch of the legal system and cannot be found both guilty of an offence and liable for a civil breach simultaneously.

- A. True
B. False

Question 6

Which of the following statements are correct about the two types of law? **(Select all that apply)**

- A. In both criminal and civil law, the burden of proof falls on the party initiating the case.
B. Assault and murder cases would be heard under civil law, whilst culpable driving and manslaughter cases would be heard under criminal law.
C. The balance of probabilities requires the prosecution to prove it is more probable than not that the accused is guilty.
D. Civil and criminal law both attempt to protect society and uphold justice.

Preparing for exams**Standard exam-style****Question 7**

(3 MARKS)

Define criminal law and identify **two** features of this type of law.

Question 8

(3 MARKS)

Outline **three** features of civil law.

Question 9

(3 MARKS)

Distinguish between criminal and civil law.

Question 10

(4 MARKS)

Polly has been working in a warehouse as a labourer for the past six years. Recently, Polly was injured in an accident involving broken machinery and permanently damaged her back. Polly's doctor informed her that she is unable to work as a labourer again and will have to find new employment.

Identify and explain the type of law that would be most relevant to Polly's case.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Danny is a member of an organised crime group who planned a heist of Oceans, a well-known casino in Melbourne. However, due to a timing miscommunication with his team, Danny did not escape Oceans in time and was arrested by the police. As the accused, Danny thinks he has the burden of proof, meaning he must prove his innocence beyond reasonable doubt in court. He is worried about the outcome of the case. Danny believes that if the Office of Public Prosecutions, the plaintiff in the case, is successful in its case against him and he is found guilty, he will have to pay remedies to the court to compensate for its loss.

Question 11

Which of the following statements are errors in the scenario? **(Select all that apply)**

- A. Danny has the burden of proof in his case.
- B. Danny's guilt must be proven beyond reasonable doubt for him to be convicted of the crime.
- C. The Office of Public Prosecutions is the plaintiff in Danny's case.
- D. If found guilty, Danny would be liable to pay remedies.

Question 12

(6 MARKS)

Advise Danny on the correct legal principles that apply to his case by identifying any errors and providing the correct information for each.

Linking to previous learning

Question 13

(3 MARKS)

Explain how criminal and civil law can contribute to the protection of rights and social cohesion.

UNIT 1 AOS 2

Proving guilt

The presumption of innocence is a fundamental principle of criminal law and provides a guarantee that an accused is presumed innocent until proven guilty beyond reasonable doubt. In this area of study, students develop an understanding of the purposes of and key concepts in criminal law, as well as the types of crime. They also investigate two criminal offences in detail. For each offence, students consider actual and/or hypothetical scenarios in which an accused has been charged with the offence, use legal reasoning to determine possible culpability and explain the impact of the offence on individuals and society.

Outcome 2

On completion of this unit the student should be able to explain the purposes and key concepts of criminal law, and use legal reasoning to argue the criminal culpability of an accused based on actual and/or hypothetical scenarios.

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KEY SKILLS

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

Image: STRINGER/Shutterstock.com

2

CHAPTER 2

Criminal law

LESSONS

- 2A** The purposes of criminal law
- 2B** The presumption of innocence
- 2C** Key concepts of criminal law
- 2D** Types of crime
- 2E** Summary offences and indictable offences
- 2F** Possible participants in a crime

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.

2A The purposes of criminal law



Image: Jan Wehnert/Shutterstock.com

In the dystopian movie 'The Purge', a crime-ridden America decides to host an annual, 12-hour period in which all criminal activity is legal. During these 12 hours, the concept of criminal law fails to exist. As a result, chaos, bloodshed, and horror ensue. The movie sends a clear message to audiences about the utter disaster that would occur in a world without criminal law, and the key purposes that act to promote and maintain social harmony.

STUDY DESIGN DOT POINT

- the purposes of criminal law

2A 2B 2C 2D 2E 2F

1.2.1.1

The purposes of criminal law

- 1.2.1.1.1 Protection of society
- 1.2.1.1.2 Deterrence of crime
- 1.2.1.1.3 Protect justice and the rule of law
- 1.2.1.1.4 Set minimum standards of behaviour

LESSON LINK

You learnt about social cohesion and the protection of society in **1A Social cohesion and the rights of individuals**.

KEY TERM

Criminal law an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.

LESSON LINK

You learnt about criminal law in **1G Criminal and civil law**.

Lesson introduction

One of the major branches of the justice system is criminal law. Criminal laws exist to assist society in functioning and promote feelings of safety for citizens. These laws serve several purposes, not only to protect society from harm and promote social cohesion, but to also prevent people from committing crimes in the first place. According to the World Population Review (2023), Australia had the 75th highest crime rate in the world. This is indicative of Australian criminal laws being relatively effective at keeping crime rates low, when compared to the rest of the world.

The purposes of criminal law 1.2.1.1

To determine whether the legislation establishing Australia's **criminal law** is operating effectively, the purposes of this type of law must be considered.

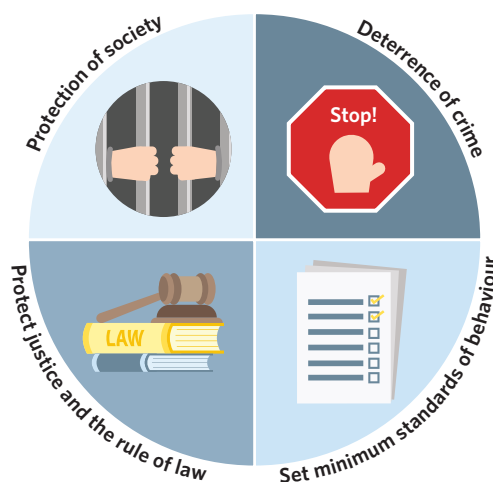


Figure 1 The purposes of criminal law

Protection of society 1.2.1.1.1

Society relies on criminal law to enforce and maintain social cohesion and order. By striving to ensure the **protection of society**, criminal laws can allow citizens to live peacefully within their community. For example, driving to school or work might be a highly dangerous activity without drink-driving laws and speed limits acting as protection. The protection of society by criminal laws can ensure people can leave the house and function in society without intense feelings of fear, paranoia, and anxiety.

KEY TERM

Protection of society a purpose of criminal law that aims to reduce danger and chaos in society and prevent individuals from experiencing harm.

HYPOTHETICAL SCENARIO

The thief of joy

Keeran was sitting at his desk, studying for his VCE Legal Studies test, when suddenly two men waltzed in and stole his computer, his food, and caused other damage in his home. He was petrified, frozen in his desk chair, just hoping the intruders would leave without hurting him.

In a world where criminal laws do not exist, people would be allowed to freely enter another person's property and take whatever goods they please. As a result, feelings of safety within homes would be threatened.

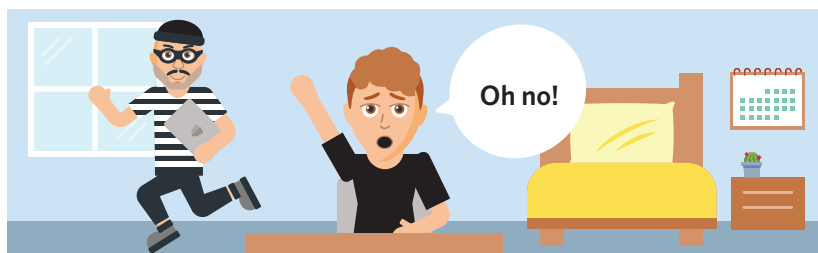


Figure 2 In the absence of criminal laws, Keeran would be helpless against intruders who could steal his property as they please

Deterrence of crime 1.2.1.1.2

Another major purpose of criminal law, and its enforcement by legal authorities, is to deter criminal behaviour. **Deterrence** aims to demonstrate to members of society that the potential gains are far outweighed by the consequences of committing a crime. Offenders who have pleaded guilty or found guilty of committing a crime are sentenced. The threat of a **sanction**, such as a fine or imprisonment, acts to deter criminal activity and discourage an offender from repeatedly committing offences.

KEY TERM

Deterrence the act of discouraging an offender, or other individuals, from reoffending or committing similar crimes, through the imposition of a criminal sanction.

LEGAL VOCABULARY

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime.

REAL WORLD EXAMPLE

Fraudster freak out!

In 2021, UK's Financial Conduct Authority reported that three white-collar criminals who had been committing investment scams were sentenced to prison for their crimes. The Authority predicted that by imposing these prison sentences, reoffending would be reduced by nearly 50% for these offenders. In addition, they claimed people who had not yet committed financial crimes but may have been considering doing so, would be deterred, out of fear that they too may face prison. Sentencing criminals to tough sanctions is one method of discouraging reoffending, and general society more broadly, from committing crimes.

Adapted from 'Fraudsters feel the fear: why prison sentences may deter white collar crime' (Bell, 2023)



Image: voronaman/Shutterstock.com

Figure 3 By imposing prison sentences for financial crimes, both the offenders and members of society, who may have committed similar offences in the future, are deterred from doing so

LESSON LINKS

You will learn more about deterrence in **5A Purposes of sanctions**.

You will learn more about white-collar crime in **2D Types of crime**.

Protect justice and the rule of law 1.2.1.1.3

LEGISLATION

Crimes Act 1958 (Vic)

KEY TERMS

Justice the idea that people are to be treated in a manner that is fair, that people should be held accountable for their actions, and adequately compensated when they have suffered harm.

Rule of law the principle that the law applies to everyone equally regardless of status.

When a crime occurs, there is an accused, the person who committed the crime, and a victim, the person who suffered harm as a result of the crime. One purpose of criminal law is to provide **justice** for the victim of the crimes, alongside their friends and family. To uphold fairness in society, those who commit a crime must face consequences for their actions. Accused persons also deserve a certain degree of justice. For example, if a person has been wrongly accused of a crime, their innocence should be established so they are not unfairly punished. Criminal laws, such as the *Crimes Act 1958 (Vic)*, set out maximum and minimum punishments for certain offences to guarantee that justice, to some extent, is provided for victims.

The concept of justice is closely related to the **rule of law**, a legal principle that aims to ensure the law is applied to everyone in society in the same manner, regardless of personal characteristics, such as socioeconomic status or career. To uphold the rule of law, society must ensure that:

- laws that are known and accessible
- trials are fair and prompt
- all accused persons are presumed innocent until proven guilty.

Table 1 The relationship between criminal law and the rule of law

Feature of criminal law	How it upholds the rule of law
Most criminal hearings and judgments are accessible to the public	The public nature of criminal trials ensures the presentation of facts is open and accessible to all members of the community. This provides transparency and accountability for the legal decisions made in the court system.
Resolution of cases with minimal delay	The criminal justice system strives to minimise delays to reduce prolonged stress and anxiety for victims, their families, witnesses, and accused persons awaiting trial. As delays may impact the reliability of evidence, due to lost or forgotten facts, minimising delays improves chances of a just outcome to the case.
An independent judge and jury	The judge and jury must act impartially and without bias, basing their decisions solely on the facts of the case.
The characteristics of an offender and the circumstances surrounding the crime are considered when sentencing	When determining an appropriate and fair sentence for the offender, the court must consider certain factors. For example: • a young, first-time offender who has shown remorse should be treated differently to a middle-aged criminal with a number of past convictions. • the degree to which a victim was impacted by a crime will be taken into consideration during sentencing, as the more severe the impact of the crime was, the higher the sentence received by the guilty person should be.
The presumption of innocence	A person accused of a crime does not have to prove their innocence, but rather, the prosecution always has the duty to prove the accused is guilty beyond reasonable doubt.
The burden of proof lies with the prosecution	Given the prosecution is pursuing the case against the accused, the onus is on them to prove the facts and claims against the accused. It would be unfair for the accused to have to prove their own innocence.

LESSON LINKS

You will learn more about the presumption of innocence in **2B The presumption of innocence**.

You will learn more about the burden of proof in **2C Key concepts of criminal law**.

Set minimum standards of behaviour 1.2.1.1.4

Minimum standards of behaviour are set out in statute and common law. These standards are upheld by the punishment prescribed to offenders who violate these behavioural expectations. For example, there is a standard established under section 21A of the *Crimes Act 1958* (Vic) stating that members of Victorian society should not stalk each other. To set this standard and guide people to abide by it, the Act also establishes the maximum penalty of 10 years imprisonment that a person may be sanctioned to if they are found guilty of stalking someone.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to sexual assault.

If the answer isn't 'yes', it's 'no'

In August 2022, the Justice Legislation Amendment (Sexual Offences and Other Matters) Bill 2022 was passed in the Victorian Parliament, introducing affirmative consent rules. The *Crimes Act 1958* (Vic) now sets out that everyone has a responsibility to gain consent before engaging in sexual activity. A person must have taken steps to ensure the other person consents before engaging in an activity that is sexual in nature. Consent may be gained when the other party says an explicit 'yes', makes a physical gesture affirming their consent, such as a nod, or makes a move reciprocating interest to engage in sexual activities, such as removing their own clothes.

By enshrining these affirmative consent laws in Victorian legislation, the minimum standards of behaviour regarding physical and verbal communications of consent were established. When consent is not provided and a person still proceeds to sexually touch another, the penalty may be up to 10 years imprisonment under s 40 of the *Crimes Act 1958* (Vic).

Adapted from 'Affirmative Consent Model Now Law in Victoria' (Premier of Victoria, 2022)

KEY TERM

Minimum standards of behaviour the expectations established in criminal law that intend to regulate how each person in society should act and establish the punishments they will receive if they do not act in a certain way.

LESSON LINK

You learnt about statute and common law in **1E Sources of law**.

Lesson summary

The purposes of criminal law include:

- protection of society
- deterrence of crime
- protection of justice and the rule of law
- setting minimum standards of behaviour.

In Australian society, by considering these purposes, laws have been modified with the aim of creating a safe and functioning society with limited crime.

2A Questions

Check your understanding

Question 1

Which of the following is **not** a purpose of criminal law?

- Protection of society
- Prevention of recent civil breaches
- Protect justice and the rule of law
- Set minimum standards of behaviour

Question 2

Protection of society is a purpose of criminal law that aims to:

- A. ensure danger and chaos are avoided by preventing individuals from experiencing harm.
- B. discourage an offender, or other individuals, from reoffending or committing similar crimes through the imposition of a criminal sanction.

Question 3

Jamie and Liam, members of an internet hacking crime group, stole data from their university and sold it online. They both received a prison sentence of six years for their crimes and have since left their crime group and committed to never participating in cybercrimes again.

The main purpose of criminal law that has been achieved in this scenario is:

- A. the rule of law.
- B. deterrence of crime.

Question 4

Which of the following statements are correct about features of the criminal justice system that uphold the rule of law? **(Select all that apply)**

- A. Most criminal hearings and judgments are accessible to the public.
- B. An independent judge and jury are used in criminal trials.
- C. Cases are resolved with minimal delays.
- D. The accused person is presumed guilty until they can prove their innocence.

Question 5

Fill in the blank with **one** of the following phrases:

set minimum standards of behaviour

prevent all crimes

When statute and common law establish expectations that society should follow and determine the punishments a person will incur if they do not follow these expectations, the purpose of criminal law that is being achieved is to

Question 6

In a futuristic society, Xavier is flying through the sky in his SkyHigh Mobile. He is speeding and crashing into multiple other flyers in the air, causing their death. However, there are no criminal laws regulating his actions so he will not be punished for killing others, and will continue doing so in the future.

In this scenario, the purposes of criminal law are all being achieved.

- A. True
- B. False

Question 7

The main purpose of criminal law is to ensure there is no crime in Australia.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Describe 'protection of society' as a purpose of criminal law.

Question 9

(3 MARKS)

Distinguish between deterrence of crime and setting minimum standards of behaviour as purposes of criminal law.

Question 10

(3 MARKS)

Explain how criminal law protects justice and the rule of law.

Question 11

(3 MARKS)

In August 2017, the Victorian Government banned smoking in all commercial outdoor dining areas throughout the state. This included all restaurants, cafes, take-away shops, and any other licensed dining premises. The change was introduced with the aim of reducing public acceptance and prevalence of smoking in communities.

Other than the protection of society, identify **one** other purpose of criminal law that is achieved by the smoking regulations. In your answer, describe how the law works to achieve this purpose.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Cam became obsessed with his work colleague, Mitchell. He would follow him around everywhere, hack into his phone to read all of his texts, and would sit outside Mitchell's house to watch him while he slept. Mitchell found out about Cam's behaviour after catching him outside his home one night. Cam has since been found guilty of stalking and sentenced to seven years in prison. However, Cam is determined to continue stalking Mitchell upon release, claiming 'if I stalk him long enough he'll realise he actually loves me'.

Question 12

Tick the box to indicate whether each of the following statements are ways the purposes of criminal law are **achieved** or **not achieved** in the scenario.

Statement	Achieved	Not achieved
I. Society is protected as Cam has been imprisoned for seven years so can no longer cause harm to Mitchell or anyone else.	☐	☐
II. The purpose of protecting justice for the victim has been achieved as Cam is facing consequences for the psychological harm he has inflicted on Mitchell due to his stalking.	☐	☐
III. Despite Cam not being deterred, the harsh punishment he received for stalking Mitchell may cause broader society to be discouraged from committing a similar crime.	☐	☐
IV. Cam has clearly not been deterred from committing the offence of stalking again as he has asserted that he will continue stalking Mitchell upon his release.	☐	☐

Question 13

(7 MARKS)

Have the purposes of criminal law been achieved in this scenario? Justify your response.

Linking to previous learning**Question 14**

(5 MARKS)

Casey was driving along a dark street without their headlights on, under the influence of alcohol. They hit a person who was walking home, killing them on impact. After being tried in the Supreme Court of Victoria in front of an impartial judge and jury, they were sentenced to 15 years imprisonment for culpable driving.

- Identify whether Casey's actions would be regulated by criminal law or civil law. 1 MARK
- Describe **two** purposes of criminal law that have been achieved in Casey's case. 4 MARKS

2B The presumption of innocence



Image: Billion Photos/Shutterstock.com

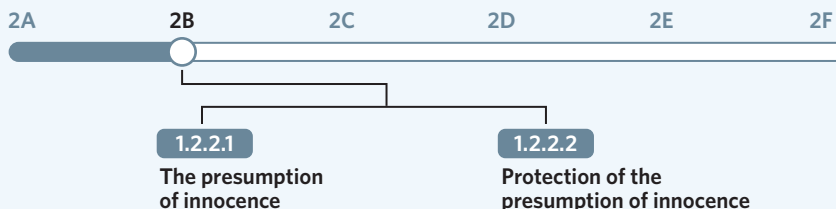
'It is better that 10 guilty persons escape, than that one innocent suffer.'

—Sir William Blackstone (English jurist, justice, and politician)

The presumption of innocence upholds this notion that it is more important in a just society to protect the innocent than strive to punish guilty persons at all costs.

STUDY DESIGN DOT POINT

- the presumption of innocence



Lesson introduction

The Australian legal system relies on key principles to ensure each individual engaging with the system is treated fairly. One core principle underpinning all legal proceedings is the presumption that all individuals are innocent of any criminal accusations until proven guilty. Various procedures and processes are implemented throughout the criminal justice system to ensure this principle is upheld for all accused individuals. The justice system, in upholding fairness and equality, does not burden those accused of a crime with having to justify and disprove an accusation against them. Instead, it is those who make such accusations who bear the burden of collecting and presenting evidence to prove guilt.

The presumption of innocence 1.2.2.1

The **presumption of innocence** refers to the guarantee made to all accused persons that they are to be treated as innocent individuals until it is proven, beyond 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. Therefore, this promotes the principle of equality before the law as everyone is afforded this presumption. Whilst this is an old common law principle, it is also protected by section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). This principle guards against **self-incrimination**.

KEY TERM

Presumption of innocence the right for all accused persons to be presumed innocent until it is proven otherwise beyond reasonable doubt.

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)

LEGAL VOCABULARY

Self-incrimination a situation in which an accused person provides evidence or testimony that proves they are guilty of a crime.

LESSON LINK

You will learn more about the *Charter of Human Rights and Responsibilities Act 2006* (Vic) in **10C Australia's protection of human rights – statute and common law**.

Protection of the presumption of innocence 1.2.2.2

Within Australia, laws exist to uphold the presumption of innocence throughout the entirety of a criminal proceeding. For example, police officers have the power to interrogate suspected offenders, however, they must ensure the presumption of the individual's innocence is still respected, and there is no abuse of power that could potentially lead to a miscarriage of justice. The presumption of innocence is enhanced by various aspects of a police investigation and the trial proceedings.

Table 1 How the presumption of innocence is upheld during a police investigation

Police investigation procedure	How it upholds the presumption of innocence
The police must have reasonable grounds to arrest an individual.	Each person has the right to not be wrongfully arrested, therefore, the police must have adequate evidence and reason for suspicion before arresting an accused person.
The right to silence means an accused person does not have any obligation to respond to police questioning and cannot be pressured to give evidence that may prove their guilt.	A person suspected of committing an offence does not usually need to answer police questions, other than providing their name and address, as they must be presumed innocent until proven otherwise. This is known as the right to silence.
Police officers can only collect forensic evidence, such as fingerprints or a blood sample, from a person when they reasonably suspect the person has committed a serious offence. The suspect must also be informed of the offence they are believed to have committed, and that the fingerprints may be used as evidence in court.	This procedure ensures an individual is presumed innocent and is not subjected to a rigorous and potentially distressing evidence-gathering process unless absolutely necessary.



Figure 1 The presumption of innocence

LEGAL VOCABULARY

Right to silence a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.

LESSON LINK

You will learn more about police powers and individual rights in **4C Institutional powers and individual rights**.

HYPOTHETICAL SCENARIO

Silent stand

Declan was questioned by police after being involved in a fight on the football field. He remembered from his VCE Legal Studies class that in order to uphold the presumption of innocence, he is not required to answer any questions. However, he does have to provide his name and address.

Before going to court, he engages a lawyer who assists him in determining the best way forward with his case. They confirm that he does not need to prove that he is innocent, rather, those bringing the case against him will have to prove he is in the wrong.



Figure 2 Declan used his right to silence to protect his innocence

LEGAL VOCABULARY

Bail the process whereby a person who has been arrested and charged with a crime is released from police custody and allowed in the community whilst awaiting their trial.

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal information, advice, and free or low-cost legal representation

Committal proceeding a hearing in the Magistrates' Court that is used to determine whether there is sufficient evidence against an accused person, charged with an indictable offence, for a trial in a higher court.

Conviction an outcome of criminal proceedings in which the accused pleads guilty, or is found guilty by the court.

Burden of proof the responsibility of a party to prove the facts of a case.

Standard of proof the degree to which the facts of a case must be proven in court.

LESSON LINKS

You will learn more about the jury in a criminal trial in **4E The jury in a criminal trial**.

You will learn more about the burden of proof and standard of proof in **2C Key concepts of criminal law**.

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 2 How the presumption of innocence is upheld during trial proceedings

Criminal trial procedure	How it upholds the presumption of innocence
The right to apply for bail and, if granted, await their trial in the community.	The presumption of innocence requires that no punishment is given to an accused before they are found guilty of a crime. The right to apply for bail ensures, in most cases, that individuals merely suspected of a crime are not punished prior to their trial. However, this right can be refused if the accused poses a serious risk of not appearing in court, interfering with witnesses, or endangering society.
The right to seek legal representation.	An accused person can have a legal expert present their defence and challenge the accuracy of the evidence presented by the prosecution. For those unable to afford legal representation, the presence of Victoria Legal Aid (VLA) allows these individuals to still access legal support and in some cases, representation.
Accused persons only face a trial for serious offences if the prosecution has substantial evidence and has established a solid case.	Being an accused person in a trial can be a very stressful and intimidating experience. To avoid unnecessary stress on accused persons, the law ensures only strong cases proceed to trial by first conducting a committal proceeding .
The right to not have prior convictions revealed during the trial.	Prior criminal offences cannot be considered when determining whether the accused is guilty, this can only be considered during sentencing if the accused has been found guilty. To have a court determine guilt based on past conduct, rather than relevant evidence, would be unfair.
The presumption of innocence is explained to a jury before it considers the verdict in a criminal matter.	All judges must explain the presumption of innocence to the jury. The jury will be instructed that the burden of proof rests with the prosecution, they must assume the accused is innocent, and they can only return a 'guilty' verdict if the evidence presented by the prosecution is reliable and persuasive.
The responsibilities of the prosecution	The prosecution has the responsibility to present evidence that may prove the accused is guilty. They must also present this evidence to a strict standard of proof in order for it to prove the accused as guilty.

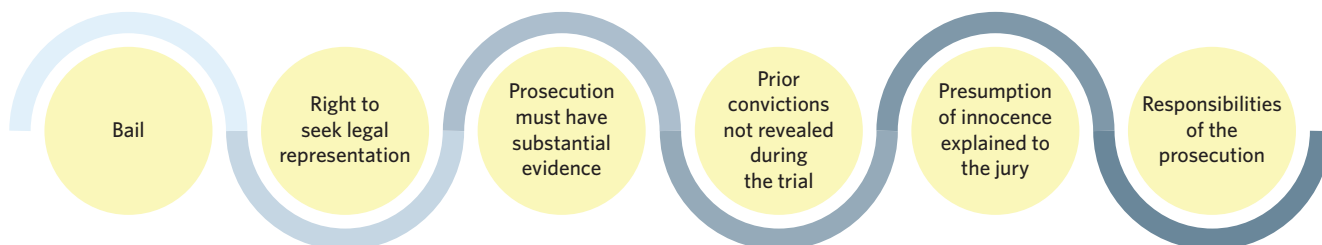


Figure 3 Features and principles that uphold the presumption of innocence

DEEP DIVE

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 contradictory to the presumption of innocence in certain circumstances.

The *Bail Act 1977* (Vic) states that individuals charged with particular offences will be presumed to not be entitled to bail, unless they can prove exceptional circumstances apply. 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.

LEGISLATION

Bail Act 1977 (Vic)

Lesson summary

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. It is protected by various aspects of police investigations and trial proceedings, including:

- the right not to be wrongfully arrested
- the right to silence
- the right to apply for bail
- the right to seek legal representation
- the right to not have prior convictions revealed during the trial
- the right to be innocent until the prosecution has proven guilt beyond a reasonable doubt.

2B Questions

Check your understanding

Question 1

The presumption of innocence is:

- the right to remain silent.
- the right to a fair trial.
- the right to be considered innocent until proven guilty.
- the right to legal representation.

Question 2

Fill in the blank with **one** of the following terms:

victims

accused persons

defendants

plaintiffs

The presumption of innocence refers to the right for all [] to be presumed not guilty until it is proven otherwise, beyond reasonable doubt.

Question 3

Which of the following statements refers to the presumption of innocence being protected by police investigation procedures?

- A. Victoria Police are trained in how to investigate crimes.
- B. Police questioning is intimidating, considering the seriousness of the outcomes of criminal offences.
- C. Police have to inform an accused person about their rights.
- D. The police force has access to forensic experts who can take blood samples for less serious criminal offences.

Question 4

Which of the following statements is the best example of how the presumption of innocence is protected during trial proceedings?

- A. Accused people have the right to not have prior convictions considered during their criminal trial when determining their guilt.
- B. Accused people have the right to not be wrongly arrested.
- C. Accused people have the right to remain silent during police questioning.
- D. None of the above.

Question 5

One way the presumption of innocence is upheld is through an accused's right to silence, which is guaranteed through the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 6**

(2 MARKS)

Define the presumption of innocence.

Question 7

(4 MARKS)

Following police investigations, Jasmine has been charged with manslaughter. Jasmine has pleaded 'not guilty' and refuses to answer any police questions out of fear she will unintentionally incriminate herself.

- a. Describe **one** reason the presumption of innocence must be upheld during police investigations. 2 MARKS
- b. Outline **one** way the presumption of innocence may have assisted Jasmine during police investigations. 2 MARKS

Question 8

(3 MARKS)

Other than the right to legal representation, explain **one** element of trial proceedings that upholds the presumption of innocence.

Question 9

(6 MARKS)

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

Identify **three** errors in the above scenario and provide the correct procedure for each.

Extended response

Use your answer to question 10 to support your response to question 11.

Use the following information to answer questions 10 and 11.

Kai has been arrested by the police outside a nightclub after being accused of starting a fight with another woman. She was put in handcuffs after the police saw incriminating footage of the fight, despite Kai insisting the woman in the footage was not her. Kai was asked to provide details of the evening and where she was during the fight. They then forced her to provide her fingerprints and a blood sample for their records. After she had answered these questions and provided the fingerprints and samples, the police informed her of her rights, including the right to silence. They did not inform Kai of the offence they believed her to have committed.

Question 10

Which of the following police actions are a breach of the presumption of innocence?

(Select all that apply)

- A. Kai was asked to provide details of the evening and where she was during the fight, before being told she had a right to silence.
- B. The police arrested Kai because they had seen footage of a fight and believed Kai was the woman in the footage.
- C. The police forced Kai to provide her fingerprints and a blood sample for their records, but did not tell her why they were collecting them or the offence they believed her to have committed.

Question 11

(5 MARKS)

Evaluate how effectively the presumption of innocence was protected in this scenario.

Linking to previous learning

Question 12

(2 MARKS)

Describe how the presumption of innocence upholds the legal principle of equality.

2C Key concepts of criminal law

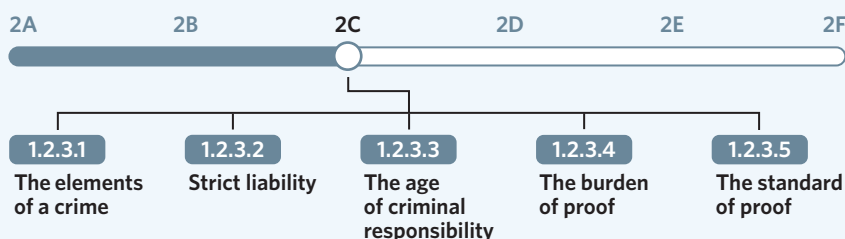


Image: Valery Sidelnykov/Shutterstock.com

Imagine you are stuck in an escape room, about to be locked in a small space with two strangers. One person is blindfolded, the other has been instructed to remain silent, and you have been given noise-cancelling headphones. No one can escape without the assistance of the other, so you must all work together and play your part to avoid being trapped forever. Like the members of this escape room, key concepts of the criminal justice system must operate together to ensure the smooth and efficient delivery of justice.

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



USEFUL TIP

Remember, the two parties in a criminal case are known as the prosecution and the accused. The prosecution represents the Commonwealth, or the state, and is the party pursuing the case against the accused. On the other hand, the accused is the party being charged with a criminal offence.

KEY TERMS

Actus reus a Latin term meaning 'guilty act' that forms the physical element of a crime and refers to the physical acts or omissions the offender must have undertaken as part of a crime.

Mens rea a Latin term meaning 'guilty mind' that forms the mental element of a crime and refers to an offender's awareness of their criminal behaviour and its potential consequences.

Lesson introduction

The foundation of the Victorian criminal justice system includes various key principles that ensure its smooth and effective operation. In order to understand how criminal proceedings are conducted and how justice is delivered to the community, the fundamental concepts of the criminal justice system must first be understood.

The elements of a crime 1.2.3.1

For an accused to be found guilty, there are two elements of a crime that must be proven: **actus reus** and **mens rea**.



Figure 1 The elements of a crime

Actus reus is a Latin term translating to 'guilty act'. For the actus reus element of a crime to be made out, it must be proven that the accused physically acted, or failed to act, in a manner that resulted in a criminal offence being committed. For example, for the offence of causing injury intentionally, the actus reus of the crime includes physically imposing force onto another person, such as punching them.

Mens rea is a Latin term translating to 'guilty mind'. For the mens rea element of a crime to be made out, the prosecution must prove either the accused had the intention of committing a crime or were, at least, in a reckless or negligent state of mind when completing the physical actions of the crime. For example, for the offence of causing injury intentionally, the mens rea of the crime includes intentionally punching someone so they suffer bruising and pain to their stomach.

Generally, both mens rea and actus reus elements need to be proven beyond reasonable doubt for an individual to be found guilty. However, there can be exceptions for strict liability crimes, where both elements are not required to find an accused guilty.

HYPOTHETICAL SCENARIO

What if I told you I'm a mastermind?

Yaye, a deeply dedicated Tracy Swank fanatic, was absolutely devastated when he was unable to purchase tickets to Swank's concert in Melbourne. Naturally, he was enraged when he found out his nemesis, Kimi, had been able to score herself tickets. Yaye decided to hatch a mastermind plan to hack into Kimi's ticket account and steal her tickets.

In this scenario, if Yaye successfully stole the tickets but was then caught, the elements of 'theft', a crime set out under s 74 of the *Crimes Act 1958* (Vic), would be satisfied. Yaye completed the physical element of the crime, also known as the actus reus, by hacking into Kimi's account and stealing her property, the tickets. He also possessed the requisite mental intent, also known as the mens rea, to be charged with theft as he hatched a plan to commit the crime and intentionally took Kimi's tickets to use as his own.

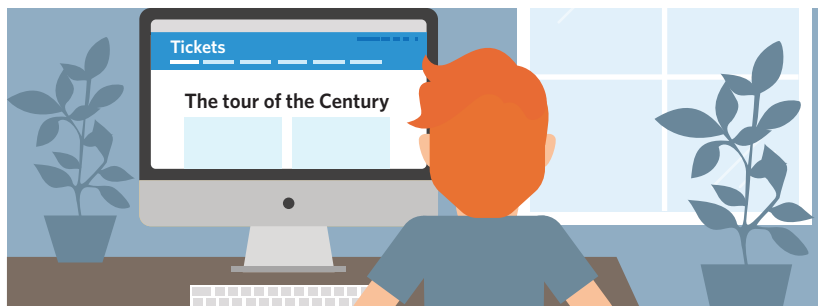


Figure 2 Desperation takes over as Yaye resorts to criminal activity for Tracy Swank tickets

LEGISLATION

Crimes Act 1958 (Vic)

REAL WORLD EXAMPLE

Young woman abuses fast-food workers

A young woman was sentenced to an 18-month good behaviour bond after an abusive rampage at an Adelaide McDonald's left staff with deep emotional trauma. Caught on CCTV and phone footage, the offender was seen 'throwing drinks and food at staff, spitting at them and punching them', returning multiple times to assault staff in a horrifying ordeal.

In this case, both mens rea and actus reus can be made out. There were many witnesses who saw the young woman physically commit the abusive acts, alongside video footage, hence fulfilling the actus reus element of a crime. Additionally, her repeated and explosive actions demonstrate her intention to intimidate and threaten the workers, aiming to inflict physical and emotional harm.

Adapted from 'McDonald's staff abused by woman at Adelaide's Hindley Street restaurant tell court of 'traumatic' experience' (Leckie, 2023)



Image: Tama2u/Shutterstock.com

Figure 3 Fast-food workers face abhorrent abuse in a violent rampage

Strict liability 1.2.3.2

Strict liability offences do not require the mens rea element of a crime to be satisfied in order to find the accused guilty. In such cases, it is enough for the person to have committed the actus reus, the physical act that is against the law, for them to be found guilty and punished. Strict liability offences are generally summary offences, which are less serious in nature, and examples of strict liability offences include:

- speeding or running a red light
- serving an underage person alcohol at a licensed venue
- not wearing a seatbelt
- public transport fare evasion.

KEY TERM

Strict liability a type of criminal responsibility that does not require the mens rea element of a crime to be proven for the offender to be found guilty.

Table 1 Reasons for strict liability offences

Reasons for strict liability offences
Offenders can be charged solely for the physical act of committing the offence. This aims to protect society from types of crimes where, regardless of the offender's intent, recklessness, or negligence, their conduct is dangerous and must be discouraged and punished by the law.
It is easier to find a person guilty of strict liability offences. The prosecution only needs to prove beyond reasonable doubt that the physical acts of the crime occurred, which there is usually concrete evidence for, as opposed to also needing to prove the mentality of the accused, which can be more difficult to make out. Therefore, the number of people that can be found guilty and punished for these offences is higher, thus acting to deter more people from committing them.
The need to prove the mens rea element for every crime would greatly compound the court backlog and unnecessarily exhaust court resources. For strict liability offences, such as speeding, the offence is typically addressed with a fine as there is no need for a court to find the accused guilty as, if a person is caught speeding, they clearly committed the physical act of speeding.

It is possible to raise the defence of 'honest and reasonable mistake of fact' in cases where a person has been charged with a strict liability offence. In order to successfully raise this defence, the accused must demonstrate:

- the mistake was genuinely honest
- the mistake could reasonably occur in the given circumstances
- the mistake is one of fact not law; not knowing the law is not an excuse for breaking the law, rather, the accused must establish that they were aware of the law and believed they were acting in accordance with the law at the time.

HYPOTHETICAL SCENARIO

Should we just keep driving?

Niall has been charged with driving with a disqualified licence. Niall is adamant that it was a genuine mistake as he had no idea his licence was suspended. The majority of driving offences, including driving with a disqualified licence, are strict liability crimes, meaning the prosecution does not need to prove the accused intended to break the law. Therefore, Niall could be found guilty of this strict liability offence even if he did not know he was committing a crime and may be sanctioned if he cannot raise a successful defence.

WANT TO KNOW MORE?

If you fail to stop at a children's crossing and are caught doing so, you will receive a fine worth 2.5 penalty units. In 2023, this equates to \$480.78. You can find out more about the punishments for road and traffic offences by searching 'VicRoads Fines and Fees' and clicking the relevant webpage (VicRoads, 2023).

KEY TERM

Age of criminal responsibility the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.

The age of criminal responsibility 1.2.3.3

The **age of criminal responsibility** is the age at which a child is deemed, by the law, to have the ability to comprehend right from wrong and understand actions that are against the law. In other words, it is the age at which a child can be criminally charged for an offence. In Australia, the age of criminal responsibility for Commonwealth offences is 10 years and older. For state and territory-governed offences, each state and territory is responsible for establishing its own age of criminal responsibility.

Table 2 The criminal responsibility of children between the ages of 10 and 14

Children under 10 years old	Children aged 10 to 13 years old	Children 14 years old and above
- Children under the age of 10 cannot be arrested, charged, or found guilty of a criminal offence. - They are considered doli incapax, a Latin term meaning they are ‘incapable of wrong’ and are considered too young to understand the criminal nature of their actions. Therefore, the mens rea element of a crime cannot be satisfied and the child cannot be held criminally responsible.	If a child between the ages of 10 and 13 is charged with an offence, the prosecution must prove they understood the act was a crime and their behaviour was wrong. If this cannot be established, the child will be released on the grounds they are doli incapax.	Children 14 years of age or above, but under the age of 18, can still be charged with a criminal offence and have the matter dealt with in the Children’s Court. It may progress to the superior courts, such as the Supreme Court – Trial Division, depending on the severity of the crime.

LEGAL VOCABULARY

Doli incapax a Latin term meaning ‘incapable of wrong’ that deems children incapable of possessing criminal intent, therefore preventing them from being charged with a crime as the mens rea element cannot be satisfied.

WANT TO KNOW MORE?

Many advocate groups, academics and the broader Australian community have campaigned to raise the age of criminal responsibility to 14 across the states and territories. Whilst some territories, like the Northern Territory, have already raised the age of criminal responsibility to 12 years old, states like Victoria have pledged to raise the age to 12 years old, with pressure mounting on the remaining states and territories to take action. You can find out more about the campaign to raise the age of criminal responsibility by searching ‘Why we need to raise the minimum age of criminal responsibility’ and clicking on the relevant article (Amnesty International, 2022).

The burden of proof 1.2.3.4

The **burden of proof** refers to the onus of proving the facts of a case. In a criminal case, the prosecution has the burden of proof. As the prosecution is pursuing the case against the accused, it is their role to prove the facts and charges against the accused. In some circumstances, the burden of proof will be reversed, such as when an accused raises the defence of self-defence or in some drug possession cases.

KEY TERM

Burden of proof the responsibility of a party to prove the facts of a case.

WANT TO KNOW MORE?

You can find out more about how the burden of proof can be reversed when the defence of self-defence is raised, by searching ‘The defence of self-defence (Vic)’ and clicking the ‘Go To Court’ article (Dahlstrom, n.d.).

HYPOTHETICAL SCENARIO

Phoney bags on the market

Phoenix, the owner of Phake Fashion and Co, has been accused of selling fake versions of high-end, designer bags, scamming thousands of customers by marketing the brands’ products as authentic, whilst providing false letters of authenticity. In this case, the prosecution has the responsibility of proving the facts of the case and providing evidence to support the charges against Phoenix.

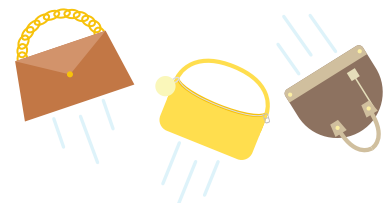


Figure 4 Phoenix does not have the burden of proof

The standard of proof 1.2.3.5

KEY TERMS

Standard of proof the degree to which the facts of a case must be proven in court.

Beyond reasonable doubt the standard of proof applicable in criminal proceedings, which requires the prosecution to prove that there is no reasonable doubt that the accused is guilty of the crime(s) they have been charged with.

USEFUL TIP

The burden of proof and the standard of proof are fundamental concepts in legal proceedings and operate together to ensure that justice can be delivered effectively. Remember, the burden of proof is the responsibility of proving the facts of the case and rests with the prosecution in criminal cases. On the other hand, the standard of proof is the degree to which the facts of the case must be proven in court and in a criminal case the standard is 'beyond reasonable doubt'. Therefore, the prosecution has the responsibility of proving the facts of the case beyond reasonable doubt in order to find the accused guilty.

The **standard of proof**, in the context of criminal law, refers to the strength of the evidence required to prove the guilt of the accused. In criminal proceedings, the standard of proof is **beyond reasonable doubt**. This means the judge or jury must have no reasonable doubt, based on the evidence presented, that the accused is guilty. If there are any alternative, logical, or reasonable conclusions that do not find the accused responsible for the crime, the case against them has not been proven beyond reasonable doubt and therefore, the accused cannot be found guilty.

HYPOTHETICAL SCENARIO

The flowery feud

Fleur and Fiore are competing florists who own flower shops across the road from one another. After a fiery incident where Fleur found out Fiore was secretly poaching her clients and spreading nasty rumours about her, Fiore's shop was mysteriously set alight, resulting in all of her products being destroyed and putting her out of business. Fleur was found at the crime scene with suspicious materials, including gasoline and a set of keys to Fiore's shop. Fleur has been charged with arson, amongst other charges, and is set to face trial soon. At the trial, the prosecution must provide evidence that proves beyond reasonable doubt that Fleur is responsible for the arson attack in order for her to be found guilty. If the evidence proves there is a reasonable possibility that another individual could be responsible for the crimes, Fleur cannot be found guilty as her guilt would not be proven beyond reasonable doubt.

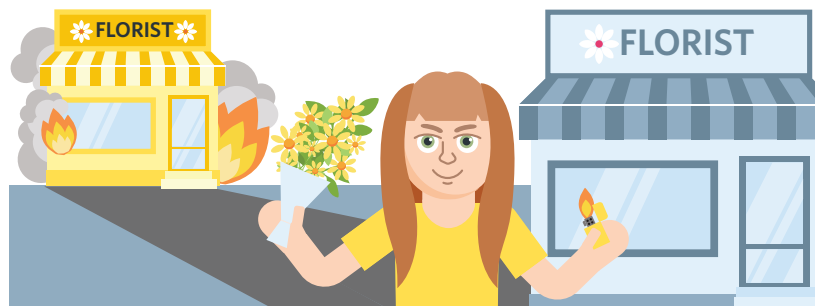


Figure 5 Is Fleur guilty beyond reasonable doubt?

Lesson summary

The Victorian criminal justice system is composed of various elements that operate together to ensure justice can efficiently and effectively be delivered to the community.

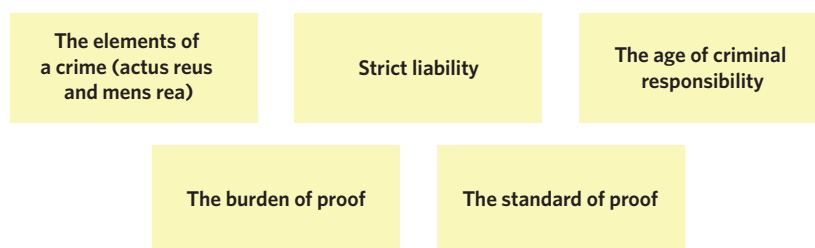


Figure 6 A summary of the key concepts of criminal law

2C Questions

Check your understanding

Question 1

The key concepts of criminal law operate individually and are not dependent on one another.

- A. True
- B. False

Question 2

Fill in the blanks with the following terms:

act

mind

The two key elements of a crime are actus reus and mens rea. Actus reus refers to a guilty [], whilst mens rea refers to a guilty []. Generally, both of these elements need to be satisfied to find an accused guilty.

Question 3

Strict liability offences require:

- A. both mens rea and actus reus to be proven.
- B. neither mens rea or actus reus to be proven.
- C. only the actus reus element of a crime to be satisfied.
- D. only the mens rea element of a crime to be satisfied.

Question 4

Tick the box to indicate whether each of the following statements are **true** or **false** about the age of criminal responsibility.

Statement	True	False
I. Each state and territory is responsible for establishing its own age of criminal responsibility.	☐	☐
II. The age of criminal responsibility refers to the age at which the law deems a child to have the ability to comprehend right from wrong and what actions are against the law, meaning they can therefore, be criminally charged for an offence.	☐	☐
III. A minor who is 17 years old cannot be charged with a criminal offence.	☐	☐
IV. If a child is deemed 'doli incapax' it means they are capable of differentiating between right and wrong, and can therefore be charged with a criminal offence.	☐	☐

Question 5

Which of the following statements are correct about the burden of proof?

(Select all that apply)

- A. It is defined as the responsibility of a party to prove the facts of the case.
- B. The accused has the responsibility to prove the charges against them.
- C. The prosecution has the burden of proof.
- D. The burden of proof can never be reversed.

Question 6

Examples of strict liability offences include:

(Select all that apply)

- A. murder.
- B. speeding.
- C. theft.
- D. serving an underage person alcohol at a licensed venue.

Question 7

The standard of proof in a criminal case is:

- A. beyond moderate doubt.
- B. on the balance of probabilities.
- C. beyond reasonable doubt.
- D. dependent on the crime the accused has been charged with.

Question 8

Which of the following statements are correct about key concepts of criminal law?

(Select all that apply)

- A. The standard of proof only applies to strict liability offences.
- B. Actus reus refers to the physical element of a criminal offence.
- C. The burden of proof is beyond reasonable doubt.
- D. Mens rea refers to the mental element of a criminal offence.
- E. Strict liability offences do not require an accused to have completed a crime intentionally, negligently, or recklessly.

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Identify the **two** elements of a crime.

Question 10

(2 MARKS)

Define 'the age of criminal responsibility'.

Question 11

(4 MARKS)

Using an example, explain **one** reason for strict liability crimes.

Question 12

(3 MARKS)

Distinguish between mens rea and actus reus as elements of a crime.

Question 13

(3 MARKS)

Lightning McQueen has been caught speeding and given a hefty fine. However, McQueen believes they should not have been given a punishment because it was not their intention to break the law.

Is McQueen correct? Justify your response.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

Sunitha walked into an expensive cosmetics store and deliberately distracted the shop assistant by asking her to check for a product in the stock room. While the shop assistant was busy looking for the product, Sunitha snuck two lipsticks and a bottle of perfume into her bag. Sunitha was caught on the CCTV camera in the store and is now facing theft charges.

Question 14

Tick the box to indicate whether each of the following statements are **true** or **false** about the burden and standard of proof in relation to Sunitha's case.

Statement	True	False
I. Sunitha will have the burden of proof if her case goes to court.	☐	☐
II. The standard of proof in criminal cases is beyond reasonable doubt.	☐	☐
III. To prove the case beyond reasonable doubt, based on the evidence, there must be no reasonable or logical doubt that Sunitha is guilty.	☐	☐
IV. As the prosecution is pursuing the case against Sunitha, they have the responsibility of proving the facts of the case.	☐	☐

Question 15

(5 MARKS)

Presuming Sunitha's case goes to court, analyse the operation of the burden and standard of proof in her case.

Linking to previous learning

Question 16

(2 MARKS)

Describe the relationship between the burden of proof and the presumption of innocence.

2D Types of crime



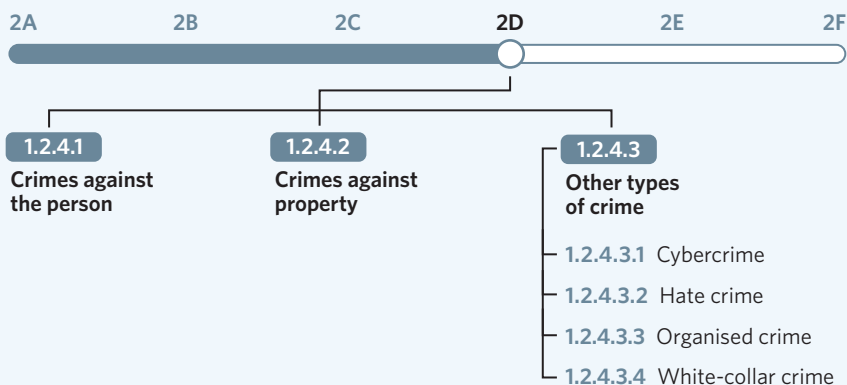
Image: Teerachai Jampanak/Shutterstock.com

'You have a \$150 voucher that is about to expire. Click the link to use it before it's too late.'

Have you ever received a message like this? Or maybe it was a message claiming your parcel could not be delivered and to click the link to rectify the situation. According to the Australian Competition and Consumer Commission (2023), Australians lost a record \$3.1 billion to scams in 2022, and with the rise of digital technology and artificial intelligence, such texting scams are becoming more frequent and insidious. Yet, aside from crimes associated with digital devices, what other types of crime exist?

STUDY DESIGN DOT POINT

- types of crime, such as crimes against the person and crimes against property



CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence, death, and marginalised groups.

KEY TERM

Crime an act or omission that violates an existing law, causes harm to an individual, or society as a whole, and is punishable by law.

LEGAL VOCABULARY

Malice wrongful intention that contributes to the degree of an offender's guilt.

Lesson introduction

A **crime** refers to an action or failure to act that results in harm to an individual or, more generally, society and carries legal consequences. Criminal activity can be categorised in various ways. Often criminal offences are categorised by the type of crime, including crimes against the person and crimes against property. Crimes against the person are usually perceived as having greater **malice** and, therefore, are more reprehensible and typically carry greater punishments than property crimes. Other categories of crime include cybercrimes, hate crimes, organised crimes, and white-collar crimes.



Figure 1 Types of crime

Crimes against the person 1.2.4.1

Crimes against the person refer to criminal acts that either cause harm to another individual or pose a threat of harm to them. If an individual makes a threat to harm but this never actually eventuates, such an action is still classified as a crime against the person. Examples of crimes against the person include:

- murder
- attempted murder
- threats to kill
- manslaughter
- culpable driving
- assault
- kidnapping
- robbery.

DEEP DIVE

Table 1 Victorian statistics from 2021 to 2023 for 'crimes against the person'

	2021	2022	2023
Homicide and related offences	175	162	181
Assault and related offences	41,432	41,132	42,926
Sexual offences	8,390	8,917	9,149
Abduction and related offences	424	413	423
Robbery	1,922	1,775	2,058

Adapted from 'Recorded Criminal Incidents' (Crime Statistics Agency, 2023)

KEY TERM

Crimes against the person criminal offences where a person is harmed or harm is threatened.

USEFUL TIP

Robbery, theft, and burglary are all different offences.

A person will be charged with robbery if, at the time of stealing, they use force or threats of force. Thus, robbery is a crime against the person and a property crime.

A person will be charged with theft if they dishonestly take property belonging to another with the intention of permanently depriving the individual of it. Therefore, this is not a crime against the person as it does not involve harming another individual.

A person will be charged with burglary if they enter any building as a trespasser with intent to steal anything in the building or to commit an offence involving an assault. Thus, burglary can be categorised as a crime against the person.

HYPOTHETICAL SCENARIO

Taken hostage

Griffin was found guilty of kidnapping Estelle. Griffin lured Estelle into his car and demanded \$25,000 from her family for her safe return. If the \$25,000 was not paid within three days, Griffin threatened to cause serious injury to Estelle. Griffin committed a crime against the person as his actions involved causing harm to Estelle by holding her against her will for ransom. Regardless of whether he followed through and committed the threatened harm to Estelle, he already committed an offence by verbalising this threat.



Figure 2 Kidnapping is classified as a crime against the person

Crimes against property 1.2.4.2

Crimes against property refer to criminal acts that employ force or deceit to acquire, damage, or demolish property. Such crimes may involve money, personal property, or land. Examples of crimes against property include:

- burglary
- fraud
- identity theft
- arson
- trespassing
- vandalism.

KEY TERM

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

LEGISLATION

Crimes Act 1958 (Vic)

HYPOTHETICAL SCENARIO

Burned bridges – Tom's revenge plot against his local pub

In an act of revenge, Tom started a fire inside his local pub, The Tipsy Gnome, after he was banned from entering the premises due to his repeated poor behaviour. Following his arrest, Tom was charged with arson. Section 197(6) of the *Crimes Act 1958 (Vic)* defines arson as 'destroying or damaging property by fire'. Therefore, Tom has committed a crime against property as force, being the fire, was used to damage property.



Figure 3 Tom committed arson, which is a crime against property

DEEP DIVE

Table 2 Victorian statistics from 2021 to 2023 for 'crimes against property'

	2021	2022	2023
Arson	1,904	1,954	2,028
Property damage	31,739	31,734	33,236
Theft	109,268	105,904	126,369

Adapted from 'Recorded Criminal Incidents' (Crime Statistics Agency, 2023)

Other types of crime 1.2.4.3

Crimes can also be classified into more specific groups. Whilst crimes against the person and crimes against property serve as overarching categories into which nearly all criminal offences can be organised, other types of crime include:

- cybercrime
- hate crime
- organised crime
- white-collar crime.

KEY TERM

Cybercrime crimes directed at computers or where the use of computers, or information and communication technologies, are key components of an offence.

Cybercrime 1.2.4.3.1

In Australia, **cybercrime** encompasses criminal activities aimed at computer systems, such as introducing viruses, as well as those conducted using computer networks, such as email scams or internet-based fraud. With the rise of technology, these types of crimes are becoming increasingly common.

REAL WORLD EXAMPLE

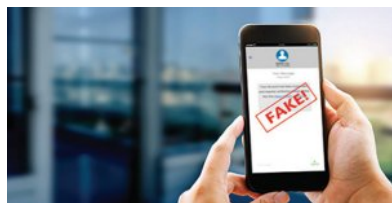


Image: panuwat phimpha/Shutterstock.com

Figure 4 Cybercrime is on the rise in Australia

Family or faux?

Online scammers are becoming more sophisticated and have started to effectively impersonate family members. They send messages such as: 'I'm at the petrol station and forgot to bring the right card. Can you please send me \$150? I'll repay you once I get back.' The 'Hi Mum' scam has reached new heights, as scammers have been able to appear in their targeted victim's phones under the name of 'Mum,' or 'Dad.'

Adapted from 'Australians have lost at least \$7.2 million to the 'Hi Mum' scam. How does it work and why is it so lucrative for cybercriminals?' (McElroy, 2022)

Hate crime 1.2.4.3.2

Acts of violence that stem from prejudice against a person's gender, ethnicity, religion, or sexual orientation are commonly known as **hate crimes** or prejudice motivated crime. There are statutes that aim to protect Australians from hate crimes, including the *Sex Discrimination Act 1984* (Cth) and the *Equal Opportunity Act 2010* (Vic).

WANT TO KNOW MORE?

The Victoria Police uses the term 'prejudice motivated crimes' to refer to 'hate crimes', and are essentially equivalent in their meaning. You can find out more about prejudice motivated crimes by searching 'Prejudice motivated crime - Victoria Police' and clicking the relevant link (Victoria Police, 2023).

LEGISLATION

Sex Discrimination Act 1984 (Cth)
Equal Opportunity Act 2010 (Vic)

KEY TERM

Hate crimes acts involving violence that are motivated by prejudice on the basis of gender, ethnicity, religion, or sexual orientation.

REAL WORLD EXAMPLE

Outlawing hate - Victoria banned the Nazi salute after anti-transgender protests

Victoria has banned the Nazi salute after an anti-transgender protest in Melbourne, organised by a far-right wing group, featured demonstrators performing the anti-Semitic gesture. Demonstrators utilised the gesture to promote hatred towards the transgender community, highlighting the intersection of two hateful ideologies and prejudices. The State's premier said the salute was an 'affront to democracy' and that the amendments to the law aim to reduce hate and discrimination. The use of Nazi symbols and gestures is also illegal in Germany and Austria. Critics of the ban have argued that it could restrict freedom of expression, but the majority believe it is necessary to combat hate speech.

Adapted from 'Victoria to ban Nazi salute after 'disgusting' scenes at anti trans protest' (Ore, 2023)



Image: Korkusung/Shutterstock.com

Figure 5 Neo-Nazi protesters targeted the transgender community on the steps of Parliament House

USEFUL TIP

A hate crime is not an offence listed under the *Crimes Act 1958* (Vic). Rather, it is an aggravating factor that a judge will consider when sentencing a guilty offender. You will learn more about aggravating factors in Unit 1 AOS 3 of the VCE Legal Studies course.

Organised crime 1.2.4.3.3

Criminal activity that is carried out in a systematic and premeditated manner by organised groups is known as **organised crime**. Such crimes often include money laundering and drug trafficking that are operated under the guise of legitimate businesses.

REAL WORLD EXAMPLE

Cracking down on the Calabrian Mafia

The notorious Calabrian mafia has operated mostly undetected in Australia for years while conducting money laundering and drug trafficking syndicates. The Australian Federal Police believe there are an estimated 5,000 members of the mafia in Australia, and the syndicate is believed to be responsible for 70 to 80 percent of the world's cocaine and other illicit drugs. Nigel Ryan, the Australian Federal Police Assistant Commissioner, ensures the Australian Federal Police work with the Italian, US, Spanish, and Brazilian authorities to protect Australians from these organised crime syndicates. The new *Surveillance Legislation Amendment (Identify and Disrupt) Act 2021* (Cth), grants the federal police the opportunity to identify and disrupt organised crime operations.

Adapted from 'Thousands of Italian mafia operating in Australia, federal police say' (Australian Associated Press, 2022)

KEY TERM

Organised crime a crime committed in a planned and methodical way by criminal syndicates, gangs, or crime families.

LEGISLATION

Surveillance Legislation Amendment (Identify and Disrupt) Act 2021 (Cth)

KEY TERM

White-collar crime financially motivated crimes that are non-violent.

LEGAL VOCABULARY

Fraud deceptive behaviour for the purpose of financial gain.

Embezzlement theft of money by a person who was entrusted with it, such as an employee stealing from an employer.

Ponzi schemes a white-collar crime that results in unsuspecting individuals investing their money with the false promise of high returns.

Pyramid schemes a fraudulent business model in which participants are promised profits primarily from recruiting others into the scheme, rather than from the sale of legitimate products or services.

White-collar crime 1.2.4.3.4

The term 'white-collar' arose in the early 19th century, and refers to people who usually work in office jobs, whilst 'blue-collar' refers to people who generally work in manual labour. The term **white-collar crime** is now commonly used to refer to non-violent crimes that are driven by financial motives. Common types of white-collar crime are **fraud**, **embezzlement**, **Ponzi schemes**, and **pyramid schemes** where unsuspecting individuals are persuaded to invest their money.

REAL WORLD EXAMPLE**The vanishing act of the Ponzi Princess**

Melissa Caddick established a Ponzi scheme over many years, before going missing the day the police were granted a search warrant at her Sydney mansion. She convinced 72 investors that her business was legitimate enough for them to invest in, telling them she was setting up accounts with a well-known, online, share-trading facility. The investors would transfer money to Caddick's accounts for her to invest on their behalf. Caddick used the money to buy mansions, motor vehicles, artworks, and jewellery for herself, whilst continually giving the investors enough money in return to ensure they kept investing and recommending her company to others. Caddick is still missing, and the only trace of her is the skeletal remains of her foot, which was found washed up on a Sydney Beach.

Adapted from 'What happened to Melissa Caddick? Accused conwoman's final days explained' (Chapman, 2022)



Image: Jaromir Chalabala/Shutterstock.com

Figure 7 Melissa Caddick created a Ponzi scheme in order to maintain her luxurious lifestyle

Lesson summary

Criminal activities are classified based on the nature of the offence, with the most common categories being:

- crimes against the person
- crimes against property.

Additionally, other categories of criminal activity include:

- cybercrimes
- hate crimes
- organised crimes
- white-collar crimes.

2D Questions**Check your understanding****Question 1**

There are many different types of crime which can be categorised based on the nature of the offence.

- A. True
- B. False

Question 2

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

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

Question 3

Which of the following are examples of a crime against property? **(Select all that apply)**

- A. Vandalism
- B. Culpable driving
- C. Trespassing
- D. Shoplifting

Question 4

Fill in the blanks with **two** of the following terms:

organised crimes

cybercrimes

hate crimes

white-collar crimes

Crimes that are motivated by prejudice towards a specific minority group are called . On the other hand, crimes that operate in a corporate environment with the goal of financial gain are called .

Question 5

Tick the box to indicate whether each of the following crimes are **crimes against the person** or **crimes against property**.

Crime	Crimes against the person	Crimes against property
I. Kidnapping	☐	☐
II. Shoplifting	☐	☐
III. Culpable driving	☐	☐
IV. Arson	☐	☐

Question 6

Tick the box to indicate whether each of the following statements refer to **organised crime** or **cybercrime**.

Statement	Organised crime	Cybercrime
I. Committed in a planned and methodical way by criminal syndicates, gangs, or crime families.	☐	☐
II. Often involves drug trafficking or money laundering.	☐	☐
III. Directed towards computers.	☐	☐
IV. Often involves fraud or online scams.	☐	☐

Question 7

The only type of crimes are crimes against the person as any issues with property, such as trespassing, are classified under civil law, not criminal law.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Samantha has been charged with a criminal offence after she created a hacking software that could steal personal computer data and sold it on the black market and to various companies for a large profit.

Outline the type of crime Samantha has committed.

Question 9

(3 MARKS)

Define the term 'crimes against the person' and provide **two** examples.

Question 10

(3 MARKS)

Using an example, describe the term 'crimes against property'.

Question 11

(3 MARKS)

Louis has been convicted of a criminal offence after he broke the window of a service station that was owned by a queer couple. He was heard yelling homophobic slurs as he fled the scene.

Identify a type of crime Louis could have been convicted of and provide reasons for your answer.

Question 12

(5 MARKS)

Distinguish between organised crime and white-collar crime, providing an example of each in your answer.

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Which of the following statements are correct? **(Select all that apply)**

- A. Crimes against the person involve a situation where an individual is directly harmed or there is a threat to harm.
- B. Crimes against property always involve harm to both property and individual victims.
- C. Crimes against property and crimes against the person both involve harm or loss due to the crime committed by an offender.
- D. Some crimes against property may not involve individual victims.
- E. Crimes against property do not involve direct harm to an individual person, but a victim may still suffer through loss or damage to their property.

Question 14

(5 MARKS)

'Crimes against property are essentially the same as crimes against the person, therefore, there should not be two different categories of crime.'

Is this statement correct? Justify your answer by comparing crimes against the person and crimes against property.

Linking to previous learning

Question 15

(5 MARKS)

After jumping the fence and entering through a window, Samarth ransacked Brielle's house before stealing thousands of dollars worth of valuable jewellery and handbags.

Identify the type of crime Samarth could be found guilty of and outline **two** purposes of criminalising this type of behaviour with reference to the scenario.

2E Summary offences and indictable offences

STUDY DESIGN DOT POINT

- the distinction between summary offences and indictable offences

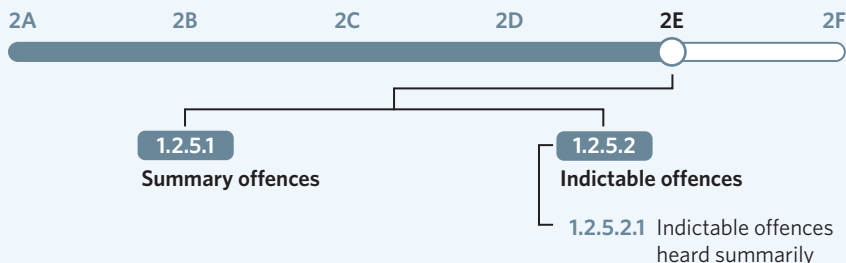


Image: sondem/Shutterstock.com

Imagine you have just graduated high school and are deciding your career path. You could choose to apply for a hairdressing course, a path with cheaper tuition and less intense studying requirements. Alternatively, you could apply for an undergraduate medicine program, a degree with greater tuition costs and more intense studying requirements. In the same way different tertiary studies vary in costs and study requirements, the criminal justice system has different categories of offences that vary in their punishments, outcomes, and severity.

Lesson introduction

There are two main categories of criminal offences: summary offences and indictable offences. Crimes are classified into one of these categories based on their severity and impact on victims and society. The court in which the case is heard and determined, and the punishment imposed on an offender if they are found guilty, can vary based on whether the committed offence is categorised as a summary or indictable offence.

Summary offences 1.2.5.1

A **summary offence** is a criminal offence that is considered less serious in nature. They are heard in the Magistrates' Court, where there is no option for a trial by jury. Sanctions for persons found guilty of summary offences include fines, community correction orders, or short terms of imprisonment. The *Summary Offences Act 1966* (Vic) includes most summary offences, such as disorderly conduct, driving offences, common assault, and damage to property. The maximum penalty that the Magistrates' Court can impose for a single summary offence is two years imprisonment or a fine not exceeding 240 **penalty units** for a single charge.

KEY TERM

Summary offence a minor criminal offence usually heard in the Magistrates' Court.

LEGAL VOCABULARY

Penalty units a measurement used to define the amount that offenders are required to pay for certain offences.

LESSON LINK

You will learn more about community corrections orders in **5B Types of sanctions**.



Figure 1 Examples of summary offences in Victoria

LEGISLATION

Summary Offences Act 1966 (Vic)

LESSON LINKS

You learnt about the Magistrates' Court in **1F The Victorian court hierarchy**.

You will learn more about trial by jury in **4E The jury in a criminal trial**.

WANT TO KNOW MORE?

There are many summary offences that a person can be charged with. You can learn more about the different types of summary offences in Victoria by searching 'Summary Offences Act 1966' and clicking the 'Victoria legislation' webpage (Victorian legislation, n.d).

When responding to summary offences, law enforcement, such as the police, have the power to exercise their own judgement on a situation. For example, if a person is found singing an obscene song or ballad in a public place, a police officer may choose to give the offender a warning or deal with the matter without pressing charges.

Table 1 Maximum penalties for different summary offences

Type of summary offence	Section of the <i>Summary Offences Act 1966 (Vic)</i>	Maximum penalty
Obstructing a footpath, canal, or waterway in such a way that could cause injury or death to any person	s 7(a)	25 penalty units, six months imprisonment, or both
Wilfully damaging any property to an extent of damage valuing less than \$5000	s 9(1)(c)	25 penalty units or six months imprisonment
Singing an obscene song or ballad in a public place	s 17(a)	10 penalty units or two months imprisonment
Common assault, such as beating another person	s 23	15 penalty units or three months imprisonment
Food or drink spiking	s 41H	Two years imprisonment

HYPOTHETICAL SCENARIO**Johnny may have to start walking**

Johnny was driving his car along the West Gate Bridge when he was pulled over by Sergeant Walker for drink-driving. The police officer witnessed Johnny consume alcoholic beverages whilst operating his motor vehicle. Following a breath test, Johnny's blood alcohol concentration was above the legal limit.

Sergeant Walker issued an on-the-spot fine of \$770 and Johnny's licence was suspended immediately for six months. Johnny was not required to attend court for his summary offence of drink-driving. However, he was warned that if future incidents were to occur, he would be tried in the Magistrates' Court and would face much harsher penalties.



Figure 2 Johnny was caught drink-driving by the police

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to Nazism.

Landmark reform to prohibit Nazi glorification

On 26 August 2022, the *Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022 (Vic)* was passed, meaning the intentional display of the Nazi swastika in public is considered a criminal offence. If a person is found guilty of displaying this symbol they can be sanctioned with a maximum fine of 120 penalty units, 12 months imprisonment, or both.

The Nazi swastika has been used to glorify 'one of the most hateful ideologies in history', being the reign of Adolf Hitler and the Nazi regime from 1933 to 1945, and can trigger feelings of fear and trauma for many people.

However, there is an exception to this Act where the symbol is being used for a 'genuine academic, artistic, religious or scientific purpose'.

Adapted from 'Victoria to become first state to ban the Nazi swastika' (Kolovos, 2022)

Indictable offences 1.2.5.2

Indictable offences are criminal offences that are considered more serious than summary offences. They are normally heard by a judge and a jury in the County or Supreme Court. However, judge-only trials can also occur. Sanctions for persons found guilty of indictable offences include large fines, community correction orders, and lengthy terms of imprisonment. Unless otherwise stated, all indictable offences are included in the *Crimes Act 1958* (Vic), such as murder, kidnapping, stalking, causing serious injury intentionally, and culpable driving causing death. The maximum penalty that can be imposed for indictable offences is life imprisonment.

KEY TERM

Indictable offence a criminal offence that is serious in nature and generally heard by a judge and jury in the County or Supreme Court.

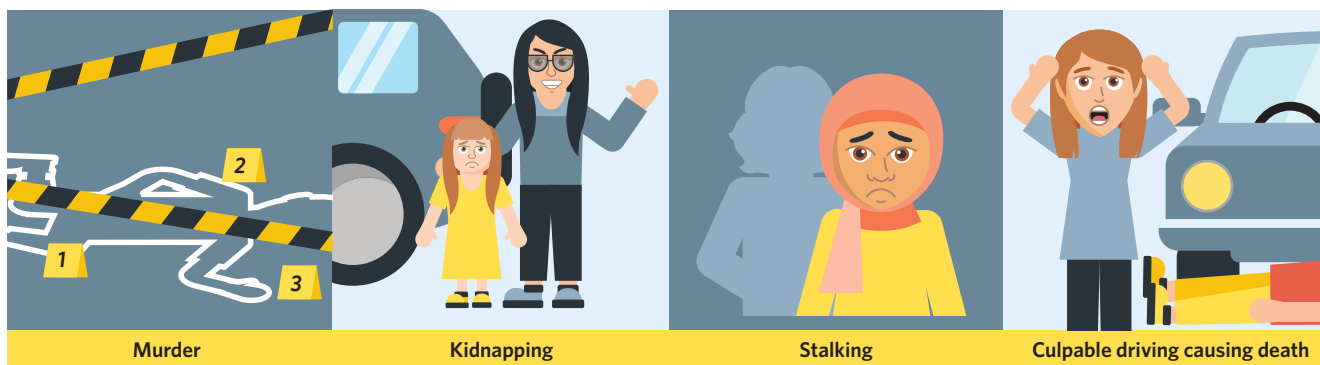


Figure 3 Examples of indictable offences in Victoria

Table 2 Maximum penalties for different summary offences

Type of summary offence	Section of the <i>Crimes Act 1958</i> (Vic)	Maximum penalty
Murder	s 3	Life imprisonment
Threats to kill	s 20	10 years imprisonment
Rape	s 38	25 years imprisonment
Kidnapping	s 63A	25 years imprisonment
Theft	s 74	10 years imprisonment

LEGISLATION

Crimes Act 1958 (Vic)

LESSON LINK

You will learn more about murder, assault, and culpable driving in **Chapter 3: Criminal offences**.

LEGAL CASE

CONTENT WARNING This section explores content that is sensitive in nature, relating to death.

Guode v R [2020] VSCA 257

Facts

On 8 April 2015, a mother drove a car carrying her four children into a lake with the intent to kill. As a result, three of the children died, including an infant. The mother pleaded guilty to one charge of infanticide, two charges of murder, and one charge of attempted murder.

Legal issue

The sentencing judge in the Supreme Court of Victoria had to determine an appropriate sentence for the indictable offences of infanticide, murder, and attempted murder as established in the *Crimes Act 1958* (Vic).

Decision

The sentencing judge in the Supreme Court of Victoria sentenced the mother to 26 years and six months imprisonment with a non-parole period of 20 years.

Significance

Following the imposition of this sentence, the mother appealed the decision in the Supreme Court of Appeal and a sentence of 18 years imprisonment with a non-parole period of 14 years was handed down. This sentence was later appealed in the High Court of Australia. This case demonstrates the severity of indictable offences and the lengthy prison sentences that can be imposed if a person is guilty of such a crime.

USEFUL TIP

To help you remember the difference between summary and indictable offences you can think about a summary of a book, which is brief in the same way that summary offences generally have shorter trials and less severe sanctions. Alternatively, you can remember indictable offences as being important (as both words begin with the letter 'I') and therefore, having more severe sentences and consequences.

Indictable offences heard summarily 1.2.5.2.1

KEY TERM

Indictable offences heard summarily a subset of indictable offences that can be heard in the Magistrates' Court in a similar manner to a summary offence.

LEGAL VOCABULARY

Committal proceeding a hearing in the Magistrates' Court that is used to determine whether there is sufficient evidence against an accused person, charged with an indictable offence, for a trial in a higher court.

LEGISLATION

Criminal Procedure Act 2009 (Vic)

Indictable offences heard summarily are indictable offences that are considered less serious and, consequently, can be heard in the Magistrates' Court, similar to the way in which summary offences are heard. For an accused person, having an indictable offence heard summarily can be beneficial as it is less costly and court time and resources can also be saved.

This is because having an offence heard summarily means an accused does not have to wait for a jury to be arranged since trial by jury is not an option in the Magistrates' Court. Furthermore, the Magistrates' Court specialises in hearing a high number of less serious offences, meaning delays in the court system can be minimised.

A magistrate will determine whether an indictable offence can be heard summarily during a **committal proceeding**. For an indictable offence to be heard summarily:

- the offence must not be punishable by a maximum term exceeding 10 years of imprisonment
- the court must agree and determine it is appropriate
- the accused must consent to having their offence(s) heard summarily.

The maximum imprisonment sentence that can be imposed in the Magistrates' Court for one offence is two years, with a maximum of five years for two or more offences. The *Criminal Procedure Act 2009 (Vic)* establishes which indictable offences can be heard summarily, including theft, property damage, and indecent assault.

HYPOTHETICAL SCENARIO

Like a thief in the night

Michael and Clancy are robbers who were recently charged with theft after stealing from a house in Toorak. It was determined the duo stole \$5,000 worth of items, including jewellery, silverware, and clothes.

Prior to their committal proceeding, Michael and Clancy's lawyer informed them that their theft is considered an indictable offence under s 74 of the *Crimes Act 1958 (Vic)* and holds a maximum penalty of 10 years imprisonment. However, their lawyer also suggested that there was a possibility their offence could be heard summarily, meaning they could only receive a maximum penalty of two years imprisonment. Michael and Clancy both consented to having their crimes heard in this manner.

The magistrate conducting the committal proceeding concluded that it was appropriate for Michael and Clancy to have their indictable offence heard summarily, as the theft was not violent and the value of the property stolen was not extremely significant. Therefore, the overall severity and seriousness of the sanction imposed on this robbing duo is likely to be lessened as a result of having their case heard in the Magistrates' Court.

USEFUL TIP

When analysing case studies and categorising criminal offences, it is important to remember that some indictable offences can be heard summarily. For example, theft is a serious crime and you may instantly think it is an indictable offence. However, some indictable offences are eligible to be heard in the same manner as a summary offence in the Magistrates' Court, including some theft offences. Therefore, the categorisation of crimes is dependent on a range of factors and can be subjective to each case.

Lesson summary

Table 3 The distinction between summary offences, indictable offences, and indictable offences heard summarily

Type of offence	Summary offences	Indictable offences	Indictable offences heard summarily
Nature of the offence	Minor criminal offence	Serious criminal offence	Less serious indictable offence
Court(s)	Magistrates' Court	County or Supreme Court	Magistrates' Court
Availability of trial by jury	No	Yes	No
Statutes related to the offences	<i>Summary Offences Act 1966</i> (Vic)	<i>Crimes Act 1958</i> (Vic)	<i>Criminal Procedure Act 2009</i> (Vic)
Examples	- Driving offences - Disorderly conduct - Damage to property	- Murder - Rape - Kidnapping - Culpable driving causing death	- Theft - Burglary - Recklessly causing injury

2E Questions

Check your understanding

Question 1

The two main categories of criminal offences are:

- summary and indecent offences.
- summary and indictable offences.
- stationary and indecent offences.
- stationary and indictable offences.

Question 2

Fill in the blanks with the following terms:

Magistrates' Court

County or Supreme Court

Indictable offences are heard in the , whilst summary offences are heard in the .

Question 3

Tick the box to indicate whether each of the following statements are examples of **summary** or **indictable** offences.

Statement	Summary	Indictable
I. Disorderly conduct	☐	☐
II. Murder	☐	☐
III. Stalking	☐	☐
IV. Property damage	☐	☐
V. Culpable driving causing death	☐	☐

Question 4

Indictable offences heard summarily are considered more serious than indictable offences but less severe than summary offences.

- A. True
- B. False

Question 5

For an indictable offence to be heard summarily:

(Select all that apply)

- A. the offence must be punishable by a maximum term exceeding 10 years imprisonment.
- B. the offence must not be punishable by a maximum term exceeding 10 years imprisonment.
- C. the court must agree and determine it is appropriate.
- D. the accused must make a statement to the court requesting for their offence to be heard summarily for the judge or magistrate to consider it.

Question 6

Fill in the blanks with the following terms:

Summary Offences Act 1966 (Vic)

Crimes Act 1958 (Vic)

Criminal Procedure Act 2009 (Vic)

In Victoria, most indictable offences are included in the , whilst indictable offences heard summarily are established in the . Alternatively, the sets out summary offences in Victoria.

Question 7

Summary offences, indictable offences, and indictable offences heard summarily are all civil offences and, therefore, are dealt with in the civil justice system.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify the **two** categories of offences in the criminal justice system.

Question 9

(2 MARKS)

Describe indictable offences heard summarily.

Question 10

(3 MARKS)

Distinguish between summary and indictable offences.

Question 11

(4 MARKS)

Elsa was caught drink-driving after consuming alcohol at a music festival. The police officer who caught her issued a fine and immediately suspended her licence for five months.

Identify the type of offence Elsa has committed and explain the features of this type of offence.

Extended response

Use your answer to question 12 to support your response to question 13.

Question 12

Which of the following statements are correct about indictable offences heard summarily? **(Select all that apply)**

- A. An indictable offence heard summarily is a subset of summary offences that can be heard in the Magistrates' Court.
- B. It can be beneficial for an accused to have their indictable offence heard summarily as the maximum imprisonment sentence given in the Magistrates' Court for one offence is two years.
- C. Having an indictable offence heard summarily can minimise delays in an accused's case and reduce their overall court expenses.
- D. Indictable offences are considered less serious than an indictable offence heard summarily.

Question 13

(6 MARKS)

'It is more beneficial for an accused to have their indictable offence tried in a higher court rather than having it heard summarily in the Magistrates' Court.'

To what extent do you agree with this statement? Justify your answer.

Linking to previous learning**Question 14**

(2 MARKS)

Joshua graffitied the fence of his neighbour, Sabrina, after she refused to trim hedges that were impeding upon his property.

Identify the type of crime and offence that Joshua has committed.

2F Possible participants in a crime



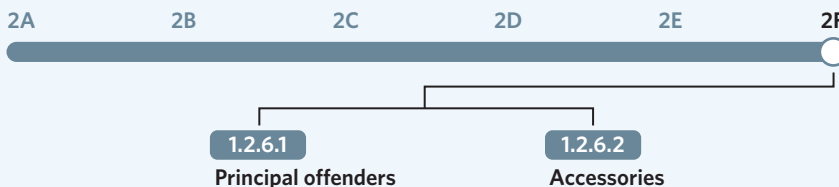
Image: Digital Storm/Shutterstock.com

*'You were drivin' the getaway car.
We were flyin', but we'd never get far.'*
—Taylor Swift (Singer and Songwriter,
Getaway Car, 2017)

But who was driving the getaway car
and could they be found guilty of an
indictable offence?

STUDY DESIGN DOT POINT

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



Lesson introduction

When an offence is investigated by the police or in a trial, all participants in the crime must be considered. Whilst there is always at least one culprit who committed the offence, there are also often individuals who are guilty of participating in, or aiding, the offence in some way.

Principal offenders 1.2.6.1

If a person was directly involved in an offence and/or held the most responsibility in committing the crime, they may be considered a **principal offender**. In most cases, the principal offender is the person who physically committed the wrongful act or omission in addition to holding the mens rea. 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.

As per the *Crimes Act 1958* (Vic), a second 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.
- enter into an agreement, arrangement, or understanding with another person to commit an offence.

In these situations, the person does not have to be physically present when the offence is committed.

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 or were involved in the commission of the offence in some other way.

KEY TERM

Principal offender the individual who actually commits the offence and/or is directly linked to the enactment of the crime.

LEGISLATION

Crimes Act 1958 (Vic)

LESSON LINK

You learnt about mens rea and actus reus in **2C Key concepts of criminal law**.

REAL WORLD EXAMPLE

Ghost train up in flames

The 1979 Ghost Train Fire at Luna Park Sydney killed seven people: six children and one adult. The initial investigation blamed an electrical fault for the blaze, but an ABC true-crime series challenged this, presenting strong evidence in support of the claim that the arson was initiated by Abe Saffron.

Abe Saffron is a well known Sydney crime organiser and it was alleged that he had his men start the fire so he could later develop the land that housed Luna Park.

In this case, Abe Saffron would be the principal offender, even though he did not commit the act or arson himself, he instructed his men to do so, demonstrating a guilty mind.

It is likely the people who actually started the fire would also be principal offenders as they committed the act. If someone was driving a getaway car or made efforts to cover up the arson, which was suspected by the police, they would be considered accessories to the crime.

Adapted from 'How Ghost Train Fire exposed remarkable police corruption, yet also failed ABC's high journalistic standards' (Muller, 2021)



Image: Sarawut Konganantdech/Shutterstock.com

Figure 1 A Sydney crime boss was suspected of being the principal offender in the 1979 Ghost Train Fire at Luna Park Sydney

Accessories 1.2.6.2

An **accessory** is any person who is aware of a crime occurring and contributes to the concealment or execution of the offence. An accessory to a crime can be found guilty of an offence even where the principal offender is found not guilty.

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

- hiding a principal offender
- hiding, destroying, or tampering with evidence
- providing an alibi for a friend who has been charged with driving under the influence
- driving a getaway car after a robbery
- helping a criminal suspect escape arrest.

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 depending on the crime the principal offender committed.

Table 1 Penalties for accessory offenders

Sentencing practice	Example
Where the maximum penalty is life imprisonment, an accessory can be sentenced to a maximum of 20 years imprisonment.	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 five years imprisonment or be more than half of the maximum penalty that could be imposed on the principal offender.	The maximum penalty for graffitiing private property without consent is two years imprisonment. An accessory to this offence could be liable to a maximum penalty of one year imprisonment.

KEY TERM

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

LESSON LINK

You will learn about culpable driving in **3G Culpable driving – elements**.

WANT TO KNOW MORE?

You can find out more about accessory offenders and what type of conduct constitutes being an accessory to a crime by searching 'Joint responsibility for criminal offences – an overview of criminal complicity in Victoria' and clicking the 'Pascoe Criminal Law' webpage (Pascoe, 2022).

HYPOTHETICAL SCENARIO

No body, no crime

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 they hide the body and clean the car to remove all traces of the accident, to which Vickie reluctantly agreed. The next day police arrested Kale as there was video footage of the incident. During investigations prior to Kale's trial, the police discovered that Vickie assisted Kale in disposing of the evidence following the event. Vickie was then arrested for her involvement.

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

Culpable driving causing death, which Kale may be convicted of, carries a maximum prison sentence of 20 years. Therefore, if this is the crime Kale is being convicted of, Vickie may face a penalty of up to five years imprisonment.

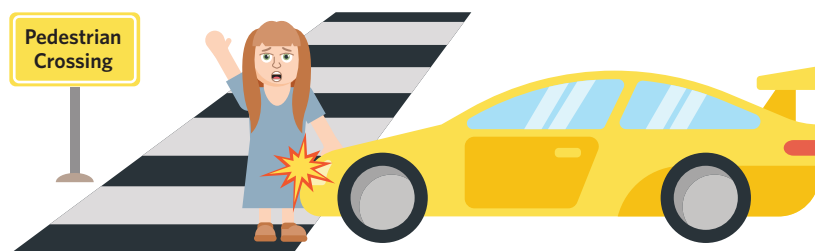


Figure 2 Kale acted as a principal offender to the crime, whilst Vickie was an accessory as she helped Kale dispose of the evidence

Lesson summary

Individuals involved in a crime, either directly or indirectly, can be considered a participant in the offence. These types of participants are:

- principal offenders
- accessories.

A principal offender is directly involved in either committing the crime or instigating the offence and usually carries the mens rea or guilty mind for the actions committed. Alternatively, an accessory is someone who is aware of a plan for a crime, or the fact a crime was committed, but does not take action to aid the arrest or conviction of a guilty person.

2F Questions

Check your understanding

Question 1

Fill in the blanks with **two** of the following terms:

a principal offender

an instigator

an accessory

A person who is involved, either directly or indirectly, with the commission of an offence is [] .

However, a person who was less involved but had knowledge of an individual committing an indictable offence is considered [] .

Question 2

There can only be one principal offender convicted for any one crime, however, there can be multiple accessories convicted for the same crime.

- A. True
- B. False

Question 3

Jasmine, a notorious gang leader who is currently under police surveillance, plans a large bank robbery through an online group chat. One of her gang members is working with the police. While Jasmine is not physically present at the crime scene, she is arrested following the incident.

Which of the following statements is correct about the type of participant Jasmine is in the crime?

- A. Jasmine is a principal offender as she committed all actus reus elements of the criminal offence.
- B. Jasmine is a principal offender as she directed and orchestrated the 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 cannot be charged with a criminal offence as she had no physical involvement in the crime and was never at the scene.

Question 4

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

- A. Commissioning another person to commit a criminal offence.
- B. Dishonestly telling the police that a suspect was with them at the time they had committed a crime.
- C. Destroying evidence to cover up an offence.
- D. Hiding an offender in their house knowing the police are looking for them.

Question 5

Diego was charged with murdering his neighbour. Joaquin, one of Diego's friends, was charged as an accessory to the crime, as he took the murder weapon from the scene and hid it in his car. After a criminal trial, Diego was found not guilty.

As Diego was found not guilty of murder, Joaquin's charges of being an accessory are also dropped.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 6

(2 MARKS)

Outline the term 'accessory'.

Question 7

(2 MARKS)

Provide **two** examples of ways an individual can be an accessory to a crime.

Question 8

(3 MARKS)

Distinguish between the principal offender and the accessories in a crime.

Question 9

(3 MARKS)

Sally decided to plan a bank robbery and recruited two of her friends to break into and steal money from the bank. During the robbery, Sally told her friends exactly what to do. However, the police arrived on the scene quickly and arrested Sally's friends. Sally was later arrested and charged with the maximum penalty for the crime, even though she did not physically commit the offence.

Explain why Sally can be sentenced with the maximum penalty for the bank robbery.

Question 10

(4 MARKS)

The police allege that Jael had an agreement with his girlfriend, Eisha, to rob a grocery store and share the money. According to police, on the day of the offence, Jael entered a local grocery store and demanded \$5,000 from the cashier. Jael then drove to the home of his friend, Lucia, and described what he had done. The police believe Lucia advised Jael on how to dispose of his clothing so he was not recognised by police.

In Jael's trial, the jury delivered a 'not guilty' verdict, which means Lucia's trial cannot proceed – she cannot be an accessory to an offence where the principal offender is acquitted. However, Eisha is found guilty as an accessory because she was in an agreement to commit an offence.

Identify **two** errors in the scenario above and, for each error, explain the correct process or procedure that should have occurred.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Jenny, Harold, and Robert decide to book a trip to Bali, but do not have enough money to pay for it. Jenny suggests they find a car to steal at a dealership nearby and then sell it. She devises a plan for the crime and 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, causing 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.

Question 11

Which of the following statements is correct about Jenny, Harold, and Robert's crime?

- A. Jenny is the principal offender as she committed the primary actus reus of the plan to steal the car.
- B. Harold did not want the money for the Bali trip and, therefore, would only be an accessory to the crime.
- C. Robert was pressured into the crime and only knew about the plan on the day, therefore he is only an accessory.
- D. Jenny, Harold, and Robert all had a high level of involvement in the crime and are, therefore, all principal offenders.

Question 12

(6 MARKS)

Analyse the type of participant Jenny, Harold, and Robert are in this crime.

Linking to previous learning**Question 13**

(3 MARKS)

Aaron ran a red light and must pay a fine.

- a. Identify the type of offender Aaron is.
- b. Outline whether this is a summary or indictable offence.

1 MARK

2 MARKS

3

CHAPTER 3

Criminal offences

LESSONS

- 3A** Murder – elements
- 3B** Murder – defences and sanctions
- 3C** Murder – trends and impact
- 3D** Assault – elements
- 3E** Assault – defences and sanctions
- 3F** Assault – trends and impact
- 3G** Culpable driving – elements
- 3H** Culpable driving – defences and sanctions
- 3I** Culpable driving – trends and impact

KEY KNOWLEDGE

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.

Image: ANURAK PONGPATIMET/Shutterstock.com

3A Murder – elements

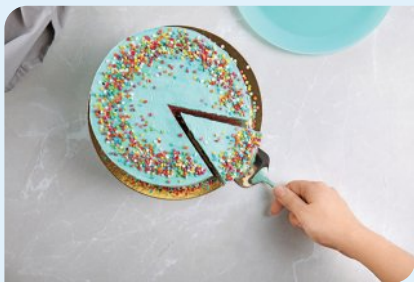
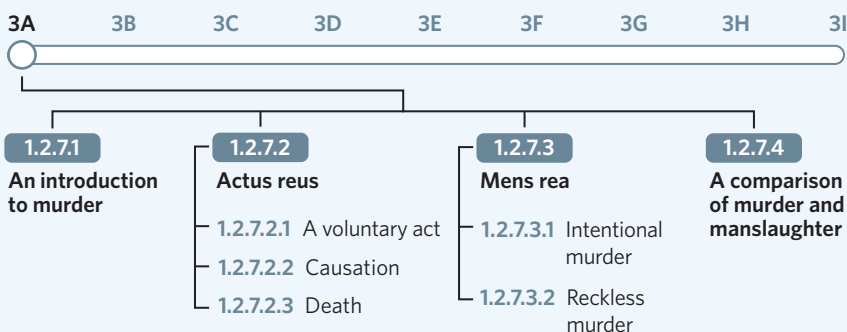


Image: New Africa/Shutterstock.com

It is your best friend's birthday! The tunes are pumping and the pizza is fresh when suddenly you remember that one time in year three when your best friend tripped you in the playground. In a fit of rage, you grab the knife for the cake and stab her in the chest, just as a classic tune comes on the speaker. It is a murder on the dancefloor!

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.



CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence and death.

Lesson introduction

Murder is one of the most serious offences in society, as it is the action of taking another person's life. In 2022 alone, there were 377 victims of homicide or related offences, such as murder, in Australia (Australian Bureau of Statistics, 2023). For obvious reasons, the sanction prescribed for murder is typically the most severe form of punishment in Victoria, reflecting the magnitude and impact of this crime.

An introduction to murder 1.2.7.1

Murder is not specifically defined in the *Crimes Act 1958* (Vic) and is instead derived from common law. This crime generally involves voluntarily causing the death of another person with intent or recklessness, and without lawful excuse.

Murder is a serious, indictable offence punishable by a maximum sentence of life imprisonment.

For the prosecution to prove an offender is guilty of murder beyond reasonable doubt, they must sufficiently prove to a jury that the offender committed both the:

- 'actus reus' of the offence, meaning their voluntary, physical actions caused the death of another person.
- 'mens rea' of the offence, meaning the offender had a degree of recklessness or intent to harm.

If one of the above elements is missing, for example, the accused caused the death of the victim by accident, acting in a manner that was not reckless, the offence of murder cannot be established. However, the accused may still be charged with a different criminal offence, such as manslaughter.

LEGISLATION

Crimes Act 1958 (Vic)

KEY TERM

Murder the action of intentionally or recklessly causing the death of a human.

LESSON LINKS

You learnt about common law in **1E Sources of law**.

You learnt about actus reus and mens rea in **2C Key concepts of criminal law**.

Actus reus 1.2.7.2

The **actus reus** of a crime refers to the physical elements of the crime that must be satisfied in order for an accused to be found guilty. For murder, there are three physical actus reus elements, alongside the **mens rea** elements, that must be met for an accused's actions to be considered murderous.

These elements are:

- a voluntary act
- causation
- death.

A voluntary act 1.2.7.2.1

The conduct must have been directed by a conscious and voluntary decision of the accused. A decision is not conscious if the accused was unconscious, had involuntary movement, or if the conduct was caused by another person. If there are multiple acts, the court will look at the series of actions as a whole to see if they are regarded as one voluntary action.

Some examples of involuntary acts include where the accused:

- was under the involuntary influence of drugs or alcohol to such an extent that they were incapable of controlling their own actions.
- acted unconsciously when committing the murder, such as while sleepwalking, due to a spasm, or an involuntary movement.
- acted in a certain way due to a mental health condition, such as schizophrenia, where they could not recognise the reality of the situation.

LEGAL CASE

R v Farquharson (2009) 26 VR 410

Facts

When driving his three sons home from Winchelsea, on Father's Day 2005, Robert Farquharson swerved his car off the Princes Highway into a dam. Whilst he was able to swim to safety, his sons were unable to escape the sinking car and drowned to their death.

Legal issue

Farquharson was charged with three counts of murder following the incident. He pleaded not guilty to all three charges. The primary argument raised by Farquharson's legal representation was that he was suffering from a coughing fit in the moments leading up to the crash, making his action of driving into the dam involuntary. They argued that, as a result of this fit, he fell unconscious and therefore, lost control of the vehicle, causing him to veer into the dam.

Decision

In his first trial, heard in the Supreme Court of Victoria, the jury found Farquharson guilty of murder and he was sentenced to three terms of life imprisonment. The jury did not believe the defence council's argument that Farquharson fell unconscious. Instead, the jurors came to the conclusion that it was beyond reasonable doubt that Farquharson had deliberately decided to swerve into the dam, based on the evidence presented by the prosecution, as well as a number of witnesses and friends of Farquharson. On appeal, the murder conviction was maintained and Farquharson's sentence of life imprisonment with a minimum term of 33 years was upheld.

Significance

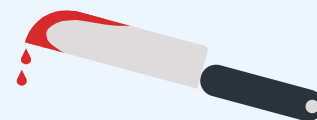
The element of 'voluntary act' was a contentious point in this case as the jury had to determine whether it believed Farquharson's action of steering the car into the dam was involuntary or not, based on his claim of unconsciousness.

KEY TERMS

Actus reus a Latin term meaning 'guilty act' that forms the physical element of a crime and refers to the physical acts or omissions the offender must have undertaken as part of a crime.

Mens rea a Latin term meaning 'guilty mind' that forms the mental element of a crime and refers to an offender's awareness of their criminal behaviour and its potential consequences.

1. The accused's actions were a voluntary act



2. The accused's actions were the cause of the victim's death



3. The victim died



Figure 1 Elements of the actus reus for murder

Causation 1.2.7.2.2

KEY TERMS

Causation the relationship between an event or action and a resulting event.

Substantial and operating cause test

a test utilised in murder cases to determine the extent to which the accused's actions caused the death of the victim when there are subsequent, intervening events.

Natural consequences test a test utilised in murder cases to determine the extent to which the victim's conduct caused their own death, and whether their actions were motivated by fear induced by the accused's actions.

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 of the accused caused the death of the victim without an intervening event.

Some of the most common tests used by Australian courts in determining whether an intervening event will break the chain of causation are the:

- **substantial and operating cause test**
- **natural consequences test.**

The substantial and operating cause test was originally derived from the United Kingdom. This test requires the accused's act or omission to have substantially or significantly contributed to the death of the victim. Even where there was an intervening event this test can still be satisfied, as long as the accused's actions are sufficiently substantial in causing the victim's death.

LEGAL CASE

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

Facts

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 passed away due to the build-up 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.

Legal issue

Evans and Gardiner were found guilty of manslaughter. However, both men appealed, arguing that the poor medical treatment of the victim, and the failure to discover the scar tissue during his illness had caused the death, rather than their actions of stabbing the victim almost a year earlier.

Decision

The court referred to the 'substantial and operating cause' test 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.

Significance

This case illustrates how a voluntary act that substantially and significantly contributes, and ultimately leads, to the death of the victim can still be a sufficient cause of the victim's death, despite an intervening event. In this case, Evans and Gardiner exhibited the actus reus required to be found guilty of murdering the victim.



Image: LightField Studios/Shutterstock.com

Figure 2 Evans and Gardiner were found guilty, despite their victim's death being delayed

The natural consequences test is often used in cases where the victim acts out of fright or self-preservation as a result of the accused's conduct, which consequently results in their own death.

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
- the victim selected a reasonable mode of escape.

LEGAL CASE

Royall v R (1991) 172 CLR 378

Facts

Royall and the victim, his girlfriend at the time, engaged in a violent argument that eventuated to her jumping out of the window of their apartment. As their apartment was six floors above ground level, she fell to her death.

Legal issue

Royall was charged with the victim's murder and pleaded not guilty. 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, as it was held that the victim chose to jump out the window herself.

Decision

The court held that, generally, a reasonable act performed in an attempt to protect oneself, such as attempting to escape violence, does not break the chain of causation. In addition, the court noted:

'where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct.'

Significance

This case utilised the natural consequences test in order to determine Royall's responsibility for his girlfriend's death. If he had not created an environment in which she was fearful and felt she had to escape, it is likely that he would have been found not guilty.

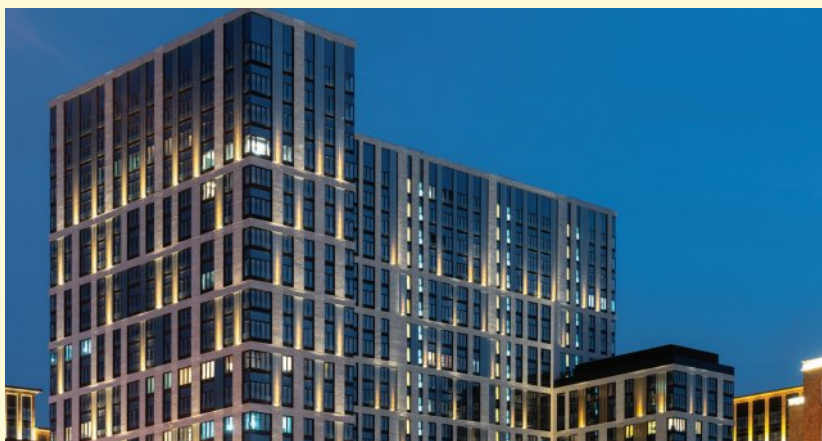


Image: Evgeniy Vasilev/Shutterstock.com

Figure 3 Royall and his girlfriend's argument led to her murder at their apartment

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to 'use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios'.

If studying murder, you may be asked to demonstrate this skill by applying elements of murder to a given scenario, which may require you to apply tests such as the substantial and operating cause test and the natural consequences test.

Death 1.2.7.2.3

The voluntary act must cause the death of another person, not an object or animal. 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. In Victoria, life as a human being finishes at the point of irreversible ending of brain function or blood circulation.

Mens rea 1.2.7.3

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 serious injury, or were reckless as to whether they would kill or cause serious injury. This separates murders into two main categories based on the offender's state of mind: intentional murder and reckless murder.

Intentional murder 1.2.7.3.1

Intentional murder is where the accused causes the death of another with the specific **intention** to kill or cause 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 death if:

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

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 death resulted from the intentional act of causing grievous bodily harm, this will suffice the mens rea for intentional murder.

Reckless murder 1.2.7.3.2

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 still constitutes 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, it must simply show that the death occurred, and that it was reasonably foreseeable for the accused to realise that their conduct would likely amount to death or grievous bodily harm.

KEY TERMS

Malice aforethought the state of mind of an offender in a murder case to cause death or serious bodily harm.

Intention the type of mens rea requiring an accused to have acted with a conscious desire to, or foresight that their actions almost certainly would, cause harm to the victim.

Grievous bodily harm a severe injury that typically involves a victim sustaining permanent or serious disfiguring.

USEFUL TIP

When determining whether a murder was intentional, remember that it can be enough that an accused intended to cause grievous bodily harm to the victim, which then resulted in their death. It is not a requirement that the accused planned to cause the victim's death as a result of their actions.

KEY TERM

Recklessness the type of mens rea requiring an accused to have engaged in conduct that they would reasonably foresee as being capable of causing harm to the victim.

REAL WORLD EXAMPLE



Image: doublelee/Shutterstock.com

Figure 4 On 20 January 2017, six people were recklessly murdered in Melbourne CBD

Bourke Street's massacre

On 20 January 2017, James 'Dimitrious' Gargasoulas drove his car into pedestrians along the footpaths of Swanston and Bourke Streets, which are both busy streets in the heart of Melbourne's CBD. Under the influence of ice, an illicit substance, he struck and killed six pedestrians while injuring 27 others.

This devastating event is now referred to as the 'Bourke Street Massacre' and there is a plaque in Parliament Gardens as a memorial for the victims.

After pleading not guilty, Gargasoulas was tried in the Supreme Court of Victoria where the prosecution raised:

'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.'

Gargasoulas is now serving life in prison. His murders were described by the sentencing judge as having 'a shattering effect on countless lives'. His actions are an example of reckless murder as, whilst he may not have intended to kill or injure multiple people, his mens rea lies in his blatant disregard for the safety of others while driving in a pedestrian area.

Adapted from 'Bourke Street driver James Gargasoulas found guilty of six murders' (Younger, 2018)

The distinction between intentional and reckless murder lies in the degree of knowledge the accused had regarding the probability that death or grievous bodily harm was 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.

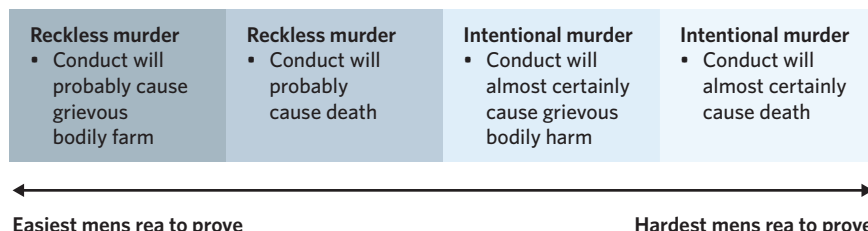


Figure 5 Distinguishing between intentional and reckless murder

A comparison of murder and manslaughter 1.2.7.4

Murder and **manslaughter** are similar in some respects as both are homicide offences that involve the killing of another human being without lawful excuse. However, the two are also different in a number of ways, especially in terms of their mens rea components.

Table 1 Comparison of 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 the accused to have some form of intention or recklessness to cause death or grievous bodily harm. Manslaughter involves gross, criminal negligence or causing death whilst performing some unlawful and dangerous act, such as hitting someone whilst texting and driving.
Criminal offence	Murder and manslaughter are both serious indictable offences.	Types	Types of murder include intentional murder and reckless murder. 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 <i>Crimes Act 1958</i> (Vic). The maximum penalty for manslaughter is 25 years imprisonment as outlined by s 5 of the <i>Crimes Act 1958</i> (Vic).

KEY TERMS

Manslaughter unlawfully causing the death of another person without malice aforethought.

Criminal negligence a type of mens rea that requires the accused to have failed to behave with a level of care that a reasonable person would have exercised under the same circumstances.

Lesson summary

For murder to be proven in a criminal trial, all elements must be made out to the jury beyond reasonable doubt by the prosecution. These elements are:

- actus reus, which requires the accused to have voluntarily performed the act of killing, been the cause of the victim's death, and the victim must have actually died.
- mens rea, which requires the accused to have acted intentionally or recklessly when causing the death of the victim.

3A Questions

Check your understanding

Question 1

Which of the following are elements of murder? **(Select all that apply)**

- A. Self-defence
- B. A voluntary act
- C. Causation
- D. Death

Question 2

The actus reus for murder involves determining whether the accused had the intent to kill or cause grievous bodily harm or was acting recklessly.

- A. True
- B. False

Question 3

One of the ways in which causation may be determined in a murder case is the 'substantial and operating cause' test.

- A. True
- B. False

Question 4

Which of the following statements is incorrect in relation to the element of death?

- A. Life ends when there is an irreversible ending to brain function or blood circulation.
- B. The element includes the death of unborn children.
- C. Only human death is considered under this element.
- D. A voluntary act of killing an animal would not satisfy the element.

Question 5

Fill in the blanks with the following terms:

an intentional

a reckless

If the accused wants to kill or cause grievous bodily harm, this is [] murder. On the other hand,

if an accused engages in activities in which it would be reasonably foreseeable that death or grievous bodily harm could

amount from their actions, this is [] murder.

Question 6

Rhiley, while sleepwalking, pushed his sister out of the window to her death.

Which of the following elements of murder would the prosecution find difficult to prove in Rhiley's case?

- A. The accused committed a voluntary act.
- B. The victim died.
- C. The accused caused the victim's death.

Question 7

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.

Question 8

If all of the elements of murder, including the actus reus and mens rea, are satisfied beyond reasonable doubt, an accused is likely to be found guilty.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 9**

(2 MARKS)

Define the term 'murder' as a criminal offence.

Question 10

(2 MARKS)

Outline **one** element of murder.

Question 11

(3 MARKS)

Explain the actus reus element of causation.

Question 12

(3 MARKS)

Distinguish between intentional murder and reckless murder.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Daichi and Rick were enjoying a hike at a national park when Daichi lost consciousness and slipped on a rock. As he fell over, he accidentally pushed Rick off a steep cliff. Rick tumbled to his death and Daichi was arrested for murder.

Question 13

Which of the following statements is incorrect about Daichi's case?

- A. The element of death will be satisfied as Rick passed away.
- B. The element of causation will not be satisfied for Daichi as the sharp rocks that Rick fell on were an intervening act. These rocks were the primary cause of Rick's death, and causation cannot be made out where an intervening act is present.
- C. Daichi's action of pushing Rick is likely involuntary as he was in the process of tripping when the action occurred, as a result of losing consciousness.
- D. It is likely that Daichi's mens rea will not be established as he was not acting recklessly, nor did he intend to cause Rick any harm.

Question 14

(6 MARKS)

Do you think Daichi is likely to be found guilty of murder in this case? Justify your answer by referring to the elements of murder.

Linking to previous learning**Question 15**

(3 MARKS)

Explain **one** way in which the principle of fairness is upheld by the elements of murder.

3B Murder – defences and sanctions

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society



1.2.8.1

Possible defences to murder

1.2.8.1.1 Self-defence

1.2.8.1.2 Duress

1.2.8.1.3 Sudden or extraordinary emergency

1.2.8.2

Possible sanctions for murder

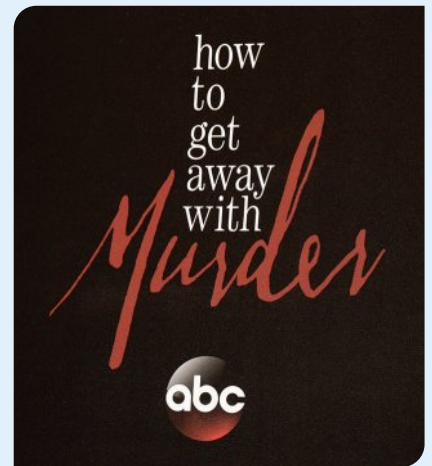


Image: Kathy Hutchins/Shutterstock.com

'How to Get Away with Murder' is an American legal drama about a criminal defence lawyer and professor who teaches a group of aspiring law students how to commit murder without being found guilty. Although one cannot 'get away with murder', there are ways that an innocent person who has been accused can defend themselves.

Lesson introduction

A person accused of murder is able to maintain and protect their innocence by raising certain defences in court. To prevent a guilty verdict, an accused can either cast doubt on one of the elements of murder, so the prosecution cannot prove the offence beyond reasonable doubt, or raise a legal defence to justify their alleged criminal activity.

Considering the severity of this offence, high penalties accompany a murder charge, including life imprisonment. If the accused is unable to successfully raise defences or cast doubt on the elements of murder, they may face such a sanction.

Possible defences to murder 1.2.8.1

Defences to murder only need to be raised if the prosecution establishes, beyond reasonable doubt, all of the elements of murder. That is, a sufficient case must have been established against the accused to warrant them arguing any defences. Some common defences available against a murder charge include:

- self-defence
- duress
- sudden or extraordinary emergency.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence and death.

KEY TERM

Defence a legally recognised argument used by a party to justify their actions, so as to claim they are innocent of a crime, or not liable for a civil breach.

LESSON LINK

You learnt about the elements of murder in **3A Murder – elements**.

LEGISLATION*Crimes Act 1958 (Vic)***KEY TERM****Self-defence as a defence to murder**

a defence that recognises a person may lawfully cause the death of another person in order to prevent unlawful harm, being death or really serious injury, against themselves or another.

USEFUL TIP

Self-defence, when used to defend a murder conviction, does not extend to actions taken to defend property or where the accused defended themselves from a non-serious injury. They must have killed the victim, believing that death or serious injury was a likely outcome for themselves or another if they did not act.

- Was the victim holding a weapon capable of causing death, such as a gun?
- Did the victim's conduct provoke the actions of the accused?
- Was there a history of violence between the victim and the accused where death was close to occurring?



Figure 1 Considerations when determining whether the accused person's actions were reasonable in the circumstances

USEFUL TIP

When presenting defences, the accused bears the evidential onus of proof and therefore, must present evidence that they acted in self-defence. If the accused satisfies all the elements of self-defence, the prosecution must then prove that the accused did not carry out the conduct in self-defence. Thus, the burden of proof changes between parties when presenting defences and rebutting them, however, regardless of which party is presenting evidence, the standard of proof of 'beyond reasonable doubt' always applies.

Self-defence 1.2.8.1.1

Self-defence as a defence to murder is set out under section 322K(3) of the *Crimes Act 1958* (Vic) and establishes that an accused can justify causing the death of another person if the death was caused by an act of self-defence. Therefore, if the accused killed another person to protect themselves or someone else, this defence may apply. Self-defence is a complete defence, meaning a person will not be found guilty of murder if they can satisfactorily prove they were acting in self-defence.

In order to prove self-defence for murder, the accused must have believed, in the moment of the murder, that their conduct was necessary to defend themselves or another person from the infliction of death or really serious injury. Once the accused has established and raised the defence, the onus is on the prosecution to prove, beyond reasonable doubt, that the accused did not act in self-defence.

There are two elements to self-defence, both of which must be proven by an accused in order for the defence to be established:

1. The accused believed the conduct of the victim was life-threatening or at least may have resulted in really serious injury.
2. The accused's conduct was a reasonable response to the circumstances as they perceived them.

The first requirement of this defence establishes that the accused must have believed killing the victim was necessary to protect themselves or another person from death or really serious injury.

The second requirement of this defence 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.

HYPOTHETICAL SCENARIO**Sibling self-defence suffers**

Bernie was always fighting with his brother Earnie. One day, Bernie was particularly frustrated with Earnie and decided to start a fight. Bernie grabbed a blunt, butter knife from the kitchen and threatened to cut Earnie's arm and leg. Earnie fought back and hit Bernie over the head with a fire extinguisher. Bernie died from the blow to his head.

Earnie argued that he was acting in self-defence in court. The judge stated that since Earnie had been cut by his brother in the past and it had only resulted in minor injuries, the threat made by Bernie could not have reasonably caused Earnie to believe his brother's conduct was threatening his life. Furthermore, Bernie was only threatening to cut Earnie on his arms or legs, which are not vital to life, and the weapon Bernie was holding, a butter knife, would be unlikely to cause death or really serious injury due to its blunt nature. Therefore, it was not reasonable for Earnie to believe that Bernie was going to kill him or cause really serious injury.

In order to prove self-defence for murder, the accused must have believed their conduct was necessary to defend themselves or another person from the infliction of death or really serious injury. In this case, it is unlikely that Bernie had the means, or was going to kill Earnie, and therefore, Earnie would be unable to rely on this defence.



Figure 2 Earnie's self-defence claim failed

Duress 1.2.8.1.2

Under s 322O of the *Crimes Act 1958* (Vic), a person cannot be found guilty of an offence if they carry out their actions under **duress**. This requires the accused to have committed murder due to a threat or coercion that death or really serious injury would occur if they did not perform the murder. For this defence to be made out, the accused must:

- reasonably believe that a threat of really serious injury or death was made to them or others and would have been carried out unless the offence was committed
- reasonably believe that carrying out the conduct was the only reasonable way to avoid the threatened harm
- act in a way that would be considered a reasonable response to the threat.

Essentially, duress is made out if an individual acts as a physical instrument for another person's criminal conduct. However, if a person is voluntarily associating with another person for the purpose of carrying out criminal activities, this defence cannot apply. For example, if a person chose to join a crime syndicate, and a member threatened to make the person commit a murder, it is unlikely they would be able to raise the defence of duress as they voluntarily placed themselves in this situation where committing violent crimes would be expected of them.

LEGAL CASE

R v Japaljarri (2002) 134 A Crim R 261

Facts

In order to claim his grandmother's estate, Japaljarri struck her over the head with a tire lever and killed her. He was charged with murder, among other crimes, and tried to claim the defence of duress. He argued that his father, Phillip Hocking, had pressured him to kill his grandmother by informing him that the family was under immense financial strain and needed the inheritance.

Legal issue

Since Japaljarri felt pressured by his father to commit murder, he decided to raise the defence of duress. The court had to determine whether duress was an appropriate defence in this case.

Decision

Japaljarri was the principal offender and there was no evidence to suggest his father had threatened to kill or harm him if he did not inflict death on his grandma, therefore, the defence of duress was not available for Japaljarri's murder charge. Even if there was evidence that suggested he might have been acting due to his father's coercion or threats, these threats were not to kill or inflict serious injury on Japaljarri if he did not follow through and kill his grandma.

Significance

Japaljarri was found guilty of murder and duress was not available to him as a defence as he had committed the actual offence of murder, and there was no evidence that his father had threatened to kill nor harm him if he did not kill his grandmother. In order for duress to be used as a defence to murder, the threat imposed by the third party must involve causing really serious injury or inflicting death on the accused or others if they do not complete the murder.

KEY TERM

Duress a defence that can be raised whereby criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party.

LESSON LINK

You learnt about principal offenders in **2F Possible participants in a crime**.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to 'use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios'. If studying murder, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence, such as duress, might be successful if argued in court. This means you would need to consider the three elements that need to be shown under s 322O of the *Crimes Act 1958* (Vic) for the defence of duress to be proven.

Sudden or extraordinary emergency 1.2.8.1.3

Section 322R of the *Crimes Act 1958* (Vic) sets out the defence of **sudden or extraordinary emergency**. In order for this defence to be made out, the accused must demonstrate:

- they reasonably believed circumstances constituting an emergency existed
- they reasonably believed the conduct was the only reasonable way to deal with the emergency
- their conduct was a reasonable response to the emergency.

When raising this defence for a murder charge, the emergency must involve the risk of death or really serious injury.

KEY TERM

Sudden or extraordinary emergency a defence that can be raised where criminal activity occurred under circumstances involving a real risk of death or serious injury.

HYPOTHETICAL SCENARIO

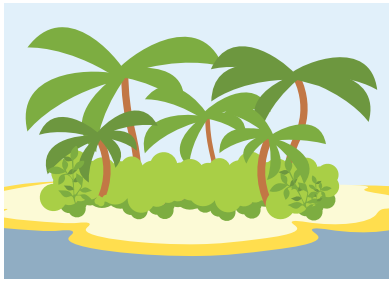


Figure 3 Sudden or extraordinary emergency can exist in a murder case where killing someone is necessary for survival

Going coconuts!

Melanie and Spencer find themselves stuck on a desert island for three weeks. They do not know when they will be found and are both starving, having not eaten during this time and without any sources of food available on or around the island. When the pair go for a swim, Spencer drowns Melanie to eat her, fearing she will die of hunger if she does not consume food within the next day. When Spencer is tried for Melanie's murder, she argues that she believed the situation was an emergency and she did not know how else she was going to survive. It is likely the courts would regard this as an emergency as being on an island with no food for three weeks would have put Spencer in a life-threatening situation where death would have likely resulted if she had not acted. However, the courts would need to consider whether there were, in fact, no other sources of food around, as if there were, eating Melanie would not be considered a 'reasonable response' to the emergency.

KEY TERM

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime.

LEGAL VOCABULARY

Sentence a term of imprisonment or other punishment imposed on an offender for committing a criminal offence.

Custodial supervision order a type of sanction where an offender is confined to custody in a suitable location, such as an approved mental health or residential treatment facility.

LESSON LINKS

You will learn more about the factors considered in sentencing in **5C Factors considered in sentencing**.

You will learn more about sanctions in **5B Types of sanctions**.

Possible sanctions for murder 1.2.8.2

The penalties for murder are outlined in s 3 of the *Crimes Act 1958* (Vic). 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 can be imposed for a criminal offence in Victoria, highlighting the severity of such a crime in the eyes of the law.

However, the standard **sentence** for murder, as set out in s 3(2) of the *Crimes Act 1958* (Vic), is 30 years imprisonment where the victim is a custodial officer or emergency worker on-duty, or 25 years imprisonment for any other case. This legislation guides a 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, and whether the accused pleaded guilty.

Table 1 Penalties for homicide

Type of unlawful homicide	Section of <i>Crimes Act 1958</i> (Vic)	Maximum sentence	Average sentence (Sentencing Advisory Council)
Murder	s 3(1)(a)	Life imprisonment	From 2017-2022, most offenders sentenced for murder received a principal sentence of imprisonment (91.8%). All of the remaining offenders received either a custodial supervision order (6.2%) or a non-custodial supervision order (2.1%). The median length of imprisonment for murder was 23 years.
Unintentional killing in the course or furtherance of a crime of violence	s 3A	Life imprisonment	–
Manslaughter – single punch or strike taken to be a dangerous act	s 4A	25 years imprisonment	–

Continues →

Table 1 Continued

Type of unlawful homicide	Section of Crimes Act 1958 (Vic)	Maximum sentence	Average sentence (Sentencing Advisory Council)
Manslaughter by unlawful and dangerous act	s 5	25 years imprisonment	From 2017-2022 most people sentenced for manslaughter received a principal sentence of imprisonment (96.6%). All of the remaining offenders received a youth justice centre order (3.4%). The median length of imprisonment for manslaughter was 9 years.

REAL WORLD EXAMPLE
The loss of Folbigg's children and freedom

Kathleen Folbigg, an Australian woman, was sentenced to 25 years in prison for the deaths of her four children. She served 20 years of her sentence in prison before being pardoned and released. Folbigg was convicted of murdering three of her children, and convicted of manslaughter for one, and has consistently claimed her innocence.

The decision to pardon and release her was made by the NSW Attorney-General, Michael Daley, following new evidence that suggested other causes of death.

This case highlights the severity of a murder sentence and how important it is to uncover all the facts before a person is imprisoned. Although it is important to protect the community, it is also vital that the law protects innocent people.

Adapted from 'Kathleen Folbigg pardoned and released after 20 years in jail over deaths of her four children' (Rose, 2023)



Image: ArtMari/Shutterstock.com

Figure 4 Imprisonment may seem like a fair sentence for murder, but it must be proven beyond reasonable doubt

Lesson summary

In order to avoid being charged with murder, an accused person should first attempt to disprove the elements of this offence. However, where they are unable to successfully cast doubt on any of these elements, some of the defences they can raise are:

- self-defence
- duress
- sudden or extraordinary emergency.

If an accused is convicted of murder, the maximum sanction imposed is life imprisonment.

3B Questions

Check your understanding

Question 1

Which of the following is **not** a defence to murder?

- Self-defence
- Duress
- Involuntary violence
- Sudden or extraordinary emergency

Question 2

Fill in the blank with **one** of the following terms:

Self-defence

Duress

Sudden or extraordinary emergency

[] is a defence that can be raised if the criminal behaviour in question was induced by threat, violence, or coercion from a third party and against the accused's better judgement.

Question 3

Which of the following best describes self-defence?

- A. The accused must have believed there was a threat that they would be killed, or seriously injured, and they acted reasonably to protect themselves.
- B. The accused must have believed their safety was threatened and they acted reasonably to protect themselves.
- C. The accused must have believed their life was threatened and they acted unreasonably to protect themselves.

Question 4

Tick the box to indicate whether each of the following statements are elements of **duress** or **sudden or extraordinary emergency**.

Statement	Duress	Sudden or extraordinary emergency
I. The accused believed the conduct was the only reasonable way to deal with the emergency.	☐	☐
II. The accused believed carrying out the conduct was the only reasonable way to avoid the threatened harm.	☐	☐
III. The accused reasonably believed circumstances constituting an emergency existed.	☐	☐
IV. The accused reasonably believed a threat of harm was made to them and would have been carried out unless the offence was committed.	☐	☐

Question 5

Which of the following groups may lead to a higher sanction than usual for an offender if murdered?

- A. Children and mothers
- B. Custodial officers and on-duty emergency workers
- C. Judges and lawyers
- D. Tram drivers and ticket inspectors

Question 6

The maximum sentence for murder is a death sentence.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(1 MARK)

Identify the maximum penalty for murder.

Question 8

(2 MARKS)

Outline **one** defence to murder.

Question 9

(3 MARKS)

Apollo was charged with murder after his employer told him to kill the CEO of their competing company. Apollo's employer told him he would lose his job if he did not carry out the murder.

Explain why Apollo would **not** be able to raise the defence of duress.

Question 10

(3 MARKS)

Distinguish between sudden or extraordinary emergency and self-defence as defences to murder.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Jessica and Watson decided to take their boat around the world for one whole year. After one month at sea, they ran out of food in the middle of the Pacific Ocean and were not set to reach land for another month. They had a fishing line and an abundance of fish surrounding their boat. Watson joked to Jessica at the start of the journey that 'he will have to throw her overboard' for eating all the muesli. Fearing he may act on his word, whilst also fearing she would die if she did not eat, Jessica suffocated Watson in his sleep.

Question 11

Which of the following statements is correct regarding Jessica's case? **(Select all that apply)**

- A. Jessica would be able to raise the defence of sudden or extraordinary emergency as they had run out of food and she was scared she would starve.
- B. Jessica would likely be successful in raising self-defence as Watson threatened to kill her.
- C. Jessica would likely be unsuccessful in raising self-defence as Watson was clearly joking when he said he would throw her overboard.
- D. Jessica would likely be unsuccessful in raising the defence of sudden or extraordinary emergency as it was not a reasonable response to the emergency considering she could have fished to gain food or redirected the boat to land sooner.

Question 12

(6 MARKS)

Analyse the likely success of **two** defences that Jessica may raise to defend her actions.

Linking to previous learning

Question 13

(4 MARKS)

Savana killed her friend's bird after her boyfriend threatened to break up with her if she did not so. Savana was charged with murder and raised the defence of duress as she was pressured to commit the murder.

Identify **two** errors in the scenario above and, for each error, explain the correct process or procedure that should have occurred.

3C Murder – trends and impact

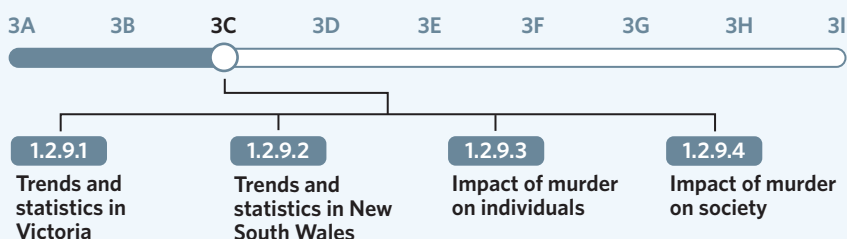


Image: Darko Cacic/Shutterstock.com

'Murder is the most serious of all criminal offences. It has always possessed a special significance as the law attributes enormous significance to the sanctity of human life, and its deliberate taking must never be regarded as anything other than a matter of the utmost seriousness.'—Victorian Sentencing Manual (Judicial College of Victoria, 2023)

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society



CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence and death.

Lesson introduction

Considering the significance of a murder offence, the sentences received by those found guilty typically reflect the severity of the offence. Unsurprisingly, prison or custodial sentences dominate the statistics for murder sanctions in Victoria and other jurisdictions across Australia. Many people are impacted by this offence including the accused, the victim, the victim's family and friends, the government, the legal system, hospitals, and the broader community.

Trends and statistics in Victoria 1.2.9.1

Under current Victorian law, murder is a Category 1 offence. This means it carries a maximum penalty of life imprisonment. From July 2017 to July 2022, 97 people were sentenced for a **principal offence** of murder. Over this same period, there was a decrease in the number of people sentenced for murder (Sentencing Advisory Council, 2023).

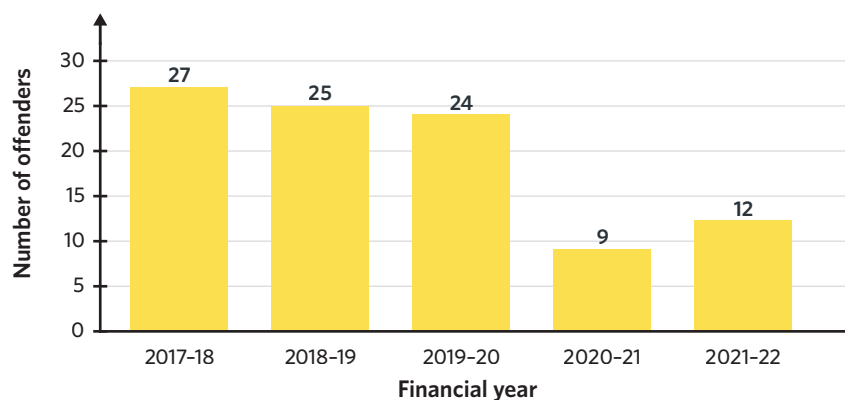


Figure 1 The number of people sentenced for murder from July 2017 to 2022 in Victoria (Sentencing Advisory Council, 2023)

LEGAL VOCABULARY

Principal offence the primary or main offence committed by an offender where multiple crimes have been committed at once.

During this five-year period, 91.8% of people sentenced for murder received a principal sentence of imprisonment. All of the remaining people received either a custodial supervision order or a **non-custodial supervision order** (Sentencing Advisory Council, 2023).

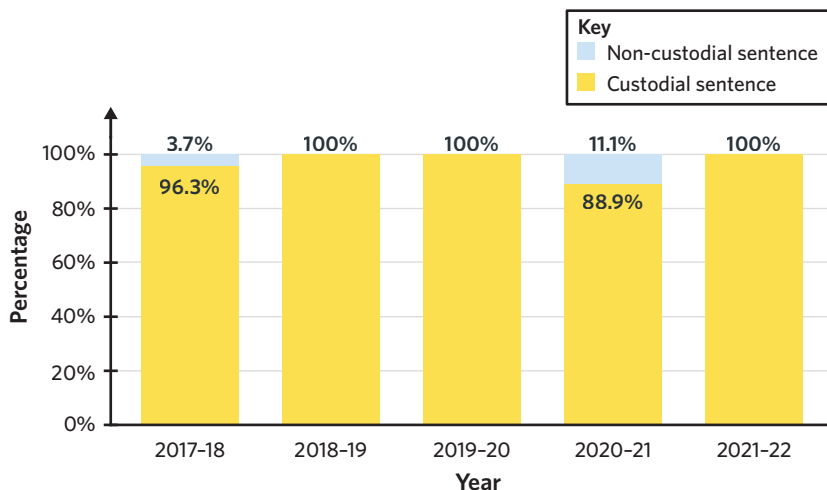


Figure 2 The percentage of offenders convicted of murder who received an immediate custodial sentence or other outcome from July 2017 to 2022 in Victoria (Sentencing Advisory Council, 2023)

When judges impose a term of imprisonment, they will also include a **non-parole period**. After serving this period, the offender may be released depending on their behaviour during their term of imprisonment. From July 2017 to July 2022, the median total effective sentence, meaning the time actually spent in prison, for all people imprisoned for murder, was 23 years and four months. Over the same period, the median non-parole period was 18 years.

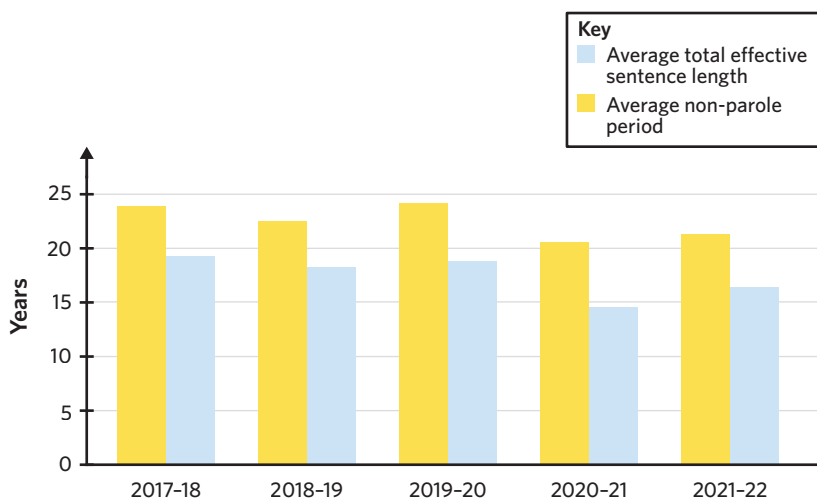


Figure 4 The average total effective sentence, excluding life, and the average non-parole period from July 2017 to 2022 (Sentencing Advisory Council, 2023)

LEGAL VOCABULARY

Non-custodial supervision order

an order made by a court that allows a person charged with an offence to live in the community while receiving treatment for mental illness.

Non-parole period the minimum time the offender must serve in prison before being eligible for an early release from prison.

WANT TO KNOW MORE?

There are many other Victorian crime statistics available online. You can find out more about Victorian crime statistics by searching 'Sentencing Advisory Council' and clicking the relevant link about 'Sentencing Statistics' (Sentencing Advisory Council, 2023).

Proportion of males to females convicted of murder in Victoria

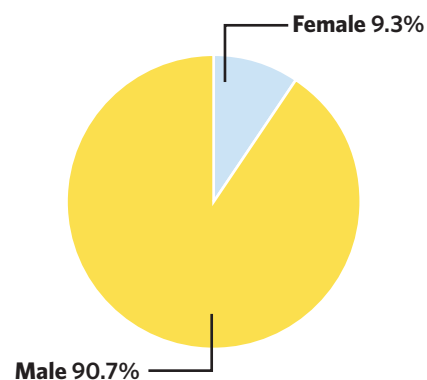


Figure 3 Proportion of females to males convicted of murder, where the gender is known, in Victoria as of June 2021 (Sentencing Advisory Council, 2023)

Trends and statistics in New South Wales 1.2.9.2

In New South Wales (NSW), the *Crimes Act 1900* (NSW) establishes the offence of murder and sets out the maximum penalty for committing this offence: life imprisonment. Since 2018, 100% of offenders convicted of murder have been sentenced to imprisonment in NSW. This differs from Victoria where 91.8% were sentenced to imprisonment. A total of 144 people were convicted of murder in NSW over the five-year period, which is more than in Victoria where only 97 people were convicted.

LEGISLATION

Crimes Act 1900 (NSW)

WANT TO KNOW MORE?

There are many other NSW crime statistics available online. You can find out more about NSW crime statistics by searching 'NSW Adult Criminal Sentencing tool' and clicking the relevant link (NSW Bureau of Crime Statistics and Research, n.d.).

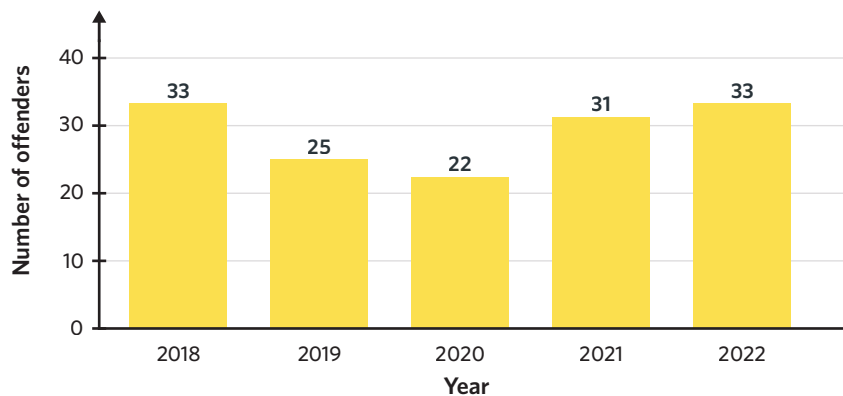


Figure 5 The number of people sentenced for murder in NSW from 2018 to 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

The total effective prison sentence for murder in NSW varies in length with one person receiving a sentence between three to four years, nine people receiving a sentence between five to ten years, and the majority of offenders, 134 convicted murderers, receiving between 10 years to life imprisonment.

Proportion of males to females convicted of murder in New South Wales

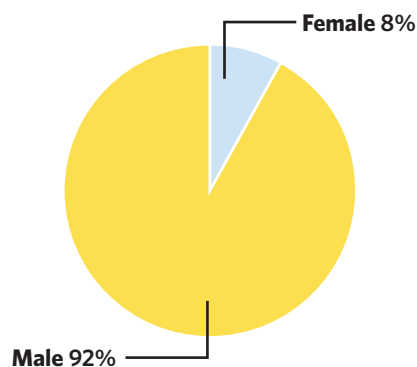


Figure 7 Proportion of females to males convicted of murder, where the gender is known, in NSW as of June 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

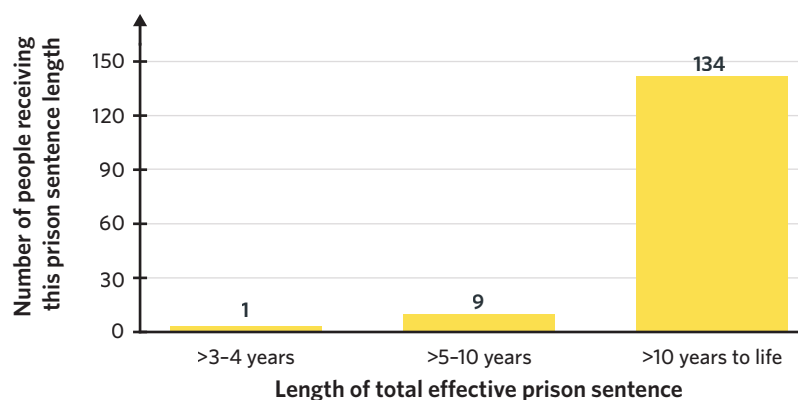


Figure 6 Prison sentence lengths for murder in NSW between 2018 and 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

Impact of murder on individuals 1.2.9.3

There are immeasurable challenges that those close to a murder victim or offender experience following the crime. These challenges are varied and cannot be summarised into one universal experience as every murder offence, offender, and victim is unique. Therefore, the impact of murder upon individuals varies.

Table 1 Impact of murder on a victim's community and the accused

Type of impact	Victim's community	Accused
Physical	Research has shown a number of physical health problems may occur for those close to a murder victim following the offence. As the body enters and remains in a state of heightened stress, grief, and fear, experiences of insomnia, memory loss, cardiac issues, and even diabetes can be common in the period after the murder.	While committing the murder, the accused themselves may have sustained physical injuries.
Psychological	The murder of an individual close to someone can have a number of detrimental effects on a person's mental health. This group of individuals, including family, friends, and partners, are at high risk of developing mental health issues, such as post-traumatic stress disorder (PTSD) and depression, depending on the nature of the crime and their unique experience after the fact.	- The offender may experience regret, guilt, and remorse for murdering another person. - There is the risk of the offender developing mental health issues, such as depression or post-traumatic stress disorder (PTSD). - The process of defending themselves in court and the uncertainty of not knowing what the outcome will be, can cause immense anxiety and stress for an accused.

Continues →

Table 1 Continued

Type of impact	Victim's community	Accused
Economic	Where the victim is the primary financial provider for a family, the whole family may suffer economically as a result of the murder.	- An offender is likely to experience a loss of earnings if they are unable to work due to a term of imprisonment. - There are significant costs associated with an accused defending themselves in court, including the cost of legal representation.
Social	Research has shown significant, detrimental effects of murder on the maintenance of stable, family relationships. The high stress associated with murder can cause discomfort, strain, and distancing in relationships. This potential loss, or at least weakening of, relationships can exacerbate feelings of isolation that may be experienced following a person's murder, especially if the victim was a relative or partner.	- In prison, an accused may face negative impacts on their social life as they are unable to regularly socialise with those in the outside world. - An accused's relationships may fall apart as those close to them may not want to be associated with a criminal or may come to fear them as a partner, family member, or friend.

REAL WORLD EXAMPLE**Mourning after murder**

Victim impact statements offer victims of crime a chance to express how they have been directly affected by the crime.

A man was shot at close range at his NSW home in 2021. A jury found his wife guilty of murder. The victim impact statements from the victim's friends and family were read to the court.

The victim's daughter said her father's murder had turned her relatively-normal life upside down. 'Every time I close my eyes to go to sleep or think about my father, the image of him after the shooting is etched in my mind,' she told the court. She expressed she had been diagnosed with post-traumatic stress disorder (PTSD), suffered from severe anxiety, and now required medication to sleep.

Another statement was written by the victim's brother, who stated 'I think of my brother every single day and throughout every day. I don't sleep well because I think of [him] and the incident that took his life'.

Murder is one crime that, due to its severity, can cause tangible, deep, and lasting impacts on those surrounding the victim.

Adapted from 'Family and friends of a NSW man who was shot dead by wife share how the murder has affected their lives' (King, 2023)

Impact of murder on society 1.2.9.4

Violent crimes, such as murder, can drastically affect society in various ways. In particular, these types of crimes can have a significant economic impact and affect the collective psychological health of society.

Table 2 Impact of murder on society

Type of impact	Explanation
Economic	- Local communities with high proportions of murders in their area will be impacted, as high rates of murder and violence in particular locations can lead to such places developing a negative reputation leading, to worse outcomes for businesses and homeowners. - Murder offenders must be tried and sentenced appropriately, imposing a societal cost as the courts must hear the cases, increasing judges' workloads and government funding requirements for the courts. - Murder cases impose a cost on society through an increased workload on law enforcement institutions that are funded by tax-payers, such as the police.

Continues →

Table 2 Continued

Type of impact	Explanation
Economic	More funding may need to be allocated to hospitals as a result of murder as the hospitals must address any physical or mental health issues stemming from a murder. The police may also require additional funding as a greater police presence may be necessary in certain regions where assault offences are frequent.
Social	The workload of police officers and staff members in a hospital may increase from increased murder offences due to greater police presence requirements and more people requiring physical and/or psychological medical treatment.
Legal	- Continuing instances of violent crimes may prompt the government to pass harsher laws in an effort to reduce the frequency of murder. - Murder cases impose a cost on society as offenders must be tried and imprisoned. The courts are also already overburdened with immense delays, especially following the COVID-19 pandemic. Therefore, the increased pressure on the courts that murder cases impose, is a negative impact of this offence.
Political	On average, one woman every nine days and one man every month is killed by a current or former partner. On 28 January 2023, the Victorian Government announced the implementation of the final recommendations of the Royal Commission into Family Violence. The recommended areas of reform include housing for victims of domestic violence and reforming the courts. Such reform aims to prevent domestic violence from being able to escalate to the point of amounting to the death of one partner.
Health	The health of the community could be impacted as members of society may be witnesses to murder, possibly causing them to experience post-traumatic stress disorder (PTSD), anxiety, and other mental health challenges.

WANT TO KNOW MORE?

The Victorian government formed a help scheme for victims of crimes, such as murder, and their families. You can find out more by searching 'Victims of crime Victoria' and clicking the 'Victims of Crime Helpline' webpage (Victims of Crime, 2023).

LEGAL CASE***R v Price* [2016] VSC 105****Facts**

In 2015, Masa Vukotic, a 17-year-old schoolgirl, was murdered by a stranger while taking an early evening walk near her home in Doncaster. The perpetrator, Price, pleaded guilty to the murder, along with other offences, such as rape and robbery. The crime received significant media coverage, leading to public outrage and fear within the community.

Legal issue

There were no legal issues in this case as Price pleaded guilty to the murder.

Decision

Price was sentenced to life imprisonment for the murder of Masa Vukotic and several other crimes.

Significance

Justice Lex Lasry described Price as a danger to the community. The media coverage of the crime sparked widespread concern, particularly regarding the vulnerability of teenage girls during daylight hours. Homicide Squad Chief Detective Inspector, Mick Hughes, emphasised the importance of remaining vigilant, advising people, especially females, to avoid being alone in parks. The Doncaster community members, bordering the popular Koonung Creek Trail where Vukotic was murdered, were reported expressing their fears following the death, concerned that 'no one is safe anymore'.

Lesson summary

The number of murder convictions in NSW is higher than the number in Victoria, with 144 murder convictions in NSW between 2018 and 2022 compared to 97 in Victoria between 2017 and 2022. This could be attributed to NSW's higher population. However, the sentences handed down in NSW and Victoria differ slightly, with:

- 91.8% of offenders receiving a term of imprisonment for murder in Victoria between 2017 to 2022.
- 100% of offenders receiving a term of imprisonment for murder in NSW between 2018 to 2022.

Regardless of where the murder occurred, the impact of murder is far-reaching.

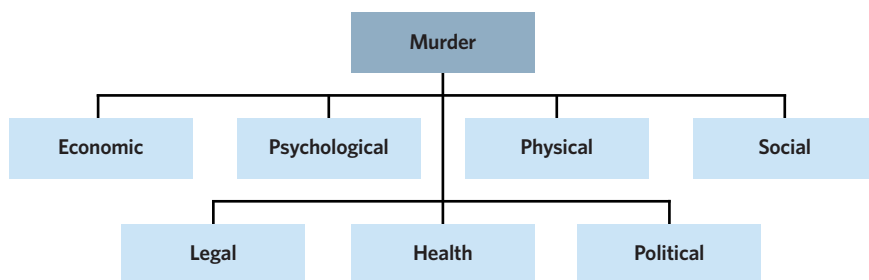


Figure 8 Impact of murder on society and individuals

3C Questions

Check your understanding

Question 1

The maximum penalties for murder in both New South Wales and Victoria are the same.

- A. True
B. False

Question 2

In Victoria, between 2017 and 2022, there were 97 murder convictions. In NSW, between 2018 and 2022, there were:

- A. 200 murder convictions.
B. 83 murder convictions.
C. 43 murder convictions.
D. 144 murder convictions.

Question 3

Fill in the blank with **one** of the following terms:

more

less

There were murder convictions in NSW from 2018 to 2022 compared to Victoria from 2017 to 2022.

Question 4

In NSW, a supervised community order is the most common type of sanction for an offender who committed serious murder.

- A. True
B. False

Question 5

Which of the following statements is correct about the average sentence for murder in Victoria from 2017 to 2022 according to the Sentencing Advisory Council?

- A. 100% of murder cases resulted in a custodial sentence.
- B. 99.9% of murder cases resulted in a custodial sentence.
- C. 91.8% of murder cases resulted in a custodial sentence.
- D. 60% of murder cases resulted in a custodial sentence.

Question 6

The impact of murder on both a victim's community and the accused include:

(Select all that apply)

- A. physical impacts.
- B. psychological impacts.
- C. secondary victimisation.
- D. emotional impacts.
- E. social impacts.

Question 7

The psychological impact of murder on a victim's community include:

- A. the victim's friends or family experiencing post-traumatic stress disorder (PTSD) after the murder, potentially resulting in a hesitancy to visit public places.
- B. the victim's community struggling financially if the victim was the primary provider for their family and is now gone, making them unable to economically support their community.

Question 8

Fill in the blanks with the following terms:

the courts

hospitals

Murder cases impact [] as victims may require urgent medical treatment prior to their death.

Furthermore, murder cases impact [] and impose a cost on society as offenders must be tried and imprisoned.

Question 9

Considering murder is a very serious criminal offence, there are various impacts on individuals and society.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 10**

(2 MARKS)

Identify **two** sentencing statistics or trends for murder as a criminal offence in Victoria.

Question 11

(4 MARKS)

Describe **two** similarities between the sentencing trends for murder in Victoria and **one** other Australian jurisdiction.

Question 12

(4 MARKS)

Outline **two** impacts of murder on individuals.

Question 13

(4 MARKS)

In 2023, there was a drastic increase in murder cases in the snowy town of Mount Icealot. Over 17 murder cases occurred in one month.

Outline **two** impacts of murder on society in relation to Mount Icealot.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

After a murder in her hometown, Anjelica is feeling apprehensive and fearful about visiting her family for the holidays. Her father is a police officer and has been working longer hours to ensure the community is safe.

Question 14

Which of the following statements are correct about the impact of the murder on society and individuals?

(Select all that apply)

- A. People may fear visiting Anjelica's hometown due to the risk of a violent encounter where they may be harmed or killed.
- B. When there is a murder in a specific community, there may be pressure on police, including Anjelica's father, to work fewer hours to reduce the risk of being harmed.
- C. The high stress that the aftermath of a murder carries may strain relationships and potentially weaken ties, closeness, and devotion between friends, partners, or family members.
- D. The community may suffer psychological impacts, such as increased feelings of fear, as demonstrated by Anjelica's reluctance to visit her hometown.

Question 15

(5 MARKS)

Analyse the impact of murder on society and individuals with reference to the scenario.

Linking to previous learning**Question 16**

(7 MARKS)

Dusty was walking down the street when his arch nemesis, Lance, came up and pushed him into oncoming traffic resulting in his death.

- a. Describe **two** elements of murder that the prosecution would need to prove beyond reasonable doubt for the offence of murder to be made out.
- b. Explain the possible impact of the murder on Lance.

4 MARKS

3 MARKS

3D Assault – elements

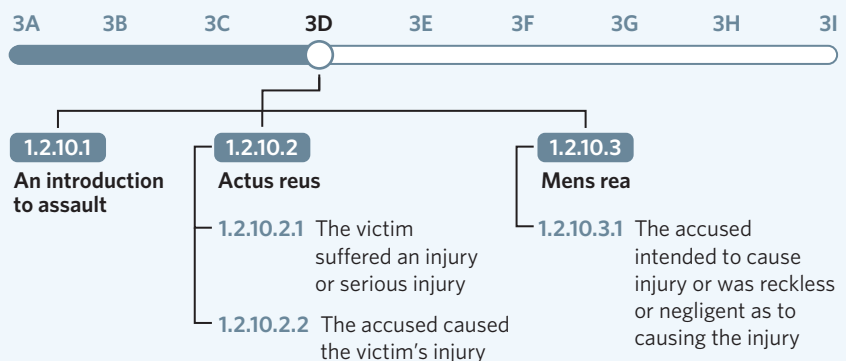


Image: JFunk/Shutterstock.com

When baking a cake, if you forget to include one ingredient, like the eggs, the whole cake may not bake correctly. Similarly, if one element of an assault offence cannot be proven sufficiently by the prosecution, their whole case would fail and they would be unable to convict the accused of committing assault. All elements of the assault offence must be proven. We know what the basic ingredients are for a cake: sugar, flour, eggs, and butter. But what are the ingredients for an assault conviction?

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society



CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence.

Lesson introduction

From 2022-2023, 47,258 assaults and related offences were reported in Victoria (Crime Statistics Agency, 2023). The broad crime of assault encompasses a number of different criminal activities, including the application of force, or the threat of the use of force, upon another. Considering the statistics, this crime is clearly a significant issue in Australian society. As this is only the number of reports, not all of these assault cases would have necessarily resulted in the accused being found guilty. This is because there are several elements the prosecution must prove beyond reasonable doubt for an accused to be found guilty of assault. There are different categories of assault that an accused may be charged with. These offences may involve the application of, or threat to use, force upon another person.

An introduction to assault 1.2.10.1

Generally, **assault** involves the use or threat of force to the body of another person without lawful excuse, either intentionally, recklessly, or negligently. As there are different categories of assault, these offences may be summary offences, outlined in the *Summary Offences Act 1966* (Vic), or indictable offences, contained within the *Crimes Act 1958* (Vic). There is also common law assault, which is not mentioned in any statute but is still considered a criminal offence. Indictable assault offences that are established in the *Crimes Act 1958* (Vic) include:

- causing serious injury recklessly in circumstances of gross violence (s 15B)
- causing serious injury intentionally (s 16)
- causing injury intentionally or recklessly (s 18)
- conduct endangering life (s 22)

LEGISLATION

Summary Offences Act 1966 (Vic)
Crimes Act 1958 (Vic)

KEY TERM

Assault the intentional or reckless application of force, or threat of force, to the body of another person without lawful excuse.

- conduct endangering persons (s 23)
- negligently causing serious injury (s 24)
- threats to kill (s 20).

Actus reus 1.2.10.2

For the prosecution to prove an offender is guilty of assault beyond reasonable doubt, they must sufficiently prove to a jury that the offender committed both the:

- ‘actus reus’ of the offence, meaning their physical actions caused the victim to suffer injury or serious injury
- ‘mens rea’ of the offence, meaning they intended to cause the victim’s injury, or acted recklessly or negligently as to causing the injury.

The various types of assault all include similar elements, with the actus reus requiring:

- injury, in that the victim suffered an injury or serious injury; and
- causation, in that the accused caused the victim’s injury.

Each of these elements have slightly different requirements depending on the category of assault that a person is charged with. Some branches of assault also have additional requirements that must be proven alongside these more general requirements. However, the offence cannot be made out if any of the elements are missing.

The victim suffered an injury or serious injury 1.2.10.2.1

The victim must have suffered an injury or serious injury. According to s 15 of the *Crimes Act 1958* (Vic), an ‘injury’ means either:

- physical injury
- harm to mental health.

Alternatively, a ‘serious injury’ is an injury that either:

- endangers life
- is substantial and protracted.

For example, if a victim is stabbed to the extent of losing a life-threatening amount of blood, this constitutes a ‘serious injury’.

The accused caused the victim’s injury 1.2.10.2.2

The prosecution must prove beyond reasonable doubt that the accused caused the victim’s injury. **Causation** requires that there is a connection between the accused’s act or omission and the injury, or serious injury, suffered by the victim. An objective test is used whereby the actions of the accused must have been a ‘substantial and operating cause’ of the victim’s injury, or serious injury, without an intervening event. The ‘substantial and operating cause’ test requires the accused’s act, or omission, to substantially or significantly contribute to the injury, or serious injury, suffered by the victim.

HYPOTHETICAL SCENARIO

A die-hard fan of ‘The Notebook’

Sachi and Sven were best friends. One afternoon, Sachi selected the film ‘The Notebook’ for the pair to watch together. Sven refused to watch it, leading to a heated argument between them. In her frustration, Sachi impulsively smashed a glass bottle on Sven’s head, causing him to sustain severe cuts. Sven called the police and Sachi was charged with causing injury recklessly, which Sachi pleaded not guilty to.

At trial, the prosecution was able to prove the element of causation as Sachi’s act of smashing a glass bottle on Sven’s head was the ‘substantial and operating cause’ of Sven sustaining severe cuts.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to ‘use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios’. If studying assault, you may be asked to demonstrate this skill by applying elements of assault to a given scenario. If considering whether the element of actus reus would likely be proven, you would need to determine whether the requirements of injury and causation are evident from the facts of the scenario.

LESSON LINK

You learnt about actus reus and mens rea in **2C Key concepts of criminal law**.

LEGAL VOCABULARY

Causation the relationship between an event or action and a resulting event.



Figure 1 Sachi assaulted Sven by smashing a glass bottle on his head

Mens rea 1.2.10.3

For the mens rea of assault to be satisfied, the prosecution must prove:

- the accused intended to cause injury or was reckless or negligent as to causing the injury, depending on the assault offence/s the accused has been charged with.

The accused intended to cause injury or was reckless or negligent as to causing the injury 1.2.10.3.1

The accused must have either intended to cause injury or acted in a manner that was reckless or negligent as to causing the injury. This is the mens rea element of assault. The accused does not need to have intended to cause the specific injury sustained by the victim, they just must have intended to cause, or acted recklessly or negligently in causing, an injury of some kind.

Table 1 The different types of mental states of an accused who committed assault

Mental state	Requirements	Example
Intentionally	The prosecution must prove beyond reasonable doubt that the accused intentionally caused injury or serious injury. It is not enough to prove the accused intended to do the act that caused the injury or serious injury.	The accused punched a man outside a restaurant after he tried to speak to his girlfriend, wanting to seriously injure him due to jealousy and anger. The assaulted man is now in a coma. As the accused intended to cause injury, intention would be made out. The accused aimed to punch a wall but, as he did, a child ran past and he accidentally punched the child instead. Although the accused intended to punch something, since he did not intend to punch the child, intention would not be made out. However, recklessness or negligence would likely be satisfied here as the accused was acting in such a way where it was foreseeable that injury could amount.
Recklessly	The prosecution must prove beyond reasonable doubt that: - the accused foresaw that their actions would probably cause injury or serious injury to the victim - the accused, knowing their actions would probably do so, decided to perform the act anyway.	A woman lost her temper and was pretending to jab at her friend, throwing her fists around in rage to scare her. She then accidentally hit her friend, resulting in the victim suffering bruising to her face. The woman did not intend to physically injure her friend, but foresaw that throwing her hands around in close proximity to her friend would probably cause injury and hit her anyway.
Negligently	Negligently causing injury or serious injury requires a great falling short of the standard of care that a reasonable person would exercise, and a high risk that injury or serious injury would result from the accused's conduct. The prosecution must prove the accused failed unjustifiably and to a gross degree to observe the standard of care that a reasonable person would have observed in all the circumstances of the case.	The accused was a surgeon who was operating on a patient to cut a mole off their back. During the operation, the surgeon received a phone call, which he picked up whilst continuing to operate on the patient. The doctor cut a long and deep slash into the patient's back due to this phone call, which was unnecessary for the purpose of the surgery. Since the doctor owes their patient a duty of care, injuring them in this way, due to being distracted by a phone call, would be a gross failure of the standard of care the doctor owes the patient.

LEGAL CASE

Aston v The Queen [2019] VSCA 225**Facts**

Jack William Aston drove a chartered bus carrying 14 passengers into a bridge. The site was notorious for collisions involving large vehicles. Six of the passengers suffered serious injuries as a result. Aston was charged and convicted of six counts of negligently causing serious injury, and six alternate charges of dangerous driving causing serious injury. Aston sought leave to appeal against the conviction on six grounds, one of which was that 'the jury directions diluted the extent of negligence required to establish the offence charged'.

Legal issue

One of the issues the Court of Appeal was required to determine was whether the trial judge's directions on the requirement of negligence were insufficient.

Decision

The court held that the trial judge directed the trial jury clearly, outlining the requirement of criminal negligence to the jury properly.

Significance

The court advised how the jury should be directed about criminal negligence:

'[T]he judge must direct the jury that the required negligence must be of a high order, involving a great falling short of the standard of care which a reasonable person would have exercised in all of the circumstances, and a high risk that death or serious injury would result from the relevant conduct.'



Image: Roger Utting/Shutterstock.com

Figure 2 Aston was convicted of six charges of negligently causing serious injury

USEFUL TIP

The standard required for recklessness to be made out is that injury is probable or likely to occur, not just possible. Additionally, the accused must be aware that their actions would probably cause injury or serious injury. It is not sufficient for the prosecution to show that the risk is obvious or well-known.

DEEP DIVE

Common law assault

In addition to assault contained in statute, an accused may be charged with common law assault, of which there are two categories.

Firstly, an accused may be charged with common law contact assault involving the application of force. For this offence to be made out, the prosecution is required to prove the following elements beyond reasonable doubt:

1. The accused applied force upon the victim.
2. The application of force was without consent.
3. The application of force was intentional or reckless.

Secondly, an accused may be charged with common law apprehension assault that does not involve the application of force, but rather the threat of force, even if there is no intention to actually carry out this threat. For this offence to be made out, the prosecution is required to prove the following elements beyond reasonable doubt:

1. The accused committed an act that caused the victim to apprehend the immediate application of force to their body.
2. The accused intended or was reckless to cause such apprehension.

Lesson summary

Whilst there are different categories of assault contained in statute law, three similar elements must be proven beyond reasonable doubt:

1. The 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 or negligent as to causing the injury.

All three elements must be proven beyond reasonable doubt for an accused to be convicted of assault.

3D Questions

Check your understanding

Question 1

Assault involves the application of force to the body of another person, but does not encompass threats to use force against another.

- A. True
- B. False

Question 2

Which of the following is **not** an element of assault?

- A. The victim suffered an injury or serious injury.
- B. The accused caused the victim's injury or serious injury.
- C. The accused intended to cause injury or was reckless or negligent as to causing the injury.
- D. The victim died.

Question 3

Fill in the blank with **one** of the following terms:

an injury

a serious injury

According to s 15 of the *Crimes Act 1958* (Vic), [] means physical injury or harm to mental health.

Question 4

For the mens rea of 'intentionally causing injury or serious injury' to be established, the prosecution must prove beyond reasonable doubt that the accused intended to do the act that caused the injury or serious injury.

- A. True
- B. False

Question 5

Fill in the blanks with the following terms:

negligently

recklessly

If an accused [] caused injury, they foresaw that their actions would probably cause injury or serious injury to the victim and decided to perform the act anyway. Alternatively, if an accused [] caused injury, their conduct was a great falling short of the standard of care that a reasonable person would exercise, and there was a high risk that injury or serious injury would result from their conduct.

Question 6

For causation to be made out:

- A. the actions of the accused must be a 'substantial and operating cause' of the victim's injury or serious injury.
- B. there must have been an intervening event that broke the chain of causation.

Question 7

If one or more of the three elements of assault are not made out, the accused will not be convicted of assault.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Describe **one** element of assault.

Question 9

(3 MARKS)

During a ballet concert, Alba was doing a pirouette across the stage, which was a planned move of the dance, when she accidentally kicked Bronte in the face as Bronte had run on stage at the wrong time. Bronte's nose was broken as a result. Enraged by her broken nose, Bronte screamed 'I'm going to report you to the police and you will be charged with assault!'. Alba is worried that she will be found guilty of assault.

Explain **one** element of assault that is unlikely to be made out in Alba's case.

Question 10

(4 MARKS)

Joseph has been charged with causing serious injury intentionally under section 16 of the *Crimes Act 1958* (Vic). He punched a supermarket worker in the face after she revealed they had run out of fish fingers. She sustained a broken jaw as a result.

With reference to Joseph, outline **two** elements of the offence of causing serious injury intentionally.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Eden is a member of GreenLeaf, an environmental activist group. After a heated group meeting, Paige, the group leader, pushed Eden who stumbled back and fell down a set of nearby stairs. Paige only meant to give him a nudge and did not think he would stumble backwards and fall down the stairs. He suffered a broken leg and broken ribs as a result of the incident. Paige was arrested and charged with causing injury intentionally or recklessly under s 18 of the *Crimes Act 1958* (Vic).

Question 11

Which of the following statements are correct about the elements of assault in relation to Paige's actions?

(Select all that apply)

- A. As Paige only meant to nudge Eden and did not think he would stumble backwards and fall down the stairs, she acted recklessly in causing Eden's injuries.
- B. Paige intended to cause injury as it is enough to prove that she intended to do the act, that is, pushing Eden, which caused his broken leg and broken bones.
- C. Paige's actions of pushing Eden is a substantial and operating cause of his broken leg and broken ribs, as the push was a reason for him stumbling and falling down the nearby stairs.
- D. The element 'the victim suffered an injury' will likely be made out as Eden suffered a physical injury of a broken leg and broken ribs from the incident.

Question 12

(6 MARKS)

'Paige will be found guilty of causing injury intentionally.'

Do you agree with this statement? Justify your answer by referring to the elements of this offence.

Linking to previous learning**Question 13**

(4 MARKS)

Diana is accused of assaulting her neighbour, Charles, after she threatened to stab him due to his barking dog. Charles reported this offence to the police. Diana knows she cannot be found guilty of assault as she merely threatened to stab him, but didn't actually do so. Diana is ready to present all her evidence to prove she is not guilty as the onus is on her to prove her innocence.

Identify **two** errors in the scenario above and, for each error, explain the correct criminal process or procedure that should have occurred.

3E Assault – defences and sanctions

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.

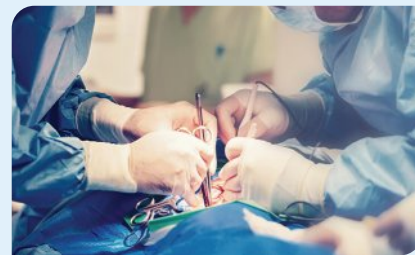
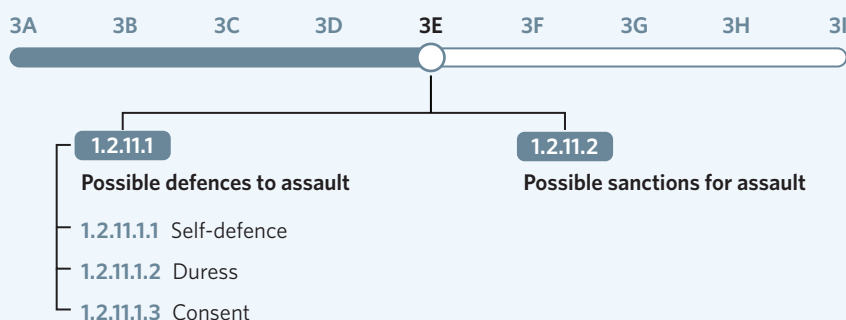


Image: MAD.vertise/Shutterstock.com

When you go under the knife for surgery, you are subjecting yourself to injury. So what is stopping you from initiating a criminal case against your surgeon for inflicting harm upon you? If you decided to pursue a criminal case, would the surgeon be able to defend themselves from an assault charge?

Lesson introduction

A person accused of assault is able to protect their innocence by raising defences in court. To prevent a guilty verdict, an accused can either cast doubt on one of the elements of assault, so the prosecution cannot prove the offence beyond reasonable doubt, or raise a defence to assault.

Considering the severe penalties that accompany an assault charge, an accused will usually raise defences to avoid such a punishment. If the accused is unable to successfully raise any defences or cast doubt on the elements of assault, they will face a sanction, such as a:

- fine
- community correction order (CCO)
- term of imprisonment.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence.

LESSON LINKS

You will learn more about fines, community correction orders (CCOs), and imprisonment in **5B Types of sanctions**.

You learnt about the elements of assault in **3D Assault – elements**.

Possible defences to assault 1.2.11.1

Defences to assault only need to be raised if the prosecution establishes all of the elements of the offence. That is, a sufficient case must have already been established against the accused to warrant them arguing that defences apply. Some defences available against a statutory assault claim include:

- self-defence
- duress
- consent.

LEGISLATION*Crimes Act 1958 (Vic)***KEY TERM****Self-defence as a defence to assault**

a defence that recognises a person may lawfully use force, or the threat of force, to prevent unlawful harm against themselves or another.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to 'use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios'.

If studying assault, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence to assault, such as self-defence, might be successful if argued in court.

This means you would need to apply the two elements of self-defence to the given scenario.

Self-defence 1.2.11.1

Self-defence as a defence to assault is set out under s 322K of the *Crimes Act 1958* (Vic) and may be raised by an accused to justify the use, or threat of, force against another person as being done to protect themselves or someone else. Self-defence is a complete defence, meaning a person will not be found guilty of assault if they can prove they were acting in self-defence.

The accused must provide evidence that they were attempting to protect themselves or another person through their conduct. If the accused proves this, the prosecution must then establish that this defence is not applicable in the circumstances.

There are two elements to self-defence that must be proven by an accused for the defence to be established:

1. The accused believed the conduct was necessary for self-defence.
2. The conduct was a reasonable response in the circumstances.

The first requirement establishes that the accused must have believed the force they exerted in relation to the threat was necessary to protect themselves or another person from harm.



Figure 1 Examples of situations where self-defence can be used as a defence against an assault charge

The second requirement, that the conduct was a reasonable response and not a disproportionate response to the perceived threat, 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.



Figure 2 Considerations when determining whether the accused person's actions were reasonable in the circumstances

LEGAL CASE

R v Barreto [2022] QCA 070

Facts

The accused was living in a unit with the victim and his girlfriend for a few months but had a falling out just before the events in question. On the day of the incident, the victim visited the unit to collect his belongings. Before doing so, the victim sent a text saying he was going to 'collect [his] furniture and [the accused's] leg', therefore threatening the accused. Later that day, the victim arrived at the unit building and walked to the front door, where the accused was standing at the door holding a steak knife. The accused opened the door, began choking the victim, and held a knife to his side. This prompted the victim to punch the accused in the face.

Legal issue

Although both men could be found guilty of assault, as the victim made a threat and punched the accused, while the accused held a knife to the victim and choked him, the trial focused on whether the accused committed assault. Therefore, the onus was on the accused to raise the defence of self-defence to defend his actions in these circumstances. The judge had to determine whether the accused's actions were in self-defence, considering the victim had made a threat to him and was engaging in the physical altercation.

Decision

Self-defence was declared to be inapplicable here as the accused had acted excessively in self-defence. The judge asserted:

'Your offending behaviour was not a proportionate response, despite the text messages... I do not accept it was an impulsive act... in the circumstances the response was excessive.'

Significance

Since self-defence did not apply to the assault, the accused was sentenced to a three-year term of imprisonment followed by a two-year term of imprisonment for the offences of causing grievous bodily harm. This case shows how an accused cannot act excessively when defending themselves and, if they do, the defence of self-defence will no longer apply.

Duress 1.2.11.1.2

Duress may be raised by the accused when they compulsively committed a crime due to a threat of harm if they failed to comply. The accused has the burden of raising the defence of acting under duress. If the accused raises this, the prosecution must then establish beyond 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).

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.
3. The conduct was a reasonable response to the threat.

HYPOTHETICAL EXAMPLE

Ready to run

Harry had organised to rob a bank and have Zayn be his getaway driver. After Harry successfully carried out the offence and approached Zayn's car, Harry was tackled and detained by a police officer. Harry then yelled to Zayn, 'You better help me or you know what the consequences are'.

Zayn kicked the police officer in the stomach, enabling Harry to escape. While Harry and Zayn were driving away from the crime scene, they were pulled over by the police and arrested. Zayn was arrested as a principal offender for robbery as he was involved in the commission of the offence by driving the getaway car. He was also charged with assaulting a police officer on duty under s 31 of the *Crimes Act 1958* (Vic).

During his trial, Zayn's barrister presented evidence of seven text messages from Harry to Zayn, 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 Zayn was acting under duress when kicking the police officer, finding him not guilty for this offence.

KEY TERM

Duress a defence that can be raised whereby criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party.

LESSON LINK

You learnt about a principal offender in **2F Possible participants in a crime**.



Figure 3 Since Zayn's actions of kicking a police officer occurred under a threat to be seriously injured if he failed to do so, the defence of duress applied

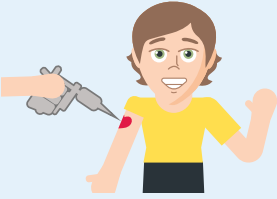
KEY TERM

Consent the voluntary agreement by one party to engage in or accept an act initiated by another person.

Consent 1.2.11.1.3

If the accused acted with **consent**, such as the consent of the injured person, they can be acquitted of the assault charges against them. There are some situations where the victim may consent to injury, or serious injury, which includes sporting events and medical procedures.

Table 1 Situations where consent may apply as a defence

Situations where the victim may consent to injury	Explanation
Sporting events 	Those participating in many sports consent to the possibility of being injured. However, there are circumstances where injury exceeds what a person has consented to and will therefore, become unlawful. When an injury is suffered during a sporting contest, an accused is considered 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.
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.
Tattoos or piercings 	A tattoo or piercing can also cause physical harm to an individual. However, if a person consents to receiving one, they cannot accuse the person who pierced or tattooed them of assault.
Daily life 	Where force is applied in the course of ordinary social activities, this is excusable and an accused cannot be found guilty of assault. This is limited to touching, which is considered reasonable in daily interactions. For example, when on a crowded train, people are likely to be in contact with each other and maybe shoving each other to try and squeeze into the carriage. As long as the force being applied is reasonable, this is acceptable, as the force is occurring in the ordinary course of daily life.

LEGAL CASE

McAveney v Quigley (1992) 58 A Crim R 457**Facts**

During an Australian Football Rules (AFL) game, the accused struck a blow to an opponent's face. Throughout the game, there were various incidents where players could have been reported for rule violations.

Legal issue

The court had to consider whether consent to assault applies in sports where players know rules will be repeatedly breached.

Decision

The court held that the player consented to the assault during the AFL game. Therefore, the accused could not be found guilty of assault as the defence of consent applied.

Significance

The court stated in its judgement that:

'In our opinion, players of the game of Australian Rules ... must be taken to accept the risk that opposing players will not always abide by the rules and it cannot be said that every infringement of the rules resulting in physical contact that results in injury can amount to a criminal act.'

This means that in sports where rules are commonly breached, the court must decide whether the degree of violence exceeds that to which consent is given and is expected.



Image: MichaelHahn/Shutterstock.com

Figure 4 The court held that AFL players consent to being injured to a certain degree, due to the dangerous nature of the game

DEEP DIVE

CONTENT WARNING This section explores content that is sensitive in nature, relating to violence against children.

A slap on the wrist

Another defence to assault not explored in depth in this lesson is the defence of lawful correction, also known as the discipline of children. Parents are permitted to use reasonable force to discipline a child. Therefore, if they hit their child in order to correct the child's behaviour, and were accused of causing injury intentionally as a result, they would be able to rely on this defence. In Victoria, this is a common law defence. However, in New South Wales, the *Crimes Act 1900* (NSW) sets out elements an accused must prove to rely on this defence. These elements are:

- the force was intended as a punishment for the child
- the force was administered by a parent or someone in a parental role
- the force was reasonable considering the child's age, health, maturity, nature of the misbehaviour, and other relevant factors.

A parent must only use force where it is reasonable. For example, eating a cookie after cleaning your teeth and being punched as a result would not be considered 'reasonable' discipline and is thus, unlawful assault.

Adapted from 'The Defence of Lawful Correction' (Dahlstrom, n.d.)

LEGISLATION

Crimes Act 1900 (NSW)

Possible sanctions for assault 1.2.11.2

If an individual is found guilty of assault and does not provide a successful defence, they will be liable for one of many penalties depending upon the type of assault committed. There are variations in the maximum sanction, being imprisonment, for the different types of assaults. However, even though the maximum sentence for assault is a prison term, not all people charged with assault will receive a custodial sentence. Rather, fines or community correction orders (CCOs) may also apply.

Table 2 Penalties for statutory assaults

Type of assault	Section of <i>Crimes Act 1958</i> (Vic)	Maximum sanction	Average sentence from 2016 to 2021 (Sentencing Advisory Council, 2023)
Causing serious injury intentionally in circumstances of gross violence	Section 15A	20 years imprisonment; with a minimum non-parole period of four years	–
Causing serious injury recklessly in circumstances of gross violence	Section 15B	15 years imprisonment	–
Causing serious injury intentionally	Section 16	20 years imprisonment	85.5% of offenders received a prison sentence. The median length of this imprisonment was five years and six months.
Causing serious injury recklessly	Section 17	15 years imprisonment	83.7% of offenders received a prison sentence. The median length of this imprisonment was three years and eight months.
Causing injury intentionally or recklessly	Section 18	10 years imprisonment if the injury was caused intentionally Five years imprisonment if the injury was caused recklessly	74.1% of ‘causing injury intentionally’ offenders received a prison sentence. The median length of this imprisonment was two years. 53.7% of ‘causing injury recklessly’ offenders received a prison sentence. The median length of imprisonment was one year and six months.
Conduct endangering life	Section 22	10 years imprisonment	88% of offenders received a prison sentence. The median length of this imprisonment was three years and six months.
Conduct endangering persons	Section 23	Five years imprisonment	–
Negligently causing serious injury	Section 24	10 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	Five years imprisonment	–

Lesson summary

In order to not be charged with any type of assault, an accused person should first attempt to disprove the elements of assault. However, where they are unable to successfully cast doubt on any of these elements, some of the defences they can raise are:

- self-defence
- duress
- consent.

If an accused is convicted of an assault charge, the sanction imposed may differ depending on the form of assault they are charged with. Prison sentences are common for assault charges, therefore reflecting the severity of assault in the eyes of the law.

3E Questions

Check your understanding

Question 1

Which of the following are **not** a defence a person accused of assault may raise if all the elements of assault have been proven by the prosecution? **(Select all that apply)**

- A. Self-defence
- B. Actus reus
- C. Duress
- D. Unlawful excuse

Question 2

For self-defence to be made out, the accused must prove:

- A. they believed their conduct was necessary for self-defence and the conduct was a reasonable response in the circumstances.
- B. their conduct was objectively necessary in self-defence and the conduct was in response to the circumstances, regardless of whether this response was proportionate to the threat or harm.

Question 3

Fill in the blanks with the following terms:

duress

self-defence

The defence of [] may be raised where an accused engaged in criminal behaviour due to threat, violence, or coercion from a third party, whereas [] is an applicable defence where the accused reasonably believed they needed to use force to prevent harm against themselves or another person.

Question 4

Which of the following are elements that must be proven by the accused in order for the defence of duress to be established? **(Select all that apply)**

- A. There was a threat of harm.
- B. The conduct by the victim warranted a reasonable response by the accused to defend themselves against the harm.
- C. The conduct was the only reasonable way to avoid the threatened harm.
- D. The conduct was a reasonable response to the threat.

Question 5

Consent is a defence that may apply where:

- A. the victim is playing a sport and therefore, consents to being injured to a certain degree due to the violent nature of the game.
- B. the victim is in public and therefore, consents to force applied over the course of ordinary social activities, such as being pushed onto a road as the accused needs to get to work faster.

Question 6

The maximum sentence for all types of assault is some form of imprisonment. However, the different forms of assault carry different maximum penalties ranging from a five to 20-year maximum prison sentence.

- A. True
- B. False

Question 7

Which of the following are possible defences or sanctions for assault?

(Select all that apply)

- A. Imprisonment
- B. Injunction
- C. Self-defence
- D. Damages
- E. Threat to harm
- F. Community correction order
- G. Duress

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Jai was convicted of causing serious injury intentionally. He punched his former partner, Ryan, to the point of Ryan sustaining serious injuries, including several broken bones.

Describe the maximum penalty Jai could receive for causing serious injury intentionally.

Question 9

(3 MARKS)

Joseph has been charged with causing serious injury intentionally. Joseph claims he was forced to assault the victim as, 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 describe the defence that Joseph has raised.

Question 10

(3 MARKS)

Nikkita was walking home from the train station when a man attempted to rob her. He held his hands over her eyes and then tugged at her bag in an attempt to take it. In response, Nikkita kicked the offender in the shin to try and escape. She then punched him before running off. The man who attacked her reported her to the police for kicking and punching him, and Nikkita now fears she may be charged with causing injury intentionally.

Explain self-defence as a defence to assault that Nikkita may raise.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Narelle was giving Farlap open-heart surgery, which he consented to. The surgery was successful. However, after the surgery, Farlap had several scars across his chest. Due to these injuries, Farlap has decided to report Narelle to the police for assault, specifically causing injury intentionally, as she cut into his chest. The cuts were a necessary part of the procedure.

Question 11

Tick the box to indicate whether each of the following statements are **true** or **false** about the possible defences Narelle can raise and the possible sanctions she may receive.

Statement	True	False
I. Narelle would be able to successfully raise the defence of consent as the injuries sustained by Farlap occurred over the course of a medical procedure, which Farlap consented to.	☐	☐
II. Narelle would be able to raise the defence of duress as, since Farlap consented to the surgery, Narelle was clearly coerced into doing it.	☐	☐
III. If Narelle was found guilty of causing injury intentionally, the maximum penalty she could receive would be 10 years imprisonment.	☐	☐
IV. If Narelle was found guilty of causing injury intentionally, the sanction she would most likely be prescribed would be a fine.	☐	☐

Question 12

(6 MARKS)

Advise Narelle about **one** defence to assault she may raise and **one** sanction she may face if this defence fails and she is found guilty.

Linking to previous learning

Question 13

(6 MARKS)

Julia and Brooke were playing rugby. Brooke had the ball and her opponent, Julia, tackled her in order to possess it. As a result of the tackle, Brooke sustained bruises and a twisted ankle. Julia is now going to court after being charged with causing injury recklessly. The onus is on the prosecution to prove on the balance of probabilities that she committed assault in her tackle against Brooke. If she is found guilty of causing injury recklessly, she could face 20 years imprisonment. Julia has been told there are no possible defences she could raise.

Identify **three** errors in the scenario and, for each error, explain the correct process or procedure that should have occurred.

3F Assault – trends and impact

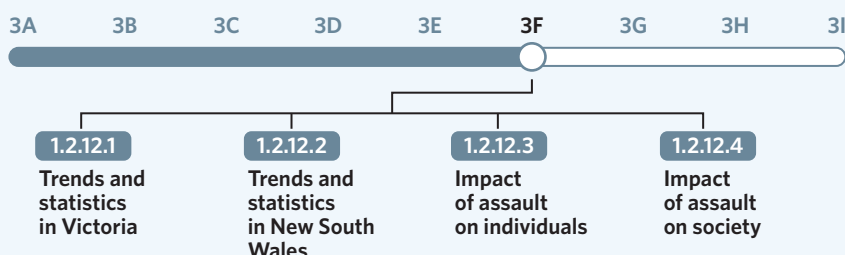


Image: Gorodenkoff/Shutterstock.com

From 2021 to 2022, there were 20,200 hospitalisations caused by assault in Australia (Australian Institute of Health and Welfare, 2023). When this statistic is just seen as a number, it is difficult to fathom how many people are impacted by assault. Not only is the injured victim affected by the crime, but the accused someone, the victim's family suffers through agonising hospital visits, witnesses to the attack may feel traumatised, and the patient load on already-crowded hospitals increases, impacting the day-to-day responsibilities of nurses and doctors.

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.



CONTENT WARNING This lesson explores content that is sensitive in nature, relating to violence.

LESSON LINK

You learnt about crimes against the person in **2D Types of crime**.

Lesson introduction

The most common type of crime 'against the person', in Victoria, is assault. From March 2022 to 2023, there were 47,258 assault offences recorded in Victoria (Crime Statistics Agency, 2023). Considering the prevalence of this crime in Victorian society, many people are impacted by this offence each day, including the accused, the victim, the victim's family and friends, the government, the legal system, hospitals, and the broader community.

Trends and statistics in Victoria 1.2.12.1

There has been a general increase in the number of recorded criminal incidents of assault across the state of Victoria between 2015-2023 (Crimes Statistics Agency, 2023). Assault statistics from the period of March 2022 to 2023 include:

- 1,156 offences recorded for the assault of a police officer.
- 15,644 family violence, common law assault offences.
- 3,340 family violence offences of recklessly causing serious injury.

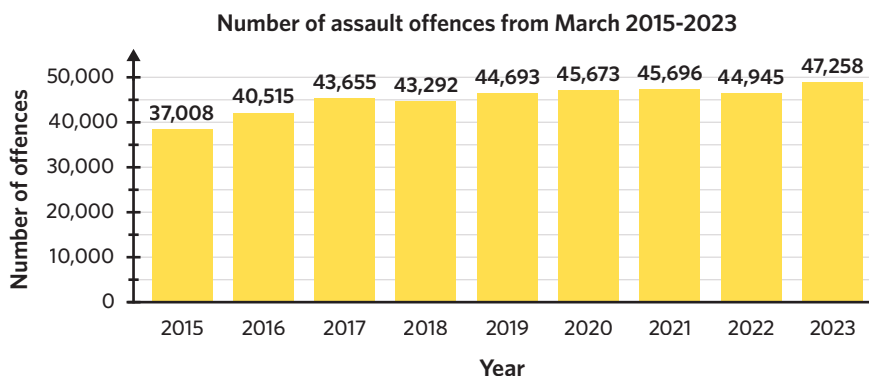


Figure 1 Number of assault offences recorded from March 2015 to 2023 (Crimes Statistics Agency, 2023)

Although the number of assault offences has increased from 2018 to 2023, so too has the Australian population. Therefore, a better measure of whether the proportion of assault cases is increasing is to look at the incidence rate of assault offences per 100,000 people. As seen in Figure 2, the rate of assault incidents has remained consistent for the past six years, with no drastic increases or decreases at any point.

LESSON LINKS

You learnt about the different types of assault in **3D Assault – elements**.

You will learn more about types of sanctions in **5B Types of sanctions**.

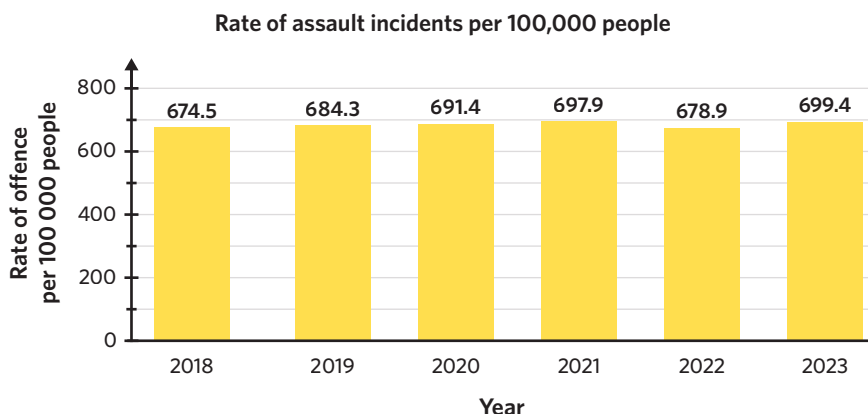


Figure 2 Assault incident rate per 100,000 in the Victorian population from March 2018 to 2023 (Crime Statistics Agency, 2023)

Since there are several types of assault, it is difficult to ascertain the number of people who have been sentenced for an assault offence over recent years. Therefore, when looking at sentencing statistics, ‘causing serious injury intentionally’ is the main assault offence that will be focused on. This offence is set out under s 16 of the *Crimes Act 1958* (Vic) and carries a maximum penalty of 20 years imprisonment.

In the financial year from 2016 to 2021, 124 people in Victoria were sentenced for causing serious injury intentionally (Sentencing Advisory Council, 2021). Over this time period, 85.5% of offenders were sanctioned with a term of imprisonment. Any other type of sanction is relatively uncommon for this offence, considering its severity.

LEGISLATION

Crimes Act 1958 (Vic)

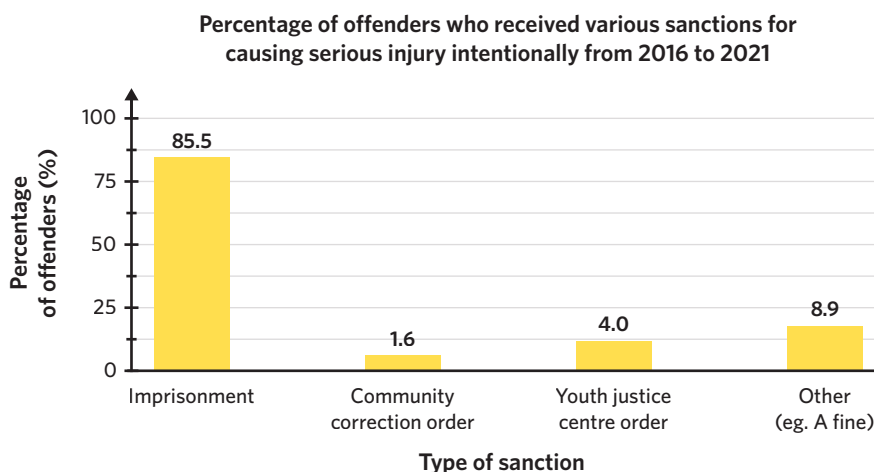


Figure 3 Number of people who received various sanctions for causing serious injury intentionally from 2016 to 2021 (Sentencing Advisory Council, 2021)

LEGAL VOCABULARY

Youth justice centre order a sentence for youth criminals between the ages of 15 to 20 that involves detainment in youth justice centres.

Trends and statistics in New South Wales 1.2.12.2

In New South Wales (NSW), there were 64,689 recorded victims of assault in 2021, an incidence rate of 790 victims of assault per 100,000 persons in the NSW population (Australian Bureau of Statistics, 2023). Comparatively, Victoria's incidence rate of assaults per 100,000 people in 2021 was 697.9. Therefore, NSW currently has a higher rate of assault per capita than Victoria.

LEGISLATION

Crimes Act 1900 (NSW)

In NSW, the offence of assault occasioning actual bodily harm under s 59 of the *Crimes Act 1900* (NSW) is five years imprisonment. This offence falls within the category of serious assault resulting in injury. Assault occasioning actual bodily harm is most similar to the Victorian offence of intentionally or recklessly causing injury, set out under s 18 of the *Crimes Act 1958* (Vic). This Victorian offence carries a maximum charge of ten or five years imprisonment, depending on whether the assault was committed intentionally or recklessly respectively.

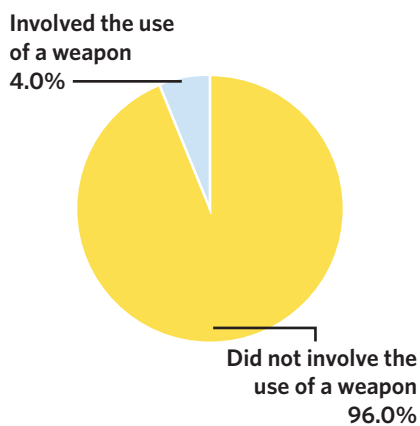


Figure 4 The proportion of assault offences in NSW involving a weapon in 2021 (Australian Bureau of Statistics, 2021)

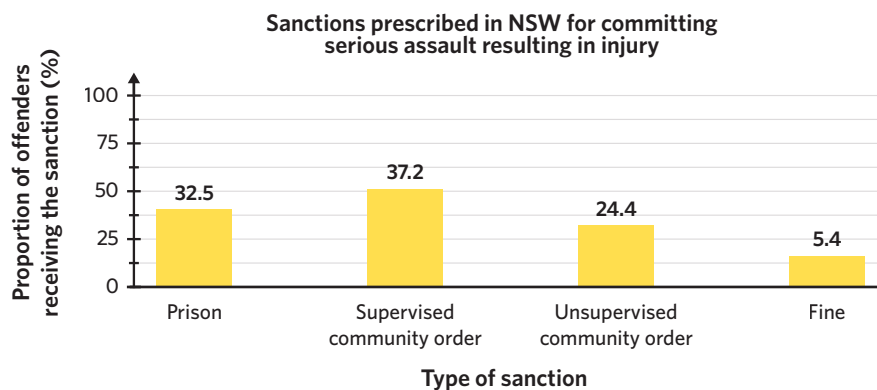


Figure 5 Sanctions prescribed in NSW for committing serious assault resulting in injury from 2018 to 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

Supervised community orders are similar to community correction orders in Victoria. This sanction requires an offender to be under supervision for up to three years. The features of such an order may require an offender to:

- have a curfew
- complete community service work
- undergo drug and alcohol treatment programs.

Unsupervised community orders have similar requirements, but less harsh supervision for the offender, likely meaning the sentencing judge perceives the offender as a lesser threat to society.

Impact of assault on individuals 1.2.12.3

Assault has wide-ranging impacts on not only the victim and their family and friends, but also on the accused. These impacts can be categorised into physical, psychological, economic, and social impacts. A victim of assault may also experience **secondary victimisation** after an assault, which can have a profound impact on them.

LEGAL VOCABULARY

Secondary victimisation

instances where a victim of crime suffers further harm, not as a direct result of the crime, but through negative experiences of the criminal justice system.

Table 1 Impact of assault on a victim and the offender

Type of impact	Victim	Offender
Physical	- Endures the physical effects of the crime, such as significant injuries. - Sustaining physical injuries can cause a victim to experience economic, social, and psychological consequences. For example, they may be unable to work due to their injuries, leading to a decreased income. Additionally, possible mobilisation difficulties resulting from injuries can cause a decline in an injured person's ability to socialise and may instigate feelings of frustration.	The offender may also have sustained injuries from committing the assault offence.
Psychological	- Research into victims of violent crimes suggests that a victim's perception of the world changes significantly after an attack. This may cause feelings of anxiety around leaving the house due to fear of another attack, or depression due to this shift in world perception. - Victims may experience post-traumatic stress disorder (PTSD) after the attack, which could result in hesitancy to visit public places.	- The offender may experience regret, guilt, and remorse for injuring another person. - There is a risk of an offender developing mental health issues, such as depression or PTSD. - The process of defending themselves in court and the uncertainty of not knowing what the resolution will be can cause immense anxiety and stress for an accused.
Economic	- As a result of the injuries sustained, a victim may be unable to work or may be more frequently absent from work due to a need to attend doctors' appointments or the court if their offender pleads not guilty and faces court. - Mental health issues that stem from a violent attack could make it difficult for an accused to re-engage at work and concentrate on their duties. - Where the victim is the primary income earner of a family, the whole family may suffer as a result of the assault due to a potential decline in the victim's earnings.	- Loss of earnings from being unable to work often occurs, as a common sanction for assault is imprisonment. - Even if an offender does not receive a prison sentence, it may be difficult for them to find employment due to an assault conviction being on their criminal record. - If an offender is not sanctioned to a term of imprisonment, they may receive a community correction order that results in a significant amount of their time being taken up by community service, limiting their capacity to work. They may also receive a fine, which imposes an economic burden. - There are significant costs associated with an accused defending themselves in court, such as legal representation and court fees.
Social	- A victim may withdraw from social engagements after a violent attack due to the psychological impacts of anxiety, depression, or PTSD. - In situations where assault occurred in the context of domestic violence, a victim may be cut off from former family members, causing social isolation.	- If an accused is sentenced to prison for an assault, they may face negative social impacts as they would become unable to regularly socialise with those in the outside world. - An accused's relationships may fall apart as those close to them may not want to be associated with a criminal.
Secondary victimisation	- Victims may experience secondary victimisation when dealing with the criminal justice system following their assault. This can occur during the trial and investigation process, where the victim may be required to participate in providing evidence, reminisce about their assault experience, and relive difficult moments in the lead-up and after the assault. Unfortunately, this can also impede on the pursuit of justice as, depending on one's grief and healing process, a victim may be less willing to participate. - A victim of assault may also experience secondary victimisation in the forming of 'victim-blaming', in which members of the criminal justice system may seek to put some of the blame for the assault on the actions of the victim, such as what they were wearing and how they were acting, amongst other factors. This can be traumatic for the victim of violence.	–

REAL WORLD EXAMPLE



Image: CHALERMPHON SRISANG/Shutterstock.com

Figure 6 A McDonald's assault left workers traumatised

Manager reveals his 'fundamentally-altered' outlook on life following assault

In October 2022, video footage emerged of a 19-year-old girl spitting on staff and throwing food at them in a McDonald's store in Adelaide. She pleaded guilty in 2023 to several offences, including aggravated assault.

The manager of the McDonald's read his victim impact statement during the trial, revealing the 'profound impact' the assault had on his life. He reported the assault to have left him with 'deep emotions that continue to affect [him] every time [he is] at work', revealing the ordeal left him with a 'fundamentally-altered' outlook on life. He now attends psychology appointments to deal with the trauma. Following the event, protective screens were installed in the McDonald's location to provide some solace and protection for the workers.

The impacts of the assault are irreversible, however, and the victims involved will likely forever be scarred by what they endured.

Adapted from 'McDonald's staff abused by woman at Adelaide's Hindley Street restaurant tell court 'traumatic' experience' (Leckie, 2023)

Impact of assault on society 1.2.12.4

Assault offences impact several areas of society, including the community, government, police, and hospitals.

Table 2 Impact of assault on society

Type of impact	Explanation
Economic	- Local communities can be impacted by high rates of assault and violence in their area, as this can cause such places to develop a negative reputation, leading to worse outcomes for businesses and homeowners. - Assault offenders must be tried and sentenced appropriately, imposing a societal cost as this requires the courts to hear cases, which increases judges' workloads and requires more government funding for the courts. - More funding may need to be allocated to hospitals as a result of assault as hospitals must address any physical or mental health issues stemming from such offences. The police may also require additional funding as a greater police presence may be necessary in certain regions where assault offences are frequent. - Greater infrastructure may be put in place at certain venues in an attempt to prevent assaults from occurring. For example, after an assault at McDonald's in 2022, protective screens were installed to try and protect workers from violent patrons in the future.
Social	- The workload of police officers and staff members in a hospital may increase due to high rates of assault offences, as this can require a greater police presence at various locations and/or more people requiring physical or psychological medical treatment. - Communities affected by assault, or certain groups particularly impacted by this offence, may rally together to seek justice against the violence either they, or their community, experiences. For example, in 2023, approximately 40 paramedics attended a regional Victorian court to campaign for harsher penalties for those who assault emergency workers, an unfortunately common occurrence.

Continues →

Table 2 Continued

Type of impact	Explanation
Health	The health and wellbeing of the community may be impacted as members of society could be witnesses of assaults, possibly causing them to experience post-traumatic stress disorder (PTSD).
Legal	Law reform may occur to criminalise certain acts or increase the penalties for specific assaults to greater punish or deter offenders from committing assaults. For example, in October 2018, Victorian laws were altered to mandate minimum sentences for assaults on emergency workers. For example, if an offender causes serious injury intentionally to an emergency worker, they must be sentenced to imprisonment.
Political	- Multiple 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 of NSW that mandated bars, restaurants, and clubs to close at a certain hour and stop serving some alcohols after a specific time of night. - The government may use different rhetorics when referring to assault cases in order to induce shame in offenders, or potential offenders. For example, there has been a recent push by political leaders to refer to what was previously known as a 'king hit' as a 'coward punch' to reflect the cowardly nature of committing such a gutless action.

REAL WORLD EXAMPLE

Increased police presence as protests boom

In 2021, the Victorian Government arranged to have an increased Victoria Police presence at Melbourne protests as people took to the streets, campaigning against Victoria's lockdown laws. One of the most violent protests occurred in August 2021, with an estimated 4,000 people flocking to Melbourne CBD to protest the lockdown. At this protest, nine police officers were taken to hospital after having items thrown at them, 200 people were arrested, and two people were charged with assault. Prior to this event, other protests had been held in which similar numbers of assaults and injuries had been caused by protestors. Therefore, the government ensured an additional 700 Victorian police officers were deployed to contain the protestors.

The increased police presence at this protest demonstrates the impact assault cases can have on the government and police. Due to assaults at previous protests, the government arranged for an increased police presence to try and limit the number of assaults at future protests. The impact on police, as the victims of assault, was also significant as several of them were hospitalised due to injuries caused by the violent protestors. Therefore, economic impacts resulted from the assaults as tax-payer funded services, such as the police, had to be increased due to previous assaults, and societal health was challenged as police and witnesses to the assaults may have experienced physical and mental harm.

Adapted from 'Police say Melbourne anti lockdown protest 'most violent in nearly 20 years'' (Australian Associated Press, 2021)



Image: Mo Wu/Shutterstock.com

Figure 7 Hundreds of additional police officers were deployed to contain protestors after assault charges were made at previous lockdown rallies

Lesson summary

The trends in Victoria and NSW regarding the number of people charged with assault each year are very similar, with 790 victims of assault per 100,000 in 2021 in NSW compared to 697.9 assault offences occurring in 2021 in Victoria. However, the sentences handed down in NSW and Victoria differ slightly, with:

- 85.5% of offenders receiving a term of imprisonment for causing injury intentionally in Victoria.
- 32.5% of offenders receiving a term of imprisonment for serious assault resulting in injury in NSW.

Regardless of the state the assault occurred in, the impacts of assault are far-reaching.

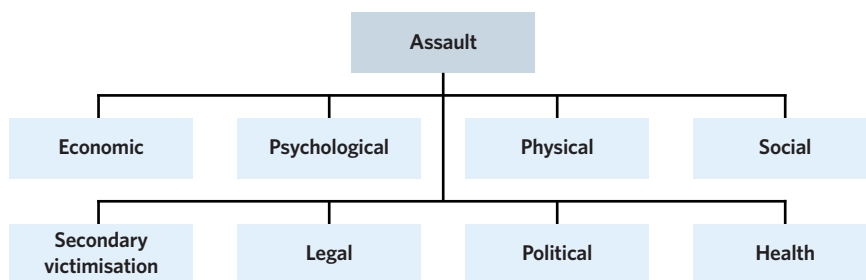


Figure 8 Impact of assault on individuals and society

3F Questions

Check your understanding

Question 1

Considering the *Crimes Act 1958* (Cth) regulates all criminal offences in Australia, the maximum penalties for assault in both New South Wales and Victoria are the same.

- A. True
- B. False

Question 2

In Victoria the rate of assault incidents per 100,000 people between the period of 2018 to 2023 was approximately:

- A. 700 incidents.
- B. 10,000 incidents.
- C. 70,000 incidents.
- D. 7 incidents.

Question 3

Fill in the blanks with the following terms:

Victoria

New South Wales

In [], the proportion of offenders sentenced to prison for causing serious injury intentionally from 2016 to 2021 was 85.5%. Comparatively, in [] the percentage of offenders that committed serious assault resulting in injury and were sentenced to a term of imprisonment from 2018 to 2022 was 32.5%.

Question 4

In NSW, a supervised community order is the most common type of sanction for an offender who committed serious assault resulting in injury.

- A. True
- B. False

Question 5

Which of the following statements is correct about the use of weapons in assault cases in New South Wales in 2021?

- A. 50% of assault cases involved the use of a weapon, whilst 50% of assault cases did not.
- B. 25% of assault cases involved the use of a weapon, whilst 75% of assault cases did not.
- C. 4% of assault cases involved the use of a weapon, whilst 96% of assault cases did not.
- D. 75% of assault cases involved the use of a weapon, whilst 25% of assault cases did not.

Question 6

Which of the following are types of impacts of assault on a victim and the accused?

(Select all that apply)

- A. Physical
- B. Psychological
- C. Demographical
- D. Economic
- E. Social

Question 7

The psychological impact of assault on a victim may be:

- A. experiencing PTSD after the attack, potentially resulting in a hesitancy to visit public places.
- B. enduring the physical pain of bruising if the assault involved them being kicked or punched.

Question 8

Fill in the blanks with the following terms:

health

economic

Assault may cause [] impacts as higher numbers of assault in a given area can impact the extent to which people feel safe in such locations, potentially reducing house prices or affecting local businesses in an area with high rates of assault. This offence may also cause [] impacts on those in the community who witnessed an assault, and may cause anxiety or post-traumatic stress disorder, affecting their mental health.

Question 9

Considering assault is a less serious criminal offence than murder or culpable driving, there are few impacts on individuals and society.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 10

(2 MARKS)

Identify **two** sentencing statistics or trends for assault in Victoria.

Question 11

(3 MARKS)

Compare the sentencing trends for assault in Victoria and **one** other Australian jurisdiction.

Question 12

(4 MARKS)

Describe **two** impacts of assault on individuals.

Question 13

(4 MARKS)

In 2023, there was a drastic increase in assault cases in the beach-side town of SunnySide. Over 30 assault cases occurred in one month.

Outline **two** impacts of assault on society in relation to SunnySide.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

In 2021, violent lockdown protesters took to the streets of Melbourne to campaign against lockdown laws. During one of the protests, two assault charges were made and nine police officers were sent to hospital after having items thrown at them. The government, therefore, decided to increase the police presence during protests by 700 officers in an attempt to prevent assaults from occurring in the future.

Question 14

Which of the following statements are correct about the impacts of assault in relation to the case study?

(Select all that apply)

- A. Considering the government increased the police presence to 700 officers during protests in an attempt to prevent assault, the police's workload may have increased significantly, which has economic impacts as tax-payers would have to fund the increased police presence.
- B. Nine police officers were sent to hospital after protesters threw items at them, resulting in direct psychological impacts.
- C. People may be encouraged to visit the city due to the risk of encountering a violent protest where they may be assaulted.
- D. The community may witness the assaults that occurred in the protests, as they happened in the public space of Melbourne CBD. Therefore, they may have developed post-traumatic stress disorder (PTSD) as a result of what they witnessed.

Question 15

(6 MARKS)

Analyse the impact of assault on society and individuals with reference to the case study.

Linking to previous learning

Question 16

(5 MARKS)

Lucia was walking down the street on a night out when Nadia hit her in the back of her head. Lucia suffered a concussion and was in a coma for a week. She accused Nadia of assault, and the police charged Nadia with causing serious injury intentionally.

- a. Identify **one** sentencing trend in Victoria relating to causing serious injury intentionally.
- b. Describe **two** elements of assault that the prosecution will need to prove beyond reasonable doubt for the offence of causing serious injury intentionally to be made out.

1 MARK

4 MARKS

3G Culpable driving – elements

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.

3A 3B 3C 3D 3E 3F **3G** 3H 3I

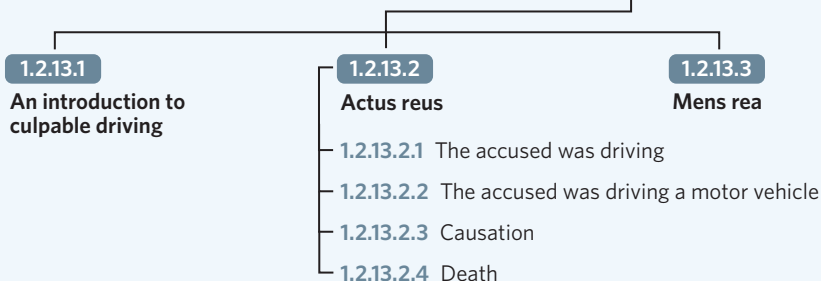


Image: Gorodenkoff/Shutterstock.com

As a VCE student studying Units 1&2, you may be learning to drive. Imagine a pedestrian sprints across a busy highway directly into your car without warning. You were driving below the speed limit, completing regular head checks, and abiding by all relevant laws. However, you still hit and accidentally kill a pedestrian. Say another drunken and speeding driver hits a pedestrian on a suburban footpath and also kills them. Would it be fair if you both received the same punishment?

Lesson introduction

The annual number of Victorian road deaths is less than a third of what it was in 1989 (Transport Accident Commission, n.d.). This is, in part, due to the constant reform of road rules in Victoria to protect drivers and pedestrians. Killing another person on the roads, due to careless or reckless behaviour is punished severely in Victoria to discourage people from acting in ways that may jeopardise the lives of others.

An introduction to culpable driving 1.2.13.1

An individual can be found guilty of **culpable driving causing death** if they were driving a motor vehicle, such as a car, truck, or motorbike, and caused the death of another person. This death cannot be due to error or a mistake, meaning it must have resulted from reckless or negligent behaviour by the driver, or the consumption of drugs or alcohol prior to driving, making the offender incapable of controlling the vehicle. The offence of culpable driving causing death is set out under s 318 of the *Crimes Act 1958* (Vic).

For the prosecution to prove an offender is guilty of culpable driving causing death beyond reasonable doubt, they must sufficiently prove to a jury that the offender committed both the:

- ‘actus reus’ of the offence, meaning their physical actions constituted driving a motor vehicle and causing the death of another person
- ‘mens rea’ of the offence, meaning their mental state was seriously affected by drugs or alcohol, they acted recklessly, or they acted negligently in the way they were operating the motor vehicle.

If one of the above elements is missing, for example, the accused caused the death of another person while driving but did so by accident and not due to personal fault, the offence cannot be established.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to death.

LEGISLATION

Crimes Act 1958 (Vic)

KEY TERM

Culpable driving causing death

a criminal offence whereby an individual causes the death of another person when driving a motor vehicle recklessly, negligently, or under the influence of drugs or alcohol.

Actus reus 1.2.13.2

LESSON LINK

You learnt about actus reus in **2C Key concepts of criminal law**.

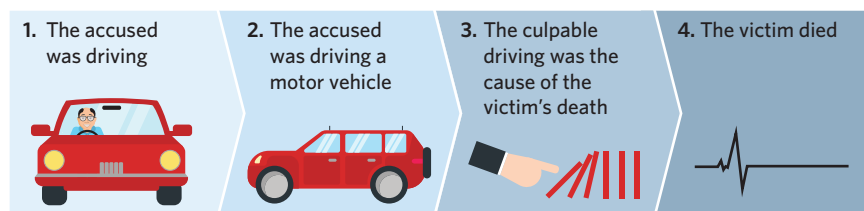


Figure 1 Elements of the actus reus for culpable driving causing death

The accused was driving 1.2.13.2.1

There is no legal definition for when a person is considered to be driving a motor vehicle. It is generally accepted that a person is driving if they are able 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 situations where the law remains unclear as to whether a person is considered to be 'driving' a motor vehicle, including where:

- the motor vehicle was broken or faulty at the time of the offence, such as a brake fault.
- the motor vehicle was moved by an external force, such as rolling down a hill or towed by another person or object.
- the motor vehicle was parked or motionless at the time of the offence, such as when stopped at traffic lights.

Therefore, determining whether the accused was 'driving' is a question of fact, requiring the judge and jury to consider the surrounding circumstances of the case they are determining to ascertain whether the accused was 'driving'.

HYPOTHETICAL SCENARIO

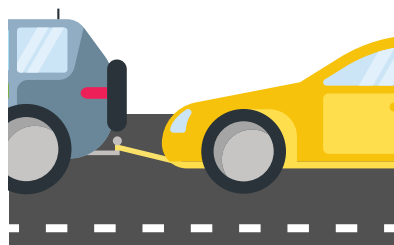


Image: PATIWIT HONGSANG/Shutterstock.com

Figure 2 The court declared that steering a car while it's being towed could not amount to driving

Oh snap! Disconnection causes disastrous death

Alba was driving to work when her car's engine failed and she immediately stopped. She called her mum, Loraine, who drove to where Alba's car was and used her own car to tow Alba's vehicle. Alba remained in the car, steering it as she was being towed along the Nepean Highway. As Loraine approached an intersection, she abruptly turned the corner, which caused the rope being used to tow Alba's car to snap. Alba's car veered into the intersection's oncoming traffic and, despite trying to steer away, she hit an approaching car and the passenger inside was killed.

The court had to determine whether Alba was 'driving', considering her vehicle was being towed by her mother Loraine. Looking at the surrounding circumstances it was determined that Alba was not driving and that steering a car when it's being towed could not amount to 'driving'.

LEGISLATION

Crimes Act 1958 (Vic)
Road Safety Act 1986 (Vic)
Marine Safety Act 2010 (Vic)

The accused was driving a motor vehicle 1.2.13.2.2

Under section 317B of the *Crimes Act 1958* (Vic), the definition of a motor vehicle 'includes vessels, whether or not the vessel is powered by a motor'. It encompasses both motor vehicles, defined under the *Road Safety Act 1986* (Vic), and vessels, defined under the *Marine Safety Act 2010* (Vic).

The *Road Safety Act 1986* (Vic) defines 'motor vehicles' as vehicles intended for highway use and built to be propelled by a motor, whilst the definition of a 'vessel' requires a vessel to be used in water.

Table 1 Vehicles that are, or are not, considered a 'motor vehicle' under the *Crimes Act 1958* (Vic)

						
A motorised wheelchair with a speed that does not exceed 10 km/h	A bike	A train	A motorbike	A car	A speedboat	A jetski
Not a motor vehicle	Not a motor vehicle	Not a motor vehicle	Motor vehicle	Motor vehicle	Vessel (Motor vehicle)	Vessel (Motor vehicle)

Causation 1.2.13.2.3

To establish that the driving of the accused caused the death of the victim, there must be:

- **causation**, meaning the accused's actions were a cause of the victim's death.
- death to another person, which is defined under s 41 of the *Human Tissue Act 1982* (Vic)

Causation requires that there is a causal connection between the accused's acts, which for culpable driving causing death is the accused's driving of a vehicle in a certain manner, and the death of the victim. An objective test is used to determine whether the conduct that caused the death of the victim occurred without an intervening event. It must be shown that the actions of the accused were the 'substantial and operating cause' of all events leading to the victim's death. The 'substantial and operating cause' test requires the accused's act, or omission, to substantially or significantly contribute to the death of the victim where there is an intervening event. If an intervening event occurs, such as significant medical negligence by a doctor treating a victim that causes the victim's death, the chain of causation may be broken, therefore causation would not be established.

When the accused is charged with culpable driving causing death and driving under the influence of alcohol or drugs, it only needs to 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, rather it is sufficient to prove:

- the accused was so affected by drugs or alcohol that they could not control the vehicle; and
- the driving caused death.

LEGISLATION

Human Tissue Act 1982 (Vic)

LEGAL VOCABULARY

Causation the relationship between an event or action and a resulting event.

HYPOTHETICAL SCENARIO

A detrimental distraction

Hoang was driving his motorbike at 80 km/h in a 40 km/h school zone, whilst under the influence of alcohol, when he hit Olive at a pedestrian crossing. Olive was distracted by her phone and failed to look carefully before crossing the road. This collision caused Olive to lose consciousness. She was sent to hospital and remained in a coma for a number of days before she passed away.

Olive's failure to look carefully was a contributing factor to the death. However, the jury must determine whether Hoang's actions were still a 'substantial and operating cause' of the collision. If causation is satisfied, he will likely be convicted of culpable driving causing death despite Olive's conduct also contributing to the incident.



Figure 3 Hoang may still be found guilty of culpable driving causing death, despite Olive's actions contributing to the collision

Death 1.2.13.2.4

The culpable driving causing death offence must have caused the death of another person. The *Human Tissue Act 1982* (Vic) defines death as either:

- irreversible cessation of circulation of blood in the body of the person
- irreversible cessation of all functions of the brain of the person.

Mens rea 1.2.13.3

Mens rea refers to the mental element of the crime, that is, whether there is a guilty mind held by the accused at the time of the offence. This must be proven to the jury.

The mens rea element for culpable driving causing death requires the driver to have been **culpable** when driving a motor vehicle. Under s 318 of the *Crimes Act 1958* (Vic), an accused is culpable if they acted with at least one of the following mental states:

- recklessly
- negligently
- under the influence of alcohol to the extent of making them incapable of having proper control of the motor vehicle
- under the influence of drugs to the extent of making them incapable of having proper control of the motor vehicle.

Only one of the above mental states must be proven for the mens rea requirement of culpable driving causing death to be satisfied.

Table 2 The different types of mental states of a culpable driver

Mental state	Requirements	Example
Recklessly	The prosecution must prove all of the following requirements, 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. • The accused, knowing of this real risk of serious injury, disregarded the risk.	Excessive speeding 70 km/h over the speed limit whilst drag-racing another motorist after consuming alcohol for the past three hours. The jury is likely to determine: • the accused was aware of the risk of death or grievous bodily harm. • the risk was substantial. • the accused engaged in the drag race regardless of the risk.
Negligently	Negligent driving requires more than an error to occur. The prosecution must prove the accused failed unjustifiably and to a gross degree to observe the standard of care that a reasonable person would have observed in all circumstances of the case. The level of negligence required is high, meaning there must be a great failure in fulfilling the standard of care that a reasonable person would have exercised. Momentarily losing concentration while driving, for example, would not be considered negligent as it is not a gross failure by the accused.	• An accused driving their vehicle at high speeds despite knowing their car is not roadworthy due to faulty brakes. • An accused FaceTiming or texting their friend while driving. • An accused slamming the brakes in front of another car out of spite after a road rage incident.

Continues →

LESSON LINK

You learnt about mens rea in **2C Key concepts of criminal law**.

LEGAL VOCABULARY

Culpable sufficiently responsible for criminal acts due to acting recklessly, negligently, or under the influence of alcohol or drugs to the extent of not having proper control.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to 'use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios'. If studying culpable driving, you may be asked to demonstrate this skill by applying elements of culpable driving to a given scenario. If considering whether the element of mens rea would likely be proven, you would need to determine whether one of the four mental states in s 318 of the *Crimes Act 1958* (Vic) are evident from the facts of the scenario.

Table 2 Continued

Mental state	Requirements	Example
Under the influence of alcohol	For this mental element to be satisfied, the accused must be under the influence of alcohol to 'such an extent as to be incapable of having proper control of the motor vehicle'. It is insufficient to show the accused was under the influence of alcohol, it must be proven to the jury that the accused was intoxicated to a large extent, making them unable to control their actions.	An accused drank a significant amount of alcohol at a bar prior to riding their motorbike home. During their journey, they collide with a pedestrian at a crossing who dies from the incident. They had a Blood Alcohol Concentration (BAC) of 0.125 during the incident. A BAC of less than 0.05 is required to drive legally for fully registered drivers.
Under the influence of drugs	The prosecution must prove beyond reasonable doubt that the accused was 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 the accused was affected by a drug, they must have been so influenced that they were not capable of having proper control of the motor vehicle.	In the case of <i>DPP v Bosman</i> [2016] VCC 1689, a man who had used ice (crystal methamphetamine) for several days and had slept very little decided to drive. He veered onto the wrong side of the road and collided with another vehicle, causing the death of the other driver. He was sentenced to seven years and six months imprisonment as a result.

DEEP DIVE

Sleeping at the wheel

According to s 318(2A) of the *Crimes Act 1958* (Vic), a driver is negligent when driving, and therefore culpable, if they:

- were so exhausted that they knew, or ought to have known, there was a large risk of them falling asleep and losing control of the vehicle.
- failed unjustifiably and to a gross degree to meet the standard of care a reasonable person would expect a driver to take in the situation due to their fatigue.



Figure 4 Driving when fatigued may be sufficient in satisfying the mens rea for culpable driving causing death

LEGAL CASE

Mohinder Singh v The Queen [2022] VSCA 178

Facts

In April 2020, Mr Singh drove a prime mover truck into four police officers, killing all four of them. In 2021, the accused pleaded guilty to four charges of culpable driving causing death and was sentenced to 22 years imprisonment. The sentencing judge set out the following contributing factors, which increased Singh's sentence:

- He had injected methamphetamine and consumed alcohol multiple times in the days prior to committing the offence.
- In the 72 hours before the collision, he had an opportunity for an estimated five hours of potential rest according to phone records.
- On the day of the incident, he drifted in and out of lanes on multiple occasions, indicating he was clearly excessively fatigued to be on the roads.
- The deaths of the police officers were 'entirely unnecessary and should have been avoided'. The grief as a result of their deaths is 'profound and life changing'.
- The toxicologist who took a blood sample from Singh after the incident concluded that the levels of methamphetamine in Singh's body 'would have impaired his driving ability to such an extent as to be incapable of having proper control of the motor vehicle'.

However, the judge also noted that Singh's guilty plea, remorse, cooperation with the investigation, and prospects of rehabilitation all lessened his sentence's severity. It was ultimately concluded that Singh was driving with the mens rea elements of both negligence and under the influence of drugs to such an extent as to be incapable of having proper control of the motor vehicle.

In 2022, Mr Singh appealed this sentence on the grounds that it was 'manifestly excessive' due to a number of mitigating factors not being considered.

Continues →

LEGAL CASE

Mohinder Singh v The Queen [2022] VSCA 178 – Continued**Legal issue**

The issue the Court of Appeal had to determine was whether to reduce Singh's sentence.

Decision

After the appeal, Singh was resentenced to 18 years and six months imprisonment with a non-parole period of 14 years and six months. The verdict of guilty was not altered, however, the Court of Appeal reduced his sentence predominantly on the basis that Mr Singh has agreed to give evidence against a former colleague in a different, forthcoming trial. The sentence still remained high due to the 'appalling consequences of [the] offending to the victims and their loved ones, the need for deterrence, both specific and general, and the need for denunciation'.

Significance

This case demonstrates the harsh penalties that apply when an individual negligently drives, or does so under the influence of drugs, which renders them incapable of controlling their actions, and kills someone in the process. It also demonstrates how all the circumstances of the case are looked at when determining if the accused was 'culpable' and the severity of their punishment.

Lesson summary

For the offence of culpable driving causing death to be made out, all elements must be proven to the jury by the prosecution beyond reasonable doubt. These elements are:

- actus reus, which requires the accused to have physically performed the act of driving a motor vehicle and the driving to be the substantial or operating cause of the victim's death
- mens rea, which requires the accused to have acted recklessly, negligently, or under the significant influence of drugs or alcohol.

3G Questions

Check your understanding

Question 1

For an accused to be found guilty of culpable driving causing death only actus reus or the mens rea must be established beyond a reasonable doubt, not both.

- A. True
- B. False

Question 2

Which of the following statements are aspects of the actus reus for culpable driving causing death that the prosecution must prove beyond reasonable doubt?

(Select all that apply)

- A. The accused was driving.
- B. The accused's actions had a causal connection to the victim's death.
- C. The victim died.
- D. The accused was either reckless or negligent when driving.

Question 3

Which of the following is **not** an example of a motor vehicle under s 317 of the *Crimes Act 1958* (Vic)?

- A. Car
- B. Bike
- C. Jet ski
- D. Motorbike

Question 4

Causation requires that the actions of the accused:

- A. were the substantial and operating cause of the victim's death, even if other factors contributed to their death, such as the victim's own carelessness.
- B. were the sole reason for the victim's death.

Question 5

Fill in the blanks with **two** of the following terms:

either	both	and	or

For the mens rea of culpable driving causing death to be satisfied, the accused's actions must have been enacted

[] negligently [] recklessly.

Question 6

Which of the following requirements must be satisfied for the mental state of 'recklessness' to be proven?

(Select all that apply)

- A. The accused was aware of the risk that death or grievous bodily harm may result as a consequence of their driving.
- B. The risk was substantial.
- C. The accused was under the influence of drugs and alcohol to such an extent that they were no longer capable of controlling their actions.
- D. The accused, knowing of this real risk of serious injury, disregarded the risk.

Question 7

An example of a culpable driving causing death offence committed with a 'negligent' mens rea is:

- A. an accused driving their vehicle at high speeds despite knowing their car is not roadworthy due to faulty brakes.
- B. an accused accidentally driving 2 km/h over the speed limit due to a momentary lapse of concentration.

Question 8

The accused must prove they did not commit all the elements of culpable driving causing death in order to be found not guilty of the offence.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Identify **two** elements of culpable driving causing death that must be proven beyond reasonable doubt by the prosecution.

Question 10

(2 MARKS)

Describe **one** element of culpable driving causing death.

Question 11

(3 MARKS)

Identify **three** aspects of the actus reus element of culpable driving causing death.

Question 12

(8 MARKS)

Rion was riding his motorbike while on a FaceTime call with Ronan when an aggressive man driving a Mercedes, Ryan, started honking at Rion and telling him 'motorbikes do not belong on the roads'. Rion heard Ryan's screaming and screeched to a halt, abruptly stopping in front of Ryan's car. Ryan crashed into the motorbike and was flung through the windscreen and onto the curb. He sustained a punctured lung and was rushed to hospital, passing away two days later. Rion has been accused of culpable driving causing death and pled not guilty.

Explain the elements of culpable driving causing death in relation to Rion's actions.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Sanjit was driving his motorised wheelchair down a suburban street. He was travelling at 10 km/h, the maximum speed this wheelchair is capable of, focusing on the roads. Suddenly, a young toddler came running onto the road to grab her ball. Sanjit tried to swerve out of the way, but he, unfortunately, bumped into the toddler. The toddler obtained grazes and bruises as a result of the altercation and has since recovered. Sanjit immediately tried to help the girl, but her parents yelled at him, claiming he committed a culpable driving causing death offence. Sanjit fears he may go to prison.

Question 13

Tick the box to indicate whether each of the following statements are **true** or **false** about the case the prosecution will be able to build against Sanjit.

Statement	True	False
I. The prosecution will not be able to satisfy the requirement for actus reus that the accused must have been driving a 'motor vehicle' as a motorised wheelchair is not considered a motor vehicle.	☐	☐
II. Sanjit may not have the requisite mens rea to be found guilty of culpable driving causing death as he was not driving recklessly or negligently, rather his wheelchair struck the girl by accident.	☐	☐
III. The prosecution will not be able to establish the offence of culpable driving causing death as the girl was only injured, not killed, which is a requirement for culpable driving causing death.	☐	☐
IV. The parent's statement is correct as the prosecution will be able to prove both the mens rea and actus reus of culpable driving causing death in this case without any issues.	☐	☐

Question 14

(6 MARKS)

Analyse the likely success of the prosecution's case against Sanjit, by identifying each of the elements required for culpable driving causing death to be made out, and applying them to the scenario.

Linking to previous learning**Question 15**

(2 MARKS)

Describe the standard of proof required to establish the offence of culpable driving causing death.

3H Culpable driving – defences and sanctions

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society

3A 3B 3C 3D 3E 3F 3G **3H** 3I

1.2.14.1

Possible defences to culpable driving

1.2.14.1.1 Duress

1.2.14.1.2 Sudden or extraordinary emergency

1.2.14.1.3 Automatism

1.2.14.2

Possible sanctions for culpable driving



Image: svekloid/Shutterstock.com

You and your friend are playing Mario Kart, speeding down the 'rainbow road', trying to beat each other to the finish line. Sitting in fifth place, you make some erratic turns, shove your friend off the path, and quickly find yourself in first place. However, achieving this position was at the cost of your friend falling off the track and into the void. Imagine if this was real life: would your need to win the race be a valid excuse for forcing your friend off the side of the road?

Lesson introduction

An accused person is able to protect their innocence by raising defences in court. Considering the maximum sentence for culpable driving causing death is 20 years imprisonment in Victoria, many people accused of this offence will attempt to disprove one of the elements. Disproving one of the elements of culpable driving causing death may result in the offender being sentenced to a less severe punishment. Alternatively, if the prosecution is able to prove an accused committed all of the elements of culpable driving causing death, the accused can raise defences if the acts took place under duress, sudden or extraordinary emergency, or automatism.

If an accused is unable to successfully raise any defences and is found guilty of culpable driving causing death, the sanctions they may receive can be severe. However, the court considers various factors when determining the offender's sentence in order to uphold fairness.

Possible defences to culpable driving 1.2.14.1

A culpable driving causing death offence can be avoided, or at least the charge's severity can be reduced and the offender can instead be charged under dangerous driving causing death, if not all elements of culpable driving causing death can be proven. Most commonly, it is difficult for the mens rea requirements of culpable driving causing death to be proven beyond reasonable doubt, therefore the offence can be challenged on this basis. If all elements of culpable driving causing death are successfully proven by the prosecution beyond reasonable doubt, the accused can rely on defences. Some of the defences against an accusation of culpable driving causing death include:

- duress
- sudden or extraordinary emergency
- automatism.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to death.

LESSON LINK

You learnt about the elements of culpable driving causing death in **3G Culpable driving – elements**.

LEGAL CASE

Director of Public Prosecutions v Towle [2008] VSC 101**Facts**

In 2006, Towle was driving home with his four-year-old child on his lap and his 10-year-old child also in the car, when he had to do a sharp, right-hand turn and lost control of his vehicle. He collided with a group of people on the corner of the road, killing six people and seriously injuring four others. It was found that he did not slow down when attempting to turn the corner, with an estimated speed of 90 km/h. The speed limit was 100 km/h in the area he was driving.

Legal issue

The jury had to determine whether Towle should be charged with culpable or dangerous driving. To be charged with culpable driving causing death, instead of dangerous driving, the prosecution needed to prove beyond reasonable doubt that Mr Towle had the requisite mens rea of being reckless or negligent when driving. The prosecution argued the case was not one of a 'momentary lapse of attention' but rather 'a case of multi-faceted lack of attention at high speed, at night, and with knowledge of risk'.

Decision

The jury found Towle not guilty of all counts of culpable driving causing death but guilty of dangerous driving causing death and serious injury. He was sentenced to seven years imprisonment before being eligible for parole.

Significance

This case demonstrates the ability of an accused to defend a culpable driving causing death charge by casting doubt on one of the elements of the offence. As the prosecution was unable to prove the mens rea for culpable driving causing death beyond reasonable doubt, the offence could not be established.

Duress 1.2.14.1.1

Under s 322O of the *Crimes Act 1958* (Vic), a person is not guilty of an offence if they carry out their actions under **duress**, which requires the accused to have committed the offence of culpable driving causing death due to coercion or a threat. For this defence to be made out, the offender must:

- reasonably believe that a threat of harm has been made towards them and will be carried out unless an offence is committed; and
- reasonably believe that carrying out the conduct is the only reasonable way to avoid the threatened harm; and
- act in a way that would be considered a reasonable response to the threat.

Essentially, duress is made out if an individual acts as an instrument for another person's criminal conduct. However, if a person is voluntarily associating with another person for the purpose of carrying out criminal activities, this defence cannot apply. For example, if a person chose to join an infamous crime syndicate, and a member threatened to make the person commit a crime, it is unlikely they would be able to raise the defence of duress as they put themselves in this situation where they would be expected to commit crimes.

HYPOTHETICAL SCENARIO**The theft threat**

Taylor is driving home from work when Jake breaks into her car and holds a knife to her throat. He tells her that if she does not steal keychains from a prestigious jeweller within the next 30 minutes, he will kill her. She tries to plead with him that she will give him all the money in her purse, however, he tells her all he wants are the keychains and he needs them immediately. The prestigious jeweller he wants her to steal from is usually a 50-minute round-trip, therefore she knows she will need to speed in order to make it in time to steal the goods.

Continues →

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

Duress a defence that can be raised whereby criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 1 VCE Legal Studies is to 'use legal reasoning and principles to identify and argue the elements of an offence, possible defences and culpability in relation to actual and/or hypothetical scenarios'. If studying culpable driving, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence, such as duress, might be successful if argued in court. This means you would need to consider the three elements that need to be shown under s 322O of the *Crimes Act 1958* (Vic) for the defence of duress to be proven.

HYPOTHETICAL SCENARIO**The theft threat – Continued**

In her fearful and speeding state, Taylor crashes into and kills a pedestrian while driving down the main road towards the jeweller. She fears she may be liable for culpable driving causing death as she was speeding 60 km/h over the speed limit when the crash occurred. However, her lawyers advised her that she could raise the defence of duress as:

- due to Jake holding the knife, it was reasonable for her to believe she had to arrive at the jeweller and steal the keychains to avoid harm.
- it was reasonable for her to believe she had to steal the keychains within 30 minutes to avoid being killed, as her pleas against the act were unsuccessful and he stressed the urgency of receiving the keychains.
- she acted reasonably in speeding towards the jeweller as the drive is typically 50 minutes and she only had 30 minutes, so speeding was necessary to fulfil the condition and avoid being killed by Jake.

Sudden or extraordinary emergency 1.2.14.1.2

Section 322R of the *Crimes Act 1958* (Vic) sets out the defence of **sudden or extraordinary emergency**. In order for this defence to be made out, the accused must show:

- they reasonably believed that circumstances constituting an emergency existed.
- they reasonably believed the conduct was the only reasonable way to deal with the emergency.
- their conduct was a reasonable response to the emergency.

There is no clear definition of what constitutes an emergency, therefore the courts must look at each case's circumstances to determine whether the surrounding facts constituted an emergency. For example, in the case of *Russell-Smith v Illich* [2000] WASCA 247, the trial judge determined that a medical practitioner who was called in to provide an emergency epidural to a distressed patient and sped to the hospital to do so, could not rely on the defence of 'sudden or extraordinary emergency', as speeding more than 41 km/h over the speed limit was not required.

KEY TERM

Sudden or extraordinary emergency
a defence that can be raised where criminal activity occurred under circumstances involving a real risk of death or serious injury.

LEGAL CASE***Dudley v Ballantyne* (1998) 28 MVR 209****Facts**

One night in 1997, a 20-year-old girl, who the court referred to as D, parked her vehicle outside a pizza shop and entered, leaving three other passengers in the car. While she was in the shop, an altercation was occurring outside between a boy, who the court referred to as K, and a group of other people. As D exited the pizza shop, K kicked the side of her car. K then assaulted D's boyfriend, causing D to quickly drive off with all of her friends inside. K attached himself to the side of the vehicle as the car began to drive off, reaching through the window and holding on to a passenger's hair. After a few hundred metres of being attached to the car, K released himself, sustaining injuries in the process.

Legal issue

D was accused of dangerous driving for continuing to drive despite knowing a man was hanging on the side of her car. She argued the defence of sudden or extraordinary emergency applied, and the court had to determine whether the prosecution could reject this defence beyond reasonable doubt.

Decision

The court found the defence did apply as D was in a 'bizarre and shocking' situation in which she feared K and believed he could endanger both her life and her property. Given her young age and relative inexperience with driving, it was reasonable for her to believe that continuing to drive was necessary to avoid violence against her or another member of the car.

Significance

Although this case does not relate to culpable driving causing death, as K was not killed in the altercation, it shows what kind of situation can be regarded as a 'sudden or extraordinary emergency' when driving.

Automatism 1.2.14.1.3

KEY TERM

Automatism bodily movements that are not consciously initiated by the mind, such as sleepwalking or breathing.

LEGAL VOCABULARY

Acquitted when an accused is given the verdict of 'not guilty' and the criminal charge they were accused of is dropped.

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.

This defence may arise where a person's mental capacity is severely influenced by external factors, including where the accused had a concussion, was sleepwalking, or suffered an involuntary movement or spasm. However, 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 automatism, they will be **acquitted** of the crime.

Automatism is also applicable if the accused was experiencing delusions from their own mind when the events of their alleged crime occurred. An accused is considered in a state of automatism if they have:

- mental illnesses, such as schizophrenia
- brain injuries, tumours, and disorders
- dissociation and epilepsy.

HYPOTHETICAL SCENARIO

Swerving lanes

Hillary is driving her car when she suddenly became unconscious. Consequently, Hillary lost control of her motor vehicle and swerved into oncoming traffic. Hillary then collided 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 due to losing consciousness whilst driving.

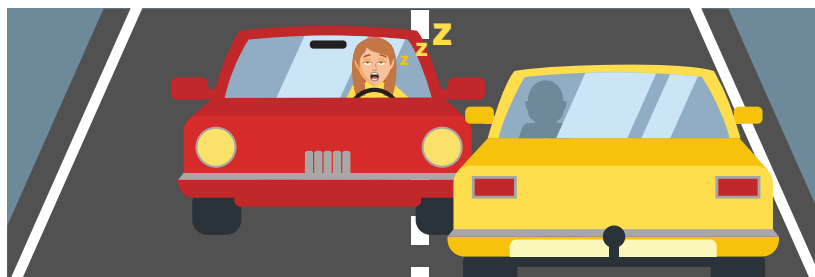


Figure 1 The defence of automatism can be raised if someone swerves across lanes and kills someone but was unconscious whilst doing so

WANT TO KNOW MORE?

From 1 July 2023 to 30 June 2024, the maximum fine for culpable driving causing death is 2,400 penalty units, which is worth \$461,544.00. The amount of money one penalty unit is worth is constantly changing. You can find out more about whether 2,400 penalty units is still worth this amount, or if the fine has increased or decreased, by searching 'Penalties and values' and clicking the webpage by the Department of Justice and Community Safety (2023).

LESSON LINKS

You will learn more about imprisonment and fines in **5B Types of sanctions**.

You will learn more about aggravating and mitigating factors in **5C Factors considered in sentencing**.

LEGISLATION

Sentencing Act 1991 (Vic)

Possible sanctions for culpable driving 1.2.14.2

Culpable driving causing death is one of the most serious offences that can occur in a motor vehicle in terms of its impact on the victim and society. The harsh maximum penalty that may be imposed for culpable driving causing death, 20 years imprisonment, reflects the severity of this offence. A fine may be imposed instead of, or in addition to, imprisonment, which can be worth a maximum of 2,400 penalty units.

In practice, all persons sentenced for culpable driving causing death in recent years have been imprisoned. The standard prison sentence for culpable driving causing death is currently eight years, as set out in s 318(1A) of the *Crimes Act 1958* (Vic). This standard sentence acts as a guide for the courts to determine an appropriate sanction for a serious crime. It reflects what may be a 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.

Pursuant to s 89 of the *Sentencing Act 1991* (Vic), a person sentenced for culpable driving causing death must also have their driver's licence cancelled by the court.

Lesson summary

In order for an accused to not be found guilty of culpable driving causing death, they must cast sufficient doubt upon at least one of the elements of culpable driving causing death. Alternatively, an accused will not be found guilty if they successfully raise one of the following defences:

- duress
- sudden or extraordinary emergency
- automatism.

If an offender is found guilty of culpable driving causing death they will have their driver's licence revoked and may be fined or imprisoned. Imprisonment is a more likely sanction for culpable driving causing death and can be a maximum sentence of 20 years.

3H Questions

Check your understanding

Question 1

Which of the following are possible defences for culpable driving causing death?

(Select all that apply)

- A. Self-defence
- B. Automatism
- C. Duress
- D. Sudden or extraordinary emergency

Question 2

Duress is the defence that an accused may raise if:

- A. their actions could be considered a reasonable response to a threat to harm that they believed would occur if they did not commit the offence, and their conduct would be the only reasonable way to avoid this harm.
- B. they reasonably believed circumstances constituting an emergency existed and their conduct was the only reasonable way to deal with the emergency.

Question 3

Needing to drive to work quickly because you are running late for your shift would be an example of a situation where an accused could raise the defence of sudden or extraordinary emergency if, during their rush to work, they struck and killed a pedestrian.

- A. True
- B. False

Question 4

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 causing death?

- A. Automatism
- B. Duress
- C. Sudden or extraordinary emergency

Question 5

Fill in the blank with **one** of the following terms:

sanctioned with

avoiding

If an accused is unable to successfully raise any defences and is found guilty of culpable driving causing death, they are likely to be [] a prison sentence.

Question 6

Brad has been convicted of culpable driving causing death after recklessly causing the death of Tina when driving at 150 km/h in an 80 km/h zone.

The maximum sanction Brad could face for his crime against Tina would be:

- A. a \$10,000 fine.
- B. 10 years imprisonment.
- C. 20 years imprisonment.
- D. life imprisonment.

Question 7

If the defences of automatism, duress, or sudden and extraordinary emergency are raised, the accused will have their sentence reduced to dangerous driving causing death. However, they will not fully be acquitted as they must be punished for causing someone's death.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Lucy was convicted of culpable driving causing death. She hit another vehicle after consuming a large quantity of alcohol and is awaiting her sentence.

Outline the maximum penalties Lucy could receive for culpable driving causing death.

Question 9

(2 MARKS)

Describe the defence to culpable driving causing death of sudden or extraordinary emergency.

Question 10

(3 MARKS)

Sarthak was in a deep slumber when he walked to his car, got into the driver's seat, and began driving at 11 pm. It was pitch black, Sarthak did not have his headlights on, and was driving at 100 km/h down a suburban side street. Siena was walking her dog and was struck by Sarthak, suffering injuries that later caused her death. Sarthak woke the next morning and had no recollection of what he had done. His lawyers assume all the elements of culpable driving causing death will be made out as Sarthak was negligent in his driving.

Explain automatism as a defence to culpable driving causing death that Sarthak may raise.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Alaya is a nurse at the Children's Hospital. One morning, her shift was commencing at 10 am. She lives 30 minutes from the hospital and therefore, must leave her house by 9:30 am to arrive by 10 am. Alaya's alarm failed, causing her to leave the house at 9:45 am, which would make her late for her immunisation appointments. She sped to the hospital, 30 km/h over the speed limit, running multiple red lights, and making a right turn that caused her to hit an elderly woman, killing her on impact. Her trial is set for three months time and her lawyers have warned her that all elements of the offence of culpable driving causing death will likely be successfully established by the prosecution. She is unsure what defences to raise and what punishment she will face if she is charged with culpable driving causing death.

Question 11

Tick the box to indicate whether each of the following statements are **true** or **false** about the possible defences Alaya could raise and the possible sanctions she may receive.

Statement	True	False
I. Alaya will most likely receive a fine if she is found guilty of culpable driving causing death, as sentencing statistics in Victoria show culpable driving causing death offenders are usually sanctioned with fines over imprisonment.	☐	☐
II. Alaya could raise the defence of sudden or extraordinary emergency by arguing she needed to arrive at the hospital on time to immunise the children. However, this defence may fail as immunisations are unlikely to be a sufficient 'emergency'.	☐	☐
III. Alaya will most likely be sanctioned with a term of imprisonment if she is found guilty of culpable driving causing death. This term of imprisonment could be a maximum of 20 years.	☐	☐
IV. The defence of automatism could apply here as it was 9:45 am so Alaya was likely tired and therefore, not in the best state of mind.	☐	☐

Question 12

(6 MARKS)

Justify **one** defence to culpable driving causing death that Alaya may raise and **one** sanction that she could face if this defence fails and she is found guilty.

Linking to previous learning

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Emmett is a truck driver in regional Victoria. For the past two years, he has dealt with significant insomnia and only has one hour of sleep each night. One night, Emmett is rostered to begin his shift at 10 pm. He has not slept for 30 hours and can sense that he is very fatigued. However, he still starts his shift in his fatigued state and begins driving his truck, forgetting to adjust his mirrors or turn his headlights on. When merging on the freeway, he veers into a cyclist causing his death on impact. The cyclist was not wearing a helmet. Emmett is extremely remorseful. He is worried, wondering whether he will be charged with culpable driving causing death and, if so, how he will be penalised.

Question 13

Which of the following statements are correct about the elements of culpable driving causing death that Emmett has or has not satisfied? **(Select all that apply)**

- A. Since the cyclist was not wearing a helmet, Emmett will not be found guilty of culpable driving causing death as the cyclist was also at fault for not protecting their head.
- B. Since Emmett acted negligently, by driving when he knew he was highly fatigued and forgetting to adjust his mirrors or turn his headlights on when it was nighttime, the mens rea requirement for culpable driving causing death will likely be made out.
- C. Since Emmett was only fatigued, but not under the influence of drugs or alcohol, it is likely the high threshold for negligence would not be met as it was a mere error on his behalf to drive when fatigued, not adjust his mirrors, and not turn his headlights on.
- D. The chain of causation is unlikely to be broken by the cyclist's lack of a helmet, as Emmett's actions, of veering into the cyclist, are still considered the 'substantial and operating cause' of the cyclist's death.

Question 14

(8 MARKS)

- a. Assume **two** of the elements of culpable driving causing death – 'the accused was driving a motor vehicle' and 'death' have been proven in Emmett's case.

Would Emmett likely be found guilty of culpable driving causing death? Justify your answer by referring to **two** other elements of culpable driving causing death.

5 MARKS

- b. Identify and explain an appropriate sanction for Emmett if he is found guilty of culpable driving causing death.

3 MARKS

31 Culpable driving – trends and impact

STUDY DESIGN DOT POINT

- two criminal offences and for each offence:
 - the elements of the offence
 - possible defences
 - possible sanctions
 - trends and statistics in relation to the offence in Victoria and in one other Australian jurisdiction
 - the possible impact of the offence on individuals and society.

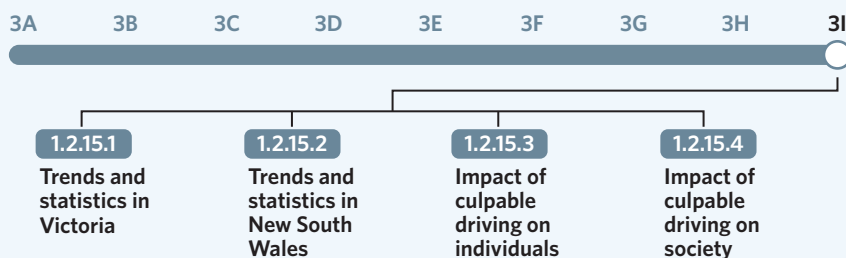


Image: Photolris2021/Shutterstock.com

'If you drink, then drive, you're a bloody idiot.'
—The Transport Accident Commission (2013)

Drink driving is condemned in Australian society for valid reasons. Around one in five drivers killed on the roads, each year, have a Blood Alcohol Concentration (BAC) over the legal limit of 0.05. To drink and drive is to risk the lives of you, your passengers, pedestrians, and everyone else on the roads.

Lesson introduction

Culpable driving causing death is a serious offence in which it is highly likely an accused will receive a custodial sentence if found guilty. As with any road accident, especially one involving death, the effects on society are damaging and can cause trauma, anxiety, and other negative outcomes for the wider community, alongside the victim's family and the offender.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to death.

Trends and statistics in Victoria 1.2.15.1

Fortunately, Victoria has the second lowest rate of road fatalities across Australian states and territories. In Victoria, from May 2019 to 2023, 3.66 people died on the roads per 100,000 people annually (Department of Infrastructure, Transport Regional Development, Communications and the Arts, 2023). The ACT had the lowest proportion of deaths at 2.08 people per 100,000 during this same period, whilst the Northern Territory had the highest proportion, at 14.44 per 100,000 in one year. In Victoria, from 2015 to 2020, 66 people were found guilty of culpable driving causing death (Sentencing Advisory Council, 2021).

LESSON LINK

You learnt about culpable driving causing death in **3G Culpable driving – elements**.

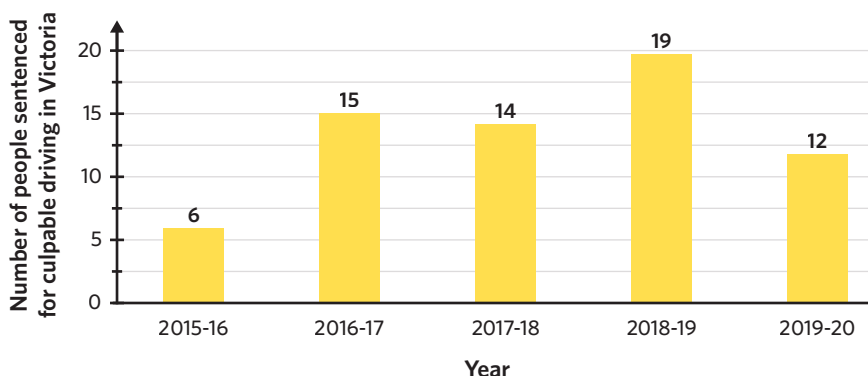


Figure 1 The number of people sentenced for culpable driving causing death from 2015–2020 in Victoria

Of these 66 offenders who were sentenced for culpable driving causing death from 2015-2020, only one offender did not receive an immediate prison sentence and instead received a different sanction (Sentencing Advisory Council, 2021). This means that 98.5% of individuals found guilty of culpable driving causing death received a term of imprisonment, demonstrating the severity of the crime. Within this five-year period, most offenders received an imprisonment term of between eight to nine years.

Trends and statistics of the offence of culpable driving causing death alone are typically not reported. Rather, driving causing death offences; culpable driving and dangerous driving causing death, are reported on together. The number of driving causing death offences reported and recorded each year for the past eight years in Victoria has remained relatively consistent according to the Crime Statistics Agency (2023). There are more driving causing death offences recorded each year than the number of people charged with culpable driving, as the mens rea of culpable driving is often difficult to prove for many offenders, or they raise defences and are acquitted.

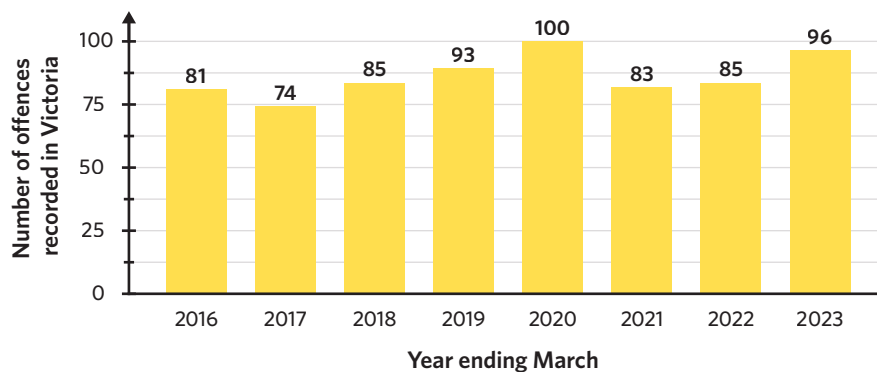


Figure 2 Number of driving causing death incidents recorded each year from 2016 to 2023 in Victoria (Crime Statistics Agency, 2023)

Trends and statistics in New South Wales 1.2.15.2

In New South Wales (NSW), there is no offence known as culpable driving causing death. In 1994, the offence of culpable driving causing death was replaced with other dangerous driving offences under the *Crimes Act 1900* (NSW). The offences relating to death caused by an accused's driving include:

- dangerous driving occasioning death
- aggravated dangerous driving occasioning death.

Dangerous driving occasioning death carries a maximum penalty of 10 years imprisonment, accompanied by an automatic licence disqualification of three years. The maximum penalty for aggravated dangerous driving occasioning death, which requires the offence to be committed in circumstances of aggravation, such as where the accused was excessively speeding, drunk, under the influence of drugs, or driving to escape police pursuit, is 14 years. In 2022, 59 people were charged with the offence of driving causing death in NSW (NSW Bureau of Crime Statistics and Research, n.d.).

In NSW, a person who is driving and kills someone can also be charged with involuntary manslaughter, a more severe offence that carries a heavier maximum penalty. For manslaughter to be made out, it can either be due to criminal negligence or by way of an unlawful and dangerous act. These are both equally serious, and the use of a motor vehicle causing someone's death can satisfy both. The maximum penalty for manslaughter is 25 years imprisonment.

LEGISLATION

Crimes Act 1900 (NSW)

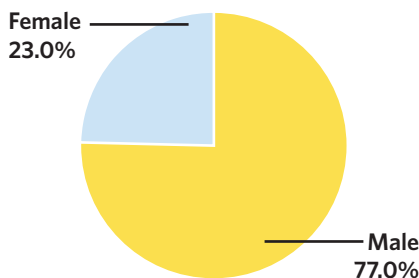


Figure 3 Proportion of males to females charged with dangerous driving causing death in NSW from 2018 to 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

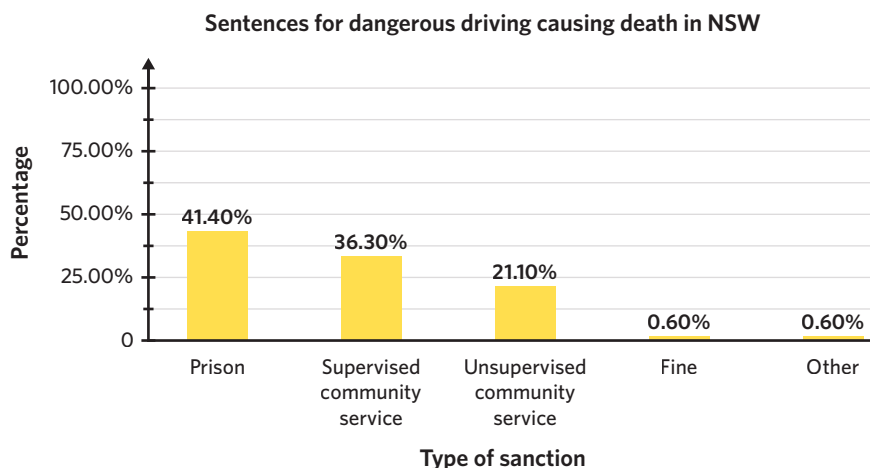


Figure 4 Sentences received by those charged with dangerous driving causing death in NSW from 2018 to 2022 (NSW Bureau of Crime Statistics and Research, n.d.)

The most common prison sentence handed down to those charged with dangerous driving causing death in NSW is a one to two-year sentence.

Impact of culpable driving on individuals 1.2.15.3

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.

On the other hand, culpable driving causing death can often be devastating for an offender, who is burdened with the knowledge that, by reason of their own extreme carelessness, an innocent person has died.

LESSON LINK

You will learn more about victim impact statements in **5C Factors considered in sentencing**.

Table 1 Impact of culpable driving causing death on a victim's family and the offender

Type of impact	Victims' family and friends	Offender
Psychological	- Shock, disbelief, and denial at the fact their loved one is no longer present. - Friends and family may experience panic and anxiety, potentially fearing the roads after the death of their loved ones. - Anger and agitation at the fact an innocent life was taken away. - There is a risk of developing mental health issues, such as depression and post-traumatic stress disorder (PTSD). - There may be negative outcomes associated with court trials, such as the stress of giving a victim impact statement (VIS) if required.	- The offender may experience regret, guilt, and remorse after having killed the victim. - There is a risk of developing mental health issues, such as depression or PTSD. - Imprisonment and loss of liberty may be incurred as a consequence of the offence. This can have a negative impact on an offender's mental health. - The offender would have to bear the punishment of being in custody if sentenced to prison for culpable driving causing death, which they likely would be.
Social	Research has shown significant, detrimental effects of culpable driving on the maintenance of stable, family relationships. The high stress associated with losing a loved one can cause discomfort, strain, and distancing in relationships. This potential loss, or at least weakening of, relationships can exacerbate feelings of isolation.	- Isolation may be experienced. - There may be negative effects on the offender's personal life and relationships.
Economic	- If the victim was the main financial contributor to the family, the family may experience significant financial losses as a result of the victim's death. - Bereavement costs may be incurred, including funeral expenses and time off work.	An offender, sentenced to prison, would likely experience a loss of earnings as they are unable to work whilst imprisoned.

REAL WORLD EXAMPLE



Image: Virrage Images/Shutterstock.com

Figure 5 A man found guilty of culpable driving expressed remorse for his actions

Guilty but remorseful

In 2023, a man pleaded guilty to culpable driving causing death in the ACT Supreme Court. In 2021, the offender had been driving a truck when he took his eyes off the road for an estimated period of 11 seconds. As a result, he went through a red light, hitting the car of the victim, who later died at the scene.

The situation was immediately distressing for the offender, with police reporting that he had apologised immediately for what he had just done. The offender was quoted saying 'I just want to make it better ... a guy is dead because of me. I'm so sorry'. Although, as of the time of his guilty plea in 2023, he has not yet been sentenced, he has already felt the devastating consequence of his carelessness and has shown great remorse and sadness for taking another's life.

Adapted from 'Queanbeyan truck driver pleads guilty over fatal Barton Highway Crash, says beeping in cabin caused him to run red light' (Byrne, 2023)

Impact of culpable driving on society 1.2.15.4

The social impacts of culpable driving causing death can also be devastating. For example, according to statistics published by the National Road Safety Strategy (Australian Transport Council, 2011), the annual costs of road crashes generally throughout Australia are estimated to be at least \$27 billion. However, outside of the purely economic costs involved, there are several other societal impacts of culpable driving.

Table 2 Impact of culpable driving causing death on society

Type of impact	Explanation
Social	Following incidents of driving causing death, the community may rally together to protest for modifications to the law or to mourn the loss of a valued community member. In 2023, for example, following the fatal road accident in Yarroweyah that caused the death of five people, tributes were held in
Economic	- There may be a need for greater public health spending to enable more funds to be dedicated to rehabilitation and counselling for mental health related injuries endured by the offender, the victim's friends and family, and witnesses of the crime. Large sums of government funding may also be required for emergency medical services that are provided to the victim at the scene of the crime. - Greater public expenses could be required for road safety improvements, repairs, and education. - Culpable driving cases add to the caseload of already congested courts. - Damage to public and private property can occur as a result of crashes.
Legal	Law reform may occur as a result of driving causing death cases. For example, in 2023, the <i>Road Safety Act 1986</i> (Vic) was amended to incorporate various new provisions regarding the use of portable devices when driving. Section 304J of the Act, for example, was amended to make it a criminal offence for a driver of a motor vehicle to touch a portable device while the vehicle is moving, or stationary but not parked.
Political	Community distrust in legal systems and road safety initiatives may increase due to societal fear that, if fatal crashes are still occurring frequently, the government is not doing enough to prevent these.

Continues →

LEGAL VOCABULARY

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness.

LEGISLATION

Road Safety Act 1986 (Vic)

LESSON LINK

You will learn more about possible law reform in **11A The rights of young people**.

Table 2 Continued

Type of impact	Explanation
Political	Continuing instances of deaths on the roads may prompt the government to pass harsher laws in an effort to reduce the frequency of murder. For example, in April 2021, driving rules were reformed to mandate that drivers travelling at 60 km/h or less have to leave at least one metre of space between their vehicle and a cyclist when passing the cyclist on a road (VicRoads, 2022). The length of the gap the driver must leave between them and the cyclist increases if a driver is exceeding speeds of 60 km/h.
Health	- Witnesses of the crime may experience trauma and anxiety, as they may now fear the roads. - There may be widespread anguish and unrest.

WANT TO KNOW MORE?

The driving laws and regulations in Victoria are constantly evolving based on new technologies that are in use. For example, regulations about the operation of portable devices when using an electric scooter have been added to the *Road Safety Act 1986* (Vic) considering their prominence in Melbourne currently. You can find out more about recent road rule changes in Victoria by searching 'Recent changes to road rules' and clicking the webpage (VicRoads, 2023).

REAL WORLD EXAMPLE

Rallying for road repairs

Repeat instances of culpable driving causing death or a sustained level of road injuries can prompt public spending to increase road safety and mitigate further harm.

In March 2023, the Victorian Government completed an eight-year project on Sydney Road, Brunswick. This project aimed to improve safety for cyclists, pedestrians, motorists, and trams along this busy inner-city corridor by upgrading five key intersections. At each intersection, enhancements were made to road markings, traffic light cycles, and signage.

The project was instigated in 2015 by the death of a cyclist on Sydney Road who was hit by a car door and then a truck whilst riding with his fiancée. The incident sparked a cyclist rally along Sydney Road, attended by over 1000 people, calling for safer conditions.

Adapted from 'More than 1,000 cyclists ride along Sydney Road in memory of Alberto Paulon' (ABC News, 2015) and 'Government Road Safety Program delivers upgrades in Melbourne's North' (Oates, 2023)



Image: Adam Calaitzis/Shutterstock.com

Figure 6 A road in Brunswick was repaired after the death of a cyclist years prior

Lesson summary

Culpable driving causing death imparts severe impacts on:

- the victim
- the victim's family and friends
- the offender
- society.

Due to the severity of this offence, the trends in recent years demonstrate that the majority of people charged with culpable driving causing death are given a prison sentence to punish their behaviour. Although this trend differs slightly in New South Wales, it is clear both states condemn the criminal act as it perpetuates great harm across society as a whole.

31 Questions

Check your understanding

Question 1

Considering culpable driving causing death only requires an offender to injure a victim with a motor vehicle, the sanction the offender receives is typically minimal, such as a fine.

- A. True
- B. False

Question 2

It is not common for offenders to be imprisoned for culpable driving causing death in Victoria.

- A. True
- B. False

Question 3

In New South Wales, if a person is driving a motor vehicle and kills someone, they may be charged under the *Crimes Act 1900* (NSW) with:

(Select all that apply)

- A. culpable driving causing death.
- B. dangerous driving occasioning death.
- C. aggravated dangerous driving occasioning death.
- D. manslaughter.

Question 4

Fill in the blank with **one** of the following terms:

In New South Wales, the majority of offenders charged with culpable driving causing death are .

Question 5

Which of the following is **not** a common impact that an offender who committed culpable driving causing death may face?

- A. Death
- B. Anxiety
- C. Financial disadvantage
- D. The stress of a court hearing

Question 6

The most likely impact faced by society as a result of culpable driving causing death is:

- A. trauma and anxiety for those who witnessed the crime, as they may now fear the roads.
- B. fewer car sales as more people will choose to use public transport instead.

Question 7

Every state in Australia has the same culpable driving causing death laws and sanctions applied to offenders.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(1 MARK)

Identify **one** sentencing trend for culpable driving causing death in **one** Australian jurisdiction other than Victoria.

Question 9

(4 MARKS)

Describe **two** trends related to culpable driving causing death in Victoria.

Question 10

(4 MARKS)

Outline **two** impacts of culpable driving causing death on the family and friends of the victim of the crime.

Question 11

(3 MARKS)

Hyun-Ae was extremely fatigued following a week-long, end-of-school celebration in Torquay. As she was driving home from her week away, she hit Iris after running a red light, failing to register it was red due to her fatigue. Iris immediately died. Hyun-Ae was found guilty of culpable driving causing death and sentenced to eight years in prison. She expressed in court to Iris' family that she will 'never be able to express how truly sorry' she is.

Explain the impact of culpable driving causing death on Hyun-Ae.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Cora was struck and killed by Leon while crossing a busy main road. Cora was using the signalised pedestrian crossing but as Leon was under the influence of narcotics, he sped through the red light. The accident occurred during peak hour in the evening, so there were many local eyewitnesses. Cora was a mother and a surgeon, accounting for around 70% of her household's income prior to her death. Leon has been sentenced in the County Court of Victoria to 10 years in prison.

Question 12

Which of the following statements are correct about the impacts of Leon's offence on society and individuals?

(Select all that apply)

- A. Cora's family will be impacted both financially and emotionally by Cora's death as she was the primary income provider for her family.
- B. Since Leon's prison sentence is only 10 years, which is not as significant as life imprisonment, for example, he will not suffer any consequences from being in prison.
- C. Considering the crash occurred in peak hour, several witnesses may have post-traumatic stress disorder (PTSD) or anxiety from witnessing the crime.
- D. Leon may suffer as a result of imprisonment as it may detrimentally impact his personal relationships and social life.
- E. Only Cora, Leon, and the witnesses of the crime will be impacted by the offence.

Question 13

(6 MARKS)

Analyse the impact that Leon's crime will have on individuals and society.

Linking to previous learning

Question 14

(3 MARKS)

Compare the sentencing trends in Victoria for culpable driving causing death and **one** other criminal offence.

UNIT 1 AOS 3

Sanctions

The criminal justice system determines the guilt of an accused, and imposes sanctions on offenders. In this area of study, students investigate key concepts in the determination of a criminal case, including the institutions that enforce criminal law, the purposes and types of sanctions, and alternative approaches to sentencing such as the Drug Court, Koori Courts and diversion programs. Students compare approaches to sentencing in Victoria to one other Australian jurisdiction. Through an investigation of criminal cases from the past four years, students apply their knowledge to discuss the effectiveness of sanctions and the ability of the Victorian criminal justice system to achieve the principles of justice.

Outcome 3

On completion of this unit the student should be able to explain the key concepts in the determination of a criminal case, discuss the principles of justice in relation to experiences of the criminal justice system, and discuss the ability of sanctions to achieve their purposes.

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KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about criminal law and recent criminal cases
- describe the institutions that enforce criminal law
- explain the role of the Victorian courts and juries in criminal cases
- compare approaches to sentencing in Victoria to those in one other Australian jurisdiction
- discuss the principles of justice in relation to experiences of the criminal justice system
- discuss the ability of sanctions to achieve their purposes
- discuss alternative approaches to sentencing
- synthesise and apply legal information to actual and/or hypothetical scenarios.

4

CHAPTER 4

The Victorian criminal justice system

LESSONS

- 4A** The principles of justice in the criminal justice system
- 4B** Institutions that enforce criminal law
- 4C** Institutional powers and individual rights
- 4D** Criminal jurisdictions of Victorian courts
- 4E** The jury in a criminal trial
- 4F** First Nations peoples and the criminal justice system
- 4G** Difficulties face by some groups in the criminal justice system

KEY KNOWLEDGE

The principles of justice and experiences of the Victorian criminal justice system

- 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 difficulties faced by different groups in the criminal justice system, such as First Nations people,
- young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities.

4A The principles of justice in the criminal justice system

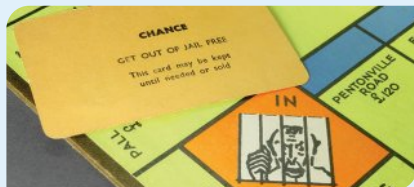
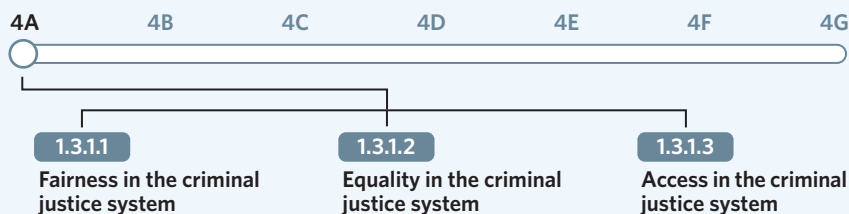


Image: SamJonah/Shutterstock.com

You land on the 'chance' block in Monopoly and pick up a 'get out of jail free' card. Now, the first time you go to jail, you face no consequences as you can be immediately freed from prison, right back into the game. Imagine one in five people were handed a 'get out of jail free card' when they were born. Would this be considered fair or equal? Would all people be able to access the same advantages before the law?

STUDY DESIGN DOT POINT

- the principles of justice: fairness, equality and access



Lesson introduction

The principles of justice are the foundation of the Victorian legal system. Elements of the Victorian justice system can be assessed in terms of whether they effectively achieve the principles of justice. Whilst each principle of justice has its own distinct characteristics, it is important to recognise the relationships between them. Often times, the achievement of one principle of justice will contribute to the achievement of another

Fairness in the criminal justice system 1.3.1.1

The principle of **fairness** is essential in the criminal justice system as each accused person and victim is entitled to experience just processes and an impartial hearing. In Victoria's criminal justice system, this is achieved through a variety of legal principles and procedures.

Table 1 Legal principles and procedures that achieve fairness

Legal principle or procedure	How it contributes to the achievement of fairness
The presumption of innocence	This guarantees that a person accused of a crime does not have to prove their innocence. Rather, the prosecution must prove the accused is guilty beyond reasonable doubt.
The burden of proof lies with the prosecution	Given the prosecution is pursuing the case against the accused, the onus is on them to prove the facts and claims against the accused. It is not the responsibility of the accused to prove their innocence, as this would be unfair.
A high standard of proof in criminal cases	The standard of proof is high in criminal cases as the prosecution must prove the accused is guilty beyond reasonable doubt. This ensures an accused is only found guilty when the magistrate, judge, or jury can determine, based on the evidence, that there is no reasonable or logical doubt that the accused committed the crime.

Continues →

KEY TERM

Fairness the principle that all people can participate in the justice system and its processes should be impartial and open.

USEFUL TIP

In your responses, avoid using the word 'fair' to define 'fairness'. Instead, try using words such as 'impartial' or 'just'.

Table 1 Continued

Legal principle or procedure	How it contributes to the achievement of fairness
Hearings are generally publicly accessible	The public nature of criminal trials ensures the presentation of facts is open and accessible to all members of the community. This provides transparency and accountability for the legal decisions made in the court system.
The right to legal representation	As the law is highly complex, all accused persons have the right to access legal representation to present their case in the best light possible.
An accused person has the opportunity to present their case	An accused person has the right to defend a criminal charge against them by disproving the prosecution's case and having the opportunity to present their own evidence and witnesses if they choose.
The resolution of cases with minimal delay	The criminal justice system strives to minimise delays to reduce stress and anxiety for victims and their families, witnesses, and accused persons awaiting trial. As delays may impact the reliability of evidence, due to lost or forgotten facts, minimising delays can ensure a just outcome.
An independent judge and jury	The judge and jury must be impartial and unbiased, basing their decisions solely on the facts and evidence presented.
The characteristics of an offender and the circumstances surrounding the crime are considered during sentencing	When determining an appropriate and fair sentence for the offender, the court must consider certain factors. For example: - a young, first-time offender who has shown remorse should be treated differently to a middle-aged criminal with several past convictions. - the degree to which a victim was impacted by a crime should be considered during sentencing, as the greater the impact of the crime, the more severe the sentence received by the guilty person should be.

LESSON LINKS

You learnt about the presumption of innocence in **2B The presumption of innocence**.

You learnt about the burden of proof and the standard of proof in **2C Key concepts of criminal law**.

You will learn more about the jury in a criminal trial in **4E The jury in a criminal trial**.

DEEP DIVE

Do judge-alone trials compromise the principle of fairness?

During the pandemic, the *Criminal Procedure Act 2009* (Vic) provided relief to the overburdened and under-resourced criminal justice system by allowing criminal trials to be heard by a judge alone. For an accused to have their hearing conducted by a judge alone, they had to:

- consent to having their offence tried without a jury
- confirm they had obtained legal advice on whether to give consent for trial without a jury
- provide an accurate, up-to-date estimate for when their trial by judge alone would occur.

Victoria's first judge-only criminal trial commenced in July 2020, when two co-accused persons had their cases decided by County Court Judge, Liz Gaynor. Judge Gaynor was the first to pass a verdict instead of 12 jurors. However, though accused people can apply for judge-alone trials, lawyers have a strong preference for jury trials as they promote impartiality, therefore, there was a limited number of accused persons opting for judge-only trials during the pandemic.

The principle of fairness was challenged with the rise of judge-only trials. This is because while a judge is legally educated and experienced, juries represent a more diverse cross-section of the community, and the decision-making process and verdict is shared between 12 people with diverse perspectives and lived experiences.

Adapted from 'Victoria to hold first judge only trial, but lawyers favour jury system' (Cooper & Estcourt, 2020)

LEGISLATION

Criminal Procedure Act 2009 (Vic)

WANT TO KNOW MORE?

One aspect of the criminal justice system that upholds fairness is the public nature of trials. Did you know most court cases are heard in an 'open court', meaning anyone can attend the hearing? You can find out more about upcoming court cases by searching 'Supreme Court of Victoria, Daily hearing list' and clicking the webpage (Supreme Court of Victoria, 2023).

Equality in the criminal justice system 1.3.1.2

The principle of **equality** ensures all people are treated the same in the criminal justice system unless doing so creates disparity or disadvantage, in which case measures or mechanisms should be in place to avoid this. While equality is often associated with equal treatment for all people, it is more accurately described as promoting an equal result for everyone involved in the criminal justice system. Therefore, achieving equality may involve treating individuals differently through the use of equitable policies, such as the arrangement of a translator for an accused who does not speak English. The ability to use a translator is not a right afforded to all accused people, however, it is a mechanism that reduces the likelihood of the accused being disadvantaged before the law due to not understanding court processes and procedures.

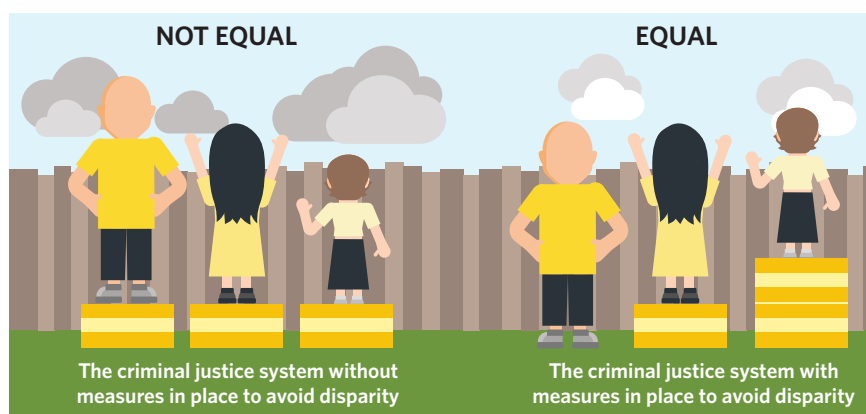


Figure 1 The principle of equality

Table 2 Legal principles and procedures that achieve equality

Legal principle or procedure	How it contributes to the achievement of equality
The availability of translators	Court processes can be confusing for an accused, particularly for individuals who are culturally and linguistically diverse. Therefore, each court in the Victorian court hierarchy can arrange for an interpreter to be present during court proceedings. The courts will pay for the interpreter and this can reduce the disadvantages and language barriers faced by certain accused individuals as they can better participate in the court process.
The right for all victims of crime to remain informed about proceedings and contribute to the sentencing process	All victims of crime are informed about criminal proceedings against the accused and provided with the opportunity to be involved in court proceedings, including through the provision of a victim impact statement (VIS) .
The rule of law	All members of the community are subject to the standards of behaviour set by criminal law regardless of personal characteristics, such as age, gender, wealth, language background, ethnicity, or religion. This is known as the rule of law . For example, those in powerful positions in society, such as members of parliament or law enforcement, are not entitled to preferential treatment by the courts as a victim of a crime or an accused person.
An independent judge and jury	The judge and jury must strive to be impartial and unbiased, basing their decisions solely on the facts of the case and not the characteristics of the victim or the accused. The justice system aims to ensure a jury is impartial by preventing certain people from being jurors in particular cases. For example, those who are personally connected to the case, such as a friend of the accused, cannot be a juror in the case.

KEY TERM

Equality the principle that all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage.

LEGAL VOCABULARY

Victim impact statement (VIS)

a written or verbal statement made to a court about the effect of an offence upon the victim.

Rule of law the principle that the law applies to everyone equally regardless of status.

LESSON LINKS

You will learn more about culturally and linguistically diverse people in **4G Difficulties faced by some groups in the criminal justice system**.

You will learn more about victim impact statements (VIS) in **5C Factors considered in sentencing**.

USEFUL TIP

In your responses, avoid using the word 'equal' to define 'equality'. Instead, try using words such as 'the same' or 'equivalent'.

DEEP DIVE

The Children's Court

The Children's Court is a specialised court that handles cases related to the wellbeing and criminal behaviour of children and young individuals. By being dedicated solely to this purpose, the court can effectively address the specific needs and interests of children, young people, and their families. This commitment influences how the court delivers its judicial processes and support services, whilst also ensuring the physical environment of the courtrooms is accommodating for youth offenders. Furthermore, the court specialises in sentencing young offenders and does so in a manner that balances the need for punishment and the desire to rehabilitate adolescents and break the cycle of offending.

Therefore, the Children's Court promotes equality as its processes and procedures are adapted to consider and serve the needs of minor offenders, and ensure that such offenders are not disadvantaged within the criminal justice system because of their age or circumstances.

Adapted from 'Children's Court of Victoria' (Children's Court of Victoria, 2021)



Image: Studio Romantic/Shutterstock.com

Figure 2 A specialty court for children is an example of a measure to address the disadvantage that would exist if children were treated the same as adults in the criminal justice system.

Access in the criminal justice system 1.3.1.3

The principle of **access** ensures all people can engage with the processes of the justice system with few barriers. This principle is essential in the criminal justice system as it promotes an accused's ability to understand their legal rights and the various processes involved in their case. In Victoria's criminal justice system, access is achieved through a variety of legal principles and procedures.



Table 3 Legal principles and procedures that achieve access

Legal principle or procedure	How it contributes to the achievement of access
The right to legal representation	As the law is highly complex, all accused persons have the right to access legal representation to better understand court processes and procedures.
Resolution of cases with minimal delay	Minimising delays reduces stress and anxiety for victims and their families, witnesses, and accused persons awaiting trial. As delays may impact the reliability of evidence, due to lost or forgotten facts, minimising delays ensures access to a just resolution of the case.
The right for all victims of crime to remain informed about proceedings and contribute to the sentencing process	All victims of crime can engage with the justice system as they are provided with the opportunity to be involved in court proceedings, such as through providing a victim impact statement, and have the right to access information relevant to their case.
The availability of legal aid	Institutions, such as Victoria Legal Aid (VLA) , provide free legal assistance to those in the community who need it most. This enables these individuals to better understand legal processes and procedures and, in turn, access justice.

Continues →

KEY TERM

Access the principle that all people should be able to engage with the justice system and its processes on an informed basis.

LEGAL VOCABULARY

Victoria Legal Aid (VLA) a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

Table 3 Continued

Legal principle or procedure	How it contributes to the achievement of access
Hearings are generally publicly accessible	The public nature of criminal trials ensures the presentation of facts is accessible to all members of the community.
The availability of translators	Court processes can be confusing for an accused, particularly if English is not their first language. Therefore, each court in the Victorian court hierarchy can arrange an interpreter where necessary. The court bears the cost of paying for interpreters, as opposed to an accused. Consequently, financial difficulties do not act as a barrier that prevents an accused from understanding court proceedings.
The right to a trial by jury for all serious criminal offences	The right to a jury trial allows those enrolled on the electoral roll to engage with the justice system by determining whether an accused charged with a serious criminal offence is guilty or not.

LEGAL VOCABULARY

Parole the early release of a prisoner, after their minimum term of imprisonment is served, which is subject to supervision and certain conditions.

REAL WORLD EXAMPLE

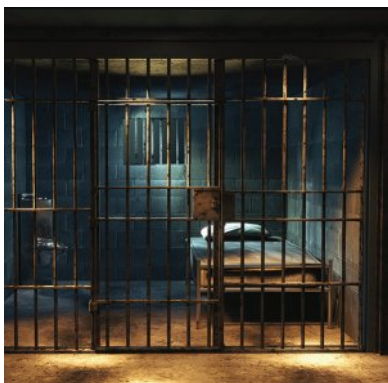


Image: Fer Gregory/Shutterstock.com

Figure 3 The Adult Parole Board determines whether to release offenders from prison if they apply for parole

Denyer denied discharge from prison

In Victoria, if an offender applies for **parole** and the victim of the crime is registered on the Victims Register they will be invited to have their say as to whether the accused should be released from prison. In a private submission, the victim or their family can write about how they may be affected if the offender is released on parole. The Adult Parole Board then considers this submission when determining whether to accept the accused's parole application.

In 2023, Victoria's parole board rejected Melbourne serial killer, Paul Denyer's, application to be released from prison, having already served 30 years for the murders of three women in 1993. The grieving families of the victims were made aware of Denyer's request for parole, pleading against his release. The partner of Natalie Russell, one of the victims of Denyer's murders, stated that he believes Denyer 'cannot be rehabilitated'. By allowing the victims' families to have their say on whether to grant the murderer freedom from his life sentence, access to justice was upheld for the victims' families as they were able to ensure Denyer continued to face the consequences of his actions.

Adapted from 'Frankston serial killer Paul Denyer denied parole three decades after murders' (ABC News, 2023)

USEFUL TIP

It is important to use the correct language when answering questions about the principles of justice. In Lesson 8A, you will learn about the principles of justice in the civil justice system. Therefore, you will need to analyse these principles using civil legal terminology, such as plaintiff and defendant, or liable and not liable. However, when answering questions relating to the principles of justice and criminal law, you will need to use different terms, such as accused and victim, or guilty and not guilty.

DEEP DIVE

Courts are drowning in cases

In the 2021–2022 financial year, 83,000 criminal cases were waiting to be heard by magistrates across Victoria (Productivity Commission, 2023). Consequently, the Victorian Government allocated one additional magistrate to the Victorian Magistrates' Court in the 2022–2023 budget. In 2022, the Premier of Victoria announced that \$300 million had been dedicated to improving the court systems in the 2022–2023 Victorian Budget. Of this, \$41 million was allocated to helping 'clear case backlogs' (Andrews, 2022). Recent statistics demonstrate many criminal cases have taken more than 12 months to be heard, a backlog that was primarily created by the suspension of jury trials during Victoria's pandemic lockdowns. This increased funding demonstrates the government's commitment to achieving the principle of access in the Victorian justice system by reducing delays so both accused persons and victims can access just, timely resolutions to their cases.

Adapted from 'Victorian courts plagued by delays as tens of thousands of criminal cases wait to be heard' (Rollason, 2023) and 'Report on Government Services 2023' (Productivity Commission, 2023)

Lesson summary

Overall, the principles of justice are an essential aspect of the Victorian criminal justice system:

- Fairness requires processes to be impartial and open, therefore enabling a just outcome to a criminal case.
- Equality requires all individuals engaging with the justice system to be treated the same, regardless of personal characteristics, such as gender or religion. However, if the same treatment creates disparity or disadvantage, adequate measures must be taken to prevent this.
- Access requires all individuals to be able to engage with the justice system with few barriers.

There are a range of legal processes and procedures, within the Victorian criminal justice system, that are designed to uphold these principles. Therefore, it is essential to recognise the interconnected nature of the principles of justice in Victoria's criminal justice system. All three principles can be achieved through a variety of legal principles and procedures.



Figure 4 The three principles of justice are all interrelated

4A Questions

Check your understanding

Question 1

The three principles of justice are:

- fairness, equity, and access.
- fairness, equality, and access.
- participation, access, and fairness.

Question 2

Which of the following is **not** correct about the principles and procedures that promote the achievement of fairness in the criminal justice system?

- An accused person has the right to access legal representation.
- An accused person is presumed guilty until they prove their innocence.
- The judge and jury must be impartial and unbiased, basing their decisions solely on the facts of the case.

Question 3

Fairness can be best defined as the principle that:

- all people can participate in the justice system and its processes should be impartial and open.
- those who are young should be favoured as they have greater chances of being rehabilitated.

Question 4

Fill in the blank with **one** of the following terms:

access

equality

The principle of [] is upheld when all people are able to engage with the justice system without disparity or disadvantage.

Question 5

For equality to be achieved:

- A. no one should have access to a translator, as if some accused people are provided with translator services, whilst other accused people who speak English fluently are not, all accused people are not being provided with the same tools.
- B. accused persons, who are culturally and linguistically diverse and, therefore, require a translator, should be provided with one by the court, whilst accused people who do not require a translator should not be provided with one as this is unnecessary.

Question 6

By understanding their legal rights and the processes involved in their case, an accused person can be provided with greater access to the justice system.

- A. True
- B. False

Question 7

Which of the following statements are correct about characteristics of the criminal justice system that promote access to justice? **(Select all that apply)**

- A. The public nature of criminal trials ensures the presentation of facts is accessible to all members of the community.
- B. Institutions, such as Victoria Legal Aid (VLA), provide free legal assistance to those in the community who need it most.
- C. An accused is able to pay for a translator to help them understand court proceedings and evidence being shared if required.
- D. As the law is highly complex, all accused persons have a right to legal representation to better understand court processes and procedures.

Question 8

The principles of justice are inherently linked as fairness is achieved when individuals are granted access to resources that enable them to attain equal outcomes.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Describe the principle of fairness.

Question 10

(3 MARKS)

Identify **one** principle of justice and outline **one** example of its application in the Victorian criminal justice system.

Question 11

(4 MARKS)

Campbell was pushed overboard by a castmate when on a cruise and suffered serious injuries as a consequence. His case was heard one month after he initially sustained the injuries. He provided a victim impact statement (VIS), expressing the profound impacts of the violent crime on his life. The jury found the offender guilty, and the judge sentenced Campbell's offender to a 10-year term of imprisonment after conducting an unbiased assessment of the facts.

Outline **two** principles of justice that have been achieved in Campbell's case.

Question 12

(4 MARKS)

'Equality is about treating everyone in exactly the same way. Even if you are disadvantaged, the law applies equally.'

To what extent do you agree with this statement in relation to criminal law?

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Theo has been accused of armed robbery. Throughout the trial, he was not informed of the proceedings and his case experienced significant delays due to the court's large backlog of cases, severely increasing feelings of stress and anxiety for Theo who already has unstable employment. He is now preparing for his criminal trial, with the help of a representative from Victoria Legal Aid (VLA), a service he qualified for due to his low socioeconomic status. A lawyer from VLA will represent him during his trial.

Question 13

Tick the box to indicate whether each of the following statements demonstrates whether the principles of justice have been **achieved** or **not achieved** for Theo.

Statement	Achieved	Not achieved
I. Delays to Theo's trial are increasing his stress as he worries that witnesses will forget what happened and evidence will be lost.	☐	☐
II. Victoria Legal Aid can assist Theo in presenting his case as he is gaining legal support for minimal, or no, expense.	☐	☐
III. Theo has not received information about the proceedings.	☐	☐
IV. The Victoria Legal Aid lawyer will represent Theo at trial, upholding the principle of access as everyone is entitled to legal representation in a criminal trial.	☐	☐

Question 14

(5 MARKS)

'All principles of justice have been achieved for Theo.'

Do you agree with this statement? Justify your response.

Linking to previous learning

Question 15

(3 MARKS)

Explain how the burden of proof in a criminal trial achieves the principle of fairness.

4B Institutions that enforce criminal law



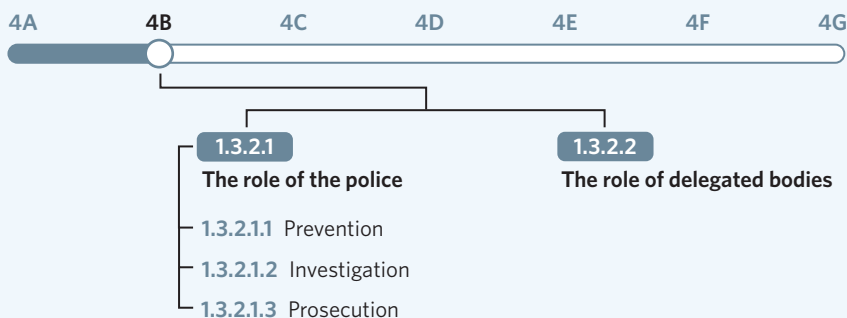
Image: Ralf Liebhold/Shutterstock.com

'Every move you make... I'll be watching you'
—The Police (English rock band, 'Every Breath You Take', 1983)

Whilst not a direct quote of Victoria Police, the sentiment of these famous lyrics is somewhat applicable to our society today. The police and delegated bodies are tasked with 'watching' over society by monitoring and enforcing the law, therefore ensuring individuals comply with all legislation created by parliament.

STUDY DESIGN DOT POINT

- institutions that enforce criminal law, such as the police and delegated bodies



Lesson introduction

There are many institutions that enforce criminal law in Australia, most notably the police and delegated bodies. Like the courts, the police operate on both a state and federal level in the form of the Victorian Police and the Australian Federal Police. Whilst the police have the power to enforce most types of criminal laws, some law-enforcing powers are vested in specialised bodies, such as VicRoads and local councils.

The role of the police 1.3.2.1

Victoria Police has a duty to protect the community in order to promote a safe, secure, and orderly society. If an individual or group has committed a crime, it is the police who enforce the law by ensuring offenders are held responsible for their actions. The police carry out this application of criminal law by preventing, investigating, and prosecuting crimes.

Prevention 1.3.2.1.1

A major role of the police is to prevent crime from occurring. This involves deterring individuals from engaging in criminal behaviour in order to reduce crime rates and ensure society is protected from harm. The police prevent crime through two primary methods:

1. The police patrol areas and maintain a constant presence in and around the community. This can include driving around streets in marked police cars or surveying areas where crime has been known to occur. By doing so, the police can maintain social order and cohesion, whilst protecting the rights of local citizens.
2. The police educate society and enact 'proactive crime prevention' to deter future criminal behaviour. For example, the police may visit schools or community centres and inform locals about the dangers of criminal behaviour and the consequences of breaking the law. Through such actions, the police aim to 'stay ahead' of crime rather than react to it after the fact.



Image: Nils Verseemann/Shutterstock.com

Figure 1 The police are bound to uphold and enforce the laws of parliament

LESSON LINK

You learnt about social cohesion and protecting the rights of individuals in **1A Social cohesion and the rights of individuals**.

REAL WORLD EXAMPLE

COVID-19 patrol

At the beginning of the COVID-19 outbreak in 2020, the Victorian Government deployed 200 Protective Service Officers (PSOs) across major activity centres across Victoria for daily surveillance. The purpose of 'Operation Shielding' was to patrol areas where people might gather in groups, which was against the law at the time given the high risk of COVID-19 transmission. Hence, the increased deployment of PSOs across Victoria was an attempt to prevent the transmission of COVID-19 and promote compliance with stay-at-home restrictions.

Adapted from 'Deploying PSOs To Where Victorians Need Them' (Premier of Victoria, 2020)



Image: STRINGER Image/Shutterstock.com

Figure 2 A greater number of Protective Service Officers (PSOs) were deployed across major activity centres during the COVID-19 lockdowns

Investigation 1.3.2.1.2

The purpose of criminal investigations are to identify potential offenders and collect evidence of their wrongdoing. The collection of evidence is a key component of criminal proceedings as it assists in the prosecution and sanctioning of the offender. For instance, the police may be called to the scene of a crime after it has occurred to begin investigating, identify possible offenders, and collect evidence that may prove guilt.

Depending on the alleged criminal offence, the police may be required to:

- interview witnesses
- search the crime scene
- collect forensic evidence
- question suspected witnesses.

Unlike Victoria Police, the Australian Federal Police (AFP) is tasked with preventing, investigating, and prosecuting crime at a federal level. The AFP also dedicates resources to a community policing branch that is responsible for the regular policing of the Australian Capital Territory (ACT). The AFP was formed in 1979 when the Commonwealth and ACT police forces merged. The AFP has an exclusive jurisdiction in airports and is considerably smaller in size, relative to the various state police forces. Specifically, the AFP has a role in:

- guarding Parliament House in Canberra
- investigating serious and organised crime, such as drug trafficking
- representing Australian law enforcement internationally
- protecting Australia's national interests and security.

LESSON LINK

You will learn more about police powers in **4C Institutional powers and individual rights**.

REAL WORLD EXAMPLE

Cocaine cargo carrier caught

In May 2023, an AFP investigation led to the seizure of 850 kg of cocaine from a cargo cruiser entering Perth. Three men travelling on the cruiser were arrested, alongside the vessel's master and chief engineers. Additionally, a Perth man and woman were arrested and were set to face court for their alleged involvement in the scheme.

The AFP Acting Inspector, Kristen Swan, stated that the 'police remain dedicated to protecting the Australian community from the harm caused by cocaine... By stopping cocaine and other illicit drugs from reaching [Australia's] shores, we are helping to keep our communities safe'.

Conspiracy to import a commercial quantity of border-controlled drugs into Australia is a Commonwealth offence, meaning the AFP, as the national primary investigative body, is responsible for investigating and prosecuting the accused individuals.

Adapted from 'AFP charges two more alleged offenders over attempted 850kg cocaine import' (Australian Federal Police, 2023)



Image: Leon Rafael/Shutterstock.com

Figure 3 An AFP investigation seized 850 kg of cocaine that was entering Perth via a cargo cruiser

LEGAL VOCABULARY

Office of Public Prosecutions (OPP) the public body responsible for initiating, preparing, and conducting legal proceedings for serious criminal matters in Victoria, on behalf of the Victorian community.

LESSON LINKS

You learnt about the burden of proof in **2C Key concepts of criminal law**.

You learnt about summary and indictable offences in **2E Summary offences and indictable offences**.

Prosecution 1.3.2.1.3

Prosecuting individuals who have broken the law often involves charging them with a crime and commencing legal proceedings against them in court. In doing so, the police are responsible for the gathering and presentation of evidence that proves an accused guilty of the crime they have been charged with. However, whether or not a crime is prosecuted depends largely on the circumstances of the offence. For example, for minor offences, the police can utilise their discretionary power to issue a caution.

Victoria Police is usually responsible for prosecuting summary offences in the Magistrates' Court, and hence, holds the burden of proof. For indictable offences, evidence collected during an investigation is handed to the **Office of Public Prosecutions (OPP)** and acts to support the prosecution of accused persons in the County Court and Supreme Court. The main aim of police prosecution is to ensure that criminal behaviour is addressed in an appropriate manner, where all possible facts of the case are on display for the judge to determine a just punishment.

HYPOTHETICAL SCENARIO



Figure 4 John was charged with unlawful assembly after the police and the OPP successfully prosecuted him

Police protect property

John was shocked by the 2021 Census data, after it reported that 30,600 Victorians were without a home. Consequently, he organised a group of people to demonstrate against the Victorian Government's lack of action regarding unhoused people and public housing. Together they marched to Parliament House.

During the march, John used a speaker to play 'Rage Against the Machine' at an extremely loud volume. The song stated that 'hungry people don't stay hungry for long'. Subsequently, the group of protesters were descended upon by Victoria Police and asked to stop playing the music. When they refused, John was charged and found guilty of unlawful assembly in the County Court for playing music that attempted to provoke political animosity during an unlawful procession.

Unlawful assembly is a very broad offence, aimed at discouraging protestors from congregating. Specifically, John was charged with provoking political animosity, in that the lyrics of the song implied revolution. The prosecution, being the Office of Public Prosecutions (OPP), presented its evidence to the judge and jury. The jury found John guilty of unlawful assembly. In this instance, since the prosecution was successful, the police fulfilled its role of prosecution.

LEGISLATION

Australian Securities and Investments Commission Act 2001 (Cth)

KEY TERM

Delegated body a specialised government agency that has been given authority from parliament to make and enforce laws within its area of specialisation.

The role of delegated bodies 1.3.2.2

Delegated bodies are specific agencies that, due to their expertise in a particular area, have been granted the authority, from parliament, to both create and enforce certain laws. This authority is assigned in legislation that has been passed by parliament. For example, the Australian Securities and Investment Commission (ASIC) was established and delegated its powers by the *Australian Securities and Investments Commission Act 2001 (Cth)*.

The overarching role of delegated bodies is to investigate, prosecute, and enforce the law in their specific area. This allows delegated bodies to develop expertise in their particular area, ensuring they are well-versed and efficient in dealing with relevant issues of law. As a result, the burden of work on the police is lessened, which is particularly important as Victoria Police advertised 800 job vacancies in 2023, suggesting it is understaffed and overburdened due to recruitment and staff shortage issues (Coulter & Ackew, 2023). This highlights the importance of the role delegated bodies have in spreading the workload of the criminal justice system.

Some delegated bodies, such as WorkSafe Victoria, have received reduced funding from the government in recent times. This has forced such bodies to reduce the benefits they provide to workers, especially those experiencing stress or burnout. When delegated bodies are underfunded they have a lowered capacity to perform their lawful role, consequently reducing access to these institutions.

DEEP DIVE

Cooperation between the police and delegated bodies

If an offender commits multiple offences that fall under the authority of a delegated body as well as the police, the delegated body will likely collate the relevant evidence of the offence before handing it to the police and, in turn, the Office of Public Prosecutions (OPP) to prosecute the offender on all charges.

For example, if an individual fails to stop at a stop sign, this would typically fall within the authority of VicRoads, who would deal with the matter and likely punish the offender with a fine and the loss of three demerit points. However, if running the stop sign resulted in the offender committing a more serious offence, such as culpable driving causing death, whereby an offender killed somebody in the course of driving, the matter would be dealt with by the police, who would have to collect evidence for the trial. This is because the case would be heard in court if the alleged offender pleads not guilty, therefore the police will need to provide evidence to the OPP for the prosecution of the offender. Therefore, VicRoads would no longer have a role in punishing the offender for this serious criminal behaviour.

However, the initial, less severe traffic offence of failing to stop at a stop sign, may be used as an aggravating factor during sentencing if the accused is found guilty. Therefore, VicRoads can collaborate with the police by providing evidence about this traffic violation that can ensure the offender is fairly sentenced.

Table 1 The role of different delegated bodies

Delegated body	Role
VicRoads	- Ensure compliance with certain road and traffic rules - Prosecute offences, such as the false completion of learner permit logbooks and minor traffic offences, according to road and traffic regulations
Local councils	Enforce local laws, such as parking fines and planning regulations, that affect local communities
Victorian WorkCover Authority (WorkSafe Victoria)	Oversee and enforce compliance with health and safety laws in workplaces across Victoria
Australian Securities and Investment Commission (ASIC)	Investigate corporations to determine if directors, chief executive officers, and other executive employers have breached their financial duties as determined in legislation
Environmental Protection Authority (EPA)	Monitor and investigate businesses for breaches of environmental protection laws
The Australian Tax Office (ATO)	Charge and prosecute individuals or businesses for failing to comply with tax laws and obligations

DEEP DIVE

The ATO and superannuation

The ATO is responsible for ensuring all Australians are taxed in accordance with the relevant rules and regulations set out by state and federal parliaments. For instance, there was an estimated \$9 billion in unpaid tax revenue in the 2020–2021 financial year, a large portion of which was based on rental income that had been incorrectly declared by landlords. The ATO mandated 17 Australian financial institutions, such as ANZ and Westpac, to provide the financial information of 1.7 million landlords. This allowed the ATO to monitor the activity of these taxpayers and determine whether tax returns were being filed correctly. The ATO has the ability to conduct such investigations from the powers granted to it via various Commonwealth legislation, such as the *Taxation Administration Act 1953* (Cth).

Adapted from 'Australian Taxation Office to force banks to hand over landlord data in investment property crackdown' (Karp, 2023)

LEGISLATION

Taxation Administration Act 1953 (Cth)

REAL WORLD EXAMPLE



Image: gobigoo/Shutterstock.com

Figure 5 Boral was found guilty in the Magistrates' Court of exposing employees to cancer-causing silica dust

Boral exposes workers to cancer-causing conditions

In May 2023, Boral, a business that sells construction material, was convicted and fined \$180,000 after pleading guilty to exposing staff to cancer-causing silica dust. It was found that tabletops cut by workers led them to inhale dust containing up to 95% silica. Silica dust can be found in certain natural elements, such as rocks and clay, and in products like bricks and concrete. Silica dust is harmful to humans and can lead to the development of lung cancer and other illnesses when inhaled.

WorkSafe alleged that Boral failed to enforce the proper usage of face respirators, leading to some employees being diagnosed with silicosis. Silicosis is an incurable, long-term lung disease that scars the lungs. WorkSafe prosecuted the case in the Magistrates' Court.

Adapted from 'Construction giant Boral fined over silica dust safety breaches' (Estcourt, 2023) and 'Silica dust' (Cancer Council, n.d)

Evaluating the ability of institutions that enforce criminal law to achieve the principles of justice



STRENGTHS

- The police and delegated bodies gather evidence that assists the Office of Public Prosecutions (OPP) in ensuring a fair trial by allowing all the facts and evidence of the case to be presented accurately in court and enabling the accused to understand the case against them.
- All people charged by a police officer and given a court trial are presumed innocent until proven guilty, enabling a fair outcome.
- The prosecution and police are responsible for establishing the facts of the case and proving the accused is guilty beyond reasonable doubt. Thus, the accused does not have to gather evidence to prove their innocence, ensuring procedural fairness.
- The prosecution has a duty to disclose all relevant evidence, even if it does not support its case. This ensures fairness as the verdict can be determined based on all the facts.

LIMITATIONS

- A financially disadvantaged accused may be unable to present their case to the same extent as the prosecution, limiting the achievement of fairness.
- If evidence is not properly processed or misplaced, the achievement of a fair trial may be limited, as the court will not be presented with an accurate case against the accused.



STRENGTHS

- Police officers and authorised officers within delegated bodies are required to remain impartial and offer the same treatment to all people suspected of breaking the law. For instance, everyone has the right to remain silent.

LIMITATIONS

- Police officers and authorised officers of delegated bodies may carry subconscious biases against people with certain characteristics and therefore, restrict the equal treatment of all individuals.

STRENGTHS

- Distributing the workload of law enforcement amongst the police and delegated bodies can increase access to such services as it ensures resources are adequately spread and available.
- Individuals are able to access justice via the roles of institutions that enforce criminal law. Each institution has different powers and responsibilities that can assist individuals in engaging with and being informed about the justice system to resolve their legal matters.
- Delays are reduced as specialised delegated bodies are efficient in dealing with familiar matters repeatedly. Therefore, access to these institutions can increase.

LIMITATIONS

- The cost, time, and effort of engaging legal representation if charged by the police can be extremely burdening, decreasing a party's access to the criminal justice system.
- Delegated bodies may experience funding cuts at various times, as they are reliant on the government for funding, potentially reducing the public's access to such institutions and their resources.



Lesson summary

The police and delegated bodies are the two main institutions that enforce criminal law.

Both Victoria Police and the Australian Federal Police (AFP) have a role in:

- preventing crimes
- investigating crimes
- prosecuting crimes.

In addition to the police, various federal and state institutions have delegated powers to enforce criminal laws. Examples of these bodies include:

- WorkSafe Victoria
- The Australian Taxation Office (ATO)
- The Environmental Protection Agency (EPA).

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. These tables showing strengths and limitations in relation to each principle can assist you in developing a discussion of the principles of justice in relation to institutions that enforce criminal law.

4B Questions

Check your understanding

Question 1

The police are the only institution that can enforce criminal law.

- A. True
- B. False

Question 2

Which of the following statements describe the role of the police in enforcing criminal law? **(Select all that apply)**

- A. Investigate people and groups suspected of breaking the law.
- B. Enforce the law in one specific area.
- C. Prosecute cases in the Magistrates' Court and County Court.
- D. Prosecute cases in the Magistrates' Court.
- E. Prevent crime.

Question 3

Victoria police prosecute all criminal offences in the courts.

- A. True
- B. False

Question 4

Tick the box to indicate whether each of the following statements relate to offences that would be investigated by the **Australian Federal Police** or **Victoria Police**.

Statement	Australian Federal Police	Victoria Police
I. Terrorism	☐	☐
II. Drug trafficking	☐	☐
III. Drug possession	☐	☐
IV. Drink driving	☐	☐

Question 5

Fill in the blank with **one** of the following terms:

parliament

the police

Delegate bodies are specialised government agencies that have been given authority from [] to make and enforce laws within their area.

Question 6

Which of the following are examples of delegated bodies? **(Select all that apply)**

- A. WorkSafe Victoria
- B. The Australian Federal Police
- C. The High Court of Victoria
- D. Parliament
- E. The Australian Taxation Office

Question 7

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of the police and delegated bodies in relation to the principles of justice.

Statement	Strengths	Limitations
I. Police officers and authorised officers within delegated bodies are required to be impartial and give all people suspected of breaking the law the same treatment.	☐	☐
II. Delegated bodies may be underfunded, as they are reliant on government funding, potentially reducing the public's access to such institutions and their resources.	☐	☐
III. The prosecution has a duty to disclose all relevant evidence, even if it does not support its case, enabling a fairly determined trial to occur based on the facts of the case.	☐	☐
IV. A financially disadvantaged accused may be unable to present their case to the same ability as the prosecution.	☐	☐

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify **two** institutions that enforce criminal law.

Question 9

(2 MARKS)

Describe **one** role of the police in enforcing criminal law.

Question 10

(4 MARKS)

Compare the role of the police and delegated bodies in enforcing criminal law.

Extended response

Use your answer to question 11 to support your response to question 12.

Question 11

Which of the following statements is correct about the ability of delegated bodies to achieve the principles of justice in criminal law?

- A. Delegated bodies are able to enhance the principle of access by spreading the workload of law enforcement amongst different bodies.
- B. A government that prioritises the enforcement of particular areas of criminal law above others may decrease the funding of certain delegated bodies, resulting in increased resourcing for such bodies.
- C. By delegating the authority to handle particular areas of law to specialised bodies, institutions are likely to experience an increased number of backlogs as they have to monitor both their own services alongside those of these bodies.

Question 12

(5 MARKS)

Discuss how delegated bodies could affect the ability of the criminal justice system to achieve the principle of access.

Linking to previous learning**Question 13**

(6 MARKS)

Alex robbed a bank. His brother, Charlie, was waiting in the car until Alex was finished. After successfully robbing the bank, Alex jumped into Charlie's car. They sped off, but Charlie lost control of the car and crashed into a pole. The police arrested the pair and charged them with the indictable offence of robbery.

- a. Define the terms 'accessory' and 'principal offender'. Identify who the accessory is and who the principal offender is in this case.
- b. Explain the role of the police in this case.

3 MARKS

3 MARKS

4C Institutional powers and individual rights



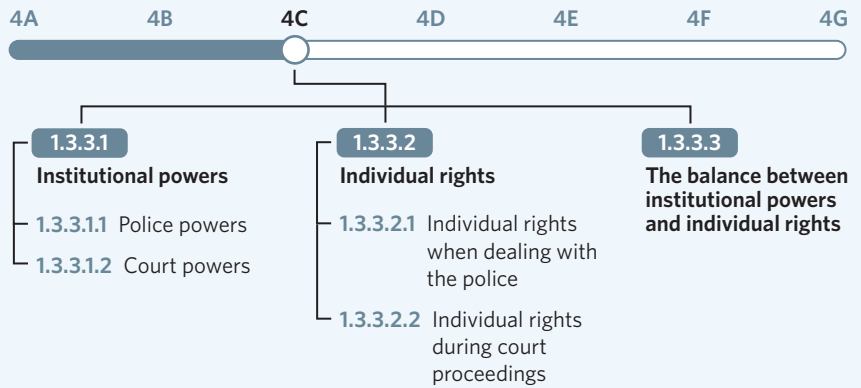
Image: Gorodenkoff/Shutterstock.com

'You have the right to remain silent. Anything you say can and will be used against you in a court of law. You have the right to an attorney. If you cannot afford an attorney, one will be appointed for you.'

You may have heard this phrase when watching TV shows or movies, but is it just an iconic line created by Hollywood or do the police actually say this? If this is a real phrase used by the police, are these rights guaranteed for people in Australia, or just accused persons within the United States where these shows are usually based?

STUDY DESIGN DOT POINT

- the balance between institutional powers and individual rights



LESSON LINK

You learnt about social cohesion in **1A Social cohesion and the rights of individuals**.

LEGAL VOCABULARY

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime.

LEGISLATION

Crimes Act 1958 (Vic)

Lesson introduction

The criminal justice system exists to ensure society can operate in a peaceful manner, where all individuals feel safe and protected by the law. Strict rules and regulations aim to ensure social cohesion is maintained. However, there must be a balance between the rights of individuals and the powers of the criminal justice system. This avoids abuses of power by these institutions, whilst also ensuring offenders are brought to justice for the sake of their victim(s), the victim's family, and broader society.

Institutional powers 1.3.3.1

In the criminal justice system, the police and the courts are the main institutions responsible for investigating crimes and ensuring offenders are brought to justice. The police have a number of powers to detect and investigate individuals suspected of committing crimes. Alternatively, the courts are responsible for determining whether an accused person is guilty, and imposing **sanctions** where appropriate. Both of these institutions work together to ensure the administration of justice.

Police powers 1.3.3.1.1

The police have a number of investigative powers that are established in legislation, such as the *Crimes Act 1958 (Vic)*. These powers ensure the police can effectively investigate and prosecute individuals suspected of committing a criminal offence.

Table 1 Police powers

Type of police power	Explanation
Arrest a suspect	The police must usually obtain a warrant to arrest a suspect. However, they may arrest a suspect without a warrant where: - the person is found committing an offence. - the police officer has grounds to reasonably believe the person is escaping from legal custody or is aiding another person to escape custody.
Obtain a person's name and address	A police officer has the power to demand a person's name and address if they have reasonable grounds to believe the person: - has committed, or is about to commit an offence. - can assist an indictable offence investigation that has been, or is suspected of being committed.
Enter and search premises	The police have the power to enter and search any area where they, on reasonable grounds, believe a person: - has committed a serious indictable offence, such as murder. - is escaping from legal custody. - is committing a serious indictable offence.
Stop and search individuals in certain circumstances	The police have the power to stop and search individuals if they: - have reasonable grounds to suspect the person is carrying drugs, weapons, or stolen property. - have a warrant to search the person or their property. - are conducting a random breath test for alcohol or drugs while driving.
Use force in certain circumstances	The police have the power to use force to prevent a crime that is about to be committed or to protect themselves or someone else. However, the force used must not be excessive and must be proportionate to the threat posed.

LEGAL VOCABULARY

Warrant a document that permits law enforcement to make an arrest, search premises, or perform an action that upholds justice.

LESSON LINKS

You will learn about sanctions in **5A Purposes of sanctions**.

You learnt about the role of the police in **4B Institutions that enforce criminal law**.

WANT TO KNOW MORE?

Black Lives Matter is a global social and political movement that seeks to raise awareness about the prevalence of racism and discrimination in the criminal justice system. In particular, the movement focuses on police brutality and racially motivated violence against black people. You can find out more about Black Lives Matter in Australia by searching 'Why does the BLM movement matter in Australia?' and clicking the 'United Nations Association of Australia' webpage (Abad, 2021).

DEEP DIVE

What are the police not allowed to do?

When conducting their duties and using their powers, the police have to adhere to strict rules and regulations to prevent an abuse of power against civilians. For example, the police cannot legally:

- target individuals based on their race, religion, or ethnicity.
- conduct searches without a valid reason or warrant against individuals based on personal characteristics, such as gender or race.
- use coercive tactics, such as threatening to enact violence, to obtain confessions or statements from individuals.
- record private communications between two parties without a warrant, unless specific legal exceptions apply.

Court powers 1.3.3.1.2

In all criminal matters heard by the courts, a sanction will be imposed if the accused is found guilty of an offence. The courts are given many powers through various Acts to ensure they can effectively conduct criminal matters and provide the most just outcome for all involved.

LEGAL VOCABULARY

Admissible evidence evidence that abides by the rules of procedure and is, therefore, allowed to be presented to the court.

Hearsay previous evidence made by a person outside of the court that is presented as the alleged truth of fact but is usually deemed inadmissible in court.

Bail the process whereby a person who has been arrested and charged with a crime is released from police custody and allowed in the community whilst awaiting their trial.

LEGISLATION

Evidence Act 2008 (Vic)

Table 2 Court powers

Type of court power	Explanation
Decide which evidence is admissible	The courts must determine which evidence is admissible . Generally, if the evidence is hearsay or gathered illegally, it will not be permitted.
Grant or withhold bail	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 the accused should be held in custody or granted bail .
Determine and impose an appropriate sanction	The <i>Crimes Act 1958 (Vic)</i> informs the type of sanction a judge will impose on an offender who has been found guilty by the jury. The Act outlines the maximum sentence for different crimes to ensure there is fairness and consistency between judges' decisions.

HYPOTHETICAL SCENARIO**He said she said**

Flavio, Greg, and Steph were friends and went out to a bar. Later that night, Flavio was arrested by police and charged with assault. He pleaded not guilty and is currently awaiting trial. Greg made a statement to the police that Steph told Greg that she had seen Flavio leave the bar with the alleged victim shortly before the assault allegedly occurred. However, pursuant to s 59 of the *Evidence Act 2008 (Vic)*, the prosecution cannot use Greg's evidence at trial as it is considered hearsay and is therefore, inadmissible.

**Figure 1** Greg's testimony is hearsay and inadmissible to be used against Flavio**Individual rights** 1.3.3.2

Individuals have various rights that balance and protect them against institutional powers. These rights are essential in preventing possible injustice and corruption that may occur if such institutions possess a disproportionate amount of power.

Individual rights when dealing with the police 1.3.3.2.1

Interacting with the police can be an intimidating experience for individuals. Consequently, specific rights are provided to protect individuals from police powers and reduce the stress associated with such interactions.

Table 3 Individual rights when dealing with the police

Type of individual right	Explanation
Remain silent	When an accused is arrested, they have the right to silence , meaning they are not obliged to answer any questions, other than providing their name and address.
Make two phone calls	After an accused is arrested, they have the right to make one phone call to contact a lawyer, and a second phone call to contact a friend or relative.

Continues →

LEGAL VOCABULARY

Right to silence a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.

Table 3 Continued

Type of individual right	Explanation
Have a parent or guardian present during questioning	If an accused is under the age of 18, the police cannot question them unless a parent or guardian is present.
Speak to a lawyer	During questioning, an accused has the right to seek the assistance of a lawyer to ensure they do not say anything incriminating.
Access an interpreter	If an accused does not understand English, they have the right to ask a police officer for a qualified interpreter that is paid for by the police.

WANT TO KNOW MORE?

Did you know there is no such thing as speaking 'off the record' to the police? Anything you say to the police can be used to arrest you, charge you, or as evidence against you in court.

You can find out more about your rights when dealing with the police by searching 'Speaking to the police' and clicking the 'Victoria Legal Aid' webpage.

HYPOTHETICAL SCENARIO

Caleb's run-in with the police

Caleb was pulled over by the police who conducted a random breath test to determine whether alcohol or drugs were present in his system whilst driving. The police arrested Caleb after he recorded a Blood Alcohol Concentration (BAC) of 0.08%, which is above the legal limit of 0.05% in Australia.

Other than providing his name and address when he was arrested, Caleb exercised his right to silence to ensure he did not say anything incriminating.



Figure 2 Caleb was pulled over for a random breath test

Individual rights during court proceedings 1.3.3.2.2

When a trial commences, it can be a difficult process for individuals involved, especially an accused who may have to face harsh consequences if found guilty. To reduce this anxiety, individuals are provided with various rights during pre-trial and trial processes.

Table 4 Individual rights during court proceedings

Type of individual right	Explanation
Be tried without unreasonable delay	Protected by s 21(5) of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic), the right to be tried without unreasonable delay ensures an accused person has their case heard in a timely fashion. Delays to a trial should only occur when a court considers such delays 'reasonable'. A number of factors are considered when determining whether to classify delays as 'unreasonable'. Therefore, what is considered 'unreasonable' will differ between cases.
Remain silent	Under s 89 of the <i>Evidence Act 2008</i> (Vic), if an accused chooses to remain silent and not present any evidence in court, the court cannot draw any unfavourable inferences from this. Additionally, the <i>Jury Directions Act 2015</i> (Vic) provides that during jury trials, the accused may request that the judge informs the jury that the right to silence is not an admission of guilt.

Continues →

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)
Jury Directions Act 2015 (Vic)

LEGAL VOCABULARY

Right to be tried without unreasonable delay an entitlement accused people possess to have their case heard in a timely manner unless the court considers delays to the trial to be 'reasonable'.

LESSON LINK

You will learn more about the jury in a criminal trial in **4E The jury in a criminal trial**.

Table 4 Continued

Type of individual right	Explanation
Have an impartial judge and/or jury	During criminal proceedings, an accused has the right to have their trial conducted by an impartial judge and heard by an impartial jury for indictable offences. This right is protected by s 24 of the <i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic).
Have a bail hearing	If the police do not grant an individual bail at the police station, they are required to bring them to the Magistrates' Court within a reasonable time frame so the court can determine whether the offender should be released from custody.
Have legal representation	Due to the complex nature of the criminal justice system, an accused has the right to obtain legal representation. When an accused is charged with a serious criminal offence and is unrepresented, the trial judge should adjourn the trial, providing the accused with the opportunity to seek legal representation.
Present a case	Although not required to do so, an accused has the right to present evidence and witnesses, whilst also cross-examining the prosecution's witnesses.

LEGAL CASE

Image: Gorodenkoff/Shutterstock.com

Figure 3 The right to legal representation contributes to the achievement of fairness

Dietrich v R* (1992) 177 CLR 292*Facts**

Dietrich was arrested for allegedly importing 70 grams of heroin into Australia after his trip to Thailand. He faced four charges related to drug trafficking and pleaded not guilty to each charge. Dietrich could not afford legal representation and applied for legal assistance from the Legal Aid Commission of Victoria, which refused to represent him unless he agreed to plead guilty to all charges. Consequently, he represented himself at trial and emphasised many times to the court that he was facing difficulties in presenting his defence. He was eventually found guilty in the County Court. Dietrich first appealed to the Supreme Court, which rejected his application, however, he was later successful in applying to have his appeal heard in the High Court.

Legal issue

The High Court was required to determine whether Dietrich's trial in the County Court was unfair as he had not been provided with legal representation.

Decision

The High Court decided that where an accused is charged with a serious criminal offence and is unrepresented, the trial judge should adjourn the trial, allowing the accused the opportunity to seek legal representation. However, there is no requirement that the court must provide legal representation to an accused. Therefore, the High Court quashed the conviction against Dietrich and ordered a new trial.

Significance

The decision made by the High Court, often referred to as the 'Dietrich principle', is widely applied in Australian courts. This ensures an accused can request to adjourn the trial and obtain legal representation so they can present their case in the best possible light, promoting a fair trial.

LEGAL CASE

R v Cranston [2023] NSWSC 1004

Facts

Adam Cranston was one of four co-accused individuals on trial in the Supreme Court of New South Wales for conspiring to defraud the Australian Taxation Office (ATO) of \$105 million. The five co-accuseds all pleaded not guilty to the charges against them. The prosecution alleged that they devised a plan using a worker payroll services company, Plutus Payroll, to collect pay-as-you-go instalments and goods and services tax. Rather than forwarding these to the ATO, they allegedly kept ‘extraordinarily large amounts’ for themselves and their associates, personally benefiting from these funds. During the proceedings, one of the accused, Adam Cranston, was receiving legal aid funding from the Commonwealth. He was found guilty but prior to sentencing in May, the Attorney-General refused to pay \$50,000 in legal funding for Cranston. As a result, Cranston applied to have the proceedings put on hold, relying on the Dietrich principle.

Legal issue

Cranston was without legal representation. As there were only a few days of court proceedings remaining where legal preparation could be required, the court had to consider whether sentencing should proceed or be delayed. Delaying sentencing would allow Cranston to be considered for state-funded legal representation and hence, enable the achievement of fairness.

Decision

Justice Payne adjourned the matter until 14 June 2023 to provide the Commonwealth and the New South Wales Legal Aid sufficient time to consider funding for Cranston.

Significance

This case illustrates the importance of an accused being able to obtain legal representation to present their case in the best possible light, promoting a fair trial.

The balance between institutional powers and individual rights 1.3.3.3

To prevent an abuse of power by institutions, whilst also ensuring those who commit criminal offences are adequately punished, there must be a balance between institutional powers and individual rights.

Table 5 The balance between police powers and individual rights

Police powers	Individual rights
The police have the right to obtain a person’s name and address and 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 may exercise their right to silence, whilst minors are required to have a parent or guardian present during questioning. This ensures individuals are not pressured by the police to answer a question that may implicate them.
The police have the power to use force to prevent a crime that is about to be committed or to protect themselves or someone else.	The force used must not be excessive and must be proportionate to the threat posed. The rule of law ensures everyone is treated equally before the law, regardless of one’s position in society. Therefore, if a police officer uses excessive force, they can still be tried and found guilty before the courts. This allows individuals and the courts to constrain the powers of the police. Continues →

LEGAL VOCABULARY

Rule of law the principle that the law applies to everyone equally regardless of status.

Table 5 Continued

Police powers	Individual rights
The police have the right to arrest a suspect if they have a warrant and in some circumstances, without a warrant.	After being arrested, individuals have various rights, including the right to: • make two phone calls to contact a friend or family member and legal representative when in custody. • meet with a lawyer in private. • have their case brought to the court in a timely manner. These rights ensure individuals are given the best opportunity to prepare for any legal proceedings that may follow their arrest.

Table 6 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 the pre-trial process, the prosecution can request that the offender remain in custody if they pose a threat to the community. The court then has the ability to decide whether it should remand the accused or grant them 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 its case, and cross-examine the accused's witnesses.	During the trial process, the accused is presumed innocent until otherwise proven guilty, whilst also having the right to have legal representation and an interpreter if needed. Individuals have a 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, meaning they can remain silent and present no defences.

LEGAL VOCABULARY

Remand the legal status of an accused when they are held in custody awaiting trial.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to sexual behaviour.

An abuse of police powers

In May 2023, former Victorian police officer, Brett Johnson, pleaded guilty to 10 charges of misconduct after he abused his position of power by pursuing vulnerable women for sex. Johnson used police databases to access the personal information of women he wanted to have sex with. These women were either seeking police help due to family violence or were victims of crime. He attempted to meet up with these women, sending them messages, calling them, and even visiting their homes.

Judge Liz Gaynor, who presided over the trial, stated the women he pursued were frightened of him. While they believed the police would help them during the most vulnerable period of their lives, they were instead subject to unwarranted advances by Johnson. As a result, he was sentenced to six months imprisonment and a two-year community corrections order (CCO). As part of the CCO, he was ordered to perform 300 hours of unpaid community service and undergo mental health treatment.

Continues →

REAL WORLD EXAMPLE**An abuse of police powers – Continued**

This case demonstrates an abuse of police powers. However, individuals and the courts can act to balance the power of police by reporting criminal actions and sanctioning crimes respectively to avoid such circumstances and ensure the rule of law is preserved.

Adapted from 'Victorian officer who abused position to pursue vulnerable women for sex jailed for six months' (Australian Associated Press, 2023)



Image: Leonard Zhukovsky/Shutterstock.com

Figure 4 A Victorian police officer abused his position by accessing the private information of a number of women

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. These tables showing strengths and limitations in relation to each principle can assist you in developing a discussion of the principles of justice in relation to the balance between institutional powers and individual rights.

Evaluating the balance between institutional powers and individual rights in relation to the principles of justice

STRENGTHS

- The right to silence can ensure individuals do not unintentionally incriminate themselves, therefore, promoting fair processes.
- The right to speak to a lawyer ensures an accused understands their legal rights and court processes and procedures. As the legal system is complex, this promotes just processes and a fair trial.
- The courts' power to decide on the admissibility of evidence ensures evidence that could jeopardise a fair trial is not permitted or considered in the outcome of the case.
- The right to be tried without unreasonable delay ensures witnesses remain reliable by reducing the likelihood of evidence being forgotten or misremembered, promoting just outcomes.
- An accused has the right to have their case heard by an impartial judge and jury, promoting a fair and unbiased outcome.

LIMITATIONS

- Individuals may be unaware of, or misunderstand, their rights when dealing with the police. For example, if an accused does not understand their right to silence, this may result in unintentional self-incrimination, potentially leading to an unjust case outcome.
- Whilst the right to silence is not to be taken as an admission of guilt, a jury may subconsciously find the accused guilty on this basis, jeopardising a fair outcome to the case.
- Individuals on a jury may have subconscious biases that could negatively influence the verdict of a case.
- Not all accused persons can afford a lawyer, potentially resulting in an unjust outcome if the accused cannot present their case in the best possible light.

**STRENGTHS**

- The right to an interpreter upholds equality by ensuring individuals who do not speak English proficiently are on equal footing in court.
- Whilst the police have the power to stop and search individuals in certain circumstances, it cannot be based on personal characteristics, such as race, religion, or gender, ensuring equal treatment amongst all individuals.
- All accused individuals, no matter their personal characteristics, are entitled to receive the same rights.

LIMITATIONS

- Police may have inherent prejudices against people with certain characteristics, causing them to unjustifiably target and increase contact with law enforcement for certain populations.





STRENGTHS

- The police's power to arrest a suspect ensures offenders are held accountable for their actions and provides access to justice for victims, their families, and the general community.
- The right to be tried without unreasonable delay ensures an accused person does not endure prolonged periods of stress and anxiety that they may experience if waiting for their trial to commence.
- The right to an interpreter ensures individuals who are not proficient in English still understand the charge(s) against them and court procedures, promoting access.

LIMITATIONS

- Not all accused persons can afford a lawyer, potentially leading to an unjust outcome if the accused cannot present their case in the best possible light. This can prevent access to justice.
- Whilst all accused persons have the right to be tried without unreasonable delay, court delays do occur and what constitutes an 'unreasonable' delay is typically a very long time. For example, a year-long delay to hear a case may still be considered reasonable. Thus, access to this right is reduced.

Lesson summary

- The police and the courts are the main institutions with the powers to investigate crime and ensure offenders are brought to justice.
- Individuals have a number of rights when dealing with the police and in the court system, which aims to balance institutional powers and protect them from abuses of such powers.

4C Questions

Check your understanding

Question 1

There must be a balance between institutional powers and individual rights to prevent an abuse of power by institutions, whilst also ensuring offenders are brought to justice.

- A. True
- B. False

Question 2

Which of the following is **not** an example of a police power?

- A. The power to obtain a person's name and address.
- B. The power to stop and search individuals under any circumstance.
- C. The power to arrest a suspect.
- D. The power to use force in certain circumstances.

Question 3

Which of the following are examples of court powers?

(Select all that apply)

- A. The power to decide which evidence is admissible.
- B. The power to arrest an individual.
- C. The power to determine and impose an appropriate sanction.
- D. The power to grant or withhold bail.
- E. The power to take away an individual's right to silence.

Question 4

The police power of using force to prevent a crime that is about to be committed, protect themselves, or someone else is balanced with:

- A. an individual's right that the force used must be proportionate to the threat posed and not excessive.
- B. an individual's right to have an interpreter during questioning.

Question 5

Tick the box to indicate whether each of the following statements are **individual rights when dealing with the police** or **individual rights during court proceedings**.

Statement	Individual rights when dealing with the police	Individual rights during court proceedings
I. The right to be tried without unreasonable delay.	☐	☐
II. The right for anyone under the age of 18 to have a parent or guardian present during questioning.	☐	☐
III. The right to make two phone calls.	☐	☐
IV. The right to an impartial judge and/or jury.	☐	☐

Question 6

Whilst an accused can exercise their right to silence, this will be taken as an admission of guilt by the court.

- A. True
- B. False

Question 7

Tick the box to indicate whether the following statements are **strengths** or **limitations** of institutional powers and individual rights in relation to the achievement of the principles of justice.

Statement	Strengths	Limitations
I. Not all accused persons can afford a lawyer, which may lead to an unjust outcome of their case if the accused cannot present evidence in the best possible light.	☐	☐
II. The right to speak to a lawyer ensures an accused understands their legal rights and the court processes and procedures. As the legal system is complex, this promotes just processes and access to a fair trial.	☐	☐
III. The police power to arrest a suspect ensures offenders are held accountable for their actions and provides access to justice for victims, their families, and the general community.	☐	☐
IV. The right to an interpreter during court proceedings ensures individuals who do not speak English proficiently are on equal footing in court.	☐	☐
V. Whilst the right to silence is not to be taken as an admission of guilt, a jury may subconsciously find the accused guilty on this basis, jeopardising a fair outcome to the case.	☐	☐

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Identify **two** police powers.

Question 9

(3 MARKS)

Explain **one** right individuals have during court proceedings.

Question 10

(3 MARKS)

Identify **one** police power and describe an individual right that balances this.

Question 11

(4 MARKS)

The police obtained a warrant to arrest Felix, as he has been suspected of theft, and have taken him to a nearby police station for questioning. Felix is concerned about the power the police have over him and is particularly concerned about answering questions they may ask.

Using **two** examples, describe the balance between police powers and Felix's rights.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Poppy was caught by the police after attempting to rob a jewellery store. As she made efforts to avoid arrest, a police officer put his hand on her shoulder to stop her. Poppy cannot afford a lawyer and pleaded not guilty to the charges she is facing.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of institutional powers and individual rights in relation to the achievement of the principles of fairness and access.

Statement	Strengths	Limitations
I. Poppy cannot afford legal representation, which may lead to an unjust outcome to her case if she cannot present her case in the best possible light.	☐	☐
II. Exercising the power to use force to prevent Poppy from escaping police arrest ensured she could be held accountable for her actions.	☐	☐
III. The police cannot use excessive force, meaning this force must be proportionate to the threat posed. This right prevents police officers from abusing their power and using force that is not proportionate to the threat. If they do so, they could be found guilty of a crime due to the rule of law.	☐	☐
IV. Poppy's right to legal representation ensures she is able to understand her legal rights and the court processes and procedures, promoting access to a fair trial.	☐	☐

Question 13

(6 MARKS)

With reference to this scenario, discuss the extent to which a balance between individual rights and institutional powers achieves the principles of fairness and access.

Linking to previous learning**Question 14**

(3 MARKS)

Explain the need for a balance between institutional powers and individual rights in achieving social cohesion.

4D Criminal jurisdictions of Victorian courts

STUDY DESIGN DOT POINT

- an overview of the role and criminal jurisdictions of the Victorian courts

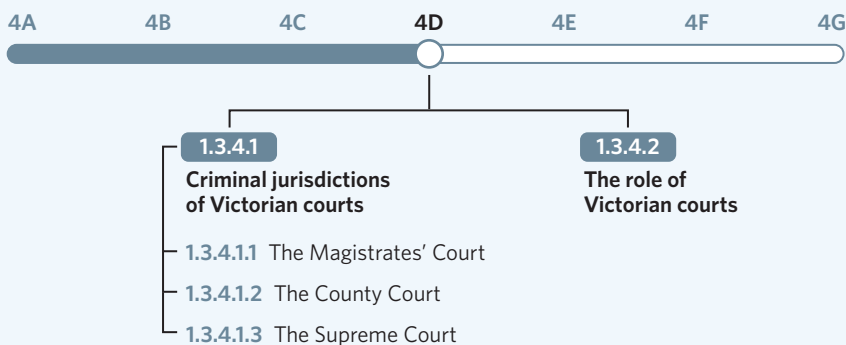


Image: Tinseltown/Shutterstock.com

In Abby Lee Miller's dance studio, featured in the TV show 'Dance Moms', Maddie was always at the top of the pyramid, representing her superiority and specialised talent in the eyes of her infamous dance teacher. Meanwhile, other dancers at the studio were regarded as lesser by Miller and, hence, were positioned at the bottom of the pyramid. In the same way Abbey Lee Miller organised her dancers into a pyramid of superiority, the Victorian courts of the criminal justice system are arranged in a similar hierarchical manner.

Lesson introduction

The Victorian courts are arranged in a hierarchy based on their powers and the cases they can hear. When a person is charged with a criminal offence, they will often have their case heard in court. If an accused is found, or pleads guilty to a criminal offence, they will have their sentencing delivered by a court. Therefore, the hierarchical organisation of the courts ensures criminal cases are heard and a sentence is delivered appropriately and efficiently.

LESSON LINK

You learnt about the Victorian court hierarchy, original and appellate jurisdiction, and appeals in **1F The Victorian court hierarchy**.

Criminal jurisdictions of Victorian courts 1.3.4.1

The Victorian **court hierarchy** refers to the organisation and ranking of the courts from least to most superior. Each court within this hierarchy has its own **jurisdiction**, which determines the types of cases the court can hear.

The two types of criminal jurisdiction that a Victorian court may have are **original jurisdiction** and **appellate jurisdiction**. A court's original jurisdiction refers to its authority to hear a case when it is being tried for the first time, whilst appellate jurisdiction refers to a court's ability to hear a case where one or both parties are seeking to review a previous decision through an **appeal**.

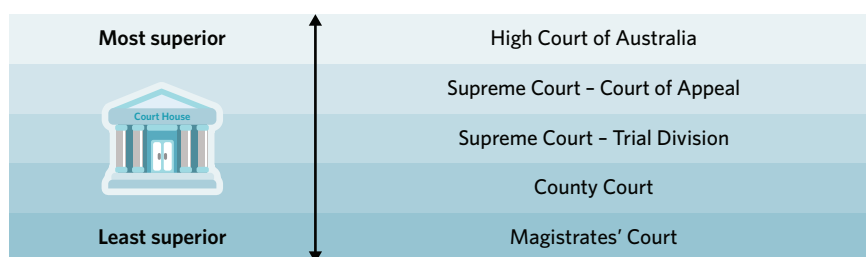


Figure 1 The Victorian court hierarchy

KEY TERMS

Court hierarchy the arrangement of courts in order of superiority.

Appeal a legal process that a dissatisfied party may pursue to have a court's decision reviewed by a higher court.

LEGAL VOCABULARY

Jurisdiction the legal power of a court or other authority to make decisions.

Original jurisdiction the legal power of a court or other authority to hear a case for the first time.

Appellate jurisdiction the legal power of a court to review a decision of a lower court or tribunal on appeal.

KEY TERMS

Magistrates' Court of Victoria the first level of the Victorian court system in which relatively minor matters are heard and determined by judicial officers, such as magistrates.

County Court of Victoria Victoria's principal trial court that hears and determines criminal and civil matters.

LEGAL VOCABULARY

Committal proceeding a hearing in the Magistrates' Court that is used to determine whether there is sufficient evidence against an accused person, charged with an indictable offence, for a trial in a higher court.

Bail the process whereby a person who has been arrested and charged with a crime is released from police custody and allowed in the community whilst awaiting their trial.

Warrant a document that permits law enforcement to make an arrest, search premises, or perform an action that upholds justice.

Question of fact an issue within a case whereby the material facts of the case need to be determined by weighing up the credibility of the evidence.

USEFUL TIP

In the Magistrates' Court, there is no option for trial by jury. Therefore, the magistrate will always determine the final verdict of the criminal matter where an accused pleads not guilty.

The Magistrates' Court 1.3.4.1.1

The **Magistrates' Court of Victoria** is the lowest-ranked court in the Victorian court hierarchy and is therefore responsible for hearing a large number of minor criminal cases.

Table 1 The criminal jurisdiction of the Magistrates' Court

Original jurisdiction	Appellate jurisdiction
The Magistrates' Court has the power to hear: - all summary offences, including driving offences and damage to property. - indictable offences heard summarily. committal proceedings. bail and warrant applications.	The Magistrates' Court is the lowest-ranked court in the Victorian court hierarchy and therefore, does not have any appellate jurisdiction.

The County Court 1.3.4.1.2

The **County Court of Victoria** is ranked above the Magistrates' Court in the Victorian court hierarchy, which provides it with greater powers in hearing various criminal cases.

Table 2 The criminal jurisdiction of the County Court

Original jurisdiction	Appellate jurisdiction
The County Court has the power to hear: most indictable offences, including culpable driving causing death, theft, and armed robbery. However, it cannot hear indictable offences in extremely serious cases, such as murder.	The County Court has the power to hear criminal appeals from the Magistrates' Court: - when an accused is appealing their sentence as a question of fact. - when an accused or prosecution is appealing the sanction imposed.

WANT TO KNOW MORE?

In 2019, Jacob Scott MacDonald who 'mowed down emus with his ute on an outback Victorian road and posted the footage online' was charged with a 42-day jail sentence in the Mildura Magistrates' Court. The offender then appealed the decision in the Victorian County Court and his sentence was reduced to 21 days instead. You can find out more about Jacob Scott MacDonald's case by searching 'Cowangie man who filmed himself running down emus has sentence reduced' and clicking the ABC News article (Testa, 2019).

REAL WORLD EXAMPLE



Image: Alex Cimbali/Shutterstock.com

Figure 2 The County Court rejected an offender's appeal from the Magistrates' Court

County Court upholds conviction

In October 2022, an accused was sentenced to a maximum of three years imprisonment in the Magistrates' Court after he pleaded guilty to stalking charges, alongside possession of child abuse material, and dissemination offences.

The offender appealed this sentence in the County Court in 2023, after he claimed the four months he spent in prison had worsened his mental health. Moreover, his legal representative said that the offender was 'suitable for a combination sentence', consisting of a community corrections order alongside his imprisonment.

Judge Kate Hawkins of the County Court rejected the offender's appeal, believing his offending was far too serious to allow a reduced prison sentence. Hence, the offender was re-sentenced to a maximum of three years in prison with a two-year non-parole period.

Adapted from 'Ex police prosecutor loses attempt to reduce sentence' (AAP Newswire, 2023)

The Supreme Court 1.3.4.1.3

The **Supreme Court of Victoria** has two divisions: the Supreme Court – Trial Division and the Supreme Court – Court of Appeal. It is the highest-ranked court in Victoria. However, the **High Court of Australia** is also part of the Victorian court hierarchy, alongside every other state and territory court hierarchy in Australia, as it can receive appeals from decisions made by the courts. The Supreme Court of Victoria is, therefore, less superior than the High Court of Australia.

Table 3 The criminal jurisdiction of the Supreme Court – Trial Division

Original jurisdiction	Appellate jurisdiction
The Supreme Court – Trial Division has the power to hear: all indictable offences, but usually only hears the most serious Victorian crimes, such as murder and treason.	The Supreme Court – Trial Division has the power to hear criminal appeals from the Magistrates' Court: when an accused is appealing the decision on a question of law.

USEFUL TIP

It is important to recognise the difference between questions of fact and questions of law. A question of fact relates to the credibility of the evidence or the facts of the case. A question of law relates to the interpretation or application of the legal principles. To remember this, think 'credibility' and 'County', the County Court hears Magistrates' Court appeals on questions of fact, while the Supreme Court – Trial Division hears them on questions of law.

KEY TERM

Supreme Court of Victoria the most superior court in Victoria that deals with the state's most serious criminal and civil cases.

LEGAL VOCABULARY

High Court of Australia the most superior court in Australia that hears matters of federal significance and appeals from federal, state, and territory courts.

Question of law an issue of law that is resolved by a judge, often concerning the interpretation and application of legal principles or legislation.

LESSON LINK

You learnt about summary offences, indictable offences heard summarily, and committal proceedings in **2E Summary offences and indictable offences**.

Table 4 The criminal jurisdiction of the Supreme Court – Court of Appeal

Original jurisdiction	Appellate jurisdiction
The Supreme Court – Court of Appeal only hears cases on appeal, therefore it has no original jurisdiction.	The Supreme Court – Court of Appeal has the power to hear all criminal appeals from the County Court and Supreme Court – Trial Division.

USEFUL TIP

Whilst the Supreme Court – Trial Division can hear all indictable offences, it will only usually conduct trials for very serious indictable offences. Therefore, when you are answering questions and referring to the jurisdiction of the Supreme Court – Trial Division, it is important to mention that it mainly hears 'serious indictable offences'. Moreover, when referring to the Victorian court hierarchy, it is important to recognise that the Supreme Court – Court of Appeal is also considered superior to the Supreme Court – Trial Division.

DEEP DIVE

The High Court of Australia

The High Court of Australia is the most superior court in the country and therefore is at the top of all court hierarchies that exist across the country. There are seven justices in the High Court who determine the overall verdict and sentence. The Court's original jurisdiction authorises it to mainly hear cases relating to the interpretation of the Constitution and disputes between states and territories. However, most of the cases that reach the High Court are heard on appeal from the Supreme Courts of states and territories, including the Supreme Court of Victoria. Other courts, such as the Federal Court of Australia, also can appeal to the High Court.

An appeal must be approved for it to be heard in the High Court. The decision made by the High Court is final, as there are no other, more superior courts available for a case to be appealed to.



Image: ChameleonsEye/Shutterstock.com

Figure 3 The High Court of Australia is the most superior court in the Victorian court hierarchy

The role of Victorian courts 1.3.4.2

Victorian courts serve to interpret criminal laws, determine the guilt of the accused, and provide appropriate sanctions to ensure justice is served for any victims of crime. The Victorian court hierarchy enables these roles to be effectively achieved in the criminal justice system.

Table 5 The role of the courts in the criminal justice system

Role	How the courts achieve their role
Provide access to an independent, experienced, and knowledgeable judicial officer	The magistrates and judges presiding over criminal cases are experienced and knowledgeable about criminal laws, court rules and procedures and relevant crimes. These judicial officers act impartially, and in a competent manner when determining the outcome of a criminal case to provide parties with a just outcome.
Enforce procedural fairness	The formality and structure of court processes support procedural fairness as existing rules and directions equally apply to both parties, whilst judges ensure such rules are appropriately followed. For example, the judge or magistrate has case management powers that enable them to organise and direct the court fairly.
Provide access to a trial by jury	In criminal cases, a trial by jury is afforded when an accused has been charged with an indictable offence and has pleaded not guilty. By accessing a trial by jury, the parties have their case heard by members of the community who can each provide a unique perspective when determining the guilt of the accused.
Provide specialised knowledge and expertise to the case	As a result of their original and appellate jurisdictions, the courts have developed expertise in hearing certain types of criminal cases. For example, justices in the Supreme Court are knowledgeable in laws relating to murder as they conduct trials for such offences on a relatively frequent basis. Alternatively, magistrates of the Magistrates' Court hold a greater understanding of less serious offences, such as speeding and property damage. Thus, this provides greater consistency, accuracy, and efficiency in the criminal justice system.
Determine the outcome of a case	A judge or jury has the responsibility of determining the overall verdict of the case. This means they hold the power to decide whether the accused is found 'guilty' or 'not guilty' based on the evidence presented. For an accused to be found guilty, the judge or jury must determine there is no reasonable doubt that the accused committed the crime.
Impose an appropriate sanction	If the judge or jury finds the accused guilty of the crime, the judge is responsible for imposing an appropriate sanction that reflects the severity and impact of the offence. For example, a judge may sentence an accused who committed a serious indictable offence with a term of imprisonment. The imposition of an accused's sanction occurs following a plea hearing .
Provide an opportunity to appeal the outcome of a case	If the prosecution or accused believes justice has not been appropriately served by the judge's decision, they can have their case reviewed in a superior court through an appeal. However, the appeal of a criminal case is not automatically granted. Rather, the prosecution or accused must have the appropriate grounds for an appeal, which differ based on the court the party is appealing to.
Set precedent for future cases	The courts have a role in developing common law by establishing precedents. Precedent refers to a legal principle established by a court that must be followed in subsequent cases that share similar material facts. Through the establishment of precedent, the courts seek to achieve justice and consistency in the criminal justice system.

LEGAL VOCABULARY

Case management powers the ability of a judge or magistrate to make orders and provide directions to the parties about the proceedings, with the aim of ensuring justice is delivered efficiently.

Plea hearing a process that occurs after an accused pleads, or is found, guilty whereby the prosecution and accused make statements to the judge about the case's facts, circumstances, and other factors that should be considered when sentencing the offender.

LESSON LINKS

You learnt about specialisation and appeals in **1F The Victorian court hierarchy**.

You will learn more about the sentencing of an accused and the possible sanctions imposed in **Chapter 5: Sentencing**.

You learnt about precedent in **1E Sources of law**.

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. The tables on the next page, showing the strengths and limitations of the Victorian courts in relation to each principle, can assist you in developing a discussion of how the courts can uphold the principles of justice.

REAL WORLD EXAMPLE

Appealing the facts nearly 40 years later

In 1985, Derek Bromley was found guilty of murdering Stephen Docoza in the Supreme Court of South Australia and was sentenced to life imprisonment. Since the application of this sanction, Bromley has spent almost 40 years in prison and has maintained his innocence throughout this period, consequently being denied parole due to his unwillingness to 'accept he committed the crime'. As Australia's longest-serving First Nations prisoner, Bromley has made several unsuccessful attempts to appeal his sentence of life imprisonment in the High Court of Australia. However, in 2023, Bromley satisfied the grounds for an appeal, arguing that the prosecution's central witness, Gary Carter, was unreliable due to having 'a schizoaffective disorder', meaning his accounts were likely inaccurate. Therefore, Bromley's appeal was based on a question of fact. The appeal was heard by five High Court Justices in May 2023, with an expert witness, Dr Brereton, stating that Carter's condition made his accounts 'so inherently unreliable'. Since the hearing, the High Court has postponed its decision on Bromley's case.

Adapted from "Enough' evidence to find Derek Bromley guilty of murder he's denied for 39 years, court hears' (Doherty, 2023) and 'Derek Bromley in final bid for freedom after nearly 40 years in South Australian jail for murder' (Kelly, 2023)



Image: ChameleonsEye/Shutterstock.com

Figure 4 Derek Bromley appealed his sentence in the High Court of Australia in 2023

Evaluating the ability of the Victorian courts to achieve the principles of justice in relation to their criminal jurisdiction

STRENGTHS

- Judges and magistrates within the criminal justice system are impartial and independent referees of the courts, meaning they determine the outcome of a case in an unbiased manner to ensure the provision of a fair trial.
- Judges and magistrates have specialised knowledge and skills as a result of the Victorian court hierarchy, therefore enabling them to deliver consistent and fair outcomes for criminal cases.
- Theoretically, appeals are available to everyone in the criminal justice system, provided they have the legal grounds to do so. This ensures any errors are corrected, achieving fairness for the parties.
- When courts set precedent for future criminal cases, greater consistency and fairness can be provided when delivering a final verdict to parties.

LIMITATIONS

- In some cases, the accused may be unable to appeal an outcome to a higher court if they cannot afford the associated fees. Therefore, the ability of a party to receive a fair outcome in the criminal justice system is limited if the lower court does not deliver a just outcome.
- Although the arrangement of the court hierarchy minimises some delays, they still exist and can cause backlogs in the criminal justice system. This can reduce fairness for parties involved as this may cause physical evidence to decay or witness memories to fade over time, limiting the reliability of evidence.
- If an unfair precedent was established in a more superior court, a lower court may be forced to follow the legal principle and, consequently, deliver an unjust verdict to an accused.



STRENGTHS

- Court rules and procedures are enforced by judges and magistrates, who ensure they apply equally to both parties.
- Both the prosecution and accused have the right to appeal the outcome of a case, regardless of characteristics such as race, sex, or gender, provided they have valid grounds to do so.

LIMITATIONS

- Appeals are not equally accessible to the prosecution and accused due to their high cost. This can cause socioeconomic discrimination if the accused is unable to appeal an unjust decision as a result of their financial position.
- The formality of the courts and its procedures may cause an accused to feel overwhelmed and stressed. This may prevent them from presenting evidence in a confident manner, therefore providing them with unequal footing in the case.





STRENGTHS

- In certain serious criminal trials, parties are awarded the right to a trial by jury. Therefore, this enables their case to be heard by members of the public, providing them with access to a more diverse range of perspectives when determining the outcome of the case.
- The court hierarchy promotes access to justice by providing an appeal process that facilitates the review of judicial decisions. Appeals ensure mistakes in the criminal justice system are corrected and provide access to a review from judges of a superior court.
- The specialised knowledge and expertise of court judges and magistrates enhance access to justice as it allows criminal cases to be resolved in a more efficient and consistent way.

LIMITATIONS

- The grounds for an appeal must exist. Therefore, some criminal cases may be ineligible for a review by a higher court, meaning access to appeals can be limited.
- The cost of engaging legal representation for the appeals process can be inaccessible to those who do not have the financial means. This can decrease a party's access to the criminal justice system.
- Appeals can result in more delays for the already overburdened courts, therefore limiting access to the timely delivery of justice.
- An accused may struggle to understand the criminal processes and procedures of the courts if they have no prior knowledge, therefore limiting their access to justice.

Lesson summary

The courts within the Victorian criminal justice system can have original and appellate jurisdiction. The Victorian courts have various roles in the criminal justice system, including:

- providing access to independent, experienced, and knowledgeable judicial officers
- enforcing procedural fairness
- providing access to a trial by jury
- providing specialised knowledge and expertise to the case
- determining the outcome of a case
- imposing an appropriate sanction
- providing an opportunity to appeal the outcome of a case
- setting precedent for future cases.

WANT TO KNOW MORE?

In Victoria, there are additional courts to those that exist within the Victorian court hierarchy. These are known as specialised courts and include the Children's Court, Coroners Court, and Koori Court. You can find out more about Victoria's specialised courts by searching 'Victoria's specialised courts' and exploring the relevant webpage.

4D Questions

Check your understanding

Question 1

All courts in the Victorian court hierarchy of the criminal justice system have an original and appellate jurisdiction.

- A. True
B. False

Question 2

Fill in the blanks with **two** of the following terms:

lowest-ranked

highest-ranked

original

appellate

As the [] court in the Victorian court hierarchy, the High Court mostly exercises its [] jurisdiction.

Question 3

Which of the following courts have a separate Trial Division and Court of Appeal?

- A. The Magistrates' Court
- B. The County Court
- C. The Supreme Court
- D. The High Court of Australia

Question 4

Which of the following are roles of the Victorian court hierarchy in the criminal justice system?

(Select all that apply)

- A. To ensure an accused is always found guilty.
- B. To impose an appropriate sanction.
- C. To persuade the jury when deciding their verdict.
- D. To determine the outcome of a case.

Question 5

Tick the box to indicate whether each of the following statements are **true** or **false** about the role of the courts in the criminal justice system

Statement	True	False
I. Criminal cases have access to a trial by jury, whereby the jury decides the overall verdict and sentence imposed.	☐	☐
II. The court hierarchy enables the courts to determine outcomes and impose appropriate sanctions in a consistent and efficient manner.	☐	☐
III. The criminal jurisdiction of the Victorian courts only enables the prosecution to appeal the outcome of a case in a higher court.	☐	☐
IV. The magistrates of the Magistrates' Court are independent and unbiased individuals, who hear a case in a competent and fair manner.	☐	☐

Question 6

Which of the following are ways in which the principles of justice are limited by the criminal jurisdiction of the Victorian courts? (Select all that apply)

- A. An accused who wants to appeal a Magistrates' Court decision in the County Court may be unable to due to limited financial means.
- B. By enforcing procedural fairness, the prosecution and accused are treated equally, regardless of characteristics, such as their gender, sex, or religion.
- C. In the criminal justice system, the cost of engaging legal representation may be unrealistic for an accused, therefore limiting their access to a fair trial.

Question 7

The criminal jurisdiction of the Victorian courts enables a more efficient and just legal system.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Identify the original and appellate criminal jurisdiction of **one** court in the Victorian court hierarchy.

Question 9

(2 MARKS)

Outline **one** role of the Victorian court hierarchy.

Question 10

(3 MARKS)

Explain how **one** role of the Victorian courts enables the achievement of access in the criminal justice system.

Question 11

(3 MARKS)

Niall was accused of armed robbery and had his case heard in the County Court by Judge Louis. The case was heard in a timely and efficient manner as Judge Louis had specialised knowledge in resolving armed robbery cases. Niall was found guilty of his crime and sentenced to a term of imprisonment. Niall believes the judge's decision is unjust and has sought an appeal.

Identify which court Niall's appeal would be heard in and outline this court's criminal jurisdiction.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Liam was accused of murder. The case was originally heard in the Supreme Court – Trial Division by a justice experienced in hearing serious and long cases. The jury found Liam not guilty of murder. The prosecution appealed this decision and the case was heard the case in the Supreme Court – Court of Appeal. The case was delayed for several months before the court found Liam guilty of murder and sentenced him to 21 years imprisonment. Liam maintained his innocence but was unable to appeal the decision further due to his financial situation.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the Victorian courts to achieve the principles of justice in relation to their criminal jurisdiction.

Statement	Strengths	Limitations
I. The specialised knowledge of the justices increases the likelihood that a just and fair outcome is delivered.	☐	☐
II. Liam has maintained his innocence, yet he is unable to afford an appeal of the Court of Appeal's decision.	☐	☐
III. The unbiased and independent nature of the Supreme Court Justices enabled the case to be resolved in a consistent and competent manner.	☐	☐
IV. The delays in the appeal may have caused Liam to become increasingly stressed and overwhelmed, potentially affecting his ability to confidently present evidence.	☐	☐
V. Liam may have been unable to afford legal representation for the prosecution's appeal in the Supreme Court, potentially leading to his guilty verdict.	☐	☐
VI. Both the prosecution and Liam have the right to appeal the outcome of a case, provided they have valid grounds to do so.	☐	☐

Question 13

(6 MARKS)

Discuss the ability of the criminal jurisdiction of the Victorian courts to achieve the principles of justice.

Linking to previous learning**Question 14**

(3 MARKS)

Simon was accused of murdering Zayn, whilst Diana was accused of culpable driving causing death, which killed Harry. Their cases are to be heard in court next month.

Define **one** of the crimes in the scenario and outline which court the case would most likely be heard in.

4E The jury in a criminal trial

STUDY DESIGN DOT POINT

- the role of the jury in a criminal trial

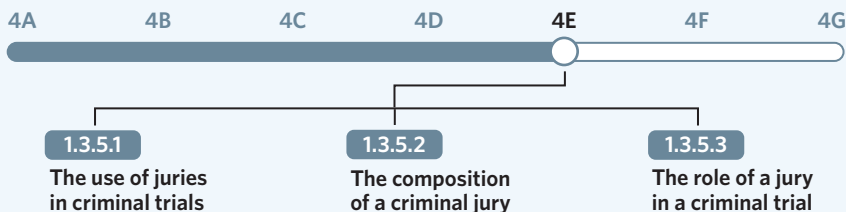


Image: Rokas Tenys/Shutterstock.com

In the internationally famous TV show, *Survivor*, voting is utilised to determine who exits the island at the closure of every episode. The 'tribe' makes decisions about who they wish to vote out based on the 'evidence' they have witnessed over the course of various challenges and social interactions.

The court system works in a similar fashion. In jury trials an accused will have their guilt determined and voted upon by a 'tribe' of 12 people from the community. Hence, once 'the tribe has spoken', the accused will not be booted off an island but will receive a guilty or not guilty verdict.

Lesson introduction

Across Australia, for indictable offences, a jury will usually determine the guilt of an accused person. When an accused pleads 'not guilty', they have the legal right to have a jury, consisting of members of the community, determine their culpability. By selecting members of the general public to hear the criminal case, as opposed to using a singular judge, the interests and values of the wider community can be represented in the courts.

The use of juries in criminal trials 1.3.5.1

The **jury** in a criminal trial is a group of 12 randomly selected people from the **electoral roll** who are required to deliver a **verdict** based on the evidence presented to them in court. The verdict represents the choice and consensus of the jury to find an accused either 'guilty' or 'not guilty'. A jury is chosen at random to represent a cross-section of the broader community and deliver an unbiased decision. The use of juries in criminal trials is set out in the *Juries Act 2000* (Vic), which legislates the process for choosing a jury, as well as the eligibility of jurors, and their responsibilities.

A jury is used to deliver a verdict where an accused has pleaded not guilty in a criminal trial occurring in the original jurisdiction of:

- the County Court
- the Supreme Court – Trial Division.

This means criminal juries are only used to determine the guilt or innocence of an accused person charged with indictable offences. Therefore, they are only used in a small proportion of criminal matters, as most criminal offences in Victoria are summary offences. When an offender is accused of an indictable offence, they will often plead guilty, making jury trials even rarer.

KEY TERM

Jury a group of randomly selected people who are required to deliver a verdict in a trial based on the evidence presented to them in court.

LEGAL VOCABULARY

Electoral roll the list of names of all Australians who are enrolled to vote. In order to enrol to vote, an individual must be an Australian citizen and over 18 years old.

Verdict a decision made by a judge or jury regarding the guilt or liability of a party.

LEGISLATION

Juries Act 2000 (Vic)

LEGAL VOCABULARY

Appeal a legal process that a dissatisfied party may pursue to have the court's decision reviewed by a higher court.

LESSON LINKS

You learnt about the original jurisdiction of courts in **4D Criminal jurisdictions of Victorian courts**.

You learnt about summary and indictable offences in **2E Summary offences and indictable offences**.

USEFUL TIP

Even if an accused pleads not guilty to an offence, it is still within their rights to not use a jury. In such cases, the accused will be tried by a judge alone. In order for this to be approved by the courts, the accused must seek legal advice and provide their formal consent.

LEGAL VOCABULARY

Jury empanelment the process of selecting the jurors for a trial, whereby potential jurors can be found ineligible, or be disqualified or excused from jury duty for a range of reasons.

A jury is not used for criminal cases:

- heard in the Magistrates' Court
- heard on **appeal**
- where the accused has already pleaded guilty to the offence
- where an accused wants to be tried by a judge alone.

DEEP DIVE

The COVID crisis in the criminal courts

From March to November 2020, jury trials ceased in the County Court and Supreme Court – Trial Division of Victoria. This was to adhere to the state's COVID-19 lockdown restrictions at the time, as gatherings of 12 people, especially in close proximity, such as on a jury panel, were prohibited or strongly advised against.

For the criminal justice system, this meant there were thousands of trials that were left waiting to be heard and tried by a jury, contributing significantly and negatively to the existing backlogs of the courts. In an attempt to remedy these conditions, the courts offered optional, 'judge-only' trials, in which the judge would determine the guilt of an accused, instead of the jury. Although this would allow an accused's case to be heard in a shorter timeframe, the courts found that many still opted to wait for a jury, likely believing a jury trial would provide a fairer assessment of their guilt.

After November 2020, the reintroduction of juries back into these courts was a slow but safe process, with precautions being taken, such as distancing jurors, mandating mask use, and increasing the availability of sanitiser.

Adapted from 'Legal system celebrates the return of 'wonderful' jury trials' (Cooper, 2020)

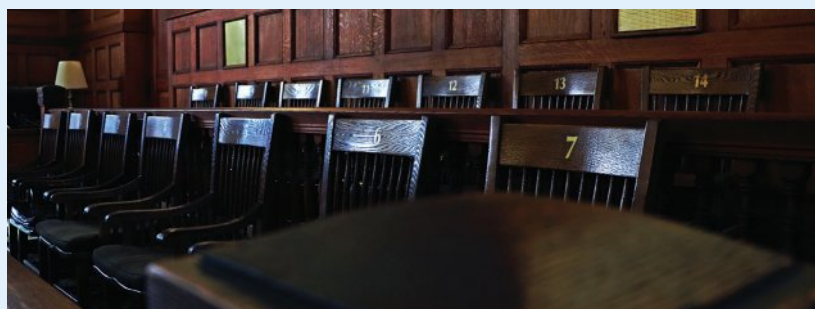


Image: Crazy City Lady/Shutterstock.com

Figure 1 Juries were prohibited in Victoria for the majority of 2020 as a precaution against COVID-19

The composition of a criminal jury 1.3.5.2

A criminal jury consists of 12 members, however, in cases where the trial is expected to be particularly long, up to 15 jurors may be subject to **jury empanelment** to account for sickness or other reasons that may cause a juror to withdraw. Despite this, the final verdict will always be decided by a jury of only 12.

The main two eligibility criteria for jury service are that a person is:

1. 18 years or older
2. enrolled to vote in Victoria.

However, this does not mean that everyone who satisfies these conditions is able to undertake jury service.

Table 1 Reasons for being unable to serve on a jury in Victoria

Reason for inability	Explanation	Conditions
Disqualified	The potential juror has a negative, past relationship with the criminal justice system.	A person who has been: - convicted of treason or an indictable offence and sentenced to a term of imprisonment or detention of three years or more. - sentenced to a term of imprisonment of three months or more, within the last 10 years. - sentenced to a term of imprisonment of three months or less, received a Community Corrections Order (CCO), or has received a suspended sentence within the last five years. - sentenced for an offence in any court, including the Magistrates' Court, in the last two years. - charged with an indictable offence and is released on bail. - remanded in custody. - declared bankrupt.
Ineligible	The potential juror possesses personal characteristics that make it difficult for them to participate in the jury in a representative, standard capacity.	Those who currently, or have in the last 10 years, held a position, such as: - Governor or Official Secretary to the Governor - judge, magistrate, or any other judicial officer - lawyer - police officer - Member of the Victorian Parliament. Individuals who may not be able to perform the necessary tasks of a juror due to personal reasons, such as: - a physical disability that renders the person incapable of performing the duties of jury service - an intellectual disability - an inability to communicate in, or understand, the English language adequately.
Excused	The potential juror is initially selected but then, by the choice of the individual or the court, they are excused for a select reason.	The court may excuse a potential juror if they: - are unable to consider the case impartially due to reasons, such as having a personal connection to the case - were a victim of a similar crime. A potential juror may request to excuse themselves and can be approved to be excused, if they meet criteria, such as: - they live more than 50km from Melbourne CBD or 60km from a regional court - substantial financial hardship would result from attending jury service - they have an illness or poor health - they bear significant caring duties - their religious beliefs are incompatible with jury service - they are of old age.

HYPOTHETICAL SCENARIO

Mel's mission for justice

Amongst the community, there are divided opinions on jury service or 'jury duty'. Consider Mel, a 21-year-old Victorian voter who lives in a remote, regional town. Her nearest court is the Bendigo Law Court, approximately 75 km from her home. For some people, jury service is perceived as a privilege, enabling them to participate in the delivery of justice within the Victorian state. Mel is one of these citizens and she attends an assault trial as a part of her jury service in Bendigo. Under current criteria, Mel would qualify to be excused as a juror, however, she chooses to not exercise this right and, instead, participates in the justice process in her wider, regional community.

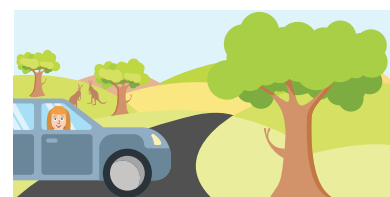


Figure 2 Mel wanted to participate in the jury process in order to assist in the delivery of justice

The role of the jury in a criminal trial 1.3.5.3

The main responsibility of the jury is to determine whether the accused is guilty of the charge against them, also known as delivering a verdict. Jurors must base this verdict, and their decision-making process, solely on the evidence presented during the trial, disregarding any personal biases or external opinions.

When determining the verdict, a jury must aim to reach a unanimous decision in which all 12 jurors agree the accused is either:

- guilty beyond reasonable doubt
- not guilty.

In some cases, a court may accept a majority verdict in which 11 of the 12 jurors agree on the **culpability** of the accused. Depending on the nature and complexity of the case, the court may accept a majority verdict, as opposed to a unanimous verdict, where the jury has deliberated for a reasonable time. However, a majority verdict is not permitted in trials for murder or serious drug offences, with the courts requiring a unanimous decision amongst jurors to find an accused guilty, due to the complexity and serious nature of such cases.

Table 2 Other roles of the jury in a criminal trial

Role of the jury	Explanation
Be objective	Throughout a criminal trial, above all other roles, the jury must remain independent and unbiased toward both parties. Potential jurors who believe they cannot remain impartial, due to prior connections with the parties or factors including their occupation, are excused during jury empanelment.
Listen to the evidence and submissions made	The jury must listen to all evidence presented at trial to ensure the verdict is based on all relevant evidence and the facts of the case. Therefore, jurors must be alert and keep track of information throughout the trial in order to make an informed and educated determination of culpability at its conclusion. Jurors may take notes during the proceedings but must not conduct any research outside of the courtroom.
Listen to directions of the judge	Judges in a criminal trial will often give directions to the jury under the <i>Jury Directions Act 2015</i> (Vic). These directions aim to assist the trial process, whilst also informing jurors on points of law, their rights, and any other matters that promote a fair trial. For example, the prosecution or defence can request a judge to inform a jury that certain evidence is unreliable if there are valid reasons why it is likely unreliable. The judge must then warn the jury of this fact. The jury has a duty to respect and follow the directions of the judge to promote a fair trial.
Appoint a foreperson	The foreperson is one of the 12 jurors who communicates on behalf of the entire jury. The jury is responsible for selecting its foreperson and, once nominated, this juror acts as a spokesperson for any questions the jury has, whilst also delivering the jury's verdict to the court at the conclusion of the trial.

LEGAL VOCABULARY

Culpability a measure of the degree to which an individual can be held legally responsible for a criminal act.

LEGISLATION

Jury Directions Act 2015 (Vic)

USEFUL TIP

Although the jury has a role in determining the guilt of an accused person, once it has delivered a verdict, its role in the delivery of justice is over. It is the sole discretion of the judge to decide on the appropriate sanction for an offender if they are found guilty by the jury.

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. These tables showing the strengths and limitations of the jury in relation to each principle can assist you in developing a discussion of how juries can uphold the principles of justice.

REAL WORLD EXAMPLE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to sexual abuse.

Deliberation delays

In March 2023, a high-profile case was heard in the County Court of Victoria in which the accused faced 27 charges, primarily involving sexual abuse.

The court anticipated the trial to be lengthy, therefore, 15 jurors were initially empanelled and then randomly narrowed to 12 for the trial process. After almost a week of deliberations, the foreman of the jury told the judge that it seemed 'unlikely' the jury would reach a unanimous decision. In response, the judge conveyed his wishes for the jurors to reach a unanimous decision, despite the long decision-making process, but also informed them of his power to give the direction to dismiss them should they be unable to come to a decision. He directed them to resolve their differences but not by compromising their stances and beliefs on the case, sending them back to deliberate after they had already spent 17 hours considering their opinions on the matter. The jury ultimately reached the verdict of finding the accused guilty of 18 charges, including rape and indecent assault.

Adapted from 'Jury unable to return unanimous verdicts on all charges' (Kohn, 2023) and 'Leifer jury reaches 'verdict' on some charges but told to continue deliberating on others' (Estcourt, 2023)



Image: Alexander Oganezov/Shutterstock.com

Figure 3 A jury was given more time to reach a unanimous verdict following a judge's decision

Evaluating the jury's ability to achieve the principles of justice in a criminal trial

STRENGTHS

- Juries are independent of all parties to a case. They are randomly selected from the community and have no connection to the victim, the accused, or witnesses. They cannot seek additional information about the case beyond the courtroom. They should, therefore, be completely impartial which promotes fairness.
- A cross-section of the community is used as the decision maker in a jury trial, so the accused should feel their case has been decided by their equals. Therefore, a fair and just outcome is produced as the verdict reflects the broader views and values of the community and what is seen as ethical and moral.

LIMITATIONS

- Juries do not need to provide reasons for their decisions and, therefore, there is no certainty they have applied the law to the facts correctly. This could be unfair for the accused persons and victims of crime.
- The use of juries can create delays, as time is taken to empanel the jury, explain court procedures and jurors' roles, explain evidence, and allow the jury to reach a decision. Delays can be unfair on an accused and victims of crime as they may compound the stress involved in the criminal trial, and could result in witness evidence being forgotten, or physical evidence being misplaced or deteriorating, therefore making this evidence unreliable.



STRENGTHS

- 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.
- The cost of a criminal jury is paid for by the courts, not by the accused, therefore an accused will not be prevented from receiving a jury trial on the basis of being unable to afford it, promoting equality among accused peoples of both a higher and lower socioeconomic status.

LIMITATIONS

- Accused persons charged with summary offences, or indictable offences heard summarily, do not have the opportunity for their case to be heard and determined by a jury.
- Every human has past experiences, prejudices, and biases that are unavoidable, even when a person is explicitly told to ignore them. Therefore, no jury is truly impartial, which may result in an unequal decision if an accused person is found guilty on the basis of jurors' subconscious biases, rather than the evidence and facts presented in court.





STRENGTHS

- Through the directions given by judges, jurors have greater access to the processes of the courtroom and the legal technicalities of the case before them. This improves their understanding of and engagement with the criminal justice system, allowing them to deliver a more informed verdict.
- All accused persons charged with an indictable offence are able to access a trial by jury.
- Jury trials enable members of the community to be involved in criminal proceedings and engage in the delivery of justice.

LIMITATIONS

- Few criminal matters are tried by a jury, as most criminal offences are summary offences resolved in the Magistrates' Court. This means only relatively few accused persons access a jury trial.

Lesson summary

- For indictable offences where an accused pleads 'not guilty', the court summons 12 members of the community to sit on a jury and determine the culpability of the accused.
- These jurors will listen to the evidence presented by both the prosecution and the accused and then deliver a verdict.
- Not all Victorians are eligible to serve on a jury. Randomly selected individuals must meet all key criteria.
- The main roles of the jury in a criminal trial are to:
 - deliver a verdict
 - be objective
 - listen to the evidence and submissions made
 - listen to directions of the judge
 - appoint a foreperson.

4E Questions

Check your understanding

Question 1

The primary role of the jury in a criminal trial is to deliver a verdict regarding the guilt of the accused.

- A. True
B. False

Question 2

Fill in the blanks with **two** of the following terms:

12

11

summary

indictable

A jury is composed of [] members who will assist in determining the guilt of persons accused of [] offences.

Question 3

Which of the following are reasons why an individual may be unable to serve on a jury in Victoria?

- A. Disqualification, occupation, excused.
- B. Disqualification, ineligibility, constraints.
- C. Disqualification, ineligibility, excused.
- D. Prohibition, occupation, constraints.

Question 4

'All accused persons who plead not guilty for an indictable offence have the same opportunity to have their case heard by a jury.'

This feature of the criminal justice system upholds the principle of equality.

- A. True
- B. False

Question 5

Which of the following is **not** a role of the jury in a criminal trial?

- A. To be objective.
- B. To listen to the directions of the judge.
- C. To appoint a foreperson.
- D. To determine the sanction.

Question 6

Juries are utilised in a majority of criminal trials.

- A. True
- B. False

Question 7

The use of juries in a criminal trial helps promote the delivery of justice by upholding:

- A. fairness.
- B. equality.
- C. access.
- D. all of the principles of justice.

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Define the term 'jury' and identify **one** role of the jury in a criminal trial.

Question 9

(3 MARKS)

Describe the composition of a jury in a criminal trial and provide **one** reason why a person may be unable to serve on a jury in Victoria.

Question 10

(4 MARKS)

Describe **two** roles of a jury in a criminal trial.

Question 11

(3 MARKS)

Angelica was accused of causing injury intentionally after her roommate, Maya, alleged that she came into her room, punched her in the face, and subsequently broke her nose. Angelica's guilt is being determined at trial by a panel of 12 jurors. Maya is testifying at the trial and her ten-year-old cousin will also present evidence, as she was in their apartment on the night of the incident and believed she may have heard it take place.

Explain **one** role of the jury in Angelica's case.

Extended response

Use your answer to question 12 to support your response to question 13.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of juries achieving the principle of fairness in criminal trials.

Statement	Strengths	Limitations
I. Juries are randomly selected from the community and cannot be connected to the victim, the accused, or witnesses. Additional information cannot be sought outside the courtroom, and jurors must disregard previous knowledge.	☐	☐
II. Juries do not need to provide reasons for their decisions and, therefore, there is no certainty they have actually applied the law to the facts correctly.	☐	☐
III. The use of juries may create delays, as time is taken to empanel the jury, explain court procedures and jurors' roles, explain evidence, and allow the jurors to reach a decision.	☐	☐
IV. A cross-section of the community is used as the decision maker in a jury trial, so the accused should feel their case has been decided by their equals. This may allow an accused to feel as though the justice system has upheld fairness.	☐	☐

Question 13

(6 MARKS)

Evaluate the ability of a criminal trial by jury to achieve the principle of fairness.

Linking to previous learning**Question 14**

(3 MARKS)

'Murder cases will always be heard by a jury.'

Do you agree with this statement? Justify your response.

4F First Nations people and the criminal justice system

STUDY DESIGN DOT POINT

- the difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities



1.3.6.1

The experiences of First Nations people in the criminal justice system



Image: Rose Marinelli/Shutterstock.com

'[The deaths in custody report] paints a horrific portrait of the state of Indigenous criminal justice'—Inga Ting (Journalist, 2013)

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) delivered its final report amidst growing concerns regarding the frequency and lack of attention given to the number of First Nations peoples' deaths in custody. Decades later, First Nations peoples are still disproportionately impacted by the criminal justice system. So why is this the case, and what can be done to address this persisting and inhumane issue of the Australian legal system?

Lesson introduction

Aboriginal and Torres Strait Islander peoples' access to and experiences in the criminal justice system are often hindered in Australia for various reasons. Language barriers, cultural misunderstandings, intergenerational trauma, previous experiences in child welfare or juvenile justice settings, police involvement in families, and the construction of the Victorian justice system, designed using Western practices and ideas, often impede the achievement of justice for First Nations victims, accused persons, and witnesses. However, institutions and processes have been established in recent decades that attempt to rectify the negative experiences of Aboriginal and Torres Strait Islander individuals in the criminal justice system, as Australia continues to strive for reconciliation.

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to people who have passed or distressing events.

The experience of First Nations people in the criminal justice system 1.3.6.1

The difficulties faced by First Nations peoples in the criminal justice system are reflected in the higher **incarceration rates** of the Aboriginal and Torres Strait Islander population in Australia compared to the general population. According to the Australian Bureau of Statistics (2023), Aboriginal and Torres Strait Islander adults accounted for 32% of the national prison population between 2021–2022, despite only making up 3.8% of the total Australian population in 2023. These higher, disproportionate incarceration rates are a product of a number of difficulties faced by First Nations peoples in the criminal justice system.

LEGAL VOCABULARY

Incarceration rate the proportion of people being sentenced to a term of imprisonment.

Victoria Legal Aid (VLA) a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

Table 1 The difficulties faced by Australia's First Nations peoples in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and within prison systems around Australia	- Figures from 2020 indicate the Aboriginal imprisonment rate in NSW is nearly 10 times the rate of the non-Aboriginal imprisonment rate (Australian Bureau of Statistics, 2020). - A report by the United Nations Association of Australia found the rate at which First Nations peoples are incarcerated continues to increase each year (Temple et al., 2021). - The Sentencing Advisory Council (2023) found that Aboriginal and Torres Strait Islander imprisonment rates almost doubled between 2011 and 2021 in Victoria. - Due to these alarming rates of incarceration, First Nations individuals may fear they are more likely to be convicted on the basis of their race, regardless of the evidence against them.
A history of dispossession and social exclusion by governments has led many First Nations individuals to lose trust in the criminal justice system	- In 2020, a Gunditjmara, Dja Dja Wurrung, Wiradjuri, and Yorta Yorta woman named Victoria Nelson, passed away in a Victorian, maximum-security prison after being arrested on suspicion of shoplifting (Ore, 2023). Despite calling for help several times due to experiencing significant vomiting and cramps, she received no help from prison staff, eventually passing away in custody. - Cases like that of Victoria Nelson may prevent Aboriginal or Torres Strait Islander victims from seeking justice, fearing ingrained racial prejudices and systematic discrimination will prevent them from attaining justice even if pursued.
Body language practices differ in Aboriginal and Torres Strait Islander cultures, compared to dominant, Western cultural practices in Australian society	In some First Nations communities, individuals may avoid eye contact and remain silent more often than non-Indigenous Australians as it can be considered respectful to do so. A lack of eye contact or silence can be misunderstood as dishonesty and evasiveness by those working within the justice system who do not understand this cultural practice.
Cultural practices make it inappropriate for persons of Aboriginal or Torres Strait Islander heritage to discuss certain subject matter when giving evidence or being questioned	- Within certain First Nations communities, it is considered disrespectful to talk about certain topics. For example, in some communities, seeing images of, hearing about, and listening to the names of deceased persons can cause sadness, distress, and offence. Consequently, an accused or victim may find it uncomfortable or culturally overwhelming to present evidence or witness the presentation of evidence in a courtroom. - Furthermore, direct questioning is generally considered rude in some Aboriginal cultures. Therefore, when being questioned by the police as an accused, or questioned by lawyers as a witness, First Nations individuals may feel 'shamed'. This includes having feelings of embarrassment, intimidation, and discomfort. Without knowing this, the police or a jury may misinterpret what is happening as an indication of guilt or evasiveness on behalf of the individual.
Intergenerational child removals, and subsequent traumas, may act as barriers preventing Indigenous Australians from reporting criminal acts perpetrated against them, particularly family violence	First Nations women, in particular, may fear reporting violence as this could result in the removal of their children by authorities. This can limit their access to justice and leave them in vulnerable or potentially dangerous domestic environments.
Aboriginal or Torres Strait identification The legal definition of this is based on a three-point definition established in the <i>Aboriginal and Torres Strait Islander Act 2005</i> (Cth): - Heritage - Self-identification - Acceptance from the community	- Aboriginality is not defined by skin colour. In fact, there is so much diversity in relation to the First Nations peoples of Australia. Racial prejudices against First Nations peoples by the justice system exist regardless of the darkness of a person's skin colour. - Racial prejudices resulting in Australian police brutality are still prevalent in Australian society. - For example, in 2015, a 26-year-old Dunghutti man, David Dungay Jr, died in a Sydney jail after being dragged by prison officers to a different cell (Davidson, 2020). Although multiple factors compounded his death, the coroner found the conduct of authorities was 'limited by systemic inefficiencies'. He called out 12 times that he couldn't breathe before losing consciousness. The National Justice Project called for justice and accountability for the 'needless' death.

Continues →

LEGISLATION

Aboriginal and Torres Strait Islander Act 2005 (Cth)

Table 1 Continued

Difficulty faced in the criminal justice system	Explanation
Language barriers due to the difference between pronunciation and grammar in Torres Strait Islander languages or Australian Aboriginal English (the name given to the complex English spoken by around 80% of Aboriginal and Torres Strait Islander peoples across Australia (Parlington and Galloway, 2007))	- In more remote areas of Australia, some First Nations peoples' proficiency in speaking Standard English differs significantly. - Certain English words may have different meanings, creating miscommunications and misinterpretations for First Nations individuals when being questioned, or presenting evidence as a victim or an accused. For example, 'home' could mean a person's place of residence, language group, or nation area. - This can negatively impact the degree of understanding the jury has of the statements given by the accused.
Socioeconomic disadvantage	- The social and economic disadvantage suffered by Aboriginal and Torres Strait Islander peoples can be attributed to higher levels of unemployment and incarceration, and lower levels of education attainment (Parliament of Australia, 2004). - Aboriginal employment for those aged between 15 to 64 was at 56% in 2021 (Australian Bureau of Statistics, 2021). - There are proven links between socioeconomic disadvantage and involvement in crime, with socioeconomic inequality being a principal factor underpinning high crime rates. Therefore, the high rates of unemployment among First Nations peoples may lead to increased contact with law enforcement and the criminal justice system as accused persons or victims of a crime.
Geographical barriers	Some Aboriginal and Torres Strait Islander peoples live in extremely remote areas, therefore affecting their ability to access the courts and legal facilities. In rural areas, for example, there are typically low numbers of legal practitioners providing legal aid, therefore accessing justice can be limited.

DEEP DIVE

Aboriginal communication

According to the Chief Executive of the Kimberley Interpreting Service (KIS), a Western Australian Aboriginal interpreting service, certain English words may be misinterpreted by Aboriginal people.

The following are examples of Aboriginal communications that have different meanings to their English equivalents:

- 'Deadly' can mean that something is good or excellent, instead of meaning 'going to kill' as it would in English.
- 'You're a killer' can take the meaning of telling someone they are awesome or fantastic.
- 'I'm gonna flog you if you don't' would typically be perceived as a threat in a plain English context. However, this is an example of humour in Aboriginal communication, used when trying to convince someone to do something.

Adapted from 'Koorified Aboriginal Communication and Well being' (Adams, 2014) and 'WA Chief Justice Wayne Martin fears language barriers putting innocent people behind bars' (Bembridge, 2015)



Image: PerthLight/Shutterstock.com

Figure 1 English words may have different meanings when spoken in certain Aboriginal and Torres Strait Islander communities

DEEP DIVE

CONTENT WARNING This example explores content that is sensitive in nature, relating to death.

Royal Commission delivers a damning report

In 1991, the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) reported on Aboriginal deaths in custody after investigating 99 deaths. The Commission found that Aboriginal people were far more likely to be in prison than non-Aboriginal people. The report also determined that Aboriginal deaths in custody were caused due to a number of factors, including police and prisons failing to uphold their duty of care, yet ultimately concluded that death rates between Indigenous and non-Indigenous prisoners did not differ.

Continues →

DEEP DIVE

Royal Commission delivers a damning report – Continued

The final report offered 339 recommendations detailing how the justice system should be reformed to better protect Aboriginal people in custody, and prevent their higher level of incarceration. These included recommending imprisonment as a last resort for sentencing, having greater medical assistance available if the condition of a detainee deteriorates, and prioritising greater collaboration with Indigenous communities. Underlying issues propelling the high incarceration rates were all considered, including social, cultural, and legal factors.

A 2018 review by Deloitte found that, since the RCIADIC, 78% of the recommendations made have been fully or mostly implemented, 16% have been partially implemented, and 6% are yet to be implemented. The review also found that, since the RCIADIC Final Report was released, the Aboriginal and Torres Strait Islander incarceration rate has doubled.

Therefore, although the RCIADIC was such a large-scale investigation into the difficulties of First Nations people in the criminal justice system, certain recommendations have not been adequately implemented, and inequality has in fact increased in Australia's criminal justice system.

Adapted from 'The 25th Anniversary of the Royal Commission into Aboriginal Deaths in Custody' (Houghton, 2016) and 'Indigenous deaths in custody: key recommendations still not fully implemented' (Allam & Wahlquist, 2018)

LESSON LINK

You will learn more about the Koori Court in **5D Alternative approaches to sentencing**.

WANT TO KNOW MORE?

In May 2023, the Victorian Government announced a significant investment into Victorian Aboriginal Legal Service's (VALS) Justice Hubs, committing \$7.1 million over the next two years to help VALS open hubs in Aboriginal communities across Victoria. You can find out more about recent news relating to the VALS by searching 'News – Victorian Aboriginal Legal Service' and clicking the relevant webpage (Victorian Aboriginal Legal Service, n.d.).

In recent years, there has been a push towards achieving reconciliation with First Nations peoples and conducting greater research into how Aboriginal and Torres Strait Islander peoples are disproportionately incarcerated in the criminal justice system. There are various mechanisms that have been implemented to address the difficulties faced by First Nations peoples in the criminal justice system.

- The Koori Court, a specialised division of the Victorian Magistrates' Court, Children's Court, and County Court, involves Community Elders and Respected Persons in the sentencing of Aboriginal and/or Torres Strait Islander offenders who have pleaded guilty to certain offences.
- Corrections Victoria has various programs that provide opportunities to Aboriginal and Torres Strait Islander prisoners, aiming to encourage rehabilitation and assist in the successful return of First Nations prisoners into the community following release from custody. An example of one of these programs is the Aboriginal Art Policy Model, which enables Aboriginal prisoners to sell artwork they have produced during their prison sentence.
- Inquiries into the interactions between Aboriginal and Torres Strait Islanders and the criminal justice system have been established, seeking to reform the system and reduce difficulties faced by First Nations peoples as accused persons, witnesses, or victims. For example, in 2018, the Australian Law Reform Commission published a report titled 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples', that investigated the reasons for the higher incarceration rates among First Nations people and contained 35 recommendations designed to reduce a range of inequalities.
- The Victorian Aboriginal Legal Service (VALS), which is funded by the government through the National Legal Assistance Partnership (NLAP), specialises in three areas of law, including criminal law. It aims to reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system. The legal service provides initial information and assistance over the phone, whilst also making referrals to other services, and advising court attendance. VALS's criminal lawyers travel to regions throughout Victoria to ensure services are provided in both rural and metropolitan areas.
- The Koori Engagement and Consultation (KEC) Framework was finalised in June 2022. The KEC is an action initiated by the Court Services Victoria Strategic Plan, created with the assistance of, and direct input from, Koori Staff, Elders, and Respected Persons. The framework was developed in an effort to increase cultural safety practices, including the implementation of a 'comprehensive cultural awareness program' across Court Services Victoria to provide cultural awareness training to all staff.

LEGAL CASE

DPP v Tierney (a pseudonym) [2023] VCC 640

Facts

In September 2021, an Aboriginal woman admitted to setting her unit on fire. The cost of the damage to her unit as a result was \$212,884.85. She attended the police station and admitted to her actions just hours after the incident. She was kept in custody for the next 73 days until she was granted bail.

Legal issue

The Koori Court division of the County Court of Victoria had to determine an adequate sentence for the offender arson, which carries a maximum sentence of 15 years imprisonment.

Decision

The sentencing judge decided that a 'powerful constellation of mitigating factors' in the case reduced the moral culpability of the offender and made a less severe sentence more adequate. There was no evidence suggesting she had premeditated the action, she was not motivated by revenge, and her activity was driven by schizophrenia, which she was suffering from at the time of the offending, causing her to experience auditory hallucinations when lighting the fire. The offender's background of 'profound trauma, deprivation, and disadvantage' also significantly reduced her moral culpability for the offending according to the judge. Considering the number of mitigating factors, the judge sentenced the offender to a 'release on adjournment', whereby she had to complete a number of conditions, including:

- attending court if called upon to do so during the period of adjournment
- exercising good behaviour during the period of adjournment
- complying with treatment recommendations for mental health issues.

Significance

The judge of the Koori Court considered the offender's 'history of profound trauma and disadvantage', which had led to her mental health struggles and criminal behaviour, when determining an appropriate sentence. By doing so, the judge was able to sentence the offender in a way that may better promote her rehabilitation and improvements in her mental health.



Image: Sean Thomforde/Shutterstock.com

Figure 2 The judge considered a number of mitigating factors when sentencing an offender for arson, considering her history of profound trauma

DEEP DIVE

Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples

In 2018, the Australian Law Reform Commission released a report titled 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'. The report investigated the disproportionate incarceration rates among Aboriginal and Torres Strait Islander adults, as they constitute 27% of the national prison population despite only comprising approximately 2% of the national population. The report also detailed recommendations as to how the criminal justice system should be reformed to promote equality and reduce the incarceration rates of Aboriginal and Torres Strait Islander peoples. These recommendations included:

- Recommendation 4 – Justice reinvestment: The Commonwealth, state, and territory governments should support the establishment of an independent justice reinvestment body, overseen by Aboriginal and Torres Strait Islander leadership, that reinvests finances from prisons to community-led initiatives that address the root causes of crime.
- Recommendation 7 – Community-based sentences: State and territory governments should fund and improve access to community-based sentencing options that are more culturally appropriate and address the complex needs of offenders.
- Recommendation 9 – Prison programs: State and territory corrective agencies should develop programs in prison that address the difficulties faced by Aboriginal and Torres Strait Islander prisoners specifically.

Despite the report being tabled several years ago, in 2021, the Law Council of Australia condemned the limited action that had been taken to address the recommendations proposed in the report, urging 'it is time for the Australian Government to take the lead in responding to the Australian Law Reform Commission'.

Adapted from 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' (Australian Law Reform Commission, 2018) and 'Time for a Government response to Pathways to Justice Report' (Wade, 2021)

LESSON LINKS

You will learn more about mitigating factors in **5C Factors considered in sentencing**.

You will learn more about rehabilitation in **5A Purposes of sanctions**.

LEGAL VOCABULARY

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal advice, information, and free or low-cost legal representation.

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. These tables showing the strengths and limitations of the criminal justice system's ability to achieve the principles of justice for First Nations people can assist you in developing a discussion on this topic.

Evaluating the ability of the criminal justice system to achieve the principles of justice for First Nations people



STRENGTHS

- The prosecution must ensure all relevant facts and legal principles are presented to the court. This helps promote fairness as the whole truth can emerge, thus overcoming the difficulties faced by First Nations peoples who may otherwise have difficulty presenting their case in the best light.
- The presumption of innocence and the high standard of proof required for a criminal conviction aims to protect those who have difficulty presenting evidence or a defence, as they do not need to prove their innocence.
- The Koori Engagement and Consultation (KEC) Framework has been developed to implement cultural awareness training for all staff across Court Services Victoria, aiming to counteract the biases or unfair outcomes that may result for First Nations accused persons due to prejudices held by staff across the Victorian courts.

LIMITATIONS

- First Nations witnesses, victims, and accused persons may face difficulties when presenting evidence due to language barriers and different body language and cultural practices of certain Aboriginal and Torres Strait Islander communities compared to Western standards. This may result in the court misinterpreting the facts of a criminal case, leading to incorrect or unjust verdicts.
- Racial prejudices are still prevalent in Australian society, therefore some police officers, jurors, or judges may have inherent biases that lead to unfair outcomes for Aboriginal and Torres Strait Islanders when participating in court processes as accused persons.



STRENGTHS

- Judges in the County Court and the Supreme Court have the power to order **Victoria Legal Aid (VLA)** to provide a lawyer to those who cannot afford legal representation, ensuring they receive some representation. This promotes equality by providing additional resources to those who need it in order to receive a just trial.
- The Koori Court is an option for Aboriginal and Torres Strait Islander peoples if they plead guilty and it promotes fairness, given it can provide culturally-relevant sentencing practices. Therefore, this can increase equality, as sentencing processes take into account cultural considerations.
- Victoria Legal Aid (VLA) can provide low-cost legal representation to all accused persons, including First Nations accused persons, as long as these individuals meet specific criteria.
- Victorian Aboriginal Legal Service (VALS) provides information and assistance to Aboriginal and Torres Strait Islander peoples interacting with the criminal justice system.

LIMITATIONS

- First Nations peoples may be less capable of presenting evidence as victims or accused persons due to different cultural standards, body language customs, or language barriers, undermining the equal treatment of all people in the criminal justice system.
- The high incarceration rates among First Nations peoples point towards inherent prejudices within the Australian criminal justice system and legal authority. Therefore, equality is limited, as these biases may lead to Aboriginal and/or Torres Strait Islander offenders being prescribed harsher penalties on the basis of their race.
- Aboriginal and Torres Strait Islander peoples typically live in more rural areas of Australia and, therefore, their access to legal representation is limited due to geographical barriers. This can lead to unequal footing for an accused, compared to the prosecution, as they may have reduced access to legal advice and resources.
- Unemployment rates in Australia are particularly high among Aboriginal and Torres Strait Islander peoples, often leading to socioeconomic disadvantage for First Nations peoples. This may result in First Nations accused persons being unable to afford quality legal representation, leading to unequal footing between them and the prosecution.

STRENGTHS

- Victorian Aboriginal Legal Service (VALS) provides tailored assistance to Aboriginal peoples who are interacting with the criminal justice system, therefore ensuring Aboriginal accused persons understand legal proceedings and their obligations if facing the courts.
- The use of the Koori Court aims to provide Aboriginal and Torres Strait Islander offenders with access to culturally-relevant sentencing that effectively acts to reduce reoffending.
- Victorian Aboriginal Legal Service (VALS) has criminal lawyers that travel across Victoria, to both rural and metropolitan areas, therefore ensuring Aboriginal peoples living in remote areas of Victoria can access justice.

LIMITATIONS

- Due to intergenerational trauma and a history of dispossession and social exclusion by the Commonwealth and state governments, First Nations individuals may have lost trust in the criminal justice system. This may cause First Nations peoples to refrain from accessing justice for themselves, unwilling to report cases of crimes perpetrated against them due to a hesitancy to interact with the criminal justice system.
- Access to the courts may be limited as 61% of First Nations peoples live in regional or remote areas (Blackwell, 2023), therefore affecting their ability to physically access the courts and legal facilities as witnesses, victims, and accused persons.



Lesson summary

Aboriginal and Torres Strait Islander peoples face several difficulties in the criminal justice system due to various factors that limit the achievement of justice, including:

- language barriers
- racial prejudices of the police and other authorities
- cultural misunderstandings or practices
- intergenerational trauma.

However, mechanisms, such as the Koori Courts and Victorian Aboriginal Legal Service, exist to assist Aboriginal and Torres Strait Islander peoples in accessing justice.

4F Questions

Check your understanding

Question 1

The experiences of First Nations peoples in the criminal justice system have been broadly positive since 1991, as a Royal Commission resulted in a major shift in the Australian criminal justice system's treatment of First Nations accused, witnesses, and victims.

- A. True
- B. False

Question 2

Which of the following are correct about difficulties faced by First Nations peoples in the criminal justice system?

(Select all that apply)

- A. A history of dispossession and social exclusion by governments has led many First Nations individuals to lose trust in the criminal justice system.
- B. Intergenerational trauma has had no impact on how First Nations peoples interact with the criminal justice system.
- C. Cultural practices may make it inappropriate for persons of Aboriginal or Torres Strait Islander heritage to discuss certain subject matter when giving evidence or being questioned.
- D. Language barriers exist due to pronunciation and grammar differences in Torres Strait Islander languages or Australian Aboriginal English (the name given to the complex English spoken by around 80% of Aboriginal and Torres Strait Islander peoples across Australia).

Question 3

Fill in the blanks with the following terms:

geographical barriers

socioeconomic disadvantages

Due to [] that may be experienced by Aboriginal and Torres Strait Islander peoples as a result of disproportionately high unemployment rates, First Nations peoples may experience difficulties in affording legal representation, limiting their access to justice. Another difficulty Aboriginal and Torres Strait Islander peoples may experience is [], which can also impede access to justice as there are often low numbers of legal practitioners in rural areas.

Question 4

One way the criminal justice system seeks to address difficulties faced by First Nations peoples is through:

- A. the Victorian Aboriginal Legal Service (VALS), which specialises in areas of law, including criminal law, with the aim of reducing the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system.
- B. preventing judges from accessing culturally relevant training programs as this could lead them to have biases favouring First Nations peoples in the courtroom over Caucasian, English-speaking people.

Question 5

Which of the following statements are correct about ways the criminal justice system seeks to address difficulties faced by First Nations peoples?

(Select all that apply)

- A. The Koori Court is a specialised division of the Magistrates' Court, Children's Court, and County Court that involves Aboriginal and Torres Strait Islander offenders being sentenced by Community Elders and Respected persons.
- B. Corrections Victoria has a range of programs that provide opportunities for Aboriginal and Torres Strait Islander prisoners to encourage rehabilitation.
- C. In 2018, the Australian Law Reform Commission published a report titled 'Pathways to Justice – Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' that declared First Nations peoples face no unique difficulties in the criminal justice system compared to Caucasian Australians.

Question 6

Fill in the blanks with the following terms:

limited

upheld

Fairness is [] for First Nations peoples in the criminal justice system. First Nations witnesses, victims, and accused persons may face difficulties when presenting evidence due to differing body language and cultural practices of certain Aboriginal and Torres Strait Islander communities compared to Western practices. However, this principle of justice is still somewhat [] due to the presumption of innocence and the high standard of proof required for a criminal conviction, which each aim to protect those who face difficulties when presenting evidence or a defence.

Question 7

Equality is limited in the criminal justice system as First Nations peoples may be less capable of presenting evidence as victims or accused persons due to language barriers, different cultural practices to those used in Australian courts, and body language customs, undermining the equal treatment of all people in the criminal justice system.

- A. True
- B. False

Question 8

One strength of the criminal justice system in achieving access for First Nations peoples is that:

- A. Victorian Aboriginal Legal Service (VALS) provides tailored assistance to Aboriginal peoples who are interacting with the criminal justice system, therefore ensuring Aboriginal accused persons understand their obligations and court proceedings if facing the court.
- B. high proportions of First Nations peoples live in rural and remote areas, therefore affecting their ability to access the courts and legal facilities as witnesses, victims, or accused persons.

Question 9

The principles of justice cannot be achieved to any extent in relation to the difficulties faced by First Nations peoples in the criminal justice system.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 10**

(2 MARKS)

Identify **two** difficulties faced by First Nations peoples in the criminal justice system.

Question 11

(3 MARKS)

Describe how **one** difficulty faced by First Nations peoples in the criminal justice system limits the principle of fairness.

Question 12

(3 MARKS)

Identify **one** difficulty faced by First Nations peoples in the criminal justice system and outline **one** process, procedure, or institution that seeks to address this difficulty.

Question 13

(4 MARKS)

'The criminal justice system in Australia makes no effort to rectify the difficulties experienced by First Nations peoples in the criminal justice system.'

Do you agree with this statement? Justify your response.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

Killara is 30 years old and lives in the North-Western, Victorian, rural town of Ararat. She is currently unemployed and, consequently, has limited finances. She was recently accused of stealing from a supermarket by a police officer who had been watching her due to a 'suspicion' he had about her, mainly due to her race as an Aboriginal person. Killara pleaded not guilty to stealing and is set to face the courts in two months where a judge will determine her guilt.

Question 14

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the criminal justice system to achieve the principles of justice for Killara.

Statement	Strengths	Limitations
I. Killara may experience socioeconomic disadvantage as she is currently unemployed, therefore, she may be unable to afford quality legal representation.	☐	☐
II. The Koori Engagement Consultation (KEC) framework aims to provide culturally-relevant training to the staff of Court Services Victoria.	☐	☐
III. Killara may experience geographical barriers to accessing justice as accessing the courts and other legal facilities could be difficult as an accused person, given her location in a remote region.	☐	☐
IV. Judges in the County Court and the Supreme Court have the power to order Victoria Legal Aid (VLA) to provide a lawyer to those who cannot afford legal representation, ensuring they receive some representation.	☐	☐
V. Victorian Aboriginal Legal Service (VALS) has criminal lawyers that travel across Victoria, to both rural and metropolitan areas, providing legal services and assistance to these people.	☐	☐
VI. Killara was followed due to a police officer being suspicious of her as a result of her race, indicating inherent biases are institutionalised in aspects of the criminal justice system, disproportionately targeting First Nations peoples.	☐	☐

Question 15

(8 MARKS)

Evaluate the ability of the criminal justice system to achieve the principles of justice for Killara.

Linking to previous learning**Question 16**

(3 MARKS)

Explain how the presumption of innocence upholds the principle of fairness for First Nations peoples in the criminal justice system.

4G Difficulties faced by some groups in the criminal justice system

STUDY DESIGN DOT POINT

- the difficulties faced by different groups in the criminal justice system, such as First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities

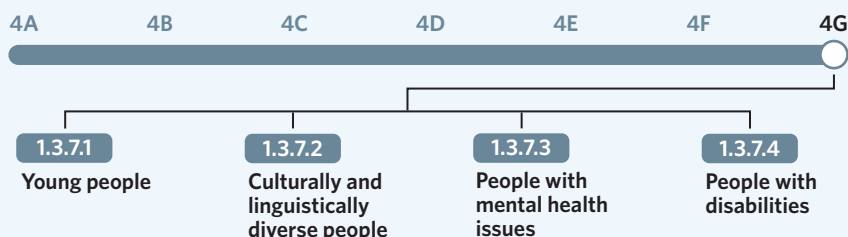


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In a bag of lolly snakes, you may prefer some flavours over others, perhaps you eat the pink snakes first and the orange ones last. Imagine if this preferential treatment applied in the criminal justice system, and judges were able to pick who was sentenced, and for how long, based on an accused's characteristics, such as their mental capacity, age, or culture.

Lesson introduction

Although the criminal justice system strives to achieve the principles of justice for all individuals who engage with the various criminal proceedings and procedures, unfortunately, this is not always possible as certain groups are often disproportionately affected by the criminal justice system. Whether it is an accused, a victim, or a witness, inequalities still arise in the criminal justice system despite the various mechanisms that exist to encourage equality between parties. Moreover, the inability to meaningfully participate in criminal proceedings or access necessary legal information and resources can lead to unjust outcomes. This is a reality that is faced by some populations in Australia more often than others.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to child abuse, mental health issues, and violence.

Young people 1.3.7.1

In the criminal justice system, those aged 10 to 18 years are considered **young people**, and as a result, the law differs slightly for people of this age. An adolescent's brain is not fully developed and only reaches full maturity when one is in their twenties. Therefore, the ability of a young person to make conscientious decisions and understand the gravity of their criminal offences may be limited, potentially leading them to carelessly engage in criminal activity. However, at this age of development, individuals can have better prospects of rehabilitation as they may be more responsive to programs addressing the root cause of their offending, allowing the cycle of offending to be broken at an early age.

Table 1 The difficulties faced by young people in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
The age of criminal responsibility	The age of criminal responsibility in Victoria, as of August 2023, is 10 years of age. However, in April 2023, the Victorian Government revealed that it would raise this age to 12 years, with this reform set to come into effect by late 2024. Regardless of this change, it has been acknowledged globally that an age of criminal responsibility lower than 14 years disadvantages children, as it leads underprivileged youth to be criminalised and incarcerated too early in their lives, increasing the chances of continuing the offending cycle into adulthood.

Continues →

LEGAL VOCABULARY

Young people people aged 10 to 18 years who are subject to different legal processes.

Age of criminal responsibility the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.

LESSON LINK

You learnt about the age of criminal responsibility in **2C Key concepts of criminal law**.

Table 1 Continued

Difficulty faced in the criminal justice system	Explanation
The negative environment of youth detention centres	- In Victoria, there are currently six youth detention centres. In the Children's Court, a child can be sentenced to detention in these centres for up to two years for a single criminal conviction. Even where there are multiple convictions, a child cannot exceed a three-year sentence in detention. - In recent years, there have been reports of horrific conditions in some of these youth detention centres, with sub-standard conditions and poor treatment of youth by staff. The ability of these centres to rehabilitate young offenders and prevent reoffending has also been questioned with a Queensland criminologist professor, Ross Homel, asserting 'detention centres are the worst possible places for fixing our broken kids'. Data from the Productivity Commission (2023) found that 56.8% of children sentenced with detention, probation, or bail reoffended within a year.
Issues with presenting evidence in court	Evidence from a child may be disregarded by a jury due to their perceived unreliability and immaturity. Additionally, child witnesses may be unable to present evidence if the court rules they are not competent to do so. Under s 13 of the <i>Evidence Act 2008</i> (Vic), a child is not of the capacity to give evidence if they are unable to understand, or give an answer to, a question about a fact. This usually applies to very young children but may prevent witnesses from sharing their evidence, thus inhibiting the achievement of justice.
Support in breaking the cycle of offending	Children who offend are more likely to have a reduced ability to participate in education and be socially engaged (Australian Institute of Health and Welfare, 2022). This can perpetuate the cycle of offending if they feel isolated from society and are consistently negatively influenced by those around them who may be encouraging them to commit crimes.
The vulnerability of children can increase their likelihood of being a victim of a crime	Both the physical and emotional vulnerability of a child can subject them to an increased likelihood of being a victim of crime. For example, between 2022 and 2023, the most common age range of sexual assault victims was between 10 and 17 years (Australian Bureau of Statistics, 2023). Despite this, children are often unable, or unlikely, to report a crime perpetrated against them.
Limited access to resources and support in pursuing justice	Young people, when victims of crime, may not have the support network or guardians to assist them in accessing legal resources and reporting a case to the police. This may deny them justice.

LEGISLATION

Evidence Act 2008 (Vic)

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to child abuse.

Don Dale Youth Detention Centre condemned by former detainee

In July 2023, Darwin Local Court heard the case of an 18-year-old who was accused of eight counts of assault after youth justice officers claimed he threw a cup of milk at them inside Don Dale Youth Detention Centre in 2021. During the trial, both the accused and fellow witnesses detailed horrific stories about their experiences in the detention centre.

Continues →

REAL WORLD EXAMPLE

Don Dale Youth Detention Centre condemned by former detainee – Continued

The allegations included:

- the accused claiming he was subjected to lockdowns for up to 23 hours a day
- being locked in cells containing bugs and a foul stench
- staff physically abusing the detainees at the centre, including reports of pinching them
- detainees being locked in isolation in a dark room for three days at a time when put in 'risk' cells if staff believed they may harm themselves.

This is an ongoing trial and is not the first time Don Dale has been subject to accusations and criticism by those who have been detained there. In February 2023, a former Don Dale detainee was reportedly suing the Northern Territory government, claiming he suffered repeated child sexual abuse by a medical officer, social worker, and guard when detained in the centre between 2004 and 2007. Given the number of accusations made by former detainees about the youth detention centre, many argue the use of child detention is ineffective and only serves to traumatise children, pushing them further towards the path of reoffending upon their release.

Adapted from 'Don Dale staff records disclosed in court reveal life inside youth detention centre's highest security block' (Fitzgerald, 2023) and 'Northern Territory government sued over claims of sexual and physical abuse at Don Dale Youth Detention Centre' (Gibson, 2023)



Image: Christopher Penler/Shutterstock.com

Figure 1 Damning reports from former detainees about the conditions inside youth detention centres sparked public outrage

WANT TO KNOW MORE?

As a young person, it may be daunting to know what to do as a witness of a crime. Who do you talk to and what happens if the crime you witnessed is examined at trial? In Victoria, the Child and Youth Witness Service can answer all these questions and help child witnesses in court. You can find out more by searching 'Child and Youth Witness Service' and clicking the Victims of Crime (2023) webpage.

Despite the difficulties young people may endure, there are certain aspects of Victoria's criminal justice system that seek to uplift youth and counteract these challenges.

- The *Children, Youth and Families Act 2005* (Vic) ensures that when sentencing a child, special consideration is given to the fact the person being sentenced is a minor. Therefore, different factors are considered, such as the need to preserve the child's relationship with their family, the need for the child's education to continue, and the desirability of allowing the child to stay at home.
- The courts must not sentence a child to a **custodial sentence** unless no other sentencing option is appropriate in the circumstances. Consequently, the number of children sentenced to a custodial order in Victoria during the 2020–21 financial year was at 5.7% (Sentencing Advisory Council, 2022).
- The **Youth Parole Board** determines, on a case-by-case basis, whether a young person is eligible for **parole**, rather than the courts.
- If children are required to provide evidence during a criminal trial, they can do so via remote witness rooms using close-circuit television (CCTV).

DEEP DIVE

Youth Parole Board

Established under s 442 of the *Children, Youth and Families Act 2005* (Vic), the Youth Parole Board is able to determine whether a young person who has received a youth justice centre order, which is a custodial sentence, is eligible for parole. This applies to offenders aged between 10 to 20 years. When making a decision as to whether a young offender should be released on parole, the board will consider the case history, psychiatric and psychological reports, and progress reports. The board aims to encourage rehabilitation in youth offenders, assisting them to enjoy a smooth transition back into the community if they are granted parole.

Adapted from 'Youth Parole Board of Victoria' (Department of Justice and Community Safety, 2023)

LEGISLATION

Children, Youth and Families Act 2005 (Vic)

LEGAL VOCABULARY

Custodial sentence a sentence that an offender serves in prison.

Youth Parole Board a committee composed of a judge, community members, and a member of the Department of Justice and Regulation that makes decisions regarding the granting, variation, or cancellation of parole for young people between the ages of 10 to 20.

Parole the early release of a prisoner, after their minimum term of imprisonment is served, which is subject to supervision and certain conditions.

Culturally and linguistically diverse people 1.3.7.2

Australia is considered a relatively culturally-diverse country. 27.6% of Australians are born overseas, at least 48.2% of children have one parent or both who were born overseas, and 21.4% of Australians speak a language other than English at home (Australian Bureau of Statistics, 2022). The criminal justice system primarily caters to Caucasian, English-speaking individuals, which can cause a number of disadvantages for culturally and linguistically diverse people. That is, individuals who come from either a non-English speaking background or were born outside Australia.

Table 2 The difficulties faced by culturally and linguistically diverse people in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Lack of knowledge about Victoria's legal system	- If a refugee or migrant is a victim of crime, they may be unaware of their rights as a victim in Australia due to their unfamiliarity with the Australian legal system. - An accused person born outside of Australia may not know they are entitled to certain rights, such as the right to legal representation when defending a charge in the courts, or their eligibility for free or low-cost legal representation through organisations, such as Victoria Legal Aid. - If an individual is representing themselves, they may not be aware of the legal procedures nor where to access resources that can inform them of the correct criminal proceedings and processes.
Limited English communication skills	- If an accused person or victim speaks limited English, they may find it difficult to give evidence at trial, especially if they are representing themselves. As a result, the court may misunderstand the circumstances relating to an offence, given the reliance on oral evidence in Victorian courts, causing incorrect and unfair outcomes. - If an accused is representing themselves, they may have difficulty questioning evidence presented by the prosecution's witnesses or may struggle to research and prepare lawful defences to a charge. - Some legal resources may not be correctly translated, or translated at all, into an individual's preferred language, therefore preventing them from accessing certain resources.
Ingrained mistrust of police and the courts due to past experiences	Migrants, refugees, or asylum seekers may have an inherent mistrust towards authorities, whether that be due to past experiences with corrupt powers in their home country, or due to experiences in detention when arriving in Australia. Consequently, these individuals may be unwilling to report crimes or speak truthfully to the police due to a lack of trust, ultimately preventing them from seeking justice for themselves or others.
Differing cultural expectations and norms	A study found that one in three women from migrant backgrounds have experienced domestic or family violence, but many do not pursue legal action to achieve justice for themselves due to the cultural shame they would feel for dividing their family (Monash University, 2021).

LEGAL VOCABULARY

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal advice, information, and free or low-cost legal representation.

USEFUL TIP

Difficulties in the criminal justice system are often compounded by a number of different factors. For example, 39% of young people in Victoria's youth detention centres identify as culturally and linguistically diverse Australians (Department of Justice and Community Safety, 2023). Therefore, a young, culturally and linguistically diverse person in the criminal justice system may face a combination of difficulties. When asked a question on this topic, it is important to consider all of the characteristics of a person and all the difficulties that might be present if given a scenario when answering a question.

REAL WORLD EXAMPLE

Misinterpretation causes major relationship mishap

In 2020, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability released a report about the treatment and conduct of police towards those with a disability. In the report, a story was also included that detailed the negative experiences of those from culturally and linguistically diverse backgrounds.

The report detailed a case where an 80-year-old woman from a migrant background went to a police station to seek a counselling referral so that she and her daughter could work on their fractured relationship. However, due to their inability to understand the woman or translate her words, the police believed she was seeking an apprehended violence order (AVO) against her daughter, which prohibits a person from enacting certain behaviours towards an individual who believes they are likely to inflict harm against them. Subsequently, the police took out an AVO on behalf of the woman against her daughter, causing their relationship to experience further damage.

Adapted from 'Police enabling violence and exploitation against people with disability, report finds' (Knaus, 2021)



Image: myphotobank.com.au/Shutterstock.com

Figure 2 Police took out a violence order against a migrant woman's daughter on her behalf despite the woman seeking counselling services

Various policies and mechanisms have been introduced in an attempt to counteract the difficulties faced by those who were born overseas, such as migrants and refugees, or those who speak minimal English.

- Interpreters are available for all accused persons, and are paid for by the courts in criminal proceedings. This allows all non-English speakers to better understand court proceedings without having to personally finance such assistance.
- Victoria Legal Aid (VLA) allows people with queries about the law or who need financial support for a case, including accused persons and victims, to call VLA on its helpline. If a VLA worker does not speak the language of the person making the call, VLA organises a free interpreter for the person so they can still gain legal advice.
- VLA has an extensive list of 36 languages that their website can be translated into so people speaking a different language to English can understand VLA's information.

WANT TO KNOW MORE?

If you are learning a language at school or speak a different language at home, you may be interested to see if you can still understand legal information if it is written in the language you partially or fully speak. You can read the VLA website in a different language by searching 'Victoria Legal Aid Help in your language' and clicking the webpage (Victoria Legal Aid, 2022). You can then scroll to the 'Information in your language' section and select a language from the 36 choices.

People with mental health issues 1.3.7.3

'People with [a] mental illness comprise a disproportionate number of the people who are arrested, who come before the courts, and who are imprisoned' (Parliament of Australia, 2006). In Victoria, over half of the prison population has reported a mental health condition (Human Rights Law Centre, 2019). Similar to those groups with the other characteristics mentioned, individuals with mental health issues often face difficulties in the criminal justice system whether they are an accused, a victim, or a witness.

Table 3 The difficulties faced by accused persons with mental health issues in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Increased contact with law enforcement due to homelessness and mental health challenges	• A significant population of unhoused individuals suffer from mental health issues. Consequently, such individuals may have increased contact with the criminal justice system due to their presence in public spaces and the stigmas associated with mental health struggles and homelessness. A 2015 study found that 22% of people detained by police in Australia lived in temporary or street accommodation 30 days prior to being detained (Australian Institute of Criminology, 2021).

Continues →

USEFUL TIP

The terms 'unhoused' or 'houselessness' are increasingly being used by activists and housing experts in preference to the term 'homelessness'. This change has been initiated by activists who identified that the word 'homeless' typically has negative connotations. The Australian government still uses the term 'homelessness', so both terms are appropriate, but you should keep in mind the growing push to use 'unhoused' as opposed to 'homeless'.

Table 3 Continued

Difficulty faced in the criminal justice system	Explanation
Increased contact with law enforcement due to houselessness and mental health challenges	When those experiencing houselessness come in contact with the criminal justice system, it can be difficult for them to obtain bail, due to a lack of financial means, not having a fixed address upon release, and not being able to comply with set conditions. Subsequently, a cycle of criminal reoffending often follows.
The relationship between substance abuse and contact with the criminal justice system	- According to the Australian Institute of Health and Welfare (2023), people with mental health conditions are more likely to exceed risk guidelines for alcohol than those without. Similarly, people with mental health issues are 1.7 times more likely to have recently used an illicit drug than those who do not have poor mental health. - Crime and substance use are known to be closely associated. In a report by the Australian Institute of Criminology (2021), it was found that nearly half of all police detainees attributed their offending to drugs and alcohol. Therefore, substance abuse issues may lead individuals to face the criminal justice system.
Restricted access to justice due to the stigmas surrounding mental health issues	- Accused criminals may fake possessing a mental illness or being of an 'unsound mind' in an attempt to lessen a punishment or avoid being found criminally responsible for their actions. For example, those accused of violent crimes may attempt to plead the mental impairment defence (previously referred to as the 'insanity defence'). This stigmatises mental health and makes the system more apprehensive to accommodate those who truly did commit crimes due to struggles with mental health. - Social stigmas and misinformation about mental illness can make it increasingly difficult for those with mental health struggles to access justice as others may not take their cases seriously or could invalidate their experiences based on their personal circumstances.
A lack of mental health treatment facilities in prisons	General practitioners and qualified mental health nurses are available at all prisons, however, these resources are limited and can be difficult to access for those who need it. Recent studies highlighted that the ACT was the only Australian jurisdiction satisfying the minimum requirement standards for mental health care facilities in prisons.
Prison can worsen offenders' mental health issues	- In 2021, it was determined that people who spend time in prison experience higher rates of mental health disorders, such as anxiety and depression (Australian Institute of Health and Welfare, 2022). - Considering many prisoners already have experienced mental health issues prior to entering the prison system, if such issues worsen, the rate of recidivism may increase as the root causes of offending, such as mental health issues, remain unaddressed.

Continues →

LEGAL VOCABULARY

Rate of recidivism a measure of the number of offenders who return to prison or other corrective services after their initial release.

Table 3 Continued

Difficulty faced in the criminal justice system	Explanation
Delays while waiting for a case to be heard can heighten mental health issues	• Delays while waiting for a case to be heard can trigger or heighten the anxiety of an accused person who is uncertain of whether they will be found guilty and, if so, what punishment they may receive. • In 2021–2022, more than one in nine matters before the criminal courts across Australia took over a year to resolve (Briggs & Truu, 2023). This period of more than 12 months can put immense strain on a person's mental health.

REAL WORLD EXAMPLE

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this section may be culturally sensitive. Examples of this include references to people who have passed, and distressing events. This section also mentions content that is sensitive in nature, relating to suicide and self-harm.

Australia's criminal justice system – 'underfunded, under-resourced, and culturally unsafe'

In 2023, an inquest into the death of Noongar Wilomin man, Stanly Inman, was released following his death in a Western Australian prison on 11 July 2020. He died two days after he was found in a critical condition in the prison. The inquest found that his mental health had been deteriorating before his death. He had warned staff and his family about his self-harm and suicidal thoughts. Following this, psychologists at the prison assessed him and determined he had a low-risk rating. Therefore, he was not required to receive as frequent observations, leading to his death just days after this evaluation.

Mr Inman's sister, Tianna Austin, declared that 'too many deaths and too many suicides [were] happening behind bars', suggesting 'young Aboriginal men and women aren't given the care they need in prison'. Inman's death highlights deficiencies in the criminal justice system across Australia when it comes to offenders with mental health issues. The lack of adequate, psychological care can perpetuate reoffending or cause further deteriorations of an offender's mental health, leading to severe consequences.

Adapted from "How many more Blackfellas?": Family of Stanley Inman warns of inadequate care in prison system' (National Indigenous Television, 2023)

DEEP DIVE

The neglect of prisoners' mental health

Lawyers and experts have largely condemned Australia's lack of prioritisation of mental health services for those inside Australian prisons. Vered Turner, a criminal defence lawyer in Gold Coast, reported she had a client who had 'been waiting nine months to see [a psychologist]', yet even though he was 'extremely depressed' since he was not yet suicidal, his pleas for help continued to go unanswered.

In 2023, Queensland Health data revealed that Queensland prisons received 3,763 mental health referrals in the 12-month period before September 2022, while the prison population at that time was 9,493. A recent study by the Queensland Centre for Mental Health Research found the ACT was the only Australian jurisdiction that satisfied the minimum requirements of mental health care that should be mandated in prisons. The minimum requirement set out in the Standard Guidelines for Corrections in Australia, is 11 full-time specialist mental health workers for every 550 prisoners. The lack of mental health services in prisons across Australia negatively impacts those in prison in a number of ways, including:

- lower chances of rehabilitation
- higher rates of recidivism.

Adapted from 'Experts, lawyers lift lid on Australia's 'woefully under funded' prison mental health services' (Colahan, 2023)

Table 4 The difficulties faced by victims and witnesses with mental health issues in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Perceived unreliability of witnesses or victims with mental health issues	Due to having mental health issues, a victim or witness of a crime may be perceived as an unreliable witness. Therefore, their first-hand accounts and testimonies may be unfairly invalidated or dismissed, limiting justice and increasing the chance of an unjust outcome.
The unhoused population have an increased likelihood of being a victim of a crime	- High proportions of people that suffer from mental illness experience houselessness and are therefore, frequent victims of crime. People who are houseless are 47 times more likely to be victims of theft than the general public and often experience much higher rates of victimisation than members of the general population (Australian Institute of Criminology, 2020). - Due to unstable living conditions and low socioeconomic statuses, these individuals are often unable to seek justice for themselves as they are unable to afford legal representation or have a lack of awareness of legal resources, such as Victoria Legal Aid (VLA).
Many victims of a crime experience post-traumatic stress disorder (PTSD) following the ordeal which can compound existing mental health issues	After being exposed to a traumatic event, such as an assault, or experiencing the death of a loved one at the hands of a violent crime, many victims experience post-traumatic stress disorder (PTSD) in the form of recollections, flashbacks, nightmares, or the development of emotional numbing. For those with prior mental health issues, experiencing PTSD can worsen or trigger other mental health issues, such as depression and eating disorders.
Anxiety can be heightened for witnesses or victims during the criminal trial process	- Victims with mental health issues, such as anxiety, may struggle to present evidence or share a victim impact statement (VIS) due to the stress associated with appearing in front of a courtroom full of people. - Just as delays may heighten anxiety in accused persons, victims may also be negatively impacted by delays as this can increase anxiety around whether their perpetrator will be brought to justice, especially in cases where the victim may be forced to co-exist with their offender in the community whilst awaiting trial.

LESSON LINKS

You will learn more about victim impact statements (VIS) in **5C Factors considered in sentencing**.

You will learn more about diversion programs in **5D Alternative approaches to sentencing**.

Policies have been introduced to try and counteract the difficulties faced by accused persons, witnesses, and victims with mental health issues when interacting with the criminal justice system.

- Alcohol and drug programs are provided in all prisons for those struggling with substance abuse. These programs include individual counselling, psycho-educational sessions, and long-term group therapy. Taking or supplying illicit drugs and alcohol is prohibited in prisons, preventing many prisoners from abusing substances, thus potentially aiding rehabilitation. However, it has been questioned how effective these programs in prisons are for drug and alcohol treatment.
- A judge may offer **diversion programs** as a sanction. These can be ideal for offenders suffering from mental health issues as they prioritise rehabilitation, as opposed to forcing an accused into an isolating environment, such as prison. Diversion programs involve an offender completing conditions, such as writing an apology letter to the victim, in order for the offender to have their criminal record removed.

LEGAL VOCABULARY

Diversion program an alternative to the court system that allows low-level offenders to avoid a criminal record, provided they make amends for their wrongdoing.

- In Victoria, an accused person can raise the defence of mental impairment for criminal behaviour. The *Crimes Act 1958* (Vic) defines the defence of ‘mental impairment’ and includes where the impairment is due to ‘mental illness’. This ensures accused persons who suffer from mental health issues that drastically have affected their mentality and decision making when committing a crime, cannot be found criminally responsible.

LEGISLATION

Crimes Act 1958 (Vic)

DEEP DIVE

Mental impairment defence

For the defence of mental impairment to be made out, the accused must prove the following on the balance of probabilities:

1. At the time of committing the physical act of the offence, the accused was suffering from a mental impairment.
2. The mental impairment had affected the person in such a way that either:
 - the person did not know the nature and quality of the conduct
 - the person could not comprehend that the conduct was wrong.

The definition of mental impairment, as per the *Crimes Act 1958* (Vic), is that it ‘includes impairment because of mental illness, intellectual disability, dementia or brain injury’.

If the defence is made out, the accused will not be sentenced under the usual criminal procedure. A judge will instead choose, depending on the risk the accused poses to the community and their mental health condition, to impose on the accused:

- a supervision order in a secure mental health facility.
- a supervision order under the supervision of a specialised community mental health service.
- release into the community.

Adapted from ‘Mental Illness & The Criminal Law’ (County Court of Victoria, n.d.)

People with disabilities 1.3.7.4

There are two broad categories of disabilities: physical and intellectual. People with a disability may be more likely to engage with the criminal justice system as an accused due to:

- neurodevelopmental disorders being a common intellectual disability. Such disorders are often associated with behaviours such as isolation and susceptibility to negative social experiences, both of which may lead to criminal behaviour.
- the environmental and individual challenges faced by people with an intellectual disability that makes them more susceptible to perpetuating specific crimes, such as sexual offences.

Table 5 The difficulties faced by people with disabilities in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Communication and/or articulation	• People with an intellectual disability may communicate in different ways, such as through hand signals, pictures, and other social tools. There is also a correlation between difficulties with speech and articulation, and intellectual disabilities. • For an accused, this may make it difficult for them to present evidence in court if they want to do so, or their words may be misinterpreted. • Similarly, for witnesses and victims, testifying against the accused may be difficult or trigger anxiety due to speech difficulties.

Continues →

Table 5 Continued

Difficulty faced in the criminal justice system	Explanation
More prone to suggestibility	- Suggestibility, which is described as an inclination to readily adopt the ideas of others without much critical thought, is elevated in people with intellectual disabilities. In the context of criminal law, this may result in accused persons, victims, or witnesses being more easily influenced by police interrogation and leading questions. - They may shift their answers as a result of guiding questions by interrogators, possibly resulting in accused persons providing self-incriminating evidence, or witnesses and victims providing inaccurate or misleading evidence.
Perceptions associated with a having a lower mental capacity	- According to the NSW Judicial Commission, 'people with intellectual disabilities are vulnerable to prejudicial assessments of their competence, reliability, and credibility' (Australian Law Reform Commission, 2014). - A judge or jury may view the evidence presented by an accused person, victim, or witness with a disability as less reliable than the evidence presented by those of full mental capacity.
Memory troubles that can limit the reliability or accuracy of presented evidence	Cognitive impairment can cause problems with memory, therefore certain people with intellectual disabilities may struggle with recalling events of a crime. This may tarnish the reliability of evidence presented by parties if the accused or witnesses have an intellectual disability. This could result in an unfair conviction being made based on unreliable evidence.

REAL WORLD EXAMPLE**Career criminal understands the reason for his behaviour**

In February 2022 an offender with 88 different criminal convictions accumulated from almost 40 years of criminal behaviour, was diagnosed with foetal alcohol spectrum disorder (FASD). FASD is a neuro-disability that can affect an individual's emotional regulation, cognition, and ability to understand consequences. After the diagnosis, the offender realised his condition 'was the reason why [he] was making those poor choices in the course of [his] life'. Due to his disability, he had a greater likelihood of committing crimes.

Despite first entering the prison system at age 17, after he was caught driving without a licence, it was not until the offender was 54 that he learnt of his disability. After learning of his disability, he was able to seek better support and learn methods to manage his behaviour. Subsequently, his criminal behaviour ceased and he was able to better integrate into society.

Although most prisons conduct health assessments when an offender arrives to determine if they have any disabilities or cognitive impairments, data from the Department of Justice suggested a large proportion of Western Australian prisoners had not been screened. By gaining a diagnosis, accused persons with a disability may be able to better understand their actions and motivations, allowing for improved rehabilitation prospects.

Adapted from 'Criminal turns new leaf after being diagnosed with neurodisability, calls for better screening in prisons' (Ho, 2023)

Although intellectual disabilities may negatively impact accused persons, witnesses, and victims in the courtroom, people with disabilities are particularly overrepresented as victims of crime (Royal Commission, 2020). In 2022, it was determined that people with disabilities are more than twice as likely to be victims of violent crime than the general population and are about 17% less likely to see their cases proceed to an outcome in, or outside of, the courts (NSW Bureau of Crime Statistics and Research, 2022).

Table 6 The difficulties faced by victims with a disability in the criminal justice system

Difficulty faced in the criminal justice system	Explanation
Mental disabilities can cause individuals to not report crimes perpetrated against them	In 1988, the Office of the Public Advocate in Victoria released a report highlighting the widespread problem of people with intellectual disabilities not reporting criminal behaviour. This may be due to the greater vulnerability of people with mental disabilities that can cause them to misunderstand the criminal behaviours perpetrated against them in the first place.
Physical barriers to escaping violent crimes	- People with a disability are twice as likely to be victims of violent and domestic-violence-related crimes (NSW Bureau of Crime Statistics and Research, 2022). 47% of adults with a disability have experienced violence since the age of 15. - This is often due to the physical vulnerabilities of people with a disability that makes them an 'easier target' for perpetrators.
Social isolation is common in victims following an attack	- People with a physical disability may struggle to socialise in society due to difficulties in travelling places. - After being sexually assaulted in 2019, a victim, who is paralysed and uses mobility aids, admitted they 'felt very vulnerable and isolated as a result of the attack. [They] couldn't socialise' (Juanola, 2023). This social isolation can result in the victim experiencing mental health issues.

However, aspects of the criminal justice system aim to uplift accused persons, witnesses, and victims with a disability in an attempt to counteract the high proportion of persons with disabilities who engage with the criminal justice system.

- The **right to silence** is an entitlement owed to all people accused of a crime. This ensures an accused person is not ever forced to speak to the police or the court, as doing so may be difficult or could result in false confessions due to intellectual disabilities.
- The **Royal Commission** into Violence, Abuse, Neglect and Exploitation of People with Disability was established in April 2019 to investigate how to better protect and prevent people with a disability from experiencing violence and abuse. The Royal Commission delivered the final report to the Australian Government on 29 September 2023, recommending how Australia's laws, policies, structures, and practices can be improved to ensure a more inclusive society. Royal Commissions, in the past, have resulted in reform to the Australian legal system, therefore this may remove certain difficulties people with a disability face in the criminal justice system.
- Section 31 of the *Evidence Act 1995* (Cth) sets out that a witness who cannot hear and speak adequately may be questioned or can provide evidence in any appropriate way, such as through an interpreter.

Lesson summary

Certain groups in Australia may face greater difficulties during interactions with the criminal justice system as either witnesses, victims, or accused persons, due to their personal characteristics and experiences. These groups include First Nations people, young people, culturally and linguistically diverse people, people with mental health issues, and people with disabilities.

Although these people face difficulties in numerous ways, there are various processes, procedures, and institutions in the criminal justice system that intend to uplift these disadvantaged communities before the law and ensure equal outcomes.

WANT TO KNOW MORE?

On 29 September 2023, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was released. You can find out more about this Royal Commission, and the suggestions it has made regarding how laws can be amended to better support people with disabilities, by searching 'Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability' and clicking the webpage (Royal Commission, n.d.).

LEGAL VOCABULARY

Right to silence a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.

Royal Commission the highest form of inquiry, which investigates a particular issue through consultation with experts and the community, then develops a final report of recommendations for law reform which is tabled in parliament.

LEGISLATION

Evidence Act 1995 (Cth)

USEFUL TIP

An important key skill in Area of Study 3 of Unit 1 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the criminal justice system'. The tables on the next page, showing the strengths and limitations of the Victorian criminal justice system's ability to achieve the principles of justice for groups facing difficulties, can assist you in developing a discussion on this topic.

Evaluating the ability of the Victorian criminal justice system to achieve the principles of justice for groups facing difficulties



STRENGTHS

- The right to silence promotes fairness as it ensures vulnerable accused persons do not self-incriminate or say something that may be perceived as a confession.
- The prosecution must ensure all relevant facts and legal principles are presented to the court. This helps promote fairness as the whole truth can emerge, thus assisting in overcoming the difficulties groups, such as people with disabilities, may otherwise face.
- The presumption of innocence and the high standard of proof required for a criminal conviction aims to protect those who have difficulty presenting evidence or defences, as they do not need to prove their own innocence.

LIMITATIONS

- Young people, people with mental health issues, and people with disabilities may all be perceived as unreliable witnesses to a crime. This can limit fairness as it prevents a judge and/or jury from being objective and making an unbiased decision based on the facts, potentially leading to an unfair outcome.
- Culturally and linguistically diverse people or people with disabilities who have difficulties with communication and/or articulation may struggle to present evidence in court as either a witness or accused, limiting the ability for just outcomes to occur in a criminal case.
- People with mental health issues or intellectual disabilities may be perceived as lying about their issues in order to rely on defences only available to those with mental impairment. This may lead to an unfair outcome as an accused's defence may be found to be unreliable and rejected by the judge and/or jury.



STRENGTHS

- There are specialised institutions and processes that children, as accused persons in the criminal justice system, are subject to. For example, the courts must consider various factors when sentencing a minor, ensuring additional concessions are in place to avoid youth detention where possible.
- There is a mental impairment defence in Victoria that allows an accused person to not be found criminally responsible for their behaviour if it was induced by mental health issues that drastically impacted their psychological state when committing the crime.
- The Royal Commission Into Violence, Abuse, Neglect and Exploitation of People with Disability has been established to ensure the achievement of equality for people with disabilities in the criminal justice system by suggesting areas where reform should occur to uplift people with a disability.

LIMITATIONS

- Certain specialised institutions for children have been criticised for their inability to correctly aid and rehabilitate child offenders. For example, youth detention centres have been exposed as often creating a negative environment for young offenders, causing a cycle of reoffending.
- The age of criminal responsibility is being raised to 12 in Victoria and is still at 10 years old in most Australian jurisdictions. Therefore, as the age of criminal responsibility does not meet global recommendations of 14 years old, equality is reduced as it allows children as young as 12, under Victorian law, to be found guilty of crimes, despite lacking awareness as to why their actions are morally wrong. This disproportionately disadvantages these young children at or above the age of 12 in the Victorian criminal justice system.
- Culturally and linguistically diverse people with limited English skills may be disadvantaged before the law as an accused due to difficulties associated with answering questions or presenting evidence.
- There is a deficit of facilities, such as psychologists and medical staff, for people with mental health issues or intellectual disabilities in prisons, possibly resulting in these people not being diagnosed or not receiving the help they need. This can worsen such issues or cause further reoffending.

STRENGTHS

- The Youth Parole Board allows young offenders access justice by being released from custody into the community. As young offenders reunite with their families and community, this may improve their rehabilitation prospects.
- Victoria Legal Aid (VLA) provides all people with free support services or representation in court, if they are eligible. This can help all groups to access justice. VLA can also provide translators and has the option for their website to be translated into a number of different languages, providing access to justice for culturally and linguistically diverse people.
- Interpreters are available for all accused persons, with the courts paying for these services to allow people with limited English skills to understand court proceedings.
- Alcohol and substance abuse programs are available in prisons with the aim of addressing the root cause of offending to reduce rates of recidivism. Engaging with these programs is encouraged within the criminal justice system.
- A witness who cannot speak or hear adequately, due to a disability, has the option to be questioned or provide evidence in a way that is appropriate for them, such as through an interpreter.
- The use of plain English during criminal trials ensures evidence and facts presented are understood. This can help young people, people who speak limited English, and those who may be intellectually disabled, to better understand and engage with court procedures.

LIMITATIONS

- Young, or culturally and linguistically diverse people, may find it difficult to report crimes to the police or access legal resources due to language barriers, a lack of knowledge about the existence of legal services, or a lack of support networks.
- People with mental disabilities have a tendency to not report crimes that were committed against them, limiting the ability of these people to access justice for themselves.
- People with mental health issues may be unhoused, potentially impacting their ability to access a means of being released from jail, such as obtaining bail. This may perpetuate the cycle of criminal offending, and increase recidivism rates.



4G Questions

Check your understanding

Question 1

All people in Australia are treated equally before the law, regardless of personal characteristics, such as their age or the language they speak.

- A. True
- B. False

Question 2

Which of the following statements are correct about the difficulties faced by some young people in the criminal justice system? **(Select all that apply)**

- A. The age of criminal responsibility is considered by many as 'too young' in Australia.
- B. Children are less likely to be victims of a crime due to their physical appearance.
- C. Youth detention centres can have negative impacts on a child offender.
- D. Children who offend may be unable to pursue an education.

Question 3

The principles of justice are upheld for young people in the criminal justice system because of various mechanisms, including:

- A. the fact the courts must not sentence a child to a custodial sentence unless no other sentencing option is appropriate in the circumstances.
- B. the ability of a judge or jury to disregard evidence presented by young people.

Question 4

Fill in the blanks with the following terms:

upheld

limited

The principles of justice may be [] for culturally and linguistically diverse people in the criminal justice system as accused persons from different cultural backgrounds may have limited English communication skills, possibly impacting their ability to give evidence or self-represent. On the other hand, the principles of justice may be [] for this same group as the Victoria Legal Aid (VLA) website can be translated into a number of different languages.

Question 5

People with a mental illness comprise a disproportionate number of the people who are arrested, come before the courts, and are imprisoned.

- A. True
- B. False

Question 6

Which of the following statements are correct about difficulties faced by accused persons with mental health issues in the criminal justice system? **(Select all that apply)**

- A. Substance abuse is common amongst those with mental health issues, which can often be a primary cause of criminal offending, often increasing their interaction with the criminal justice system.
- B. Prison can worsen an offender's mental health issues.
- C. Stigmas surrounding mental health issues, such as people utilising the defence of mental impairment to avoid criminal charges, can prevent an accused from receiving justice.
- D. Delays while waiting for a case to be heard can mitigate mental health issues and ease an accused's mind.

Question 7

Which of the following statements are correct about difficulties faced by victims with mental health issues in the criminal justice system? **(Select all that apply)**

- A. Witnesses or victims with mental health issues may find it difficult to give evidence due to barriers in the criminal justice system.
- B. Anxiety can be heightened for witnesses or victims during the criminal trial process.
- C. Many victims of a crime are able to recover from mental health struggles after experiencing a violent crime after they realise how important life is.

Question 8

Fairness is upheld for people with mental health issues in the criminal justice system as:

- A. the mental impairment defence ensures accused persons suffering from mental health issues that have drastically affected their mentality when committing a crime cannot be found criminally responsible.
- B. the prison system across Australia is well-equipped to handle prisoners with mental health issues as no prisons are understaffed and every prisoner with a mental health issue can access the help they need.

Question 9

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the criminal justice system in upholding the principles of justice for people with disabilities.

Statement	Strengths	Limitations
I. People with an intellectual disability may experience difficulty with communication and/or articulation, which can make it difficult for them to present evidence when a witness, victim, or accused person.	☐	☐
II. The right to silence ensures accused persons who may be misled into false confessions can opt to not answer questions if they feel they may incriminate themselves.	☐	☐
III. Victims with a mental disability have a tendency to not report the crimes perpetrated against them.	☐	☐
IV. Witnesses with a disability hindering their speech or hearing can provide evidence or be questioned in more appropriate ways, such as through an interpreter.	☐	☐

Preparing for exams**Standard exam-style****Question 10**

(2 MARKS)

Identify **two** difficulties faced by culturally and linguistically diverse people in the criminal justice system.

Question 11

(3 MARKS)

Billy, a 13-year-old boy, was involved in a fight with his friend and put washing powder in his lemonade out of spite. Billy did so as he believed the powder would give the drink a sour taste, yet was unaware that washing powder was unsafe to eat and could cause injuries. Billy's friend suffered serious injuries after consuming the entire drink. Billy will be tried for his offence in the Children's Court in a few months.

Explain **one** difficulty Billy may face in the criminal justice system.

Question 12

(4 MARKS)

Describe **two** difficulties faced by people with disabilities in the criminal justice system.

Question 13

(6 MARKS)

Dhruv migrated from India to Australia by himself when he was 15 years old for his final years of high school. The move was not easy, and Dhruv developed anxiety and depression. He struggled with high school in Australia, unable to communicate well with his peers or teachers as he never learned English and cannot speak it very well. Dhruv took \$500 worth of groceries from his local supermarket without paying, as he had run out of money. He has pleaded not guilty to the theft charges. His trial is to take place in one year.

Explain **two** difficulties Dhruv may face in the criminal justice system.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

Latisha has an intellectual disability, causing her to have limited communication skills. She also has schizophrenia, a mental illness that causes her to interpret reality abnormally and experience hallucinations. On her drive to the grocery store, Latisha hallucinated that a car containing her high school bullies, all holding knives, was following her. She immediately sped away, running through a pedestrian crossing, and causing the death of a woman. She has been accused of culpable driving causing death and will be tried in court in 18 months. If found guilty, she could be sentenced to up to 20 years in prison. Her lawyers will be raising the defence of mental impairment.

Question 14

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the criminal justice in upholding the principles of justice for people with disabilities.

Statement	Strengths	Limitations
I. Accused criminals in the past have faked possessing mental illnesses or being of an 'unsound mind' in an attempt to lessen a punishment or entirely avoid being found criminally responsible for their actions. This has stigmatised mental health and may cause the judge or jury to believe Latisha is lying about hallucinating at the time of the alleged crime, resulting in an unfair outcome for Latisha.	☐	☐
II. In Victoria, an accused person can raise the defence of mental impairment for criminal behaviour. This ensures Latisha can avoid being found criminally responsible as her actions were a product of her mental illness, not her conscious mind.	☐	☐
III. General practitioners and qualified mental health nurses are available at all prisons. Therefore, if Latisha is sentenced to prison for culpable driving, her schizophrenia can still be treated in prison.	☐	☐
IV. Recent studies highlighted that the ACT was the only Australian jurisdiction that satisfied the minimum requirements for mental health care in prisons. Therefore, Latisha may not receive adequate care for her mental health issues if sentenced to prison.	☐	☐
V. Latisha, due to her intellectual disability, may not be able to communicate sufficiently to a judge and jury to provide evidence about the incident. Therefore, her defence of mental impairment may be less believable as she may not present any evidence to prove herself.	☐	☐

Question 15

(6 MARKS)

Evaluate the ability of the criminal justice system to uphold the principles of justice in Latisha's case. In your response, refer to at least **two** difficulties faced by groups in the criminal justice system.

Linking to previous learning**Question 16**

(4 MARKS)

Leon has an intellectual disability that makes it difficult for him to process information and causes him to be prone to suggestibility. One night, Joseph, a man on the street, challenges him to punch a group of guys as they walk past them. Leon does so, deciding it's a good opportunity to make friends with Joseph. The police catch Leon throwing a punch at the man and arrest him. Leon is warned he has the right to silence and decides not to speak during police questioning.

- a. Describe **one** individual right Leon has in the scenario when dealing with the police. 2 MARKS
- b. Outline how the right to silence aims to counter difficulties faced by Leon in the criminal justice system. 2 MARKS

5

CHAPTER 5

Sentencing

LESSONS

- 5A** Purposes of sanctions
- 5B** Types of sanctions
- 5C** Factors considered in sentencing
- 5D** Alternative approaches to sentencing
- 5E** Sentencing in the Northern Territory

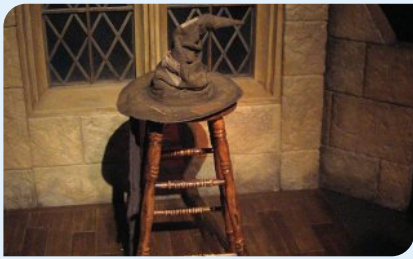
KEY KNOWLEDGE

Sentencing

- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation
- types of sanctions such as fines, community correction orders and imprisonment
- factors considered in sentencing
- alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs
- sentencing practices in one other Australian jurisdiction.

Image: SpeedKingz/Shutterstock.com

5A Purposes of sanctions

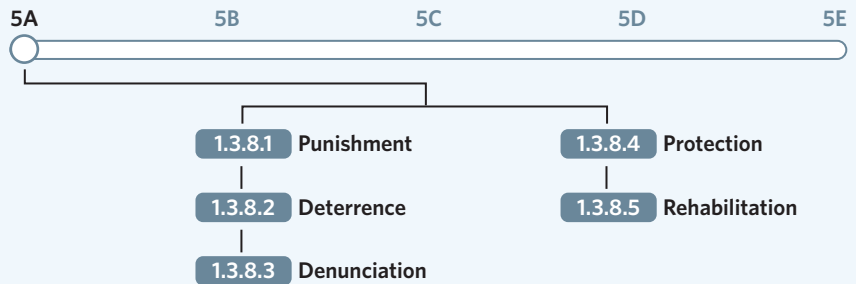


'Old Hogwarts Sorting Hat sing me a song,
speak in my head and tell me where I belong'.
—RiddleTM (Wizard Rock Band, 'The Sorting
Hat', 2010)

Imagine if sanctions were determined by a magical hat, or based on an offender's mythical fate. In reality, sanctions are not magically determined, but rather, are handed down by the courts for a range of reasons. But what are these reasons? Why do some offenders receive terms of imprisonment, whilst others receive minor fines? Would it be easier if an offender's fate was determined by a magical hat?

STUDY DESIGN DOT POINT

- the purposes of sanctions: punishment, deterrence, denunciation, protection and rehabilitation



KEY TERMS

Sentencing the act of deciding and declaring the sanction an offender will receive after pleading or being found guilty of an offence.

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime.

LEGISLATION

Sentencing Act 1991 (Vic)

Lesson introduction

When an offender is **sentenced**, the court must consider the purposes of the **sanction** they are seeking to impose. Whilst some offenders may need to be rehabilitated, others may also need to be deterred from reoffending. Each criminal sanction achieves different purposes and to varying extents, therefore, some sanctions may be better suited to a particular offence. Five of the key purposes of sanctions are outlined in section 5 of the *Sentencing Act 1991 (Vic)*.

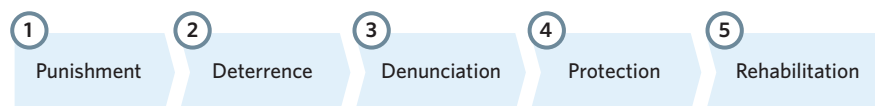


Figure 1 The five purposes of sanctions

Punishment 1.3.8.1

Punishment is a purpose of sanctions that aims to hold offenders accountable for their crimes and ensure **retribution** is sought on behalf of the victim and society as a whole. As the courts aim to punish offenders appropriately, victims and their families are discouraged from enacting revenge themselves against an offender by 'taking matters into their own hands'. Therefore, adequately punishing the offender will likely result in victims and their families feeling that retribution has been achieved. A court aiming to punish an offender will impose a more severe sanction, for example, a larger fine or longer term of imprisonment.

KEY TERM

Punishment the infliction of pain or loss to ensure an offender is adequately penalised and held accountable for their crimes and their impact on victims and society as a whole.

LEGAL VOCABULARY

Retribution punishment inflicted upon an individual for a wrong or criminal act.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to murder.

Imprisoned for life, the punishment for an abhorrent crime

In 2019, a 25-year-old man, Anthony Harvey, was the first person in Western Australia to be imprisoned for life and ordered to never be released. Harvey murdered his wife, three daughters, and their grandma in their family home in a pre-planned attack. A few days after the gruesome murders, Harvey travelled to his parent's home and confessed his crime to his father, who immediately called the police.

At the sentencing hearing, Justice Hall stated the following:

- 'Frankly, I struggle to find the words that are adequate to convey the magnitude of your offences.'
- 'Your actions are so far beyond the bounds of acceptable human conduct that they instil horror and revulsion into even the most hardened of people.'
- 'It is necessary to make an order that you never be released in order to meet the community's interest in punishment and deterrence.'

The judge's sentencing statement demonstrates how offenders are denounced and punished by the criminal justice system via appropriate sanctions that intend to reflect the severity of their offending and in turn, ensure justice is delivered to victims and their families.

Adapted from 'Perth mass murderer Anthony Harvey gets historic sentence for stabbing his family to death' (Weber & Menagh, 2019)



Image: Dan Henson/Shutterstock.com

Figure 1 Anthony Harvey was given a landmark life imprisonment sentence for murdering his family

Deterrence 1.3.8.2

Deterrence is a purpose of sanctions that aims to prevent an offender, or the general public, from reoffending or committing a crime. The effectiveness of deterrence can influence **the rate of recidivism** across the criminal justice system.

The two types of deterrence are:

1. **specific deterrence**, where the offender themselves is discouraged from committing offences of the same or similar nature through the imposition of a sanction.
2. **general deterrence**, where individuals other than the offender, are discouraged from committing offences of the same or similar nature to avoid receiving the same sanction as convicted offenders.

Specific deterrence can be achieved as the individual offender is responsive to, and aware of, the potential sanction they could receive if they reoffend and commit similar crimes. However, the success of general deterrence is dependent on the public's awareness of the potential sanctions they could receive for committing certain offences. If wider society is unaware of the possible sanctions associated with particular crimes, they may not be discouraged from partaking in such activity.

A court aiming to achieve deterrence will impose a more severe sanction, such as imprisonment, rather than a less severe sanction, such as a community correction order (CCO). This will usually be accompanied by comments from the court stating that the more severe sanction is designed to specifically or generally discourage such offending.

KEY TERM

Deterrence the action of discouraging an offender, or other individuals, from reoffending or committing similar crimes, through the imposition of a criminal sanction.

LEGAL VOCABULARY

The rate of recidivism a measure of the number of offenders who return to prison or other corrective services after their initial release.

Specific deterrence a type of deterrence in which the offender themselves is discouraged from reoffending and committing offences of a similar nature.

General deterrence a type of deterrence in which individuals other than the offender, such as the general public, are discouraged from committing offences because they wish to avoid receiving the same sanction as offenders.

LESSON LINK

You will learn more about community correction orders (CCOs) in **5B Types of sanctions**.

HYPOTHETICAL SCENARIO



Figure 2 Cassie's childhood crush catches her riffling through his trash, picking out his used tissues

Yearning for you

Cassie has been ordered to undertake a community correction order (CCO) and a therapy program after being found guilty of stalking a well-known actor, Mikey Shum. After becoming infatuated with the actor, Cassie began to follow him around and visit his house at random hours of the day. Shum once caught Cassie riffling through his trash and picking out his used tissues, and there is evidence showing she sent over 300 letters to his home over the course of one month. Shum is now worried about his physical safety and fears leaving and entering his home due to the possibility of being ambushed by Cassie.

By sanctioning Cassie for her offending, the court is seeking to specifically deter her from reoffending and committing similar offences in the future. Additionally, the court may also be seeking to deter the general public from stalking public figures by enforcing a sanction for such offences and using it as a warning that individuals could face similar consequences if they partake in the same offences.

KEY TERM

Denunciation the act of publicly condemning an offender's criminal behaviour.

Denunciation 1.3.8.3

Denunciation is a purpose of sanctions in which the court aims to publicly criticise the offender's criminal behaviour. Essentially, the court formally expresses its disapproval of the offender's actions to highlight how the offender has violated the moral and ethical standards of society. Denunciation occurs in a judge's statement at the end of the hearing or trial, or more specifically, during the sentencing hearing. Whilst the judge's comments outline the court's condemnation of the offender's actions, denunciation does not necessarily provide a practical solution to addressing the offender's criminal behaviour, unlike the other purposes of sanctions which can. That is, the act of publicly criticising a person's behaviour does not increase the severity of their sentence, or prevent further harm from occurring, though it may incite feelings of humiliation for the offender.

REAL WORLD EXAMPLE



Image: Elenitsa/Shutterstock.com

Figure 3 A dispute over a water hose resulted in the death of two men

CONTENT WARNING This section explores content that is sensitive in nature, relating to murder.

How a hose led to two horrific deaths

In 2023, a 74-year-old man was sentenced to 30 years in prison after murdering two men who lived in the same unit block after a neighbourly dispute over a garden hose. The dispute arose after the offender returned to the communal garden to see that the hose he had been using to water the garden had been turned off. After a verbal dispute with one neighbour, the offender retrieved a gun from his unit and shot his neighbour at close range before shooting another neighbour who was attempting to assist the wounded man. Unfortunately, both men died at the scene.

Justice Elliot denounced the offender for showing 'little remorse' for his actions, stating that 'nothing could justify the disproportionate, senseless and brutally violent way in which [he] responded' and that he will 'almost certainly be imprisoned for the remainder of [his] life'.

Adapted from 'Melbourne man Rodney John Lee sentenced over double murder triggered by garden hose dispute' (Silva, 2023)

KEY TERM

Protection the act of ensuring offenders do not pose a significant risk to the welfare and safety of their victims and broader society.

Protection 1.3.8.4

Protection can be achieved by removing offenders from society to ensure they do not pose a risk to the safety and welfare of their victims or society as a whole. The level of protection provided to society should be proportionate to the degree of risk posed by an individual offender. Hence, a court aiming to reinforce protection would impose a period of imprisonment, which removes an offender from society, as opposed to a CCO, where an offender can remain in society.

LESSON LINK

You learnt about the Australian Federal Police (AFP) in **4B Institutions that enforce criminal law**.

REAL WORLD EXAMPLE

Operation Fuji

In 2023, two members of a Melbourne-based crime syndicate were sentenced to imprisonment after an Australian Federal Police (AFP) investigation, entitled Operation Fuji, led to the discovery of a 'transnational crime syndicate' that was involved in the importation of \$55 million worth of illicit drugs into Australia. The male offender, who was already serving time in prison, was sentenced to a total of 22 years imprisonment, whilst his partner, a Mickleham woman, was sentenced to 13 years imprisonment. The man was able to take part in the criminal activity by pretending that his partner was part of his legal team, with the pair speaking in 'coded language to plan illicit drug importations into Victoria'.

Whilst the terms of imprisonment sought to punish the offenders, they also acted to protect the broader community. According to the AFP Detective, Superintendent Anthony Hall, 'the importation of harmful illicit drugs into [the] country...significantly contribute[s] to the abhorrent harm being inflicted on the Australian community'. By breaking the law, the offenders are also 'severely impacting the health and wellbeing of Australians and ... support services'. Therefore, the AFP believed it was imperative that appropriate sanctions were handed down to the offenders to maintain social cohesion and secure the welfare of society.

Adapted from 'Pair sentenced over AFP prison phone sting' (Australian Federal Police, 2023)



Image: Tinnakorn jorruang/Shutterstock.com

Figure 4 AFP investigations targeted drug importation operations

Rehabilitation 1.3.8.5

Rehabilitation can be achieved by sanctions that seek to break the cycle of offending. When imposing a sanction, a court may consider which sanction most appropriately addresses the underlying reasons for offending and encourages the rehabilitation of an offender. By rehabilitating an offender, the rate of recidivism may be reduced, preventing future offending. Moreover, certain sanctions, such as CCOs or drug treatment orders, can be effective in prioritising the rehabilitation of an offender.

KEY TERM

Rehabilitation the act of restoring an offender to normal life as a law-abiding member of the community after they have engaged in criminal activity.

REAL WORLD EXAMPLE

Finding freedom through art

Generally, the rehabilitation of offenders is centred around structured programs, such as drug and alcohol treatment programs or educational programs. However, an art gallery at the Eastern Goldfields Regional Prison, in Western Australia, is attempting to give inmates a new outlook on life and bring them an inner 'sense of bliss'. Particularly for First Nations prisoners, art can help offenders 'feel that [they] are part of the culture [and] still part of the lands', according to one of the inmates. Whilst painting has many personally fulfilling aspects, it can also assist in rehabilitating individuals and reintegrating them into society.

Cassie Tasker, the Educational Campus Manager, stated, 'sharing talents gives them [a] sense of self-esteem that is really important in terms of self-development'. The program provides individuals with the opportunity to reimagine their identities beyond being a prisoner and can motivate them to pursue new avenues outside of prison. The program also provides prisoners with nationally-recognised accreditation, providing them with opportunities to make a living from art when released from prison. Moreover, the inmates are able to sell their artwork through the gallery, assisting them financially as they transition out of custody. Rehabilitation can come in many forms, whereby a combination of traditional and innovative rehabilitation programs may be best suited to breaking the cycle of offending.

Adapted from 'Art gallery at Eastern Goldfields Regional Prison opens doors to public, and for prisoners' (Bertoglio, 2022)



Image: Gorodenkoff/Shutterstock.com

Figure 5 The freedom of expression found through art has helped rehabilitate offenders

WANT TO KNOW MORE?

Rehabilitation can take place in many different forms, in multiple environments, and may be targeted towards addressing various underlying issues. You can find out more about the rehabilitation programs provided by Victorian prisons by searching 'Prison rehabilitation programs Victoria' and clicking the webpage titled 'Transitional programs' (Corrections Victoria, 2023).

LESSON LINK

You will learn about drug treatment orders in **5D Alternative approaches to sentencing**.

Lesson summary

- There are five purposes of sanctions: punishment, deterrence, denunciation, protection, and rehabilitation.
- Each sanction may achieve different purposes of sanctions to varying degrees. Therefore, when sanctioning an offender, a court must consider which of these purposes it wishes to achieve.

Table 1 Summary of the purposes of sanctions

Purpose of sanction	Explanation
Punishment	• When punishment is the purpose, sanctions will be applied that penalise and hold an offender accountable for their actions. • Punishing offenders ensures justice can be delivered to victims and retribution can be sought for the impact of the crimes committed.
Deterrence	• This purpose can be specific to the offender or applicable to the general public. • Applying a sanction for the purpose of deterrence aims to discourage an offender and/or the public from committing the same or similar offences.
Denunciation	• The court publicly condemns the offender's actions for violating society's moral and ethical standards. • The condemnation generally occurs at the end of a hearing or trial during the judge's statement.
Protection	• Sanctions may be applied that aim to protect the victim and/or society from the harm and threat of the offender. • This purpose can be achieved by removing the offender from society through imprisonment.
Rehabilitation	• This purpose seeks to address and resolve the underlying causes of offending. • Rehabilitation can be achieved through rehabilitation programs offered in prison or as part of CCOs.

USEFUL TIP

When trying to remember the purposes of sanctions, it may be helpful to use a mnemonic. The following phrase is one you can use, or you can make up your own!

Denunciation **r**ehabilitation **D**eterrence
Protection **P**unishment – **Dr DPP**

5A Questions

Check your understanding

Question 1

There are five purposes of sanctions set out in the *Sentencing Act 1991* (Vic).

- A. True
- B. False

Question 2

Which of the following statements correctly describes the purpose of protection?

- A. To remove offenders from society in order to prevent harm and ensure the safety of the community.
- B. To allow the offender to contact the victim if they wish to apologise.
- C. To publicly condemn an offender for their criminal behaviour.

Question 3

Fill in the blanks with the following terms:

specific deterrence

general deterrence

When the offender themselves is discouraged from committing offences of the same or similar nature through the provision of a sanction, this is known as . On the other hand, occurs when individuals other than the offender, are discouraged from committing offences of the same or similar nature to avoid receiving the same sanction as convicted offenders.

Question 4

Which of the following statements are correct about rehabilitation as a purpose of sanctions?

(Select all that apply)

- A. Rehabilitation can only be achieved if the offender undertakes rehabilitation programs in prison.
- B. Rehabilitation can be achieved by sanctions that seek to break the cycle of offending and address the underlying reasons for offending.
- C. Some sanctions, such as CCOs, prioritise the rehabilitation of offenders as they must follow certain conditions, such as treatment for drug addiction.
- D. The rate of reoffending may be reduced if offenders are adequately rehabilitated.

Question 5

At Jeremiah's sentencing hearing, Judge Susannah condemned him for his crimes, stating 'your actions are absolutely deplorable, to steal personal information from others and exploit it for your own benefit is selfish and harmful to these innocent victims'.

Which of the purposes of sanctions has been demonstrated by Judge Susannah's sentencing statement?

- A. Punishment
- B. Deterrence
- C. Denunciation
- D. Dispute resolution

Question 6

Which of the following statements are correct about the purpose of punishment?

(Select all that apply)

- A. Punishment encourages victims to take matters into their own hands and achieve justice by enacting revenge themselves.
- B. Punishment aims to hold offenders accountable for their crimes and ensure retribution is sought on behalf of the victim and society as a whole.
- C. A court aiming to punish an offender will impose a more severe sanction.
- D. A less severe sanction is more likely to punish an offender.

Question 7

All sanctions can achieve all the purposes of sanctions to the same degree.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(1 MARK)

Identify **one** purpose of sanctions.

Question 9

(2 MARKS)

Outline punishment as a purpose of sanctions.

Question 10

(3 MARKS)

Mark has been sentenced to 20 years imprisonment after a drug-induced violent rampage that involved the death of an innocent bystander, threats to kill, and a high-speed police chase. Mark is considered a violent offender and has shown no remorse for his actions.

Describe **one** purpose of sanctions that has been achieved in this scenario.

Question 11

(3 MARKS)

Explain denunciation as a purpose of sanctions.

Question 12

(4 MARKS)

'Rehabilitation is rarely achieved by sanctions and should only be considered occasionally when sanctioning an offender.'

Do you agree with this statement? Justify your answer.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Dwight has been sentenced to five years imprisonment after setting up an elaborate scheme to steal the personal information of his fellow colleague, Jim. Using this stolen information, Dwight then created a range of fake identity documents, opened bank accounts, and took out loans under his colleague's identity. Unfortunately, Jim had over \$5,000 stolen from him and was forced to replace his legal documents, such as his birth certificate, to protect his identity. During sentencing, Judge Scott denounced Dwight for his actions, stating they were 'reckless, selfish, and a grave breach of privacy that caused unnecessary distress to the victim'.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of Dwight's sanction to achieve the purposes of sanctions.

Statement	Strengths	Limitations
I. Dwight has been punished for his actions via a five-year imprisonment sentence.	☐	☐
II. Rehabilitation may not be achieved by this sanction as there is no indication that there is a persistent underlying cause for offending, or that the sentencing specifically addresses rehabilitation. This may mean that Dwight could reoffend upon release.	☐	☐
III. Jim and the broader community can be protected from Dwight and the possibility of him committing other identity theft crimes as he is being imprisoned.	☐	☐
IV. Judge Scott's sentencing statement denounced Dwight for his 'reckless' and 'selfish' actions that were 'a grave breach of privacy that caused unnecessary distress to the victim'.	☐	☐
V. The achievement of general deterrence may be dependent on whether the wider community is aware of the possible sanctions for identity theft.	☐	☐

Question 14

(6 MARKS)

Discuss the extent to which the purposes of sanctions have been achieved by Dwight's sentence.

Linking to previous learning

Question 15

(4 MARKS)

Outline **two** purposes of sanctions that may be achieved through a sentence of imprisonment of an offender being found guilty of **either** murder or culpable driving.

5B Types of sanctions

STUDY DESIGN DOT POINT

- types of sanctions such as fines, community correction orders and imprisonment

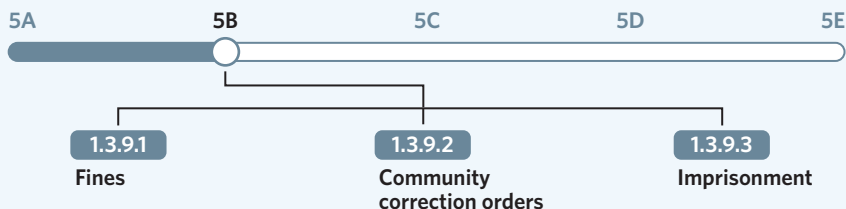


Image: wavebreakmedia/Shutterstock.com

When you break your parents' rules, you are usually punished. Generally, you would not receive the same punishment for sneaking out of the house as you would for stealing some cookies from the pantry. Sanctions work in the same way, in that the appropriateness of a sanction varies depending on the crime's severity.

Lesson introduction

A wide range of sanctions may be imposed by the courts, with each sanction aiming to achieve different purposes, whether that is rehabilitating an offender or deterring others from committing similar crimes. Most commonly, sanctions include fines, community correction orders, and imprisonment.

LESSON LINK

You learnt about the purposes of sanctions in **5A Purposes of sanctions**.

Fines 1.3.9.1

If an offender receives a **fine**, they are required to pay a sum of money to the state as a penalty for committing a particular criminal offence. Fines for offences are expressed in **penalty units**, as opposed to a dollar amount, to ensure consistency across all Acts and to avoid the need to amend an Act's stated fine annually. From 1 July 2023 to 30 June 2024, one penalty unit is equivalent to \$192.31 (Department of Justice and Community Safety, 2023). In determining how much to fine an offender, courts consider the minimum and maximum penalty for the offence, the purposes the court wishes to achieve, any aggravating or mitigating factors, and the offender's ability to pay the fine.

A fine is a **non-custodial sentence**, meaning it is a penalty that does not involve imprisonment.

KEY TERM

Fine a sanction that requires an offender to make a monetary payment as a penalty for a criminal offence.

LEGAL VOCABULARY

Penalty units a measurement used to define the amount that offenders are required to pay as a fine for certain offences.

Non-custodial sentence a type of sanction that does not involve imprisonment.

HYPOTHETICAL SCENARIO

Not such a fine outcome

Nathan was caught speeding 4 km/h over the speed limit by a speed camera on High Street. He received a fine in the mail for \$240. Meanwhile, Beverley was caught speeding 5 km/h over the speed limit and also received a \$240 fine. Nathan earns \$960 a week before tax as a supermarket worker. Meanwhile, Beverley, a property investor, receives \$2,400 a week before tax.

Resultantly, whilst a speeding fine for Nathan is 25% of his weekly income, it is merely 10% of Beverley's. Therefore, Beverley is essentially punished to a lesser degree for committing the same offence as Nathan. This illustrates how fines can disproportionately affect lower income workers and are less of a punishment and source of deterrence for those receiving higher incomes.

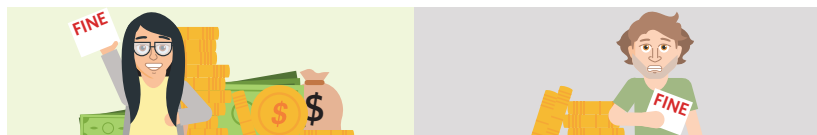


Figure 1 Nathan and Beverley both received fines for travelling at high speeds on High Street

LESSON LINK

You will learn more about aggravating and mitigating factors in **5C Factors considered in sentencing**.

USEFUL TIP

The VCE Legal Studies Study Design requires students to 'discuss the ability of sanctions to achieve their purposes' in both Units 1 and 3. 'Discuss' means weighing up the strengths and limitations of each type of sanction to ultimately achieve the purposes of sanctions.

Table 1 The ability of fines to achieve the purposes of sanctions

Purpose	Strengths	Limitations
Punishment	- Paying money to the state instead of using it for personal purposes aims to penalise the offender. - The court can attempt to ensure an appropriate fine is issued, relative to the offender's financial means.	The legislated maximum penalty may not be high enough to punish wealthy offenders.
Deterrence	- The financial loss caused by a fine discourages an offender from reoffending, achieving specific deterrence. - The financial loss caused by a fine discourages other members of the community from committing similar offences, achieving general deterrence.	A legislated maximum penalty may not be high enough to discourage wealthy individuals or large corporations from breaching the law, restricting the achievement of specific and general deterrence.
Protection	Due to the deterrent effect of fines on people's behaviour, fines can achieve some protection> For example, drivers are deterred from dangerous behaviour on the roads due to the risk of fines if they are caught.	Community protection is not directly achieved by a fine, as this sanction does not remove an offender from the community or restrict their behaviour in any way.
Denunciation	If a court imposes a very large fine, this communicates 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.
Rehabilitation	–	Rehabilitation is not achieved by a fine. Any underlying causes of criminal offending, such as drug or alcohol addiction, are not addressed.

Community correction orders 1.3.9.2

KEY TERM

Community correction order (CCO)

a non-custodial sanction that is served by the offender in the community with certain conditions attached.

LEGAL VOCABULARY

Standard conditions terms attached to all CCOs that the offender must follow.

Additional conditions terms specific to each offender that are attached to a CCO and must be followed.

Community correction orders (CCO) require offenders to undertake specific actions and abide by certain conditions, while still being permitted to stay in the community. Since a CCO is served in the community, it is a non-custodial sentence. A judge or magistrate may order a CCO if all of the following conditions are met:

- The offence is punishable by five penalty units or more.
- They do not think a fine is appropriate.
- The offender has agreed to a CCO.

The maximum length of a CCO for one offence is two years, and for multiple offences is five years. A CCO will include **standard conditions** and at least one or more **additional conditions** that the offender must follow.

Table 2 Conditions attached to CCOs

Standard conditions	Additional conditions
The offender must: - not reoffend while the CCO is in place. - not leave Victoria without permission. - report to a community corrections centre and regularly meet with their supervisor.	The offender may be required to fulfil one or more additional conditions, such as: - completing 600 hours of community service work - abiding by a curfew - undertaking medical treatment rehabilitation programs - ceasing communication with a certain individual - not entering, remaining within, or consuming alcohol in a licensed premises.

HYPOTHETICAL SCENARIO

Rehabilitation required

Arin is charged with assaulting his friend Petro whilst intoxicated at a bar, the third time he has assaulted Petro in a month. This time, Petro decided to press charges. Arin pleaded guilty in the Magistrates' Court and was sentenced to serve a community correction order (CCO). The magistrate outlined that Arin is not to leave Victoria without permission and will be required to report to a community corrections officer regularly. In conjunction with these standard conditions, the magistrate also attached an additional condition of undertaking a mandatory alcohol rehabilitation course, while also ordering Arin to cease all communication with Petro. The CCO has been tailored to Arin so he can adequately reform his ways and function in society again.



Figure 2 CCOs can be effective at rehabilitating offenders

LEGAL CASE

Director of Public Prosecutions (DPP) v Lombardo (2022) 102 MVR 19

Facts

The offender, a 22-year-old agricultural contractor and tractor driver, was driving from his partner's family's rural property shortly after 7 am one morning. The windows of his vehicle were fogged and the visibility was poor, especially through the side windows. When entering the property he was driving to, he looked right and left, noticing an oncoming light to his right. He believed the light was far enough away that he could safely turn. When doing so, his car struck the motorbike driven by the victim, Mr Flack. The victim was pronounced dead at the scene.

Legal issue

The *Sentencing Act 1991* (Vic) requires offenders who have committed a category two offence, such as dangerous driving causing death which was the offence committed by the offender in this case, should receive a term of imprisonment unless 'substantial and compelling circumstances that are exceptional and rare, ... justify not making an order [of imprisonment]'. When determining whether there are compelling circumstances, the court must consider the offender's previous good character, an early guilty plea, and prospects of rehabilitation, amongst other factors. The court, therefore, had to determine whether the offender acted under 'compelling circumstances' in this case.

Decision

The offender was sentenced to a three-year community correction order (CCO), with a condition requiring 250 hours of unpaid community work. His driver's licence was also cancelled and he was disqualified from driving for 18 months. The sentencing judge held that there was 'substantial and compelling circumstances that were exceptional and rare which justified not imposing a sentence of imprisonment'. These circumstances included that the offender:

- was youthful with no criminal past
- took immediate responsibility for his conduct and its terrible consequences
- pleaded guilty immediately which was evidence of remorse
- had strong family, social, and employment supports
- had symptoms of anxiety and post-traumatic stress which were likely to be exacerbated if he were imprisoned.

Significance

The offender was able to receive a CCO, as opposed to a prison sentence, for committing dangerous driving causing death because his 'moral culpability was low' in that he clearly acted with no malice or to purposely do wrong.

LEGISLATION

Sentencing Act 1991 (Vic)

Table 3 The ability of CCOs to achieve the purposes of sanctions

Purpose	Strengths	Limitations
Punishment	- A CCO can restrict an offender's movements or actions depending on the attached additional conditions. This may serve to penalise the offender for their actions. - The inconvenience of completing many hours of unpaid community work provides some retribution for the offender's conduct.	If the impact of an offence is severe, such as a violent assault, a CCO may not punish an offender sufficiently, causing unjust outcomes for victims, their families, and the community.
Deterrence	- Specific deterrence can be achieved as judges have flexibility in setting a CCO's terms to discourage each offender. Breaching a CCO can result in imprisonment, which can also act as a deterrent. - Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans, and other conditions of a CCO, members of the community may be discouraged from committing a similar offence to avoid receiving similar CCO conditions. This can enable the achievement of general deterrence.	A CCO is not as severe as imprisonment. Therefore, the wider community may not consider a CCO as harsh of a punishment, and hence a CCO may fail to achieve general deterrence.
Protection	The offender can be restricted from attending certain places, or from contacting specific people, including victims and co-offenders, thus promoting community safety.	The offender remains in the community and may not adhere to the conditions of the CCO. Therefore, community safety may not be promoted to the same extent as imprisonment, where offenders are completely removed from society.
Denunciation	–	Denunciation is not achieved by a CCO. A CCO is not as harsh a sanction as imprisonment and may not be severe enough to 'send a message' about the court's condemnation of the offender.
Rehabilitation	A CCO can include treatment for mental health issues and drug or alcohol addiction that have caused criminal offending, potentially reducing the risk of reoffending.	Rehabilitation is contingent on the offender's willingness to participate and hence, will not always be successful.

KEY TERM

Imprisonment a sanction that removes an offender from the community and places them in prison for a given period of time.

LEGAL VOCABULARY

Custodial sentence a sentence that an offender serves in prison.

Parole the early release of a prisoner, after their minimum term of imprisonment is served, which is subject to supervision and certain conditions.

Concurrent sentence a sentence of imprisonment or detention that is served at the same time as another when an offender has been convicted of more than one crime.

Cumulative sentence a sentence of imprisonment or detention that commences after the completion of another when an offender has been convicted of more than one crime.

Imprisonment 1.3.9.3

The most severe penalty that a court can impose is **imprisonment**, which involves removing the offender from society for a certain period of time, thus depriving them of their liberty. Imprisonment is a **custodial sentence**. When a court imposes a prison term, it will usually provide a minimum period of imprisonment, after which an offender can apply for **parole**. If the offender has behaved well in prison and is not regarded as a threat to public safety, they will likely be released on parole if they prove to the parole board that they are deserving of release.

Imprisonment can only be ordered by a court if it is stated as a potential penalty for the offence. Specifically, there are nine levels of imprisonment, ranging from six months, at level nine, to life imprisonment, at level one. Some offences, such as murder, are category one offences and therefore, require the offender to be imprisoned.

Where an offender is charged with multiple offences, the judge will either impose a **concurrent sentence**, whereby the offender will serve each sentence at the same time, or a **cumulative sentence**, whereby the offender will serve each sentence one after the other. Cumulative sentences are considered more severe than concurrent sentences as they increase the offender's overall term of imprisonment.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to violence, crime, and death.

Woman behind bars over lethal biscuit

In September 2020, Rebecca Payne ground up a sedative drug called Temazepam, laced a biscuit's icing with the substance, and fed the biscuit to her husband. Once he fell unconscious, she wrapped his body into a blanket and placed it into a freezer. This act was brought on by years of abuse Payne had faced at the hands of her husband, with the woman revealing during the court proceedings that her finances, weight, medical appointments, and showers were all regulated by her husband at the time.

Despite pleading not guilty, in May 2023, a jury in the Supreme Court of Victoria found Payne guilty of murdering her husband. Judge Incerti handed Payne a sentence of 16 years imprisonment with a non-parole period of 10 years. This is a significantly lower sentence than the maximum life imprisonment that can be handed to those convicted of murder. The judge determined this lower-than-average sentence was appropriate considering Payne had a 'good character' and 'excellent chances of rehabilitation'. Considering Payne already served time prior to sentencing, she could be released from prison by 2030.

Adapted from 'Rebecca Payne sentenced to 16 years' jail for murdering husband with drug laced biscuits' (Clark, 2023)

LEGAL VOCABULARY

Rate of recidivism a measure of the number of offenders who return to prison or other corrective services after their initial release.

Table 4 The ability of imprisonment to achieve the purposes of sanctions

Purpose	Strengths	Limitations
Punishment	- The offender is placed in a harsh environment, where their liberty and movement is restricted. - The offender loses most of their contact with family and friends. - The offender will usually lose their employment and therefore, any income while in prison.	–
Deterrence	- Prison's harsh punishment is likely to discourage offenders from reoffending out of fear of receiving a similar sentence. Hence, this can achieve specific deterrence. - Prison's harsh punishment can discourage members of the community from committing a similar offence out of fear of receiving a similar sentence. This can support the achievement of general deterrence.	In reality, prison is not an extremely effective deterrent for many offenders. In Victoria, the rate of recidivism is high, with approximately 43.6% of offenders reoffending within 2 years (Sentence Advisory Agency, 2021).
Protection	As the offender is removed from society, they can no longer pose a significant risk to the welfare of the community or their victims.	Many prisoners who are released will reoffend. Therefore, long-term community protection may be limited if the offender is not rehabilitated in prison.
Denunciation	- A sentence of imprisonment is the most severe and harsh sanction a court can impose. Therefore, if the court imposes a sentence of imprisonment over another type of sanction, such as a fine or CCO, the court's condemnation for the offence is communicated. - Where appropriate, judges are able to impose a longer prison sentence to demonstrate their condemnation of the offender's criminal conduct.	–
Rehabilitation	Prisons provide rehabilitation programs, such as alcohol and drug dependency programs, to assist the offender in addressing the underlying causes of their behaviour and hence, can help break the cycle of offending.	- The need among prisoners for services to treat drug and alcohol addiction far exceeds those provided, as there are often long waiting lists for access to such programs. Many prisoners leave prison without addressing their alcohol or drug-related issues. - If an offender has mental health issues that contributed to their offending, putting them in a harsh environment and isolating them from family, friends, and meaningful work can often make such issues worse.

Lesson summary

There are several types of sanctions that may be imposed on an offender, such as:

- fines, which require the offender to pay a fixed sum of money to the state as punishment for their criminal acts.
- CCOs, which allow an offender to remain in the community while being monitored for a fixed period of time in order to rehabilitate the offender, as opposed to strictly punishing them.
- imprisonment, whereby an accused is detained for a stated period of time and is deprived of their liberty as a result.

Fines, CCOs, and imprisonment each achieve the purposes of sanctions to varying degrees of effectiveness.

USEFUL TIP

When defining a sanction, or any legal terminology, try to avoid repeating the term you are defining. In the VCAA 2017 Legal Studies exam, students were asked to define a sanction for 2 marks. The VCAA examination report commented that describing imprisonment as 'when a person is imprisoned' is not sufficient.

5B Questions

Check your understanding

Question 1

Fines, CCOs, and imprisonment all achieve the purposes of sanctions equally.

- A. True
- B. False

Question 2

Which of the following factors are considered by the courts when determining a fine for an offender?

(Select all that apply)

- A. The purposes of the sanction that the court wishes to achieve.
- B. Any aggravating or mitigating factors.
- C. The offender's social standing.
- D. The offender's ability to pay the fine.

Question 3

What is the maximum length of a CCO for a single offence?

- A. One year
- B. Two years
- C. Four years
- D. Five years

Question 4

What is the most severe penalty a court can impose?

- A. A fine
- B. Community correction order
- C. Imprisonment

Question 5

Tick the box to indicate whether each of the following statements are strengths of **fin**es, **CCOs**, or **imprisonment**.

Statement	Fines	CCOs	Imprisonment
I. The financial loss caused by this sanction, as indicated by its penalty units, can discourage other members of the community from committing similar offences, achieving general deterrence.	☐	☐	☐
II. This type of sanction deprives the offender of their liberty.	☐	☐	☐
III. This sanction can include treatment for mental health issues and drug or alcohol addiction, which is served in the community, reducing the risk of reoffending.	☐	☐	☐

Preparing for exams

Standard exam-style

Question 6

(2 MARKS)

Zac, 56, pleaded guilty in the Supreme Court of Victoria to stalking his friend, Leo.

Outline **one** sanction that may be imposed on Zac.

Question 7

(3 MARKS)

Identify **three** conditions that a court may attach to a CCO.

Question 8

(3 MARKS)

Filip is convicted of assault, arson, and property damage, against his neighbour, Rushil.

Identify and describe **one** purpose of sanctions that could be achieved by imprisoning Filip.

Question 9

(4 MARKS)

'Fines do not achieve punishment'.

Do you agree? Justify your response.

Extended response

Use your answer to question 10 to support your response to question 11.

Question 10

Tick the box to indicate whether each of the following statements about CCOs relate to achieving **rehabilitation** or **deterrence**.

Statement	Rehabilitation	Deterrence
I. A CCO can include treatment for mental health issues and drug or alcohol addiction that have caused criminal offending, potentially reducing the risk of reoffending.	☐	☐
II. Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans, and other conditions of a CCO, members of the community may be discouraged from committing a similar offence to avoid receiving similar CCO conditions.	☐	☐
III. Some offenders may be unwilling to participate in drug and alcohol treatment programs.	☐	☐
IV. A CCO is not as severe as imprisonment. Therefore, the wider community may not consider a CCO as severe or harsh of a punishment.	☐	☐

Question 11

(6 MARKS)

Discuss the extent to which community correction orders (CCO) achieve rehabilitation and deterrence.

Linking to previous learning**Question 12**

(4 MARKS)

Gjordan, 42, was charged with murder. He is planning to plead guilty when the matter goes to court.

a. In what court would Gjordan have his case heard?

2 MARKS

b. Outline an appropriate sanction for Gjordan.

2 MARKS

5C Factors considered in sentencing

STUDY DESIGN DOT POINT

- factors considered in sentencing

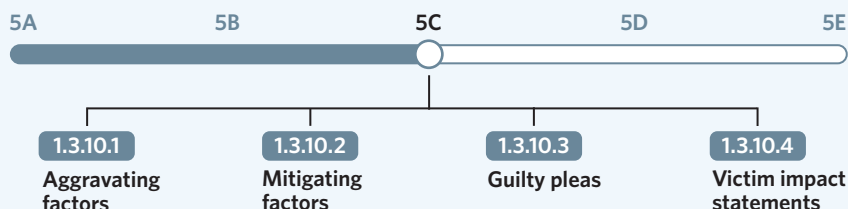


Image: JM Travel Photography/Shutterstock.com

You are deciding between two flavours at the local ice cream shop: chocolate pecan crumble or mint matcha delight. Whilst pecans are not your favourite, the chunky bits of crumble entice you, but mint matcha seems like a flavour combination you cannot go past. However, previous experiences with matcha ice cream have not been the best. In the same way different factors may lead you towards choosing a particular ice cream flavour, a judge will consider various factors when sentencing an offender.

Lesson introduction

When a judge is sentencing an offender, they will consider various factors that can either increase or decrease the severity of the sanction. These factors are listed in the *Sentencing Act 1991* (Vic) and allow a judge to consistently and fairly sentence an offender and deliver justice. Factors that are considered during sentencing may relate to the conduct of the offender or their crime's impact upon the victim and/or the victim's friends or family. Therefore, this ensures the sentence imposed reflects the severity of their conduct.

LEGISLATION

Sentencing Act 1991 (Vic)

Aggravating factors 1.3.10.1

A judge will consider the **aggravating factors** that apply to both the offence and the offender during sentencing, which will increase the severity of the sentence imposed. If aggravating factors are identified in an offender's case, their **culpability** will increase, ultimately causing the court to impose a more severe sanction, such as a longer non-parole period of imprisonment.

Aggravating factors include:

- an offence being planned or **premeditated**.
- a weapon being used whilst committing an offence.
- committing an offence inspired by prejudice towards a particular group, also known as hate crimes.
- committing an offence with a group of fellow offenders against an 'outnumbered' victim.
- where the victim of the offence was particularly vulnerable, such as an elderly person, a person with a disability, or a child.
- the offence occurring in front of children.
- the offender having prior convictions.

It should be noted that whilst genuine remorse can act as a mitigating factor and consequently decrease an offender's sentence, the courts have long established that a lack of remorse will not be considered an aggravating factor when sentencing.

KEY TERM

Aggravating factors aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.

LEGAL VOCABULARY

Culpability a measure of the degree to which an individual can be held legally responsible for a criminal act.

Premeditated the conscious, willful, and deliberate planning of an act in advance.

LESSON LINK

You learnt about hate crimes in **2D Types of crime**.

USEFUL TIP

When trying to remember whether aggravating factors increase or decrease the severity of a sentence, it may be helpful to think about a time when you 'aggravated' a friend or family member. Usually, such behaviour will cause a situation or interaction to become worse or less positive, in the same way that aggravating factors essentially 'worsen' the severity of a crime and the sentence received by an offender.

LESSON LINK

You learnt about community correction orders (CCOs) in **5B Types of sanctions**.

KEY TERM

Mitigating factors aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.

LEGAL VOCABULARY

Provocation an action or statement that aggravates an individual, leading to a criminal act.

LEGAL CASE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to death.

Nauer v R (2020) 93 MVR 296

Facts

A 20-year-old sleep-deprived woman was driving a motor vehicle carrying a number of family members. She was driving unlicensed due to previous offences that disqualified her from driving. Despite experiencing increased drowsiness, the woman continued to drive, and fell asleep at the wheel. The vehicle crossed onto the wrong side of the road into oncoming traffic and collided with another vehicle. The woman's father and two-year-old niece suffered serious injuries and later died, while other family members and the driver of the other vehicle also sustained injuries. The woman pleaded guilty to all charges.

Legal issue

When sentencing the offender, the judge had to consider various factors to determine an appropriate sanction for this crime and deliver justice to the victims, their families, and others impacted by the offence.

Decision

The offender was sentenced to four years and six months imprisonment with a non-parole period of two years and six months. The judge identified various aggravating factors that contributed to her sentence, including her willingness to put a number of people at risk, especially children, the fact that her licence was disqualified due to previous offences, and that she continued to drive for some time despite her tiredness. The offender appealed her sentence, however, this appeal was dismissed by the court.

Significance

This case indicates that the presence of aggravating factors, such as having previous offences, can increase an offender's culpability for a crime and consequently, the severity of their sentence.

Mitigating factors 1.3.10.2

Whilst aggravating factors act to increase an offender's sentence, **mitigating factors** can decrease the severity of an offence, resulting in a reduction in the sentence the judge imposes. If mitigating factors are identified in an offender's case, their culpability will decrease, likely resulting in the court imposing a less severe sanction, such as a shorter term of imprisonment.

Mitigating factors include:

- genuine remorse.
- the offence occurring due to **provocation**, rather than premeditation.
- the age of the offender, as young offenders may be more capable of rehabilitation and, consequently, can receive greater leniency when being sentenced.
- an offender having a particularly traumatic personal history, such as a disadvantaged upbringing, drug addiction, or alcoholism.
- a limited criminal history or no previous offences.
- cooperating with police during their investigation of the offence.
- favourable prospects of rehabilitation.

LEGAL CASE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to death.

R v Hackett (2021) 98 MVR 209

Facts

A 35-year-old man was charged with dangerous driving causing death after crashing the garbage truck he was driving into the back of a car, causing serious injuries to the victim which led to their death. The offender pleaded guilty to the charge.

Legal issue

The judge had to determine whether mitigating factors were present in this case when sentencing the guilty offender to ensure an appropriate sanction was imposed.

Decision

The offender was sentenced to a 20-month community corrections order (CCO) after the judge determined that Hackett demonstrated a history of good character, remorse, and strong prospects of rehabilitation, whilst no serious aggravating factors impacted this decision.

Significance

The sentence imposed on the offender demonstrates that the presence of mitigating factors in a criminal case can positively impact an offender during sentencing.

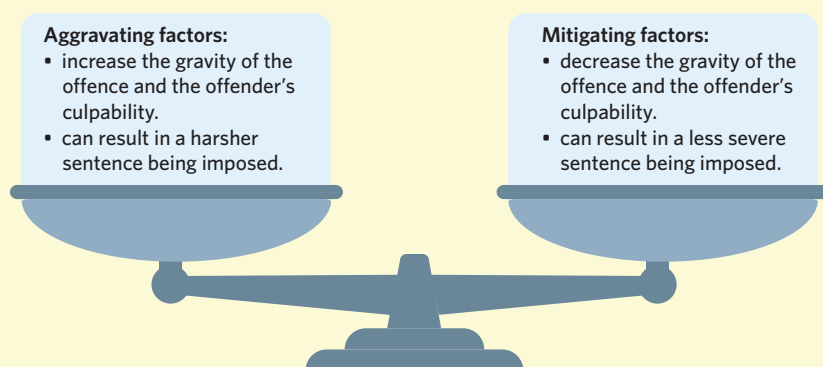


Figure 1 Judges will weigh up the impact of both mitigating factors and aggravating factors when imposing a sentence

Guilty pleas 1.3.10.3

When an offender pleads guilty to an offence, a trial will not be conducted, meaning the prosecution does not present evidence to prove the offender is guilty.

Instead, the court will proceed to sentence the offender, whereby the judge will consider a **guilty plea** as a mitigating factor when imposing the sanction. If an offender is charged with multiple offences, they may choose to plead guilty to some or all charges to reduce the severity of the sentence imposed. The earlier an offender pleads guilty, the greater the reduction in the harshness of their sentence, relative to other aggravating and mitigating factors. This lesser sentence, due to the guilty plea, is thought to act as a reward to the offender for owning their actions and saving the court the resources of conducting a full trial.

In some cases, when a court imposes a reduced sentence due to a guilty plea, the judge must state both the sentence that would have been imposed if the offender pleaded not guilty and was convicted, alongside the **sentencing discount**, being the sentence they actually received.

KEY TERM

Guilty plea a full admission of guilt by an accused person of an offence for which they have been charged.

LEGAL VOCABULARY

Sentencing discount a reduction in an offender's sentence that they receive for pleading guilty to an offence.

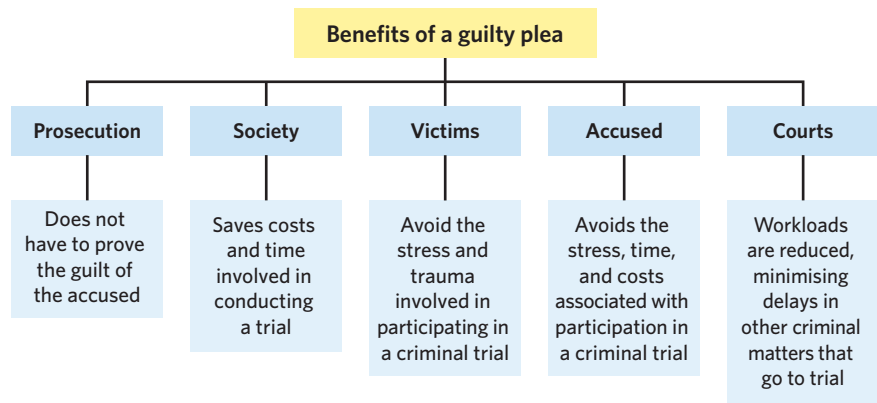


Figure 2 The benefits of a guilty plea

REAL WORLD EXAMPLE



Image: simon jhuan/Shutterstock.com

Figure 3 Queensland's youth offenders are pleading guilty to charges they did not commit to avoid long periods on remand

Guilty pleas as the only way out

In 2023, it was found that many youth offenders in Queensland were pleading guilty to offences they did not commit, or where there was little evidence to support their charges, to avoid extremely long periods of remand and custody.

Lawyers from various youth support services have expressed their concerns as children and young offenders are spending 'disproportionate' amounts of 'time in prison prior to being sentenced'. This has caused many young people to plead guilty to charges in an effort to leave detention as the 'time spent on remand is often longer than the sentence' they would receive. Therefore, this indicates that in some cases, a guilty plea is the only option for youth offenders to receive a just outcome.

Adapted from 'Innocent Queensland children pleading guilty to avoid harsh bail laws, lawyers say' (Smee, 2023)

Victim impact statements 1.3.10.4

KEY TERM

Victim impact statement (VIS)

a written or verbal statement made to the court about the effect of an offence upon the victim.

In order for a judge to understand the full effects of the offence upon victims and sentence the offender appropriately, a **victim impact statement (VIS)** may be written and submitted to the court. This statement provides physical, emotional, and economic insights into the impact of the offence upon the victim. Individuals who were not directly impacted by the offence, such as the victim's family or witnesses, may also contribute to the VIS.

Writing and submitting a VIS can inform a judge's decision and impact the offender's sentencing. For example, if a VIS indicates that an offence greatly impacted a victim, the severity of the sanction imposed may increase. On the other hand, if a victim demonstrates a level of forgiveness towards an offender through their VIS, a less severe sanction could be imposed. However, the significance of a VIS on a judge's decision will always be relative to aggravating and mitigating factors, as well as a guilty plea.

HYPOTHETICAL SCENARIO

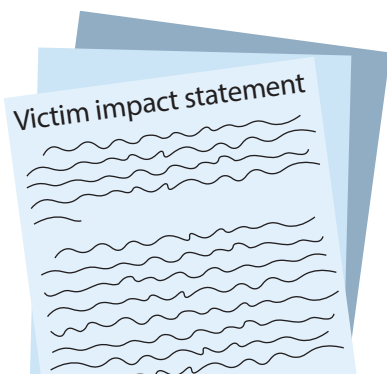


Figure 4 The VIS given by the victim's mother enabled a just outcome to be provided in Dale's case

CONTENT WARNING This section mentions content that is sensitive in nature, relating to violence.

A fitting sentence for a cowardly act

Dale, a 22-year-old male, was charged with intentionally causing grievous bodily harm after enacting a coward punch attack on another young male outside a pub in Fitzroy. The young victim was seriously injured and sustained permanent brain trauma and damage. In court, Dale pleaded guilty to all charges and appeared extremely remorseful for his actions. Since the attack, Dale has been diagnosed with post-traumatic stress disorder (PTSD), alcohol and drug abuse, and depression, after details of an abusive childhood were revealed. The mother of the victim submitted a victim impact statement (VIS) where she articulated her and her family's forgiveness towards Dale. She detailed that her family wishes to see him rehabilitated for his issues, understanding that the trauma he had experienced contributed to the attack. This VIS enabled the judge to impose a fair and appropriate sentence to Dale, in consideration of the victim and the victim's family, ultimately supporting the delivery of justice.

Lesson summary

In order to deliver a fair sentence, a judge must consider various factors associated with the offender, offence, and the victim(s), including:

- aggravating factors, which act to increase the seriousness of an offence and often result in a harsher sentence.
- mitigating factors, which act to decrease the seriousness of an offence and often result in a less severe sentence.
- a guilty plea, which can act as a mitigating factor as the offender may be showing remorse and regret while taking ownership for their actions.
- a victim impact statement, which can act to increase or decrease the severity of an offender's conduct, depending on the overall effect of the offence upon the victim, their family, and witnesses.

USEFUL TIP

When trying to remember the various factors a judge will consider when sentencing an offender, it may be helpful to use a mnemonic. The following phrases are examples of mnemonics you could use to remember the factors considered in sentencing. You could even make up your own!

After **M**idnight **G**ary **V**acuums

Amazing **M**others **G**row **V**egetables

Arnold **M**akes **G**reen **V**ehicles

5C Questions

Check your understanding

Question 1

When sentencing an offender, a judge will only identify aggravating and mitigating factors as they are the only two considerations that can increase or decrease the sentence imposed.

- A. True
- B. False

Question 2

Which of the following statements are examples of aggravating factors? **(Select all that apply)**

- A. The use of a weapon when committing a crime.
- B. The offender showing a lack of remorse for their conduct.
- C. The offender having a history of prior convictions.
- D. The offence being directed towards a particular group in society for prejudiced reasons.

Question 3

Fill in the blanks with the following terms:

decrease

increase

Whilst aggravating factors tend to [] the severity of an offence, mitigating factors usually

[] the offender's culpability and, consequently, the harshness of their sentence.

Question 4

If an offender pleads guilty to an offence, this will act as:

- A. an aggravating factor.
- B. a mitigating factor.
- C. a victim impact statement.

Question 5

Which of the following statements is correct about a victim impact statement (VIS)?

- A. A VIS can act to increase or decrease the severity of an offender's conduct.
- B. A VIS only acts to increase the severity of an offender's conduct.
- C. A VIS only acts to decrease the severity of an offender's conduct.
- D. A VIS does not act to increase or decrease the severity of an offender's conduct but aims to impose guilt upon them.

Question 6

A judge can utilise various factors when sentencing an offender to:

- A. ensure each judgment that is made is unique and inconsistent, ensuring justice is delivered to victims, without considering justice for the offender.
- B. allow a consistent and appropriate sentence to be handed down that reflects the principles of the justice system, delivering a fair outcome to both victims and offenders.

Preparing for exams**Standard exam-style****Question 7**

(2 MARKS)

Define 'aggravating factors' and provide **one** example of an aggravating factor a judge may consider in sentencing.

Question 8

(2 MARKS)

Outline a victim impact statement as a factor a judge may consider in sentencing.

Question 9

(3 MARKS)

Distinguish between aggravating and mitigating factors as factors a judge would consider in sentencing.

Question 10

(4 MARKS)

Judge Judd is sentencing an offender who was charged with arson and attempted murder. The offender pleaded guilty but did not demonstrate any remorse when attending court. It was known that the offender had a difficult upbringing and that the crime was premeditated.

Describe **two** factors Judge Judd would consider when sentencing the offender.

Question 11

(4 MARKS)

'Mitigating factors are the only consideration that can act to decrease the severity of an offender's sentence.'

To what extent do you agree with this statement? Explain your response.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Kristoff was charged with assault after he attacked his friend Sven with a knife. The judge identified that Kristoff had prior convictions of assault and that the attack upon Sven was premeditated, with Kristoff planning the act for some time. However, Sven submitted a victim impact statement (VIS) where he expressed his forgiveness towards Kristoff and was happy to 'let it go'. He also articulated his desire for Kristoff to access the rehabilitation he requires.

Question 12

Tick the box to indicate whether each of the following statements relate to **aggravating factors** or **victim impact statements**.

Statement	Aggravating factors	Victim impact statements
I. They only act to increase the severity and culpability of an offender's conduct.	☐	☐
II. They can include the victim's level of forgiveness towards the offender.	☐	☐
III. They can act to increase or decrease the severity of an offender's conduct, depending on the overall effect of the crime.	☐	☐
IV. Examples include considering whether the offence is premeditated, if a weapon was used, and if the offender has prior convictions.	☐	☐

Question 13

(6 MARKS)

Analyse the factors considered by the judge when sentencing Kristoff.

Linking to previous learning

Question 14

(4 MARKS)

Emily was convicted of drunk driving on three separate occasions. She has now been convicted of driving without a licence. The judge is currently in the process of sentencing Emily.

Outline **one** factor that would be considered when sentencing Emily and **one** appropriate sanction the judge could impose.

5D Alternative approaches to sentencing



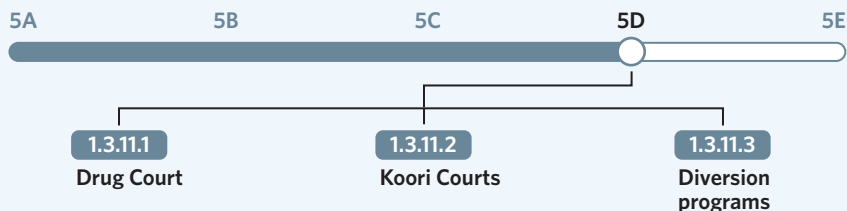
Image: FOTOKITA/Shutterstock.com

'We sentence for individual circumstances, the individual, the individual crime, the circumstances of that particular crime and that particular person.'—Chief Justice Ferguson (Supreme Court of Victoria, n.d.)

No two crimes, nor criminals, are identical. Therefore, each sentence should be carefully tailored to the specific offender. By offering alternative approaches to sentencing, the Victorian criminal justice system can sanction offenders with methods that better promote rehabilitation and reduce the likelihood of a criminal reoffending.

STUDY DESIGN DOT POINT

- alternative approaches to sentencing, such as the use of the Drug Court, Koori Courts and diversion programs



LESSON LINK

You learnt about sentencing in **5A Purposes of sanctions**.

KEY TERM

Drug Court a specialised court established to treat and rehabilitate offenders with a substance dependency through imposing a drug and alcohol treatment order.

LEGAL VOCABULARY

Recidivism repeated criminal offending by an offender who has already been convicted and served a sentence.

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime.

Drug Treatment Order (DTO) an order that combines a term of imprisonment with drug or alcohol treatment, whereby the term of imprisonment is suspended while the offender undergoes treatment and supervision.

Custodial sentence a sentence that an offender serves in prison.

Lesson introduction

The Victorian criminal justice system has adopted more flexible sentencing practices in recent decades with the aim of better addressing the particular needs of different groups in society. The introduction of specialist courts, such as the Drug Court and the Koori Courts, in addition to diversion programs, has offered offenders alternative approaches in their sentencing, compared to the traditional process of a sentencing judge determining the appropriate sanction in a courtroom. These alternative sentencing approaches may be chosen in order to better facilitate rehabilitation, whilst reducing crime rates and the risk of reoffending.

Drug Court 1.3.11.1

In May 2002, the **Drug Court** was established in Victoria as a division of the Magistrates' Court. It intends to rehabilitate offenders and improve the community's safety by reducing **recidivism**. To achieve this core objective, the Drug Court has the jurisdiction to impose a particular **sanction**, a **Drug Treatment Order (DTO)**, which aims to address the root cause of the offender's criminal behaviour by treating their substance abuse issues. Not all offenders are eligible to have their matter heard in the Drug Court and receive a DTO as a sanction, there are certain criteria that must be met. If an offender is eligible for a DTO, however, they will be offered incentives, in the form of reduced time in custody, to encourage compliance and participation in the program.

Mandatory treatment and rehabilitation activities, which can include:

- counselling services for addiction and psychological problems.
- regular drug testing.
- weekly attendance at the Drug Court.
- attending educational and employment programs.
- complying with curfew conditions and attending appointments.

A maximum, two-year **custodial sentence**, that will only be served if the offender fails to successfully complete the treatment phase of the order. If they successfully complete their assigned treatment plan, they will not have to serve the custodial sentence.

Figure 1 The features of a Drug Treatment Order

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 verbal warnings, to high severity, such as cancellation of the entire DTO and the offender serving their previously suspended prison sentence. Some form of reward is given each time the offender follows their condition and progresses in their rehabilitation. These may be low-level rewards, such as verbal praise, or higher-level rewards, such as immediate DTO completion.

REAL WORLD EXAMPLE

Drug Court turns 20!

In August 2022, the Dandenong Drug Court celebrated 20 years of providing services to offenders in the region. After 20 years, the Court found it had:

- broken the cycle of reoffending for many of the nearly 1700 offenders across the four Drug Court venues in Victoria
- facilitated 35% of offenders completing the two-year, intensive DTO.
- provided 'life-changing opportunities' to offenders whose crimes were fuelled by substance addiction.

The supervising magistrate of the Drug Court, Suzie Cameron, asserted the program was 'not easy, in fact, it's extremely difficult' to run.

The Drug Court reported success stories that had emerged over the years. Chloe, who was in and out of prison before the Court's intervention, made a choice to detox after almost having her DTO cancelled and being punished with 14 days in custody. Now, she studies at TAFE, and strives 'to be the best person [she] can be'.

Adapted from 'Drug Court marks 20 year success' (Lucadou Wells, 2022)

The offender has a dependency on drugs or alcohol that has directly contributed to their offending.



The offender is facing a term of imprisonment of no more than two years.



The offender has pleaded guilty to the offence.



The offender is facing charges that are not sexual offences or involve the infliction of actual bodily harm.



The offender is not on parole.



Figure 2 Criteria an offender must meet to be eligible for the Victorian Drug Court

Table 1 Strengths and limitations of the Drug Court of Victoria

Strengths	Limitations
• 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, whilst also providing a strong incentive to adhere to the terms of the DTO. • A DTO is able to address underlying drug or alcohol dependencies that may have contributed to offending in addicted individuals. • If successfully completed, a DTO allows an offender to avoid the negative prison environment and experience. • There are substantial costs associated with the prison system, therefore, the Victorian criminal justice system has been able to significantly save money through the Drug Court lightening the load on Victorian prisons. • Individuals who complete a DTO often have greater job prospects and obtain stable housing compared to those who fail to complete it and serve a custodial sentence. • The Drug Court has become more accessible as the 2020 Victorian Budget allocated \$35 million to facilitate its expansion. There are now Drug Courts in the Melbourne, Dandenong, Shepparton, and Ballarat Magistrates' Courts. • Victorian Drug Courts have established the Drug Court Housing Pathways Initiative allowing offenders to access transitional housing and specialist houselessness support. Evidence suggests large percentages of offenders accepting a DTO are unhoused at the time, making it difficult for their substance abuse issues to be addressed in the absence of stable housing.	• There is a cap on the number of offenders who can be given a DTO per year, as executing this order requires large amounts of resources for treatment, including financial and human resources. • Criticisms have been raised that the provision of rewards to offenders who successfully complete their DTO acts as a 'bribe' for them to follow the law, instead of encouraging offenders to follow the law for moral reasons. • Individuals seeking drug treatment may feel encouraged by DTOs to break the law in order to receive drug treatment that they otherwise would be unable to afford. • In Victoria, the Drug Court performs three drug tests a week typically during Phase I of the DTO, compared to New South Wales where only two tests are performed per week. This increases the cost of the Victorian Drug Court. • Offenders may feel pressured into pleading guilty, even if they are not, to obtain a Drug Court referral. Matters cannot be referred to this specialist court unless a guilty plea is made. • Victims and those directly impacted by the offender's crime may feel the offender is not being properly punished for their actions. • DTOs are only available to a portion of offenders, meaning other drug-reliant offenders who do not fit the criteria will miss out on valuable rehabilitation opportunities.

Koori Courts 1.3.11.2

KEY TERM

Koori Court an alternative sentencing court for First Nations offenders who have pleaded guilty to their criminal offence, developed to take into account the different cultural values of Aboriginal and Torres Strait Islander peoples.

LEGAL VOCABULARY

Incarceration rate the proportion of people being sentenced to a term of imprisonment.

Despite making up only 3.2% of the overall population in Australia (Australian Bureau of Statistics, 2022), Aboriginal and Torres Strait Islanders account for 32% of the total prison population in the country (Australian Bureau of Statistics, 2023). In an effort to combat this high **incarceration rate** of First Nations peoples in Victoria, the **Koori Court** was introduced as an alternative sentencing court in 2002. The Koori Courts recognise that traditional court practices can be alienating for Aboriginal people and Torres Strait people. Therefore, the processes adopted in the Koori Courts align more closely with traditional, Aboriginal and Torres Strait Islander practices and processes of law, including discussion and family engagement. Similar to the Drug Court, there are key criteria that must be met so that an offender can be sentenced by the Koori Court. Not all Aboriginal people and Torres Strait people immediately qualify.

The Koori Courts only deal with the sentencing of Aboriginal and Torres Strait Islander offenders in Victoria. They were originally established as a single specialist division of the Magistrates' Court, but have since expanded to include the Children's Koori Court and County Koori Court.

The approach taken by the Koori Court:

- is much less formal than traditional court proceedings.
- encourages an open dialogue between the parties.
- intends to prompt the offender to re-think their behaviour more than during a standard sentencing hearing.

In the Koori Court, the offender sits at a round table with a variety of parties, including the magistrate or judge, Aboriginal and Torres Strait Islander Elders and Respected Persons from the Aboriginal community, their lawyer, and their family. The offender discusses their reasons for offending and the impact of their crime, or crimes, on the victim, the offender, the offender's family, and the local Aboriginal community. The magistrate or judge then imposes a sanction. The sanction imposed is not more or less severe than if the sentence was to be decided in the Magistrates' Court or County Court after a traditional sentencing hearing, however, this sentencing process has proven effective at reducing reoffending.

REAL WORLD EXAMPLE



Image used with permission from YardFurniture.com.au

Figure 4 The Koori Court in Victoria

Jamie's story

The following story is from Jamie, an Aboriginal offender, who was sentenced in the Koori Court.

I was charged with driving without a licence. I had given up my licence for three months, when I gained 12 demerit points for a range of driving offences, mainly speeding fines. I was too 'shamed' to tell my employer that I had no licence. As a result, I was driving myself to work each day.

On his way to work one morning, I took a left corner too wide. There was an unmarked police car behind me. I saw the lights and then heard the siren. The police pulled me over. They asked me to produce my licence, and also take a breathalyser test. I was honest with the police officer and explained that I did not have a licence. I was later charged with driving without a licence. As I pleaded guilty to the charge, my lawyer gave me the opportunity to choose, if I wanted, to go through the Koori Court process.

I was initially hesitant, knowing that I would be facing Elders of the community. When the case was brought to court, I attended with my lawyer and my family. I also brought with me support letters from my employer, and other Respected Aboriginal community members. The process involved the Magistrate leaving the bench and coming to sit around the table with my lawyer, the Police Prosecutor, my brother, and two Elders of the community. It was a very casual experience. The police prosecutor read the charges. The Magistrate then asked me to explain the whole situation. I told the court that I felt a 'shame' not having a licence, and how I didn't want my employer to know. One of the Elders then explained to the court what 'shame' meant. 'Shame' in the Aboriginal context means 'embarrassed'. The Elders then also spoke. They told the court about the work that I do in the community, and stated that they were disappointed in my actions. My brother was also allowed to speak. It was like a large discussion that allowed all parties to be heard. In the end, I was given a fine to pay, but no conviction. In summary, I found this process to be daunting, as I had to face the Elders, but also it allowed my story to be told in a culturally-safe way.

Adapted from a story told to A.J. Williams Tchen (personal communication, 16 July, 2023)

Table 2 Objectives of the Koori Courts

Objectives of the Koori Courts
- Promote greater participation of Aboriginal and Torres Strait Islander communities in the sentencing process. - Reduce incarceration rates of both Aboriginal and Torres Strait Islander people by exploring sentencing alternatives. - Increase community awareness of the cultural needs and practices of those who identify as being either Aboriginal and/or Torres Strait Islander peoples. - Encourage First Nations ownership and agency over the administration of justice.

Table 3 Strengths and limitations of the Koori Courts

Strengths	Limitations
- The Koori Courts provide a more informal atmosphere compared to other courts. This allows for greater participation by the offender and Community Elders or Respected Persons in the court process, promoting access to the justice system. - The role of the magistrate or judge is slightly less formal than other courts, as they sit at a table and engage in conversation with all other participants, rather than sitting behind a raised bench as in a normal court sentencing process. - The offender is able to sit with a family member or support person during the discussions. - The discussions are in plain English, rather than technical legal language. This promotes access to the justice system as Aboriginal and Torres Strait Islander peoples can better engage in discussions. - The offender is able to reflect on their past and provide reasons for offending. The Elders and Respected Persons present will also often describe how the offender's behaviour has negatively affected their own family and the community. The discussion also includes what the offender can do to prevent further offending in the future and how their community can help. This process has proven to be effective at reducing reoffending in the Koori Court divisions of the Magistrates' Court and the County Court.	- Offenders may feel pressured into pleading guilty, even if they are not, to meet the conditions of the Koori Courts. - Some may argue that it is unfair to have an alternative court option for sentencing one cultural group, yet not alternative options for others. - It has been suggested that the Koori Courts sentence offenders with 'softer' punishments. However, this argument is unfounded as the Koori Courts do not act under a special sentencing regime. Whilst these courts do sentence offenders with different and more culturally appropriate treatment, this treatment is not less severe compared to regular court sentencing. - Over-representation of Aboriginal and Torres Strait Islander persons in Australia's prison system has not experienced a noticeable decline in recent years, despite the introduction of the Koori Courts. - The Koori Courts are limited to only being able to sentence those who identify as being Aboriginal and Torres Strait Islander, as opposed to conducting the accused person's trial too. Therefore, the inequalities that exist in the justice system, due to institutionalised prejudices, are still present in the Victorian criminal justice system. The Koori Courts are not a solution that addresses all the fundamental inequalities of the Victorian justice system. - Elders and Respected Community Persons may be unaware of the court's existence, preventing their participation in this process.

Diversion programs 1.3.11.3

Diversion programs aim to provide, predominantly first-time offenders, with the opportunity to not have their crimes on their criminal record, so long as they fulfil certain requirements. Offenders must meet key criteria in order to be considered for a diversion program.

Once an individual is approved to complete a diversion program, there are some conditions that their **diversion plan** may stipulate, including:

- an apology to the victim.
- rehabilitation through counselling and/or treatment services.
- undertaking volunteer work in the community.
- donating money or time to a charity or a local community initiative.
- attending a defensive driving course or road safety seminar if the crime committed was a driving offence.

KEY TERM

Diversion program an alternative to the court system that allows low-level offenders to avoid a criminal record, provided they make amends for their wrongdoing.

LEGAL VOCABULARY

Diversion plan an outline of the set of conditions an offender must follow in order to have their charges dismissed and ensure their offence does not appear on their criminal record.

The offence is a summary offence or an indictable offence tried summarily.



The offence is not subject to a mandatory or fixed penalty, such as a minimum fine.



The offender acknowledges and takes responsibility for the offence by pleading guilty.



There is sufficient evidence to gain a conviction should the matter proceed to trial.



The prosecution agrees to a diversion program for the offender.



Figure 5 Criteria an offender must meet to be eligible for diversion programs

LESSON LINK

You learnt about summary offences and indictable offences heard summarily in **2E Summary offences and indictable offences**.

LEGAL VOCABULARY

Restitution an act of restoring to a victim what they lost from the offence perpetrated against them.

Whilst diversion programs are mainly used for first-time offenders, the existence of prior convictions does not automatically disqualify someone from the program. However, the court will consider any prior convictions when deciding whether or not the diversion program is appropriate in the circumstances.

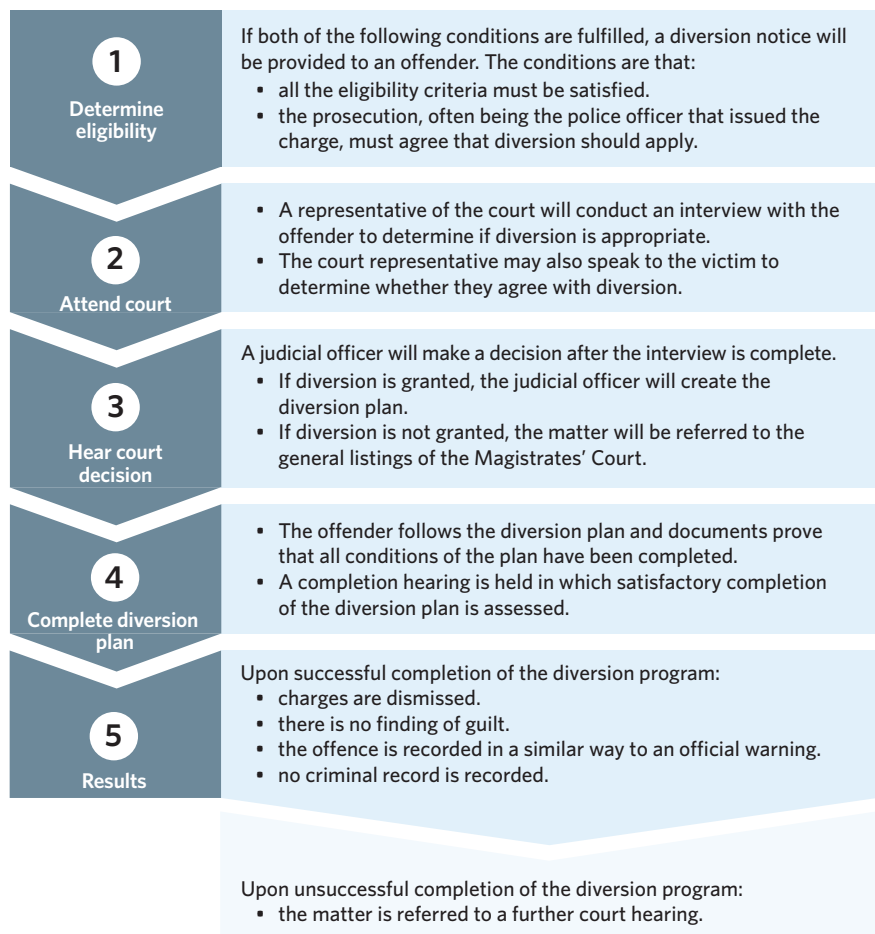


Figure 6 Process of obtaining a diversion program

Table 4 Strengths and limitations of diversion programs

Strengths	Limitations
- The offender's individual circumstances are reflected in the diversion plan, which promotes fairness. - The offender is able to avoid a criminal record. This is beneficial as criminal records can hinder job prospects, impact one's ability to acquire insurance, and fully participate in society. - 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, promoting fairness. - The local community benefits from voluntary work or donations from the offender. - If the diversion succeeds in discouraging future criminal offending, society is better off.	- There can be a lack of consistency in the approval of diversion programs by police officers. - Diversion programs may be seen as withholding the achievement of justice for the victim as the offender is punished with a relatively 'light' sanction. - The prosecution may reject the opportunity for an offender to receive this alternative form of sentencing. - Diversion programs are limited in their application, only applying to certain offenders.

HYPOTHETICAL SCENARIO**Caught red-handed**

Alex, 19, was caught stealing headphones from a local electronics store after he was captured on the store's CCTV system placing them in his pockets. This was Alex's first offence and he was terrified by the idea of having a criminal record. He is worried it will affect his future career.

Immediately after being caught by the police, Alex handed over the headphones and admitted his guilt in stealing them. Theft of this level is an indictable offence that is tried summarily. Theft, when heard summarily, is punishable by a maximum penalty of two years in prison, a fine worth 240 penalty units, or both. The police officer who discovered Alex's theft consented to Alex partaking in a diversion program. The owner of the electronics store also agreed to diversion for Alex.

Considering this series of facts, Alex was eligible for a diversion program. After being questioned by a court representative, the information was passed onto a judicial officer who determined that diversion appeared to be appropriate for Alex.

The judicial officer created the diversion plan which stipulated that Alex had to provide:

- a \$200 donation to the store that he stole from
- a written letter of apology to the electronics store owner.

Alex completed all aspects of the plan. At the completion hearing, the judge was satisfied that all conditions of the diversion plan had been met, and therefore dropped the criminal charges, meaning Alex did not obtain a criminal record.



Figure 7 Alex may have to write an apology letter as a condition of his diversion plan

Lesson summary

- There are several benefits of the Drug and Koori Courts for conducting alternative approaches to judicial sentencing, including reducing rates of recidivism in those who partake.
- However, these courts can be expensive to establish and are not available to the majority of offenders, as there are extensive requirements to access these courts.
- The use of diversion programs may also be a valuable tool for reducing rates of recidivism as they allow an offender to avoid unnecessarily obtaining a criminal record.

5D Questions

Check your understanding

Question 1

An offender is only able to receive a sentence for a criminal offence in the main division of the Magistrates' Court.

- A. True
- B. False

Question 2

Which of the following are the necessary criteria for a person to be eligible for a diversion program?

(Select all that apply)

- 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.

Question 3

Eliza, 34, was sentenced to a term of imprisonment but it was suspended as part of her Drug Treatment Order (DTO). She was required to attend counselling services to combat her alcohol addiction.

The alternative approach to sentencing involved:

- A. the Drug Court of Victoria.
- B. the Koori Court.
- C. a diversion program.

Question 4

The Koori Court is an alternative court that can only review and determine the guilt of people of Aboriginal or Torres Strait Islander descent, whilst the Magistrates' Court can determine verdicts for every other cultural group.

- A. True
- B. False

Question 5

In order to have a matter referred to the Koori Court, an offender must:

(Select all that apply)

- A. plead guilty to the charges against them.
- B. be of Aboriginal or Torres Strait Islander descent.
- C. have committed a criminal offence, such as a sexual offence.
- D. have consented to have their sentencing referred to the Koori Court.

Question 6

Fill in the blanks with the following terms:

custodial sentence

Drug Treatment Order (DTO)

If an offender completes a , they will not have to serve a , which is a maximum term of imprisonment of two years that is suspended while an offender engages in, and fulfils the conditions of, their treatment plan.

Question 7

Alternative approaches to sentencing, such as the Koori Court, the Drug Court, and diversion programs are available to all offenders in the criminal justice system.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify **two** requirements an offender must meet to have their sentence prescribed by the Drug Court of Victoria.

Question 9

(2 MARKS)

Outline the role of the Koori Courts.

Question 10

(3 MARKS)

Explain **one** feature of diversion programs.

Question 11

(6 MARKS)

Tony is the mayor of Illegalville, a small town enduring a recent increase in petty crime. Many local businesses are having their goods stolen due to delinquent teenagers. Tony is frustrated about the state of his beloved town, stating in a recent meeting that 'the use of diversion programs have allowed thieves to get away with their crimes and harsher sanctions are needed for first-time and low-level offenders'.

Explain **two** benefits of diversion programs in this case.

Question 12

(7 MARKS)

Tom, 23, and Jerry, 25, were both charged with possessing illicit substances for personal use. This is an offence with a maximum penalty of one-year imprisonment, a fine not exceeding 30 penalty units, or both.

Despite other offences in the past, this was Tom's first drug-related offence. Tom pleaded guilty to possessing illicit substances. Jerry was also dependent on drugs at the time of his arrest. The prosecution found that Jerry was on parole for a recent assault charge. Jerry pleaded not guilty.

- Propose and justify which offender would **not** be eligible for a Drug Treatment Order (DTO). 3 MARKS
- Describe **two** benefits of a DTO for the eligible offender. 4 MARKS

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Koori Courts in Victoria.

Statement	Strengths	Limitations
I. The Koori Courts provide a more informal atmosphere when compared to other courts. This allows for greater participation by the offender and First Nations Elders and Respected Persons in the court process, promoting access to the justice system.	☐	☐
II. The incarceration rates for First Nations peoples are still disproportionate, indicating the fundamental flaws in the Victorian criminal justice system that the Koori Courts fails to address.	☐	☐
III. The offender is able to reflect on their past and provide reasons for offending, which is an effective means of reducing recidivism rates among First Nations offenders in Victoria.	☐	☐
IV. The Koori Courts require offenders to have pleaded guilty in order to be sentenced by the court. Therefore, accused persons may plead guilty even if they are not, so they can be sentenced by the Koori Courts and avoid the Magistrates' or County Court.	☐	☐

Question 14

(7 MARKS)

Discuss the effectiveness of the Koori Courts in Victoria.

Linking to previous learning**Question 15**

(3 MARKS)

Explain how the Drug Court of Victoria helps achieve the 'rehabilitation' purpose of sanctions.

5E Sentencing in the Northern Territory



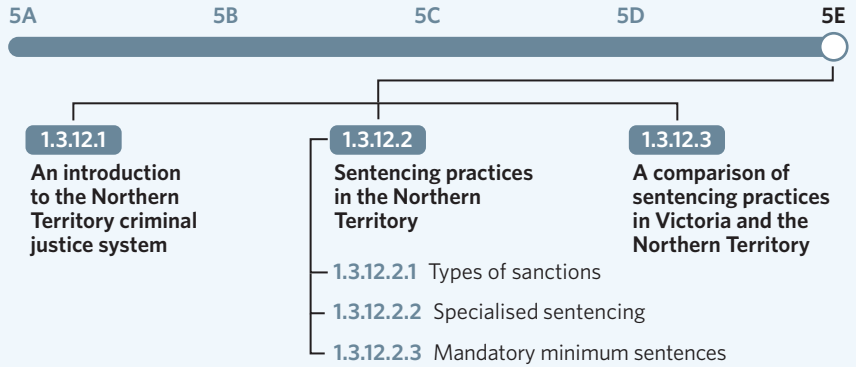
Image: Brooke Ottley/Shutterstock.com

'Australians all let us rejoice, for we are one and free.'—Advance Australia Fair (Australian National Anthem, 1878)

Although all Australian states and territories are united in forming Australia, each state and territory still has unique power to govern aspects of its citizens' lives. For example, state and territory parliaments have the jurisdiction to create and administer many of the criminal laws and procedures that its resident members must then follow.

STUDY DESIGN DOT POINT

- sentencing practices in one other Australian jurisdiction



CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to people who have passed, triggering language, or distressing events.

This lesson explores content that is sensitive in nature, relating to domestic violence.

Lesson introduction

In Australia, there are nine recognised legal systems; eight state and territory systems and one federal system. These recognised systems do not comprise the customary laws First Nations communities have utilised for tens of thousands of years. Such customary laws prohibit certain behaviours, which are allowed under Western laws, and validate behaviour prohibited by Australia's recognised law. For example, spearing is a traditional form of punishment practised by some Aboriginal communities. This practice has been defended as a reasonable form of punishment by the communities who engage in it. Therefore, the conflict between customary laws and formally-recognised laws has contributed to the criminalisation of First Nations peoples and their negative experiences with the criminal justice system.

Under the Australian Constitution, states and territories are responsible for creating, amending, and administering their own laws that primarily regulate the day-to-day lives of their citizens, including a majority of criminal laws. Considering different legislation regulates crimes in various states and territories, the sentencing practices and trends across the various states and territories in Australia can differ considerably.

LEGAL VOCABULARY

Rate of recidivism a measure of the number of offenders who return to prison or other corrective services after their initial release.

LESSON LINK

You learnt about youth detention centres in **4G Difficulties faced by some groups in the criminal justice system**.

Introduction to the Northern Territory criminal justice system 1.3.12.1

The Northern Territory (NT) has the highest imprisonment rate of any state or territory in Australia, with 1,026.6 prisoners per 100,000 adults as of June 2022 (Sentencing Advisory Council, 2023). Figure 1 demonstrates the significance of this incarceration rate compared to all other states and territories in Australia. Not only does the NT have the highest incarceration rate in Australia, but it also has the highest **rate of recidivism**. In 2023, it was reported that 56.7% of offenders released from prison in the NT re-offend and return to prison within two years of leaving. In Victoria, this figure is at 37.0% (Sentencing Advisory Council, 2023).

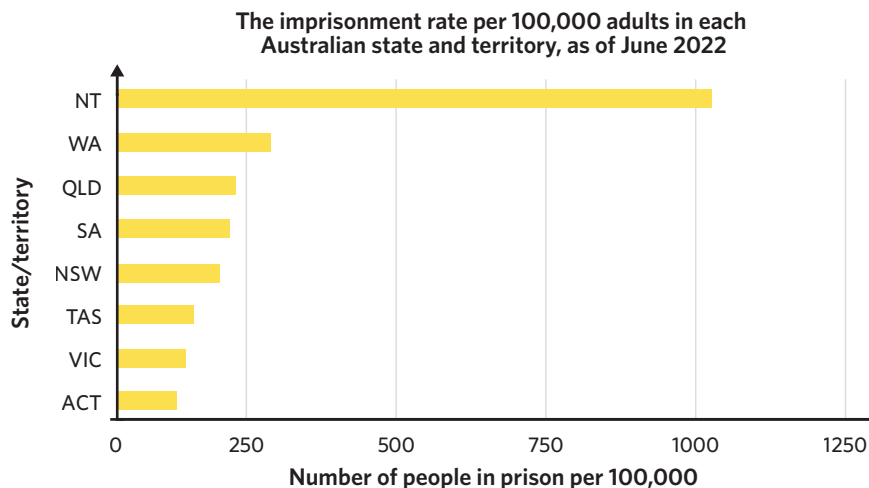


Figure 1 The imprisonment rate per 100,000 adults in each Australian state and territory, as of June 2022 (Sentencing Advisory Council, 2023)

The rates of young people in youth detention centres are also highest in the NT compared to every other state and territory in Australia. These detention centres intend to rehabilitate young offenders but have been criticised in recent years for creating a negative environment for children, increasing the likelihood of them re-offending upon release. A disproportionate amount of these young people in youth detention in the NT are Aboriginal and Torres Strait Islander peoples, as seen in Figure 3. However, it should be noted that the proportion of the Northern Territory's total population that is of Aboriginal or Torres Strait Islander descent was 30.3% in 2023, whilst Aboriginal and Torres Strait Islander peoples made up just 1.0% of Victoria's population at this time (Australian Institute of Health and Welfare, 2023). This is not to say the overrepresentation of First Nations youth in the Northern Territory's youth detention centres is solely due to population distribution, as systemic patterns of racism in Australian society, among other factors, also play a role.

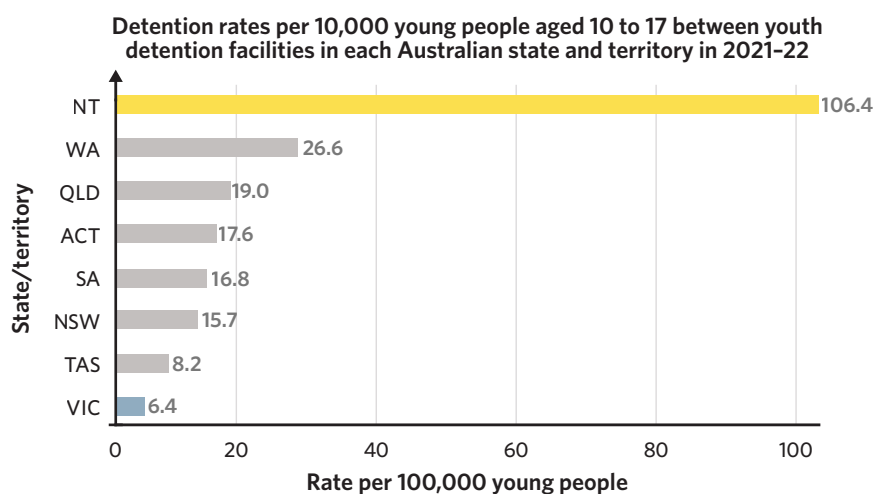


Figure 2 Youth detention rates in each Australian state and territory from 2021 to 2022 (Sentencing Advisory Council, 2023)

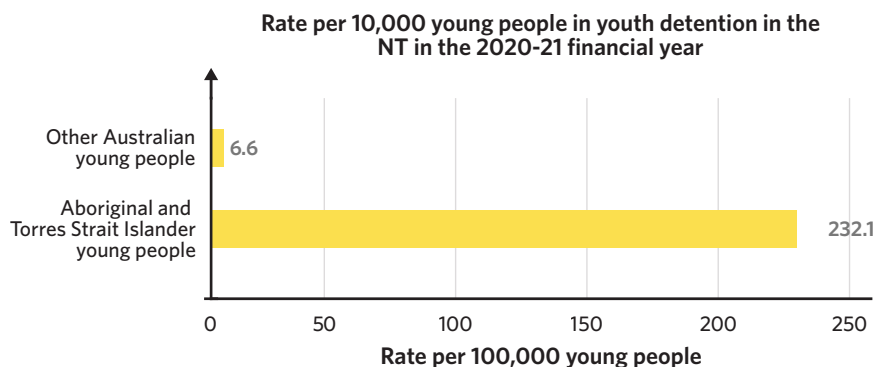


Figure 3 Rates per 10,000 young people in youth detention in the Northern Territory in the 2020-21 financial year (Sentencing Advisory Council, 2023)

Sentencing practices in the Northern Territory 1.3.12.2

There are various aspects of the Northern Territory's criminal justice system to consider when analysing the territory's sentencing practices, including:

- types of sanctions
- specialised sentencing
- mandatory minimum sentences.

Types of sanctions 1.3.12.2.1

Despite the NT's high imprisonment rate, it still utilises alternative sanctions other than prison, such as community-based sentences. As seen in Figure 2, the NT has the highest rate of offenders completing a community-based order, which are non-custodial sanctions that are completed whilst remaining in the community, such as a **community work order** or a **community custody order**. However, the NT is also the only Australian state or territory with more offenders sentenced to a term of imprisonment than a community-based order (Northern Territory Law Reform Committee, 2021).

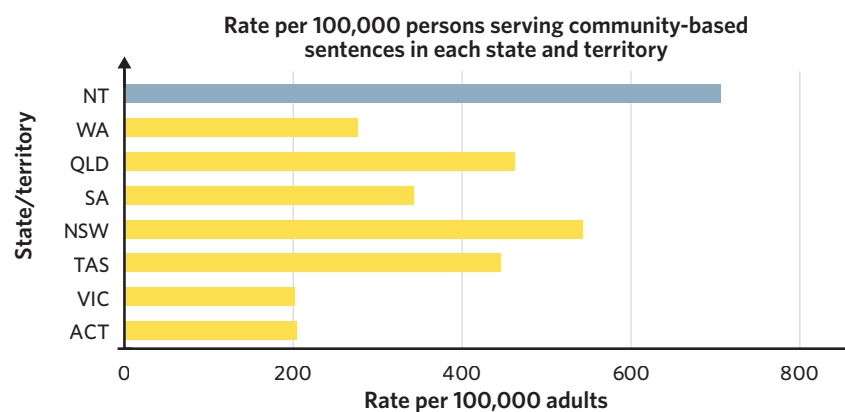


Figure 4 Rate per 100,000 persons serving community-based sentences in each state and territory (Australian Bureau of Statistics, 2023)

Table 1 Types of sanctions in the Northern Territory (NT)

Type of sanction	The NT's use of this sanction	Example of an offence when the sanction may be imposed
Imprisonment	Imprisonment is the most severe sentence the NT courts can impose. A term of imprisonment may range from one day to a life sentence. It involves a person being confined to a 'correctional centre', such as the Darwin Correctional Centre or the Alice Springs Correctional Centre. Almost 1% of the adult population in the Northern Territory is in prison at any point in time (Justice Reform Initiative, 2022).	• In the Northern Territory, prisoners who are convicted of murder are automatically given a life sentence under the law, meaning they are not entitled to parole for at least 20 years unless the judge specifies that the non-parole period should be extended further. • Terrorism • Interfering with the free exercise of the Legislative Assembly by force, deception, threat, or intimidation Continues →

LEGAL VOCABULARY

Community work order a non-custodial sentence that aims to assist the offender in making amends with the community by performing specific tasks.

Community custody order a sentence that is considered to be imprisonment, but allows the offender to serve their sentence in the community.

CONTENT WARNING This table mentions content that is sensitive in nature, relating to child abuse and sexual offences.

LEGAL VOCABULARY

Imprisonment a sanction that removes an offender from the community and places them in prison for a given period of time.

Table 1 Continued

Type of sanction	The NT's use of this sanction	Example of an offence when the sanction may be imposed
Community custody order	These orders can be imposed for up to 12 months and are accompanied by several conditions an offender must fulfil, including: • completing 12 hours of community work each week • attending rehabilitation programs or counselling • reporting to an officer twice a week. According to the <i>Sentencing Act 1995</i> (NT), an offender is eligible for this sentence for any offence with the exception of sexual offences, violent offences, and common assaults occurring in situations of aggravation.	• Theft • Disclosure of confidential information • Impersonating public officers, which occurs when a person pretends to be employed in the public service
Home detention order	A home detention order is accompanied by appropriate conditions, such as requiring an offender to: • wear an electronic monitoring device • not leave the premises without permission • abstain from consuming drugs or alcohol. This order can only be made where the total term of imprisonment is less than 12 months.	• Neglecting to aid in arresting offenders • Harboring escaped prisoners • Theft
Indefinite imprisonment	The Supreme Court in the NT can sentence an offender convicted of a violent offence to an indefinite sentence. The imposition of this sanction is dependent on the severity of the offence and the personal characteristics of the offender, such as their age and health. The court considers various factors before imposing this sanction, including: • whether the offence is exceptional in nature • the risk of serious or physical harm to community members if an indefinite sentence were not imposed • any medical or psychiatric reports related to the offender. The court must also impose a nominal sentence when handing out an indefinite term of imprisonment. This nominal sentence is the prison sentence the offender would have been charged with had they not been given an indefinite sentence. A nominal sentence is given to an offender so that, halfway through this sentence, the indefinite sentence can be reviewed to determine if it should be changed to have a definitive end date.	• Manslaughter • Murder • Sexual intercourse or gross indecency involving a child under 16 years • Sexual intercourse without consent

Continues →

LEGISLATION

Sentencing Act 1995 (NT)

LEGAL VOCABULARY

Home detention order a custodial sentence in which the offender stays within a specified premises while abiding by certain conditions and orders.

Indefinite sentence a term of imprisonment that is not assigned an end date by a court.

Table 1 Continued

Type of sanction	The NT's use of this sanction	Example of an offence when the sanction may be imposed
Suspended sentence	Suspended sentences are terms of imprisonment that are not actually served. Instead, an offender will remain in the community, working and fulfilling their responsibilities. The purpose of these sentences is to allow the offender to connect to the community, increasing their chances of rehabilitation by allowing them to productively contribute to society. This sentence can apply when the term of imprisonment for the offence is five years or less. The court may partly suspend the sentence, meaning the offender will be required to serve some of their sentence in prison, and then the rest in the community. Alternatively, the court may wholly suspend the sentence in which case the offender will not be required to go to prison.	• Drink and food spiking • Bribery • Placing false ballot papers in ballot boxes • Escaping from lawful custody
Community work order	A community work order may require an offender to: • complete community service for a maximum of 480 hours, working no more than 8 hours per day • not break the law • present themselves to an officer. Community work orders may be ordered for a number of offences, as long as these offences do not carry mandatory imprisonment.	• Negligently causing serious harm • Distribution of an intimate image without consent • Shoplifting
Fine	Fines can be used to sanction an offender for less serious criminal matters and where there is no mandatory imprisonment for the relevant offence. Offences in the <i>Criminal Code Act 1983</i> (NT) may have maximum fines worth a specified amount of penalty units.	• Shoplifting worth less than \$500 • Unlawful disclosure • Conspiring to commit an offence

LEGAL VOCABULARY

Suspended sentence a custodial prison sentence that is postponed and not put into immediate effect, allowing the offender to remain in the community whilst completing conditions.

LEGAL VOCABULARY

Fine a sanction that requires the offender to make a monetary payment as a penalty for a criminal offence.

LEGISLATION

Criminal Code Act 1983 (NT)

DEEP DIVE**Suspended sentences**

Courts in the Northern Territory can order suspended sentences, which are custodial prison sentences that are not put into immediate effect. An offender will remain in the community, working and fulfilling their responsibilities, while their prison sentence is suspended. The offender will not serve any time in prison unless they breach the terms of their suspended sentence. Terms of suspended sentences may include:

- participating in rehabilitation programs
- not consuming alcohol or drugs
- regularly reporting to a probation officer.

Continues →

DEEP DIVE

Suspended sentences – Continued

If an offender breaches one of the conditions of their suspended sentence, the sentence that was held in suspense will usually be restored. Additionally, if an offender breaches the conditions of their suspended sentence and commits a different offence that would result in them receiving a term of imprisonment, the court may order them to first serve some or all of the suspended term of imprisonment, as well as all of the new penalty imposed. The offender will then need to serve these sentences back-to-back.

A suspended sentence is available when:

- the court deems it would be appropriate for the offender
- the term does not exceed five years
- the offending warranted a term of imprisonment.

Adapted from 'Suspended sentence: supervised' (Northern Territory Government, 2023)

LEGAL CASE

CONTENT WARNING This section explores content that is sensitive in nature, relating to violence.

R v Hughes* [2023] NTSC 52*Facts**

In February 2016, a man was drinking with his acquaintances when one of them fell asleep, prompting the man to go through the sleeping victim's pockets. When the victim awoke, the man attacked him violently. The victim was older and more frail than the offender, sustaining severe traumatic brain injuries, multiple rib fractures, widespread bone injuries, and a broken collarbone, alongside other injuries. In court, evidence was presented demonstrating the victim would have died from his head injuries had he not received immediate medical treatment.

Legal issue

For his callous behaviour, the offender was sentenced by the Northern Territory Supreme Court, in 2017, to an indefinite sentence with a nominal period of 14 years for the offence of attempted murder. The *Sentencing Act 1995* (NT) sets out that the court must review the indefinite sentence once 50% of the nominal sentence has been served. Therefore, the court had to determine, in 2023, whether the offender should continue serving an indefinite sentence, or whether to prescribe an end date to his sentence.

Decision

The court believed the likelihood of the offender committing criminal offences again, if released from prison, was extremely high, given his:

- history of non-compliance
- lack of internal motivation and insight
- lack of a supportive network, considering a majority of his friends would drink whenever they were together
- risk of relapse within the community.

Therefore, the judge held that 'the offender is still a serious danger to the community, and that the indefinite sentence should continue in force'.

Significance

This case demonstrates how indefinite sentences are handed down by the Northern Territory Supreme Court in circumstances where an offender has limited chances of rehabilitation and is likely to pose a serious danger to the community. By reviewing these indefinite sentences periodically, the courts ensure that offenders who show signs of rehabilitation and positive future prospects can be released from prison eventually.

Specialised sentencing 1.3.12.2.2

Just as Victoria has specialised courts, such as the Koori Courts and Drug Court, the Northern Territory (NT) also has courts that specialise in assisting certain demographics. However, these specialised courts are different to those in Victoria and reflect the unique problems facing the NT's criminal justice system.

Table 2 Types of specialised courts in the Northern Territory

Type of specialised court	Explanation
Community courts	Community courts allow Aboriginal offenders to request to be sentenced by an Aboriginal community. These courts intend to 'support local community involvement and Aboriginal leadership by ... helping [offenders] to understand the impacts of their behaviour' (Chaseling & Spina-Matthews, 2023).
Youth Justice Court	The Youth Justice Court in the NT hears charges against young offenders aged 12 to 18 years old. If an offence is particularly serious, such as in the case of murder or manslaughter, it will be transferred to the Supreme Court for trial and/or sentencing. This court must ensure rehabilitation is a central consideration when sentencing a young person.

REAL WORLD EXAMPLE

Image: Lightspring/Shutterstock.com

Figure 5 The reintroduction of community courts in the Northern Territory in 2023 aimed to reduce recidivism and imprisonment rates

Community courts curb crime

In 2018, the Australian Law Reform Commission released a report titled 'Pathways to Justice – Inquiry Into The Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'. Recommendation 10 of the report stated that 'state and territory governments should establish specialist Aboriginal and Torres Strait Islander sentencing courts'. The report condemned the lack of such mechanisms in the Northern Territory (NT), prompting reform.

In May 2023, the NT passed amendments to the *Sentencing Act 1995* (NT), re-establishing community courts as of 1 July 2023. These community courts can sentence both children and adult offenders who have had their matters heard in the NT's lower local courts. They must have pleaded guilty in order to be sentenced by the community courts.

Adapted from 'Aboriginal community courts will return in the NT after legislation passes parliament. Here's how they will work' (Chaseling & Spina Matthews, 2023)

KEY TERM**Mandatory minimum sentence**

a term of imprisonment that an offender must receive if they committed a certain offence. There is no ability for the judge to award a different, less harsh sanction.

LESSON LINK

You learnt about aggravating factors in **5C Factors considered in sentencing**.

Mandatory minimum sentences 1.3.12.2.3

The *Sentencing Act 1995* (NT) establishes **mandatory minimum sentences** for various offences, which differ based on the severity of the offence. For example, an offender must receive a:

- term of life imprisonment if they committed murder.
- 12-month minimum sentence of imprisonment if they have previously been convicted of a violent offence and are then found guilty of either:
 - committing serious harm against another person
 - using, or threatening to use a weapon while assaulting a worker, a judge, or a police officer
 - assaulting with an intent to commit an offence.
- three-month minimum sentence of imprisonment if they have not previously been convicted of any violent offences and committed one of the above offences.
- term of actual imprisonment, as short as the judge sees fit, if the offender has not previously been convicted of a violent offence and commits an offence, such as common assault, where no aggravating factors apply. Aggravating factors can include:
 - a male committing an assault against a female
 - if the victim was below the age of 16
 - assault against a member of parliament due to their position
 - an offender threatening a victim with a weapon.

REAL WORLD EXAMPLE

Mandatory sentencing in the Northern Territory

In 2022, the Northern Territory removed mandatory sentencing requirements for several offences, including assaults, drug offences, and repeat breaches of domestic violence orders. Mandatory sentences still exist for murder, serious sexual offending, assaults against police and emergency workers, and serious property offences.

These reforms were instigated by the NT Law Reform Committee's 2019 report, which called for the mandatory sentencing laws to be repealed. Although some of the Committee's recommendations were introduced, the recommendation that a mandatory life sentence should not be imposed for murder was not adopted. This recommendation had been made after a man in the NT had been handed a life sentence for involvement in a murder he did not commit.

Adapted from 'Changes to the NT's mandatory sentencing laws pass parliament, prisoner numbers reach new record' (Thompson, Abram and Morgan, 2022)

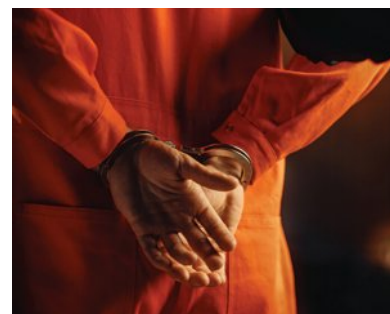


Image: Gorodenkoff/Shutterstock.com

Figure 6 The Northern Territory has abolished mandatory sentencing for some offences

A comparison of sentencing practices in Victoria and the Northern Territory 1.3.12.3

In Victoria, criminal behaviour is regulated by several Acts, including the *Crimes Act 1958* (Vic) and the *Summary Offences Act 1966* (Vic), whilst people who commit most crimes in the Northern Territory (NT) are convicted and sentenced under the *Criminal Code Act 1983* (NT). There are some similarities between certain sentencing trends in Victoria and the NT. For example, according to data from the Australian Bureau of Statistics collected in the 2021–2022 financial year:

- the median age of accused persons was 35 years in Victoria and 32 in the NT.
- traffic and vehicle regulation offences made up 35% of **principal offences** in Victoria and 25% in the NT.

However, there are some significant differences in the criminal trends in Victoria and the NT. Whilst 30% of offences committed from 2021–2022 in the NT were acts intended to cause injury, only 16% of offences in Victoria had causing injury intentionally as the primary offence.

These trends may be explained by the differences in sentencing practices of Victoria and the NT. Certain sentencing practices utilised in the NT are not used, or have been discontinued, in Victoria, and vice versa. For example, in 2012, Victoria abolished suspended sentences, replacing these with community correction orders, which are intended to be more flexible.



Figure 7 Proportion of offenders in the 2021–22 financial year who were male in the Northern Territory compared to Victoria (Australian Bureau of Statistics, 2022)

LEGISLATION

Crimes Act 1958 (Vic)

Summary Offences Act 1966 (Vic)

LEGAL VOCABULARY

Principal offence the primary or main offence committed by an offender where multiple crimes have been committed at once.

Age of criminal responsibility the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.

LESSON LINKS

You will learn more about the age of criminal responsibility in **11A The rights of young people**.

You learnt about community correction orders (CCOs) in **5B Types of sanctions**.

Table 3 A comparison of sentencing practices in Victoria compared to the Northern Territory

Sentencing practice	Victoria	Northern Territory (NT)
Use of imprisonment for family domestic violence offences	According to the Australian Bureau of Statistics (2023), there were 14,409 offenders guilty of at least one family domestic violence charge in Victoria from July 2021–2022. Of these offenders, 15% received a custodial sentence.	In the NT, 2,797 offenders were found guilty of a family domestic violence charge in the same period. Of these offenders, 73% were sentenced to a custodial sentence, indicative of the more prominent use of imprisonment as a sanction in the NT compared to Victoria.
Specialised courts for children	The Children’s Court in Victoria hears and determines cases involving children and young people up to the age of 18.	The Youth Justice Court in the NT determines cases for offenders between the ages of 12 to 18. If an offence is particularly serious, it will be transferred to the Supreme Court for trial and/or sentencing.
Specialised courts for Aboriginal and Torres Strait Islander peoples	The Koori Courts are specialist divisions of the Magistrates’, Children’s, and County Courts in Victoria. These are sentencing courts that allow First Nations Elders and Respected Persons to engage in conversations with Aboriginal and/or Torres Strait Islander offenders who have pleaded guilty to certain crimes.	In 2023, the Northern Territory passed legislation establishing community courts, allowing Aboriginal offenders to be sentenced in a community environment to better support their rehabilitation and encourage them to understand the impacts of their crimes on society.
Youth detention centres	In Victoria, there are six youth detention centres. In the June quarter of 2022, the rate of young people in detention in Victoria was 1.3 children per 10,000 people (Australian Institute of Health and Welfare, 2022).	In the June quarter of 2022, the rate of young people in detention in the NT was 21 children per 10,000 people. According to the Australian Institute of Health and Welfare (2022), the number of people in youth detention increased in the NT from 2021 to 2022, whilst youth detention populations fell in Victoria during the same period.
Use of mandatory sentencing	Victorian legislation establishes that for all Category 1 and 2 offences, the courts must impose an adult or juvenile detention sentence. Category 1 offences include: • murder • causing serious injury intentionally in circumstances of gross violence • rape. Category 2 offences include: • manslaughter • kidnapping • providing documents facilitating terrorist acts.	Up until November 2022, the NT had a number of mandatory sentencing laws, including for domestic violence, drug, and assault offences. These laws were repealed and now there are only mandatory prison sentences for fewer offences including murder, sexual offences, and assaults of frontline workers.
Community-based order	Community correction orders (CCOs) in Victoria can have a maximum length of five years, if the order is made in respect of three or more offences, whilst they require an offender to fulfil various conditions, such as: • not re-offending while the CCO is in place • not leaving Victoria without permission • reporting to a community corrections centre and regularly meeting with their supervisor.	Community-based orders are a type of NT sanction that can last up to two years, whereby an offender may have to: • attend programs or counselling • undergo drug or alcohol treatment • have medical psychological assessments • complete unpaid community work.
Age of criminal responsibility	In April 2023, the former Premier, Daniel Andrews, announced the age of criminal responsibility in Victoria would increase from 10 to 12 years old by 2024.	As of August 1 2023, under the <i>Criminal Code Act 1983</i> (NT), the age of criminal responsibility in the NT is 12 years old.

Lesson summary

Given that each state and territory has the power to legislate its own criminal law and determine the sanctions available for different offences, Victoria and the Northern Territory have similarities and differences in their sentencing practices.

Table 4 Similarities and differences between sentencing practices in the Northern Territory and Victoria

Similarities	Differences
- Types of sentences, such as fines and imprisonment. - Specialised courts, such as the Youth Justice Court in the NT and the Children’s Court in Victoria. - Higher rates of incarceration among Aboriginal and Torres Strait Islander peoples. - Courts that use more informal sentencing methods that are specialised to Aboriginal and Torres Strait Islander cultural practices, being the community courts in the NT and the Koori Court in Victoria. - Use of youth detention centres. - Use of indefinite sentences for serious offences. - Mandatory sentencing, whereby a period of detention must be imposed for serious offences, such as murder. - Use of community-based orders that aim to rehabilitate offenders. - The age of criminal responsibility has been increased to 12 years old in the NT, whilst in Victoria there are plans for it to be increased by 2024. Therefore, children in both jurisdictions are soon to be prevented from being found guilty of criminal offences when below the age of 12.	- Increased prevalence of custodial sentences given to domestic violence offenders in the NT. - The NT uses suspended sentences and home detention orders, which are not used in Victoria. - Higher rates of incarceration and youth detention in the NT. - It is mandatory for a judge to sentence an offender to life imprisonment in the NT for murder whilst, in Victoria, no mandatory life imprisonment sentence for murder exists. However, a judge must sentence a murder offender to prison in Victoria unless particular circumstances exist. - In Victoria, the Children’s Court has a Koori Court division. Therefore, young, Aboriginal offenders can have their sentence determined by the Koori Court as long as they fulfil the conditions for this, such as pleading guilty. On the other hand, the Local Court in the NT is the only court that can refer an offender who has pleaded guilty to the community courts for culturally-relevant sentencing. Therefore, child offenders cannot be sentenced by community courts.

5E Questions

Check your understanding

Question 1

The Commonwealth Parliament enacts criminal legislation in Australia, therefore every jurisdiction follows the same Act when sentencing.

- A. True
- B. False

Question 2

Fill in the blank with **one** of the following terms:

highest

lowest

The Northern Territory (NT) has the imprisonment rate of any state or territory in Australia, with 1,026.6 prisoners per 100,000 adults as of June 2022 (Sentencing Advisory Council, 2023).

Question 3

Which of the following are types of sanctions the Northern Territory may hand down to an offender?

(Select all that apply)

- A. Community custody order
- B. Hotel detention
- C. Indefinite imprisonment
- D. Damages

Question 4

Community work orders involve an offender:

- A. continuing to work their regular job, but giving half of the profit they earn to the government so this money can be directed towards rehabilitation efforts to improve the general community.
- B. not receiving any time in custody but rather, completing community service and being required to abide by the law in order to prove they are making amends with the community.

Question 5

Suspended sentences are fines that are not put into immediate effect but are suspended until an offender has had the time to gather the money required to pay the fine.

- A. True
- B. False

Question 6

Tick the box to indicate whether each of the following courts are specialised courts in the **Northern Territory** or **Victoria**.

Court	Northern Territory	Victoria
I. Koori Court	☐	☐
II. Youth Justice Court	☐	☐
III. Community courts	☐	☐
IV. Children's Court	☐	☐

Question 7

Fill in the blanks with the following terms:

the Northern Territory

Victoria

15% of offenders guilty of domestic violence received a custodial sentence in [], whereas 73% of all offenders guilty of this offence in [] received a custodial sentence in the 2021-22 period (Australian Bureau of Statistics, 2023).

Question 8

Mandatory sentencing has been abolished in both Victoria and the Northern Territory.

- A. True
- B. False

Question 9

Which of the following statements are correct about the similarities between approaches to sentencing in Victoria and the Northern Territory? **(Select all that apply)**

- A. Both jurisdictions contain specialised courts, such as the Youth Justice Court in the Northern Territory and the Children's Court in Victoria.
- B. Both jurisdictions have courts that use more informal sentencing methods specialised to Aboriginal and Torres Strait Islander cultural practices, being the community courts and the Koori courts.
- C. Both jurisdictions contain youth detention centres.
- D. Both jurisdictions contain a mandatory life imprisonment sentence for offenders found guilty of murder.

Preparing for exams**Standard exam-style****Question 10**

(2 MARKS)

Identify **two** approaches to sentencing in the Northern Territory that are different to the approaches in Victoria.

Question 11

(6 MARKS)

Explain **two** sentencing approaches used in the Northern Territory.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Eddie is a 13-year-old Borroloola boy. Borroloola is a remote, Aboriginal community group located in the Northern Territory (NT). Growing up in a rural town with limited money, Eddie has engaged in petty crime throughout his youth, such as theft. He was recently accused of committing domestic violence against his mother after an altercation. He is planning to plead guilty and will therefore need to be sentenced. He is worried about the sentence he may receive.

Question 12

Tick the box to indicate whether the following statements are **similarities** or **differences** related to the experiences Eddie may have if he were in Victoria compared to the Northern Territory.

Statement	Similarities	Differences
I. In the NT, Eddie may be sentenced in the Youth Justice Court for his offence and the Children's Court would hear Eddie's case in Victoria, both being specialised courts for young accused persons engaging with the criminal justice system.	☐	☐
II. Eddie may be sentenced to a period of detention in a youth detention centre in Victoria and the NT as both jurisdictions have these facilities.	☐	☐
III. In Victoria, there is a Koori Court division of the Children's Court, therefore young, Aboriginal offenders who plead guilty can have their sentence determined by a specialised, culturally-relevant court. In the Northern Territory, community courts can only sentence offenders approved to partake in community court processes by the Local Court. There are no community court sentencing options for young offenders.	☐	☐
IV. Eddie is more likely to be sentenced to a custodial sentence for the domestic violence offence in the NT compared to Victoria as statistics suggest Victoria sanctions domestic violence offenders to a custodial sentence far less frequently than the NT.	☐	☐

Question 13

(5 MARKS)

Compare the sentencing experiences Eddie may have if he were sentenced in Victoria compared to the Northern Territory.

Linking to previous learning

Question 14

(3 MARKS)

Jerry, a Northern Territory resident, was standing by a bridge, watching the view. He quickly turned around and his backpack accidentally struck another man standing next to him on the bridge, causing the man to fall into the river and drown. Jerry was found guilty of murder despite maintaining his innocence after evidence emerged that the man he struck had recently received a job Jerry had applied for. The media suggested that Jerry had intended to kill him so he could receive the job offer instead. Jerry showed significant remorse after the murder, writing apologies to the friends and family of the victim.

Distinguish between the sentence Jerry would likely receive in Victoria compared to the sentence he will receive in the Northern Territory. Refer to the factors considered in sentencing with regard to Victoria's sentencing.

Question 15

(5 MARKS)

Recently, Margot was at a youth climate change protest in the Northern Territory. Margot went to the protests as she knew her high school bully was also attending as a police officer. When she spotted her former bully in the crowd, Margot lunged at the police officer and punched her several times. Several children watched as Margot pulled out a knife to continue the attack. Margot has been accused of assaulting a frontline worker. This is her first offence.

- a. Outline the type of sanction Margot will receive if found guilty of assaulting a frontline worker in the Northern Territory.
- b. Provide **three** examples of aggravating factors relevant to Margot's case.

2 MARKS

3 MARKS



2

UNIT 2

Wrongs and rights

Civil law aims to protect the rights of individuals. When rights are infringed, a dispute may arise requiring resolution, and remedies may be awarded. In this unit, students investigate key concepts of civil law and apply these to actual and/or hypothetical scenarios to determine whether a party is liable in a civil dispute. Students explore different areas of civil law, and the methods and institutions that may be used to resolve a civil dispute and provide remedies. They apply knowledge through an investigation of civil cases from the past four years. Students also develop an understanding of how human rights are protected in Australia and possible reforms to the protection of rights, and investigate a contemporary human rights issue in Australia, with a specific focus on one case study.

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UNIT 2 AOS 1

Civil liability

Civil law aims to protect the rights of individuals, groups and organisations, and provide opportunities for a wronged party to seek redress for a breach. In this area of study, students develop an understanding of key concepts in civil law and investigate two areas of civil law in detail. Possible areas of civil law could include negligence, defamation, nuisance, trespass and contracts. For each area of civil law, students consider actual and/or hypothetical scenarios giving rise to a civil claim, apply legal reasoning to determine possible liability for a breach of civil law and explain the impact of a breach of civil law on the parties.

Outcome 1

On completion of this unit the student should be able to explain the purposes and key concepts of civil law, and apply legal reasoning to argue the liability of a party in civil law based on actual and/or hypothetical scenarios.

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KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about civil law
- classify civil law according to its type
- explain the purposes and key concepts of civil law
- apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios
- synthesise and apply legal information to actual and/or hypothetical scenarios in relation to two areas of civil law.

Image: Birgit Reitz-Hofmann/Shutterstock.com

6

CHAPTER 6

Civil law

LESSONS

- 6A** Purposes and types of civil law
- 6B** Key concepts of civil law
- 6C** Plaintiffs and defendants

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.

6A Purposes and types of civil law

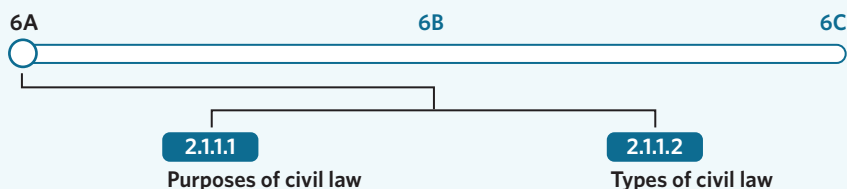


Image: fizkes/Shutterstock.com

What happens if you have a legal issue with anyone from a peer to an organisation? Fake rumours spread about you online, a warranty that is not upheld, work injuries, the list goes on. Up until this point, you have dealt with and learnt about the prosecution, defences, accusations, and culpability. But what happens when the state is not instigating the legal action?

STUDY DESIGN DOT POINT

- the purposes and types of civil law



LESSON LINKS

You learnt about common law and statute law in **1E Sources of law**.

You will learn more about remedies in **Chapter 9: Remedies**.

KEY TERMS

Civil law an area of law that defines the rights and responsibilities of individuals, government entities, and organisations, and provides a legal framework for when these parties interact with each other.

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.

LEGAL VOCABULARY

Loss a disadvantage experienced by a party due to an action or the inaction of another party.

Lesson introduction

Civil law applies in situations where personal rights have been breached, but criminal law does not apply. Civil laws aim to ensure rights are upheld and people in society are compensated for any loss they have suffered, both financially and emotionally.

Common law, made by judges, or statute law, made in parliament, aims to provide individuals and organisations with the right to seek a remedy if another party infringes upon their rights and a subsequent injury or loss is suffered.

Purposes of civil law 2.1.1.1

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 another institution to obtain a **remedy**.

The primary purpose of civil law is to restore the individual who suffered a **loss** to their original position before the loss occurred. Other purposes include:

- providing a system for parties to pursue rights protection
- providing remedies
- establishing guidelines for appropriate behaviours.

In most cases, the individual or group suffering the loss, also known as an aggrieved party, will receive compensation through a remedy. Remedies come in two main forms: damages and injunctions.

When comparing civil and criminal law, a remedy is the civil equivalent of a sanction, whilst a dispute is the civil equivalent of a crime.

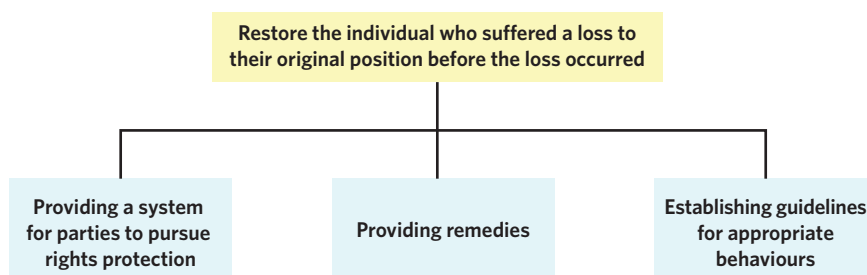


Figure 1 Purposes of civil law

HYPOTHETICAL SCENARIO

Painting a picture of the purposes

Anastasia is walking through Gracie's gallery when she comes across some uneven floorboards that are not part of an art installation. Losing her footing, Anastasia falls and injures her back.

She decides to turn to civil law as she believes Gracie has not upheld her rights and acted carelessly by allowing the floorboards to remain unkempt.

During the court proceedings, Anastasia is awarded a remedy that covers her medical bills and compensates her for the work she missed due to her injuries. Whilst Anastasia did take some time to recover, she is, in many ways, in the same position she was in before her loss. Gracie is also now more aware of the standard of care she owes to the visitors of her gallery.



Figure 2 Anastasia's case provided both Anastasia and Gracie an experience with some of the purposes of civil law

Types of civil law 2.1.1.2

There are many different types of civil law. The specific rights that are protected in a civil dispute depend on the type of civil law the dispute falls under.

Workplace law

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).

LEGISLATION

Fair Work Act 2009 (Cth)

REAL WORLD EXAMPLE

Rights, rewards, and awards

The *Fair Work Act 2009* (Cth) contains over 100 'awards' that outline the minimum conditions employees in a specific industry are entitled to. Awards specify job conditions, such as minimum wages, breaks, leave entitlements, and penalty rates. These awards serve to protect employees by providing the baseline wages and conditions for their employment.

The Fair Work Ombudsman assists employees when issues arise between employers and employees. Its website also provides a number of useful, simple tools that allow users to check minimum wage entitlements in different industries, find awards that apply to an occupation, and calculate leave entitlements.

Adapted from 'Fair Work Ombudsman' (Australian Government, n.d.)



Image: Giruba_86/Shutterstock.com

Figure 3 The *Fair Work Act 2009* (Cth) is critical in workplace law and the protection of employees' rights

Contract law

Contract law aims to protect the rights of parties when establishing enforceable agreements. This is set out in numerous Acts, including the *Goods Act 1958* (Vic).

LEGISLATION

Goods Act 1958 (Vic)

DEEP DIVE

Everyday contract law

As individuals in modern society, you and your classmates are likely engaging in multiple contracts a day, often without knowing. Every time you access data through your mobile phone, this is upholding and utilising the contract you have with your mobile provider. Purchasing a good or service, such as a packet of gum from a newsagent, also constitutes a contract with the given store.

These everyday contracts are useful when issues arise, such as your mobile data shutting off unexpectedly or the packet of gum turning out to be expired. However, for the most part, these contracts provide an invisible, legal framework behind your daily lives that do not significantly affect your day-to-day activities.



Figure 4 There are many contracts that individuals engage in everyday

LESSON LINK

You will learn more about specific types of civil law, including defamation, negligence, and misleading or deceptive conduct, in **Chapter 7: Types of civil disputes**.

LEGISLATION

Competition and Consumer Act 2010 (Cth)

Consumer protection law

Consumer protection laws ensure individuals purchasing goods and services from businesses do not have their rights infringed. These laws also seek to protect consumers when engaging in activities associated with trade and commerce, such as warranties, guarantees, and financing. Such laws are enforced by numerous Acts, but are primarily established in the *Competition and Consumer Act 2010 (Cth)*.

REAL WORLD EXAMPLE

Image: Fdesign96/Shutterstock.com

Figure 5 Consumer protection laws operate alongside national commissions to safeguard consumers from being misled about the good or service they are purchasing

Environmental exaggeration

The Australian Competition and Consumer Commission (ACCC) is an independent authority primarily concerned with upholding and enforcing the *Competition and Consumer Act 2010 (Cth)*. Its activities involve promoting fair trading practices, consumer education, and protection.

In March 2023, the ACCC, as part of its regular investigative activities, found that 57% of 257 businesses surveyed were overstating their environmental credentials. This overstating came in a wide and damning variety of forms. It was determined some businesses had used vague and baseless terms to promote their brand or products, such as 'kind to the planet', while others provided online links to broken websites when attempting to prove their sustainability to consumers.

The ACCC conducted this survey as more consumers are basing purchasing decisions on these environmental signals. Therefore, in the interest of consumer protection, it is crucial that companies are being truthful about the sustainability of their goods and services.

Deputy Chair of the ACCC, Catriona Lowe, noted that 'it appears that rather than making legitimate changes to their practices and procedures, some businesses are relying on false or misleading claims'. She also noted that the ACCC would now be taking 'enforcement action where it is appropriate to do so'.

Adapted from 'ACCC to crack down on 'greenwashing' after survey reveals spike in misleading claims' (Hannam, 2023)

LEGISLATION

Property Law Act 1958 (Vic)
Transfer of Land Act 1958 (Vic)
Residential Tenancies Act 1997 (Vic)

Property law

Property laws help individuals buy, sell, and rent houses, deal with commercial property leases, and regulate property development and the division and transfer of assets. These activities are mainly enforced in Victoria by the *Property Law Act 1958 (Vic)*, the *Transfer of Land Act 1958 (Vic)*, and the *Residential Tenancies Act 1997 (Vic)*.

USEFUL TIP

Unless specifically stated, the exact legislation titles are unlikely to be required in answers regarding types of civil law. However, they are a great tool to enhance the quality of your responses and demonstrate a deeper understanding of these types of law.

HYPOTHETICAL SCENARIO**Mouldy mischief**

Jack has just moved into a rental property in Brunswick East. His apartment is in a block of flats that was built in the 1960s and his rent is relatively cheap. After a month of occupying the property, he notices a patch of mould growing on his bedroom roof that leaks water when it rains. He addresses this with his landlord and the real estate agent, but they tell him that because his rent is relatively cheap and the flat is old, it is not their responsibility to repair and cleanse the property. Jack isn't happy with this resolution and turns to s 68 of the *Residential Tenancies Act 1997 (Vic)*. He learns that it is the landlord's duty to maintain the premises. Therefore, after further discussion, his roof is restored at the expense of the landlord.



Image: Graham Corney/Shutterstock.com

Figure 6 Jack was put in a vulnerable position after his landlord refused to maintain his rental property

Table 1 Other types of civil law

Type of civil law	Legislation	Explanation
Family law	Family Law Act 1975 (Cth)	Family law guides important decisions surrounding the custody of children, divorce settlements, and the division of assets when families have broken down.
Wills and probate law	Administration and Probate Act 1958 (Vic)	Wills and probate law is concerned with the creation and enforcement of wills.
Defamation law	Defamation Act 2005 (Vic)	Defamation law protects a person’s reputation from being damaged by lies that are shared with the public.
Negligence law	Wrongs Act 1958 (Vic)	Negligence requires certain individuals to take reasonable care in preventing foreseeable damage from occurring.

Lesson summary

Table 2 Summary of the purposes and types of civil law

Purposes of civil law	Types of civil law	
• Restoring the plaintiff to their original position • Providing a system for individuals to protect their rights • Providing monetary compensation to individuals who have experienced a loss • Establishing guidelines for appropriate behaviours	• Workplace • Contract • Consumer protection • Property	• Family • Wills and probate • Defamation • Negligence

6A Questions

Check your understanding

Question 1

The main purpose of civil law is to punish the defendant for what they have done to the plaintiff.

- A.** True **B.** False

Question 2

Which of the following types of civil law deals with divorce, division of assets, and custody agreements?

- A.** Defamation law **C.** Family law
- B.** Consumer protection law **D.** Workplace law

Question 3

Fill in the blanks with the following phrases:

restore the plaintiff to their original position

protect the rights of individuals

One of the primary purposes of civil law is to []. Thus, the legal framework is then able to [] in a broad sense.

Question 4

Ashwin has been unable to replace his faulty laptop at the place of purchase despite it being covered by a warranty that guaranteed functionality.

Which type of civil law is Ashwin most likely to engage with to find a resolution?

- A.** Consumer protection law
- B.** Defamation law
- C.** Negligence law
- D.** Property law

Question 5

Which of the following is **not** a purpose of civil law?

- A. Enabling monetary compensation.
- B. Embarrassing the defendant for what they have done.
- C. Establishing acceptable standards of behaviour.
- D. Protecting rights of individuals.

Question 6

A civil dispute will be successful if the plaintiff is compensated for the loss they have suffered at the hands of the defendant.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Outline **one** purpose of civil law.

Question 8

(3 MARKS)

Explain how **one** type of civil law can achieve **one** purpose of civil law.

Question 9

(4 MARKS)

Describe **two** types of civil law.

Extended response

Use your answer to question 10 to support your response to question 11.

Use the following information to answer questions 10 and 11.

Aayush's coworker, Hunter, has been posting serious falsehoods and accusations about Aayush's workplace conduct internally and externally. Despite telling them to stop, Hunter is still relentlessly spreading lies about Aayush as they said they have freedom of speech and can say whatever they want. Aayush's manager informs him that, unfortunately, due to the nature of the allegations, the business is removing the annual leave he has accumulated and lowering his wage as punishment.

Question 10

Which of the following types of civil law are relevant to Aayush's situation? **(Select all that apply)**

- A. Family
- B. Property
- C. Defamation
- D. Workplace

Question 11

(6 MARKS)

Analyse **two** types of civil law relevant to the scenario. Refer to the ability of these laws to achieve the purposes of civil law in your response.

Linking to previous learning

Question 12

(3 MARKS)

Distinguish between the main purpose of civil and criminal law.

6B Key concepts of civil law

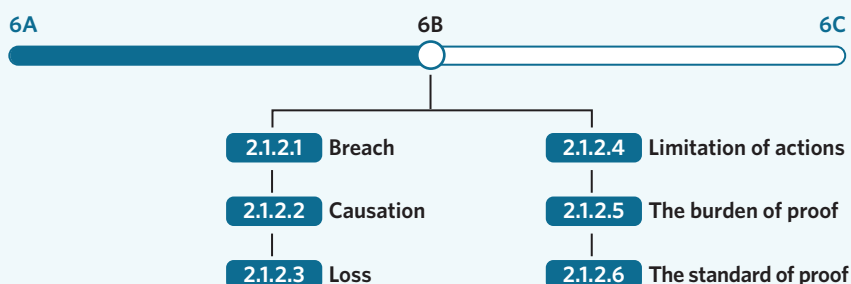
STUDY DESIGN DOT POINT

- key concepts of civil law, including:
 - breach
 - causation
 - loss
 - limitation of actions
 - the burden of proof
 - the standard of proof



Image: Mr.Nikon/Shutterstock.com

'*Treat people how you want to be treated*', also referred to as 'the golden rule', is a moral and philosophical principle that is referenced in a variety of religions, cultures, and texts. It would be great if everyone followed this rule, but human conflict is all around us. So how can the legal system assist in times of dispute? Enter civil law, and its various components, that seek to assist those who have been mistreated.



Lesson introduction

Whilst different types of civil law exist, such as defamation and family law, these categories of civil law are all governed by similar concepts and principles. These concepts are crucial to the civil justice system and ensure civil laws protect the rights of individuals and, in turn, deliver justice. Like criminal law, there is a standard and burden of proof that applies to civil law, alongside general elements that are consistent across all types of civil law: breach, causation, and loss.

Breach 2.1.2.1

When a person or company fails to abide by civil law, this is considered a **breach**. This means there has been a failure to perform a legal obligation owed to a person or business. As civil law protects certain individual rights, when these rights have been infringed, it means civil law has been breached. Therefore, a breach of statute or common law is an element that must be proven when taking legal action in civil law.

Civil law covers many different rights and what constitutes a 'breach' of the law will vary depending on the nature of the legal rights that have been infringed.

Table 1 Examples of a civil law breach

Area of law	Example of breach
Employment	A business dismissing a worker because they are pregnant.
Contract	A homeowner failing to make a payment to a builder renovating their house, which was required under their contract.
Negligence	A doctor not exercising enough care when performing surgery and causing their patient to sustain an injury.
Defamation	A media outlet publishing negative falsehoods about an individual.

USEFUL TIP

Remember, the two parties in a civil dispute are known as the plaintiff and the defendant. The plaintiff is the party pursuing the claim against the defendant, and who has allegedly had their rights breached. On the other hand, the defendant is the party who has allegedly committed a civil breach and inflicted harm or suffering on the plaintiff.

KEY TERM

Breach an act or omission that represents a failure to meet a legal obligation.

LESSON LINKS

You will learn more about negligence in **7A Negligence – elements**.

You will learn more about defamation in **7D Defamation – elements**.

REAL WORLD EXAMPLE



Image: Natee Meepian/Shutterstock.com

Figure 1 An employee at the Australian Bureau of Statistics was terminated after sharing anti-government material on professional social media platform, LinkedIn

LinkedIn and lockdowns

In this digital age, many employers include a social media policy in the contracts of their employees. These often act to protect and preserve the employer's reputation from being tarnished by an employee who chooses to act unfavourably on their personal social media accounts.

In 2021, the Australian Bureau of Statistics (ABS) employed a contractor as a part of the 2021 census. This contractor assisted members of the public to complete the national survey and therefore, acted on behalf of the ABS in commanding strong public trust.

The employee, during this time, posted anti-government material complaining about COVID-19 lockdown restrictions to LinkedIn. LinkedIn is a business social media platform in which people often share work-related achievements and updates. As the ABS was publicly listed on the employee's profile alongside posts that encouraged 'revolution' against the government, the ABS sent the employee a letter of termination of employment.

The employee took the ABS to court claiming they had been unfairly terminated and therefore, the ABS had breached workplace laws. However, the court found the ABS was permitted to terminate this employee as they had, in fact, breached their employment contract in regards to social media.

Adapted from 'Fired over LinkedIn post? Worker takes employer to court' (Tamaray, 2023)

KEY TERM

Causation the relationship between an event or action and a resulting event.

LEGAL VOCABULARY

'But for' test a legal test of causation that seeks to determine whether a party would have suffered harm if not for the actions of another party.

Causation 2.1.2.2

For a party to be found liable for the loss suffered by another, there must be **causation**.

To establish a claim, the plaintiff needs to show that the defendant's breach was a necessary condition of the loss suffered, thus making it a key element of civil law. That is, but for the actions of the defendant, the harm sustained by the plaintiff would not have occurred. The **'but for' test** is applied where there was more than one cause of a plaintiff's injury. For example, if a supermarket had unmarked, slippery floors that a plaintiff slipped on, even if they slipped because they were lightly nudged by their toddler, the 'but for' test would still be established. That is because 'but for' the floors being slippery, the push from the toddler would likely not have caused any injuries.

Sometimes it may be possible for a defendant to avoid liability if they can prove their breach was not the true cause of the loss and was rather 'merely consequential'. This requires that there was an intervening act that broke the chain of causation. In these circumstances, it must be proven that a different event occurred and actually caused the loss of the plaintiff. An intervening act may be a voluntary human action.

For example, if a plaintiff suffered back injuries at work due to their employer's negligence, and then decided to go to the gym and attempt a 200 kg deadlift, causing them to break their back, this would be an intervening act as the plaintiff voluntarily subjected themselves to further injury.

HYPOTHETICAL SCENARIO



Figure 2 Will was found to have not acted negligently towards Stella to cause her broken leg

Will's wacky welding

Will and Stella share a jewellery studio in which they both use various equipment to create rings. Will uses the studio in the morning, and Stella uses the studio in the afternoon, which prevents them from crowding each other's space.

One stormy day, Will left the studio after welding and setting some opals on his new rings. When Stella arrived, she picked up a welding tool and badly burnt her hand as it had been left on for a long time, despite Will being required to turn it off and leave it in its container after use. As she left the studio to seek medical assistance for her hand, she slipped in the heavy rain and broke her leg.

Stella initiated civil action against Will to compensate her for her loss of earnings as she could not work with her burnt hand. She also sought compensation for the medical bills associated with her broken leg.

The court found that, although Will was liable for her hand injuries, the heavy rain created dangerous conditions that broke the chain of causation between Will's actions and Stella's broken leg.

Loss 2.1.2.3

A plaintiff must have suffered **loss** in order to be granted a remedy by the courts when taking civil action. This is a key element that must be proven by the plaintiff as it assists the courts or the dispute resolution body to determine how best to restore the plaintiff to the position they were in before their loss.

Table 2 Types and examples of civil loss

Loss	Example
Loss of earnings	A sports star has been injured and can no longer play.
Loss of enjoyment	A landlord's misconduct creates a hostile home environment for their tenant.
Damage to property	A dead tree falls on a house that the local council should have removed.
Injury, suffering, or death	A breach of an employment contract leaves the employee with lasting chronic pain and depression.
Loss of reputation	The public thinks less of a celebrity because of untrue claims made about them in a magazine article.

KEY TERM

Loss a disadvantage experienced by a party due to an action or the inaction of another party.

REAL WORLD EXAMPLE

Katie roars louder than Katy

A Sydney fashion designer, Katie Taylor, also known as Katie Perry, successfully took legal action against Katy Perry in 2019 after she claimed that Perry infringed her 'Katie Perry' trademark in Australia.

Taylor has been operating a clothing brand in Sydney, named 'Katie Perry' since 2006. In 2019, she alleged that when Perry visited Australia in 2014 and 2015 on her Prismatic tour, she violated Taylor's trademarks with merchandise at pop-up stores in Sydney and Melbourne, as well as on an online store and Perry's social media channels.

In April 2023, the Federal Court of Australia ruled in favour of Katie Taylor and she was awarded damages to compensate for loss of earnings, not only for the periods that Perry was trading under a similar name but also for the extended periods of time that Taylor had to devote to the case proceedings as the owner of her small business.

Adapted from 'Katy Perry loses out in Federal Court spat with Australian fashion designer' (Roberts & McKinnell, 2023)



Image: Debby Wong/Shutterstock.com

Figure 3 Australian, Katie Taylor, successfully initiated legal action against famous musician Katy Perry over an alleged trademark infringement

Limitation of actions 2.1.2.4

A person who feels their rights have been breached under civil law must initiate civil action within a set period of time, depending on the law that applies to that particular civil wrong. A potential plaintiff must consider the **limitation of actions** when commencing legal proceedings, as their claim will have a limitation period applicable.

The purpose of having a limitation period for different civil breaches is to ensure civil cases are resolved in a timely manner. This means evidence is readily available and the defendant does not have their case pending for an unlimited amount of time. If a plaintiff initiates civil action outside of the limitation period, the defendant may raise this as a defence.

The time frame within which different types of civil actions must be commenced are contained in the *Limitation of Actions Act 1958* (Vic), and therefore, the Victorian Parliament is able to amend and alter these limits as required.

Table 3 Examples of limitation periods for different types of civil law as of 2023

Type of civil law	Limitation period
Defamation	One year
Personal injury negligence claim	Three years
Contract	Six years

KEY TERMS

Limitation of actions a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.

LEGISLATION

Limitation of Actions Act 1958 (Vic)

The burden of proof 2.1.2.5

In a civil trial, the plaintiff holds the **burden of proof** and therefore must prove the defendant was liable for their loss. The plaintiff must gather evidence to support their claim and present it to the relevant dispute resolution body or court. It is not the responsibility of the defendant to disprove their liability.

This is seen to be fair in the civil justice system as the plaintiff is the party bringing the action and alleging the defendant has breached civil law, so they should have to prove the case. Similarly to criminal law, it would be unfair for the law to assume a defendant was responsible for another party's injury and require them to prove they did not cause the plaintiff's injury.

There are some situations where the burden of proof may be reversed. If the defendant wishes to raise a particular defence or **counterclaim**, they bear the burden of proving the facts that support their case.

The standard of proof 2.1.2.6

In civil trials, the plaintiff must prove the defendant is liable for breaching civil law on the **balance of probabilities**. This involves presenting evidence that makes it more probable than not that the defendant caused the civil loss. This is a lower **standard of proof** than 'beyond reasonable doubt', which is required in criminal trials.

HYPOTHETICAL SCENARIO

Minette's musical maybes

Abbi has been telling her friend Izzy that Minette was being a bad friend after Abbi and Minette recently attended a music festival together. Abbi claimed that Minette left her alone at one of the stages for five hours and then was being too loud, to the point that Abbi could not sleep, once they returned to their tent at the end of the night.

Izzy takes a chance to consider both Minette and Abbi's version of events and decides that she will choose who to believe on the 'balance of probabilities'. After listening to Minette's version of events, in which she described that she only left Abbi briefly to use the bathroom and showed Izzy a video of Abbi playing music loudly in their tent, Izzy believes that Minette's version of events is more likely to be true than Abbi's.

This is the balance of probabilities as a standard of proof. Although there may have been some truth to Abbi's side of the story, Izzy found that Minette's was more likely to be true. Therefore, a plaintiff or defendant will only need to prove they are more factual than their opposing party when presenting their case in a civil dispute.



Figure 4 Minette had to prove her version of events was 'more likely' than Abbi's

Lesson summary

- In order for a plaintiff to initiate any sort of successful civil action, the defendant's actions must satisfy three elements: breach, causation, and loss.
- A plaintiff has a defined time period to commence legal action against the defendant, known as the limitation of actions, which aims to prompt a swift delivery of justice.
- In all civil cases, the plaintiff holds the burden of proof and must establish this proof on the balance of probabilities, in order for the standard of proof to be satisfied.

KEY TERM

Burden of proof the responsibility of a party to prove the facts of a case.

LEGAL VOCABULARY

Counterclaim a separate claim made by the defendant against the plaintiff.

USEFUL TIP

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.

KEY TERMS

Balance of probabilities the standard of proof in civil cases that requires the plaintiff to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.

Standard of proof the degree to which the facts of a case must be proven in court.

6B Questions

Check your understanding

Question 1

The central concepts of civil law are breach, causation, loss, limitation of actions, burden of proof, and standard of proof.

- A. True
- B. False

Question 2

Which of the following statements is **not** true about the limitation of actions?

- A. There are statutory provisions regulating the limitation of actions for different civil breaches.
- B. The limitation period ensures evidence is readily available and the courts do not have cases pending for an unlimited amount of time.
- C. The defendant may 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.

Question 3

Elektra has experienced illness after her landlord Asha refused to repair the central heating in her home during the middle of winter.

The illness Elektra is experiencing is most relevant to:

- A. loss.
- B. causation.
- C. breach.

Question 4

In a civil case, it is the responsibility of the defendant to prove themselves not liable. They hold the burden of proof.

- A. True
- B. False

Question 5

The balance of probabilities is a standard of proof that requires a party to:

- A. establish that their version of the facts is most likely to be correct.
- B. prove there is no reasonable doubt that the defendant is liable.

Question 6

A breach in civil law is:

- A. the pain or injury suffered by the plaintiff as a result of the defendant's actions.
- B. the requirement that the plaintiff must prove there was a direct link between the actions of the defendant and the loss they suffered.
- C. when a person does not abide by civil law by failing to perform a legal or moral obligation owed to another person or party at the time.
- D. a violation of criminal law.

Question 7

Fill in the blank with **one** of the following terms:

loss

breach

causation

The concept in civil law that requires the defendant's act to be a necessary cause of the plaintiff's loss and, 'but for' the defendant's actions, the loss would not have occurred, is referred to as [] .

Question 8

Fill in the blanks with the following terms:

limitation period

burden of proof

loss

Before a person can be found liable under civil law, the plaintiff in a civil dispute will usually have to prove that the defendant's actions were a breach that caused them to suffer a [] . The plaintiff must ensure they initiate a claim within the [] . They will have the onus of proving their claim, as the plaintiff carries the [] in a civil trial.

Preparing for exams**Standard exam-style****Question 9**

(2 MARKS)

Outline the standard of proof in a civil dispute.

Question 10

(3 MARKS)

Distinguish between causation and breach in a civil dispute.

Question 11

(3 MARKS)

Explain the limitation of actions and provide **one** example of the limitation period for a civil wrong.

Question 12

(3 MARKS)

June intentionally published defamatory statements about May that caused her to lose her job. May has initiated civil proceedings.

Outline who will have the burden of proof in the case and identify **one** type of loss that May has suffered.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Skylar has initiated civil proceedings against Aryan after he intentionally broke a contractual obligation relating to Skylar's property and pets. As a result of Aryan's actions, Skylar has sustained damage to her property, suffered trauma, and consequently, been unable to work.

Question 13

Tick the box to indicate whether each of the following statements are **true** or **false** regarding Skylar and Aryan's case.

Statement	True	False
I. Aryan has breached the conditions of his contract with Skylar and has, therefore, breached civil law.	☐	☐
II. Aryan accidentally broke his contract with Skylar and, therefore, he did not cause her loss.	☐	☐
III. Skylar has suffered tangible losses. She has experienced a loss of earnings, damage to her property, and mental injury.	☐	☐
IV. Skylar will have six years to initiate proceedings as it is a contract law dispute.	☐	☐
V. The burden of proof lies with Aryan as he is the defendant.	☐	☐
VI. The standard of proof will be on the balance of probabilities.	☐	☐

Question 14

(10 MARKS)

- Identify who will hold the burden of proof in this case and what the standard of proof will be. 2 MARKS
- Outline the time period in which Skylar has to initiate proceedings against Aryan. 2 MARKS
- Justify how **three** elements of civil law have been satisfied in this case. 6 MARKS

Linking to previous learning

Question 15

(3 MARKS)

Compare the burden of proof in a criminal and civil case.

6C Plaintiffs and defendants

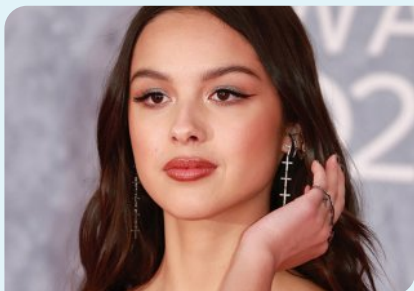
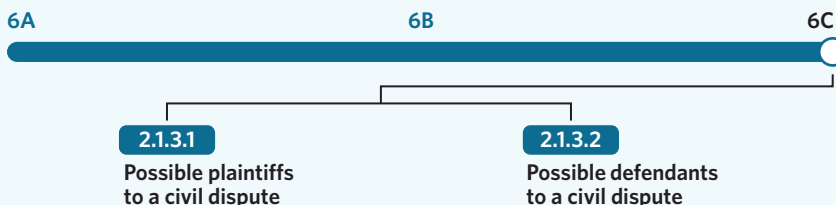


Image: Fred Duval/Shutterstock.com

'You betrayed me, and I know that you'll never be sorry...'—Olivia Rodrigo's hit 'Traitor' may be getting you through your latest heartbreak but have you ever considered what the legal consequences are when someone betrays another party by breaching their civil rights? Whether it is a breach of trust or duty of care, in such situations, one party, the plaintiff, experiences the alleged breach at the hands of the 'traitor', otherwise known as the defendant.

STUDY DESIGN DOT POINT

- possible plaintiffs and defendants to a civil dispute



Lesson introduction

There are two main parties involved in civil disputes in Australia. The plaintiff is the party who feels they have suffered a loss and initiates a civil claim. On the other hand, the party who the plaintiff believes wrongfully infringed upon and breached their rights is the defendant.

Possible plaintiffs to a civil dispute 2.1.3.1

In a civil dispute, the party that has had their rights breached and, consequently, brings the claim to court is known as the **plaintiff**. To be successful in their claim, the plaintiff, the party with the burden of proof, must prove the defendant is liable on the balance of probabilities. This is the standard of proof in a civil dispute and requires the plaintiff to prove that their version of the facts is more likely to be correct, and the defendant is most likely liable. A plaintiff will seek compensation from the defendant in the form of a remedy, whether that be monetary or a legally binding court order to take, or refrain from taking, certain action.

KEY TERM

Plaintiff the party that initiates a civil claim against another person, the defendant, in court.

LESSON LINKS

You learnt about plaintiffs, defendants, the burden of proof, and the standard of proof in **1G Criminal and civil law**.

You will learn more about remedies in **Chapter 9: Remedies**.

WANT TO KNOW MORE?

CONTENT WARNING Aboriginal and/or Torres Strait Islander readers should be aware that some material in this section may be culturally sensitive. Examples of this include references to people who have passed and/or distressing events

In January 2020, a Gunditjmarra, Dja Dja Wurrung, Wiradjuri, and Yorta Yorta woman, Veronica Nelson, was found dead in custody at the Dame Phyllis Frost Centre. In 2023, her long-term partner, Percy Lovett, initiated civil action against the State of Victoria, claiming her death was a breach of human rights.

You can find out more about Lovett's civil claim by searching 'Veronica Nelson's partner launches civil lawsuit against Victorian government over death in custody' and clicking on the relevant article (Australian Associated Press, 2023).



Aggrieved party

The individual or group who has directly suffered the loss and has had their rights breached.



Other victims

An individual or group who has indirectly suffered a loss as a result of the actions against the aggrieved party. For example, family members, friends, and witnesses are considered other victims.



Insurers

Individuals or corporations that provide insurance to another party. Insurers may be entitled to compensation if they have paid out insurance for a loss caused by another party.

Figure 1 Possible plaintiffs to a civil dispute

There may be one, or multiple, plaintiffs when taking civil action. In circumstances where seven or more people have the same or a similar claim and legal issue against a defendant, a **class action** may be commenced. Class actions are also known as representative proceedings and initially occur in the Supreme Court – Trial Division. They are particularly useful at providing a large number of people with access to the civil justice system as the costs associated with the proceeding are covered by either the plaintiff or third-party litigation funders. Court time and resources can also be saved as the court does not hear and determine each claim individually.

KEY TERM

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts.

Table 1 The criteria for a class action

Criterion 1	Criterion 2	Criterion 3
Seven or more people are claiming against the same defendant.	The claim must be in respect of, or arise from, the same, similar, or related circumstances.	The claim must give rise to a common issue of law or fact, meaning the same issues are determined by the court for all claims.
		

USEFUL TIP

Whilst class actions are also known as representative proceedings, VCAA will only ever refer to them as 'class actions'.

WANT TO KNOW MORE?

In March 2014, Malaysia Airlines flight MH370 went missing during its journey from Kuala Lumpur to Beijing. To this day, the plane has still not been recovered and, consequently, many relatives of victims on the flight initiated civil claims against the airline.

You can learn more about flight MH370 and the various civil claims against Malaysia Airlines by searching 'MH370 Negligence cases' and clicking on relevant articles.

REAL WORLD EXAMPLE

Costly consequences for a cybersecurity compromise

Medibank is an Australian private health insurance provider that experienced a cyberattack in 2022, causing the personal data of 9.7 million current and former customers to be breached. Consequently, several customers united to initiate class actions against the company since the data breach.

In one claim, customers argued that Medibank failed to 'comply with corporate law' by 'not revealing information on its cyber security deficiencies'. The company stated that it would defend itself against any claims, although it was told by a banking authority to set aside \$250 million to potentially account for the costs of these legal battles.

Adapted from 'Australia's Medibank faces fourth class action lawsuit over cyberattack' (Reuters, 2023)



Image: doublelee/Shutterstock.com

Figure 2 Medibank has had several class actions initiated against it after a major data breach in 2022

KEY TERM

Defendant the party that is defending themselves against a claim by another person, the plaintiff, for an alleged breach of civil law.

Possible defendants to a civil dispute 2.1.3.2

A plaintiff will initiate their civil claim against a **defendant**, such as an individual, company, or institution. The defendant is the party that has allegedly carried out a civil wrong and breached the plaintiff's rights.



Wrongdoer

The individual or group who has directly caused or instigated the loss or suffering of a plaintiff, breaching their civil rights.



Employers

An individual or corporation that employs the plaintiff and has either directly or indirectly caused their loss or suffering.



Insurers

Individuals or corporations that provide insurance to another party. A plaintiff may initiate a claim against an insurer if they were denied compensation for loss or suffering they believe is covered by their insurance.

Figure 3 Possible defendants to a civil dispute

LEGAL VOCABULARY

Vicarious liability a party being held responsible for the civil wrong of another person, regardless of whether that person has any personal fault.

There may be one or multiple defendants that are directly or indirectly responsible for the breach of the plaintiff's rights. When a party is indirectly responsible for a plaintiff's suffering or loss, this is known as **vicarious liability**. For example, over the course of their employment, an employee is considered to be acting on behalf of their employer. Therefore, acts or omissions committed by the employee may result in the employer being found liable.

REAL WORLD EXAMPLE



Image: Boumen Japet/Shutterstock.com

Figure 4 A woman was awarded \$1,126,045.39 in damages following poisoning by a cleaning agent

Damages not as cheap as chips

In May 2013, a Western Australian woman ordered dinner from a Chicken Treat outlet in Bunbury, Perth. As she consumed her chips she noted an odd taste and was later informed by the food outlet that caustic soda, a cleaning agent, had been used as seasoning on the chips instead of salt. She suffered 'caustic burns to her upper gastrointestinal tract' and was later diagnosed with post-traumatic stress disorder and pain-related issues as a result of consuming the chips. Following the incident, the woman can now only consume bland foods and drink water, whilst she also suffered various psychological impacts that have largely impacted her life and her ability to work. Consequently, she took civil action against Tabloid Pty Ltd, the operator of the Chicken Treat outlet, and in February 2023 was awarded \$1,126,045.39 in damages. Due to vicarious liability, the employee responsible for preparing the chips was not sued, rather Tabloid Pty Ltd itself was the liable defendant.

Adapted from 'West Australian woman awarded \$1.1 million over Chicken Treat hot chips seasoned with caustic soda' (Bold & Ho, 2023)

LESSON LINK

You will learn more about defamation in **7D Defamation – elements**.

HYPOTHETICAL SCENARIO

Sharpay's attempt to bop Ryan from the top

Sharpay is a famous movie star who also writes for a celebrity gossip magazine, Troy!. She recently wrote and published an article that included mean and dishonest comments about her up-and-coming co-star, Ryan. Ryan has initiated a civil claim against Sharpay, accusing her of defaming him. Considering Sharpay wrote the article as an employee of Troy! magazine, Ryan has decided to sue Troy! instead, as the magazine is vicariously liable for Sharpay's actions. The defendant, Troy!, can defend the claim against itself to avoid having to compensate Ryan for any reputational loss he may have suffered. However, if Ryan is successful in his claim, it is likely Troy! would be required to financially compensate him for the reputational damage and possible loss of income.

Lesson summary

In a civil dispute, there are two main parties:

- the plaintiff, who initiates the civil claim against the defendant and holds the burden of proof.
- the defendant, who has allegedly breached the rights of the plaintiff and must defend the civil claim against them.

6C Questions

Check your understanding

Question 1

The two main parties in a civil dispute are the:

- A. persons and defendants.
- B. persons and delinquents.
- C. plaintiff and delinquent.
- D. plaintiff and defendants.

Question 2

In a civil dispute, the plaintiff has:

- A. the burden of proof and must prove the defendant is liable on the balance of probabilities.
- B. no obligation to prove the defendant is liable as it is the defendant's responsibility to prove they are not responsible for the plaintiff's loss.

Question 3

Fill in the blanks with the following terms:

defendant

plaintiff

The party that has allegedly caused the loss of the [] is the [] .

Question 4

When a civil dispute affects multiple individuals, the parties may come together to initiate a civil claim known as a:

- A. case action.
- B. class action.

Question 5

Vicarious liability occurs when a party is indirectly responsible for a plaintiff's suffering or loss.

- A. True
- B. False

Question 6

The plaintiff in a civil dispute is always the person who directly suffered the loss.

- A. True
- B. False

Question 7

Fill in the blank with **one** of the following terms:

liability

remedy

recovery

If a plaintiff is successful in their claim against a defendant, they will usually receive some sort of compensation in the form of a .

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Outline **one** possible party to a civil dispute.

Question 9

(3 MARKS)

Distinguish between plaintiffs and defendants as possible parties to a civil dispute.

Question 10

(4 MARKS)

Barb and Ken work at Dreamhouse, a luxury toy store selling dolls and dollhouse accessories. Last month, Barb and Ken realised that Dreamhouse had been underpaying them for their work. After speaking to nine other similarly affected workers, they decided to initiate a class action against Dreamhouse for a breach of their rights.

Describe the possible parties to the civil dispute in this scenario.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Alex, Gloria, and Marty are frequent customers of King Julien, a cruise ship company that sails to Madagascar and offers safari tours and experiences. However, it was recently exposed that King Julien had insufficient lifeboats on the ship in the case of an emergency. When sailing to Madagascar, the ship hit rough waters and began to sink. Without enough lifeboats, Alex, Gloria, and Marty had to swim to the nearest land. They sustained significant injuries and believe their rights were breached as they are now all unable to work. They are all wanting to take action against King Julien.

Question 11

Which of the following statements are correct about the possible parties to this civil dispute?

(Select all that apply)

- A. Alex, Gloria, and Marty could each individually initiate a civil claim against King Julien for a breach of their rights.
- B. The plaintiff in this dispute would not hold the burden of proof and only has to defend any claims made by the defendant.
- C. The defendant is King Julien, as it will be responsible for defending itself against any legal action that is initiated by Alex, Gloria, or Marty.
- D. If Alex, Gloria, and Marty come together with a group of at least seven people, they could initiate a class action against King Julien.

Question 12

(6 MARKS)

Analyse the possible parties to this civil dispute.

Linking to previous learning**Question 13**

(4 MARKS)

Identify **one** purpose of civil law and explain how this purpose can be upheld for a plaintiff.



CHAPTER 7

Types of civil disputes

LESSONS

- 7A** Negligence - elements
- 7B** Negligence - defences and remedies
- 7C** Negligence - impact
- 7D** Defamation - elements
- 7E** Defamation - defences and remedies
- 7F** Defamation - impact
- 7G** Misleading or deceptive conduct - elements
- 7H** Misleading or deceptive conduct
- defences and remedies
- 7I** Misleading or deceptive conduct - impact

KEY KNOWLEDGE

- 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
 - possible remedies
 - the impact of the breach on the parties.

Image: Anton Vierietin/Shutterstock.com

7A Negligence – elements

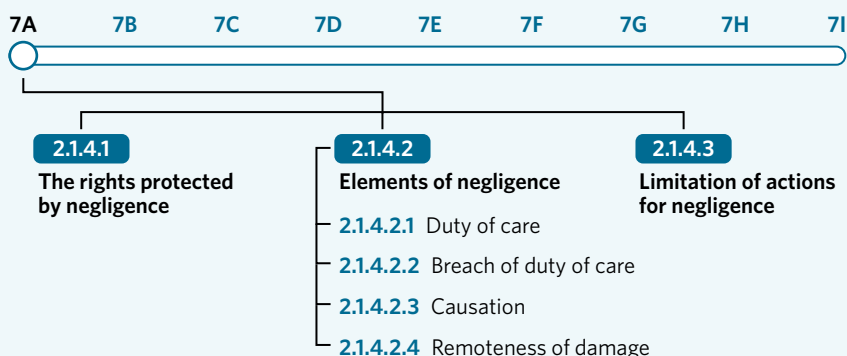


Image: I-ing/Shutterstock.com

In its final descent, the people riding a rollercoaster noticed the operator had become distracted. Panic set in as the ride accelerated, swerving violently. The negligence of the ride operator had endangered countless lives as the rollercoaster derailed and flew off the tracks. Considering the operator's fault in causing the ride disaster, can the people pursue any legal claim against them or the company?

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
 - possible remedies
 - the impact of the breach on the parties



Lesson introduction

Negligence laws ensure people are protected from harm by legally enforcing all individuals and organisations to take reasonable care and avoid causing harm to another person. If a party fails to do so and causes loss or harm to another party, the careless party may be liable for negligence.

The rights protected by negligence 2.1.4.1

Negligence is an area of civil law that seeks to safeguard a plaintiff from experiencing unjust harm or loss. Negligence laws focus on protecting people from harm and ensuring parties that owe a duty of care, uphold their duty. If a plaintiff successfully argues that they have suffered harm, and the defendant should have taken reasonable steps to prevent this harm, the court will award a civil remedy to try and restore the plaintiff, as close as possible, to their original position.

Table 1 Types of harm that give rise to negligence

Type of harm	Example
Financial harm	- Loss of income as a result of being unable to work. - Medical bills incurred as a result of physical harm.
Physical harm	Allergic reaction due to a business selling food without providing allergy warnings.
Mental harm	Psychological damage from a school failing to provide school counsellors to its students.

KEY TERM

Negligence a failure to behave with a level of care to prevent loss or injury to another person, that a reasonable person would have exercised under the same circumstances.

LESSON LINK

You will learn more about remedies for negligence in **7B Negligence – defences and remedies**.

LEGAL CASE

Donoghue v Stevenson [1932] AC 562**Facts**

May Donoghue met a friend at a cafe who purchased a ginger beer for her. Mrs Donoghue was pouring the ginger beer, which was in a dark, opaque bottle, into a glass. After she drank half the contents of the bottle, a decomposed snail was poured into her glass. Diagnosed with severe gastroenteritis and shock, she alleged the presence of the snail caused her illness and sued Mr Stevenson, the manufacturer, seeking damages.

Legal issue

The main issue to determine was whether Mr Stevenson owed a duty of care to Mrs. Donoghue. At the time, there was no established legal precedent on manufacturers' duty of care towards consumers. The court had to decide whether a manufacturer was under a duty of care to the end users of its products.

Decision

The court ruled in favour of Mrs Donoghue, affirming that Mr Stevenson owed a duty of care. This established the 'neighbour principle', stating that one must owe a duty of care to those directly affected by their actions. The court also established the principle of negligence, holding that breaching this duty of care and causing harm makes one liable for damages.

Significance

This decision was pivotal, setting the foundation for modern negligence law. It broadened existing law to include harm from faulty products and established that manufacturers may still be found liable for negligence even if they had no intent to cause harm.



Image: Oleg Troino/Shutterstock.com

Figure 1 The UK 'snail in the bottle' case established the tort of negligence

Elements of negligence 2.1.4.2

The four elements that must be proven for a claim in negligence to be successful are established in the *Wrongs Act 1958* (Vic).

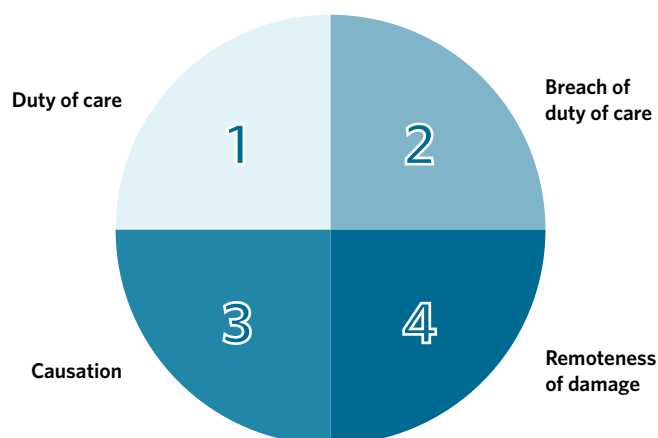


Figure 2 The elements of negligence

Duty of care 2.1.4.2.1

In order for a claim in negligence to be successful, the plaintiff must prove the defendant owed them a **duty of care**. Two elements must be proven to establish a duty of care:

- **reasonable foreseeability**
- **the neighbour principle.**

Reasonable foreseeability refers to 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.

LEGISLATION

Wrongs Act 1958 (Vic)

KEY TERM

Duty of care a legal obligation to ensure the safety and wellbeing of others, and to avoid conduct that could be reasonably foreseen to harm another person.

LEGAL VOCABULARY

Reasonable foreseeability an element of duty of care concerned with whether it is sufficiently likely that a person of ordinary prudence would take it into account when making a decision.

The neighbour principle a legal principle that requires people to take reasonable care to avoid acts or omissions that could be reasonably foreseen to injure another person.

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'. The term 'neighbour' refers to the relationship between two parties who are directly impacted by each other's actions or omissions. This connection is so significant that they should consider the potential consequences on each other before taking any action.

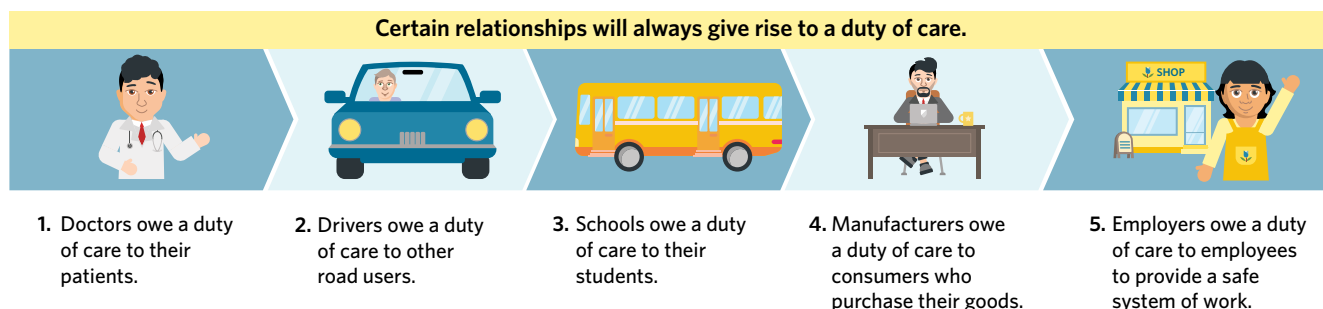


Figure 3 Types of relationships that always give rise to a duty of care

KEY TERM

Breach of duty an act or omission by a defendant that is a failure to uphold their duty of care because the behaviour falls below the standard of care that would be expected of a reasonable person in the same position.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying negligence, you may be asked to demonstrate this skill by applying the elements of negligence to a given scenario. For example, this would mean you would need to consider reasonable foreseeability and apply the neighbour test to consider whether a duty of care exists in relation to the scenario.

Breach of duty of care 2.1.4.2.2

Once the plaintiff has established that the defendant owed them a duty of care, they must then prove the defendant breached that duty. This is the element that determines whether the defendant has actually been 'negligent' and fallen below the standard of care required to not harm their neighbour. The key focus when discussing **breach of duty** is reasonableness. It is not an absolute duty to ensure the plaintiff will not be harmed, rather, it is a duty to take reasonable care to prevent the harm from occurring.

A person breaches their duty of care if the following is established:

- the risk of harm was foreseeable
- the risk was not insignificant
- a reasonable person in the same position would have taken precautions.

HYPOTHETICAL SCENARIO

Flu shot fiasco

Daniel visits his doctor, 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. Daniel becomes very ill with an infection contracted from the syringe.

Daniel consults a lawyer to bring legal actions against Dr Kat. The lawyer considered whether Dr Kat breached her duty of care to Daniel, determining that:

- it is certainly foreseeable that using an unsterilised syringe on a patient could transmit a disease.
- the risk of such transmission was high and not insignificant.
- a reasonable person would have exercised precautions to prevent this, such as keeping used and sterile medical equipment separate.

The lawyer advises Daniel that Dr Kat will likely be found to have breached her duty, but the other elements of negligence would also need to be satisfied.

WANT TO KNOW MORE?

All employers have a duty of care to their employees. You can find out more about this duty of care by searching 'Occupational health and safety – your legal duties' and clicking the relevant link (WorkSafe Victoria, 2023).

Causation 2.1.4.2.3

Once the plaintiff has established a duty and breach of care, **causation** must also be proven. Causation is a link between the breach of duty and the harm caused. Causation for negligence is comprised of two factors:

- **factual causation**
- **scope of liability.**

Factual causation 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 by considering all surrounding circumstances.

The court must consider if the actions of the defendant fall within the 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:

- whether there has been a break in the chain of causation. In other words, the court will need to determine whether there has been an intervening act that caused the plaintiff's injury as opposed to the defendant's actions.
- any factors relating to questions of morality, justice, or ethics that would make it impractical to hold the defendant liable.

DEEP DIVE

Scope of liability

Under certain circumstances, a judge may determine that the alleged breach by the defendant is outside the scope of liability and they should not be held liable for breaching their duty of care. For instance, the negligent party may not have had adequate resources available to fulfil their duty of care in a responsible manner. A relevant example is the case of hospitals or paramedics during the COVID-19 pandemic. For example, if someone lost their life whilst waiting in an ambulance outside a hospital, at first glance, it may seem as though the hospital was negligent. However, upon closer examination, this could have occurred due to the limited resources, in terms of staff and hospital beds, available at the time. Therefore, the hospital or ambulance service may not have realistically done more to fulfil their duty of care.



Figure 4 In some circumstances, especially in the provision of medical care, an alleged breach may fall outside the scope of liability

Remoteness of damage 2.1.4.2.4

The final element that a plaintiff must prove to be successful in a claim of negligence against the defendant is **remoteness**. When determining the liability of the defendant, the court must consider whether the plaintiff's harm is too 'remote' from the conduct of the defendant. This limits liability in negligence to harm that was a reasonably foreseeable outcome of the negligent act. 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.

KEY TERM

Causation the relationship between an event or action and a resulting event.

LEGAL VOCABULARY

Factual causation a question of fact, required to prove negligence, in that evidence must demonstrate that the breach of the defendant was a necessary condition of the harm.

Scope of liability a factor considered when determining causation in negligence, whereby it must be appropriate for the scope of the defendant's liability to extend to the harm caused.

USEFUL TIP

You may remember the term 'causation' from lessons about criminal offences, such as murder and culpable driving. While the causation test for criminal offences is whether the accused's actions were the 'substantial and operating cause' of the victim's injury or death, the test for determining civil causation differs. In civil law, the test for causation is factual causation and the scope of liability.

KEY TERM

Remoteness an element of negligence concerned with the extent of liability, which considers whether the consequences of the negligent action were so far removed from it as to have been unforeseeable by the defendant.

HYPOTHETICAL SCENARIO



Figure 5 The negligence claim against Run for Fun was too remote to find the organiser liable

Marathon mishap

Sally was participating in a marathon organised by Run for Fun. During this marathon, Sally tripped over a branch that had fallen, due to extreme winds, from a nearby tree. Sally sustained an injury to her ankle and was unable to finish the marathon.

Sally commenced civil action against Run for Fun claiming it was negligent by omission for failing to remove the branch that caused her injury. In this situation, the court would likely decide 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. In this situation, the harm is too remote.

KEY TERM

Limitation of actions a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.

LEGISLATION

Limitation of Actions Act 1958 (Vic)

Limitation of actions for negligence 2.1.4.3

Limitation of actions refers to the period of time in which a person, who feels their rights have been breached, can initiate a civil action. This time period will differ, depending on the law that applies to that particular civil wrong. The *Limitation of Actions Act 1958 (Vic)* places time restrictions on when a person may pursue a claim in negligence. However, section 23A of the *Wrongs Act 1958 (Vic)* outlines that a court may extend the limitation period in certain negligence cases to a period the court deems fit.

Table 2 Limitation of actions for negligence

Type of harm	Limitation period
Property damages or economic loss	Section 5(1) of the <i>Limitation of Actions Act 1958 (Vic)</i> states that a claim of property damage or economic loss must be brought within six years of the plaintiff's knowledge of the harm.
Personal injury	Section 5(1A) of the <i>Limitation of Actions Act 1958 (Vic)</i> states that a claim for personal injury must be brought within three years of the plaintiff's knowledge of the harm.

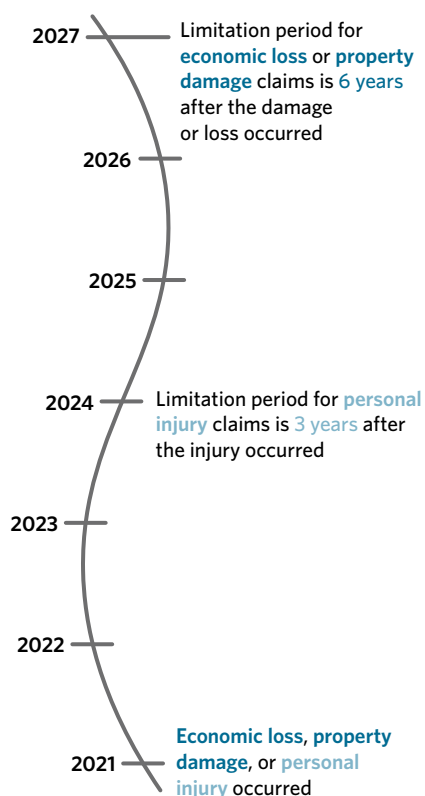


Figure 6 The limitation periods for negligence claims

Lesson summary

Negligence laws focus on protecting people from harm and ensuring parties that owe a duty of care to another, uphold this duty.

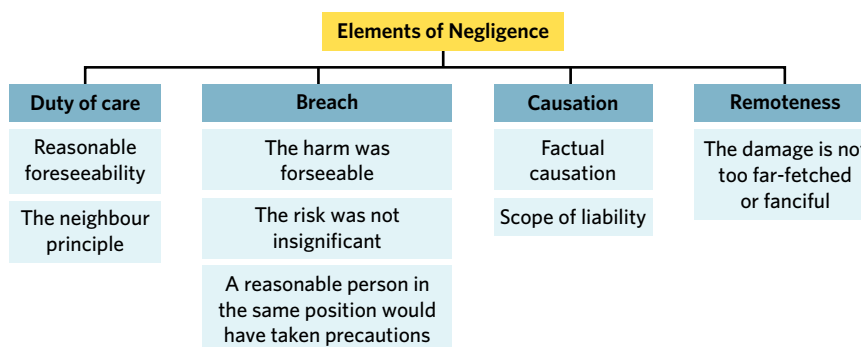


Figure 7 Elements of negligence summary

7A Questions

Check your understanding

Question 1

Negligence refers to the criminal offence in which a defendant breaches their duty of care to a plaintiff, causing damages due to their carelessness.

- A. True
- B. False

Question 2

Which of the following is **not** an element of negligence that needs to be proven for a successful claim by the plaintiff?

- A. Remoteness of damage
- B. Causation
- C. Breach of negligence
- D. Duty of care

Question 3

Which of the following are established categories where a duty of care automatically arises?

(Select all that apply)

- A. Solicitor's to their clients
- B. Manufacturers to their consumers
- C. Employers to their employees
- D. Students to their teachers

Question 4

Reasonable foreseeability refers to:

- A. the principle that states all individuals and organisations are required to take reasonable care to avoid acts or omissions that can reasonably be foreseen to injure their 'neighbour'.
- B. the capacity to anticipate that a person's act or omission could cause harm to someone else.

Question 5

Fill in the blanks with the following terms:

reasonable

not

foreseeable

For a breach of duty of care to be made out, it must be established that the risk of harm was [] insignificant and [], in that it could have been anticipated that the defendant's act or omission could cause harm to someone else. It must also be established that a [] person in the same position would have taken precautions.

Question 6

The test to determine whether factual causation has been established is the 'but for' test. This test involves considering if, but for the defendant's negligent act or omission, the harm to the plaintiff would have still occurred.

- A. True
- B. False

Question 7

Fill in the blank with **one** of the following terms:

too remote

reasonably foreseeable

In order for a risk of harm to be [], there must be a real risk of damage, not one that is too far-fetched or fanciful.

Question 8

Which of the following is correct about the length of time that can pass before a person can commence a claim in negligence for property damage?

- A. Within three years of the incident occurring.
- B. Within three years of the cause of action.
- C. Within six years of the incident occurring.
- D. Within six years of the cause of action.

Preparing for exams**Standard exam-style****Question 9**

(3 MARKS)

Define the term 'duty of care'. Identify **two** established categories where a duty of care automatically applies.

Question 10

(3 MARKS)

Explain the impact of the limitation of actions on property damage negligence cases.

Question 11

(4 MARKS)

Outline duty of care and causation as elements of negligence.

Question 12

(3 MARKS)

Four years ago, Jasmine developed a back injury as a result of her employer not adequately training her in how to safely lift heavy boxes. Jasmine did not commence legal action at the time to avoid potential workplace issues. However, after Jasmine was fired from her job she wanted to commence legal action against the employer for negligence.

Advise Jasmine as to whether she would be able to initiate a claim in negligence against her employer.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Arthur owns a football oval in Melbourne where local matches are held every weekend. Arthur was away on holiday for three weeks and was unable to maintain the grass and the surrounding areas. Consequently, the grounds became bumpy and unkept, making it difficult for players to run on during their matches. During a game, a football player, Jordan, soared for a mark and landed badly on his knee, due to the uneven ground. Jordan now wants to initiate a negligence claim against Arthur.

Question 13

Which of the following are elements Jordan must prove if he decides to pursue a negligence claim?

(Select all that apply)

- A. Arthur owed Jordan a duty of care.
 - B. Arthur breached his duty to Jordan.
 - C. Jordan's actions were too far remote and broke the causal link.
 - D. The risk of harm was not far-fetched or fanciful.
-

Question 14

(7 MARKS)

Assume Jordan has successfully proven the first element of negligence, being duty of care.

To what extent would Jordan successfully establish the other elements of negligence in a claim against Arthur? Limit your discussion to the elements of breach, causation, and remoteness of damage.

Linking to previous learning**Question 15**

(3 MARKS)

Explain how the limitation of actions for a negligence claim may hinder the achievement of the principle of access.

7B Negligence – defences and remedies

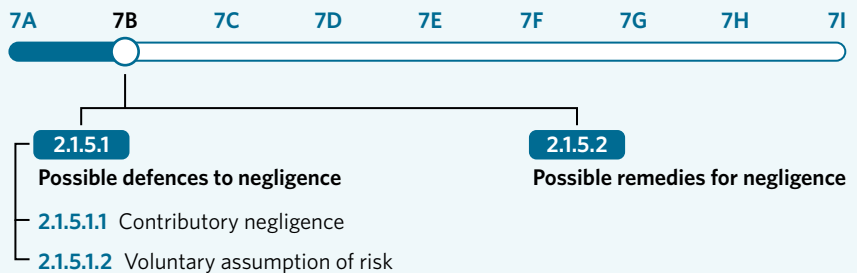


Image: Mauricio Graiki/Shutterstock.com

For some people, the thought of jumping out of a plane is quite enticing. However, this does not mean the activity is not risky. There is some potential for injury to occur when skydiving. So what happens if someone is injured while skydiving? If partaking in the activity was voluntary and the person understood the risks involved, would it be fair for the skydiving company to be found liable for negligence when someone is injured? The law of negligence provides a framework for determining an answer to this.

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
 - possible remedies
 - the impact of the breach on the parties



LESSON LINK

You learnt about negligence in **7A Negligence – elements**.

Lesson introduction

In order to uphold fairness and equality, the defendant in a negligence dispute has the opportunity to present counter-arguments and protect themselves from liability. However, a defendant has no obligation to present an argument in court if they do not think the plaintiff successfully proved the elements of negligence on the balance of probabilities. Just as there are elements that need to be proven to have a successful claim in negligence, there are also specific elements that must be satisfied in order to have a successful defence to negligence.

Possible defences to negligence 2.1.5.1

If a defendant is sued for negligence, there are various defences that can be raised to avoid being found liable. Some of the defences available against a negligence claim include:

- contributory negligence
- voluntary assumption of risk.

These two defences and their elements are outlined in the *Wrongs Act 1958* (Vic), along with other defences.

Contributory negligence 2.1.5.1.1

Contributory negligence is a defence to negligence whereby the defendant attempts to prove the plaintiff also contributed to their own loss or damage by failing to take reasonable care of themselves.

LEGISLATION

Wrongs Act 1958 (Vic)

KEY TERM

Contributory negligence

failure by a person, typically a plaintiff, to take reasonable care for their own safety, which adds to the harm the person suffers.

In order to establish contributory negligence, the defendant must prove that:

- the plaintiff themselves behaved negligently and did not take reasonable care in taking sensible steps to avoid a foreseeable risk of injury.
- the plaintiff's negligence was a contributing cause of the damage suffered.

Both of these elements of contributory negligence must be proven in order to establish a viable defence.

Contributory negligence is not a complete defence, meaning even if the defence is successfully raised, the defendant is still liable for negligence. However, the defence reduces the defendant's liability because the plaintiff also contributed to the loss or damage suffered. If the defence of contributory negligence is successful, the court must consider an appropriate reduction in damages to account for the plaintiff's contributory negligence. This requires the judge to determine both:

- 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
- the relative importance of the acts of the parties in causing the injuries.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying negligence, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence, such as contributory negligence, might be successful if argued in court. This means you would need to consider whether the elements of contributory negligence could be proven by the facts of the scenario.

HYPOTHETICAL SCENARIO

Car crash conundrum

Eunice was involved in a car accident with Mary. Eunice was left with significant injuries and Mary was unharmed. Eunice is claiming that Mary was negligent on the road and caused her injuries. Mary's lawyers argued that Eunice's failure to wear a seatbelt played a significant role in worsening her injuries. They contend that if Eunice had worn a seatbelt, she would have either avoided the injury entirely or experienced a lesser degree of harm. In this case, the court may find Eunice partly negligent and reduce the damages by 20%.

Alternatively, suppose Eunice was intoxicated and not wearing a seatbelt. It is evident that this factor would significantly contribute to the severity of her injuries. The court may determine that she bears 80% of the liability for her injuries, and Mary would be required to pay less damages if found liable in negligence.

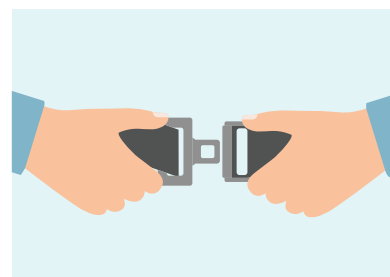


Figure 1 Failing to wear a seatbelt may give rise to the defence of contributory negligence

Voluntary assumption of risk 2.1.5.1.2

Voluntary assumption of risk is a defence in which it is claimed the plaintiff willingly accepted the likelihood of risk when participating in an act. In order to establish the defence of voluntary assumption of risk, the defendant must show the plaintiff:

- had full knowledge of the risk
- appreciated and understood the risk involved
- freely and voluntarily agreed to incur the risk of injury.

KEY TERM

Voluntary assumption of risk a defence to negligence in which it is claimed the plaintiff accepted and was aware of the risks inherent in the activity.

Table 1 Voluntary assumption of risk elements

Element	Explanation
The plaintiff had full knowledge of the risk	The defendant must first prove the plaintiff knew all of the facts and the extent of the potential danger. In situations where the risk is obvious, 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.
The plaintiff appreciated and understood the risk involved	It is not enough to show the plaintiff knew there was danger involved in the activity or engaged in a dangerous recreational past-time. The plaintiff must also have an understanding and appreciation of the extent of the specific risk involved and the potential repercussions.
The plaintiff 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, therefore giving up their right to bring action. This tends to occur by having the plaintiff sign a consent form, waiver, or contract that states they understand and accept the risk involved.

USEFUL TIP

Contributory negligence is a partial defence, where the plaintiff bears some of the liability if the defendant is successful in raising the defence. In contrast, voluntary assumption of risk is a complete defence, meaning if the defendant can prove all the elements on the balance of probabilities, they are not liable at all in negligence.

HYPOTHETICAL SCENARIO

Consenting to a concussion

Bailey is a keen football player for Bullfrogs. He recently suffered a severe concussion and is planning to sue his football club for damages. Bailey's lawyer advises him that his football club will likely raise the defence of voluntary assumption of risk. This is because when playing football, it is assumed that players are aware and understand the risk of injury. Since Bailey voluntarily agreed to play football, and as football players would appreciate that concussions are not an unlikely result of playing, this defence could possibly be successful.



Figure 2 Voluntary assumption of risk is a common defence raised in cases related to sports

KEY TERMS

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.

Injunction a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action.

USEFUL TIP

When referring to court orders or the outcome of a case use the term 'remedies', instead of 'compensation'. Remedies are awarded by a court, whereas compensation is what a remedy tries to achieve for a successful plaintiff.

LESSON LINK

You will learn more about remedies in **9B Types of remedies**.

Possible remedies for negligence 2.1.4.2

A **remedy** is an order from the court that upholds the plaintiff's civil rights by providing relief and/or compensation for the loss or injury they have suffered. The two forms of remedies usually granted in negligence claims are **damages** and an **injunction**. Damages are the most common remedy for negligence and 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, which aim to restore the plaintiff to their original position.

Table 2 Types of compensatory damages for negligence

Type of damages	Definition	Example
Specific damages	A type of compensatory damages that has a precise value, are easily quantifiable, and the amount can be calculated objectively.	Compensation for medical expenses or loss of earnings resulting from an inability to work.
General damages	A type of compensatory damages that do not have a precise value and is not easily quantifiable. They are awarded where the plaintiff has endured general pain and suffering, loss of quality of life, or a shortened life expectancy.	Compensation for a defendant's actions that resulted in the plaintiff's inability to walk and live independently, leading to a diminished quality of life.

Furthermore, aggravated damages and exemplary damages are other types of damages that can be awarded in negligence cases, but are rare. Judges may award them in exceptional circumstances. Aggravated damages aim to compensate for additional embarrassment or humiliation caused. Exemplary damages aim to punish the defendant and make an example of them to deter community members from behaving in a similar way.

DEEP DIVE

Apportionment of damages in contributory negligence

If the defence of contributory negligence is successful, the judges must consider to what degree each party departed from their standard of care. They must take into account the relative culpability and the importance of each party's actions in causing the damage. The court may also consider the duration of the breach and the maturity of the parties. Ultimately, the judges will make a decision expressed in a percentage and adjust the damages accordingly. For example, if the plaintiff was found to be 40% liable, then they would receive only 60% of the expected damages.

Injunctions are court orders compelling a party to do something, or preventing a party from doing something. However, injunctions are rarely awarded in negligence cases as damages are usually more suitable.

Lesson summary

A person accused of negligence has the opportunity to present counterarguments and establish their innocence. These defences include:

- contributory negligence
- voluntary assumption of risk.

Remedies are available to the plaintiff if they successfully establish the elements of negligence and no defence, or only partial defences, apply. This allows the courts to uphold the plaintiff's rights and restore them to their original position. These remedies include:

- damages
- injunctions.

7B Questions

Check your understanding

Question 1

There are only two possible defences to negligence.

- A. True
- B. False

Question 2

Which of the following statements most accurately describes the defence of contributory negligence?

- A. The plaintiff's negligence that the defendant is bringing a separate claim for.
- B. Failure by the plaintiff to take reasonable care for their own safety, which added to the harm they suffered.
- C. Where the plaintiff defends their liability.

Question 3

Which of the following statements most accurately describes the defence of voluntary assumption of risk?

- A. Where the plaintiff volunteers to partake in a certain activity and harm is caused to the defendant.
- B. Where the plaintiff accepted and was aware of the risks inherent in the activity.
- C. Where the defendant was aware of the risks inherent in the activity.

Question 4

If the defence of voluntary assumption of risk can be made out, the amount of damages that must be paid by the defendant can be partially reduced, depending on the extent to which the plaintiff voluntarily exposed themselves to harm.

- A. True
- B. False

Question 5

A plaintiff can receive compensation for harm incurred by a defendant if:

(Select all that apply)

- A. all elements of the tort of negligence are established and no defences are raised by the defendant.
- B. all elements of the tort of negligence are established and the defence of contributory negligence is successfully raised by the defendant, ruling the plaintiff to be 50% culpable for their own harm.
- C. all elements of the tort of negligence are established and the defence of voluntary assumption of risk is successfully raised by the defendant.
- D. all elements of the tort of negligence are established, except for remoteness, and no defences are raised by the defendant.

Question 6

Which of the following is **not** a common type of damages for negligence?

- A. General damages
- B. Exemplary damages
- C. Specific damages

Question 7

Fill in the blank with **one** of the following terms:

more

less

If contributory negligence is successful, the plaintiff will receive [] damages than they would if the elements of negligence were proven without any defences raised by the defendant.

Question 8

Fill in the blank with **one** of the following terms:

Wrongs Act 1958 (Vic)

Negligence Act 1958 (Vic)

The defences to negligence are set out in the [].

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Outline the defence of contributory negligence.

Question 10

(3 MARKS)

Explain the defence of voluntary assumption of risk.

Question 11

(3 MARKS)

After bungee jumping at Bungee & Co, Alesha suffered severe muscle pains. She was required to see a physiotherapist and receive a weekly massage as a result of the pain. Alesha decided to commence legal action against Bungee & Co, claiming it acted negligently when tightening her harness. Bungee & Co provides a briefing to its customers before each session, informing participants of the potential muscle soreness that may be a side-effect of bungee jumping. Each participant is also required to sign a form that outlines their understanding and acceptance of the risks involved.

Propose and justify **one** defence that Bungee & Co could raise.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Portia is a prima ballerina performing in The Nutcracker. The stage has been particularly slippery and many of her fellow cast members have fallen down during this particular performance. The stage manager, Wilbur, has failed to properly clean the floor. Portia knows there is a talent scout in the audience, so she performs her solo even though she knows there is a risk she will slip over. During her solo she does a particularly difficult move and falls, twisting her ankle. Despite her injury, she continues dancing, even after the physio advises her not to during intermission and she knows her understudy could step in. Portia further injures herself in the finale and wants to sue Wilbur for negligence.

Question 12

Which of the following statements are correct? **(Select all that apply)**

- A. Portia was aware of the risk and understood the chance that she might fall.
- B. The stage manager will not be able to raise any defences against Portia as she did nothing wrong.
- C. Portia contributed to her own injuries by continuing to perform after she fell over.
- D. The talent scout may be found liable for negligence.

Question 13

(6 MARKS)

Analyse the possible defences that would be appropriate for Wilbur to raise against Portia's claim in negligence.

Linking to previous learning**Question 14**

(7 MARKS)

Fred operates a seafood business and sold contaminated fish to his customers, resulting in food poisoning. Ruth, the owner of a fish and chip shop, was desperate for a new supply of fish, as her old supplier went out of business. Ruth knows about the contamination but decides to buy from Fred anyway. Ruth's customers fall ill as a result, and she loses a significant amount of customers.

- a. Identify the elements that Ruth would have to prove in order to have a successful negligence claim against Fred.
- b. Identify and outline **one** potential defence that Fred could raise if Ruth successfully proves the elements of negligence on the balance of probabilities.

4 MARKS

3 MARKS

7C Negligence – impact

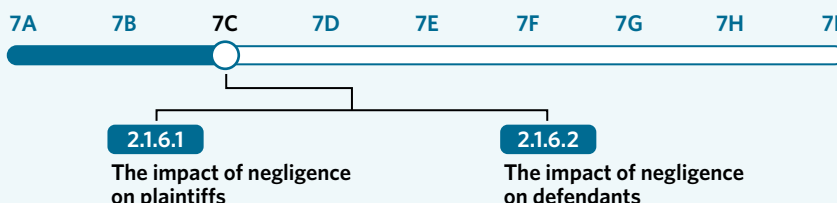


Image: Marc van Vuren/Shutterstock.com

Imagine you sign up for a hot air balloon ride for your 18th birthday. However, due to improper care and safety checks, the base of the balloon's basket collapses mid-flight, causing you to plummet to the ground. Caught by a nearby tree, you survive the horrific fall but now live with permanent physical injuries. These physical injuries are not the only sustained consequences of the accident. You will also incur the costs associated with recovery and mental trauma.

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
 - possible remedies
 - the impact of the breach on the parties



LESSON LINKS

You learnt about the elements and defences to negligence in **7A Negligence – elements** and **7B Negligence – defences and remedies**.

Lesson introduction

The tort of negligence protects people and businesses from individuals who do not take reasonable care to prevent harm or loss to others. Both the plaintiff and the defendant involved in a negligence claim can face ramifications from the alleged failure of the defendant to act with the appropriate standard of care.

The impact of negligence on plaintiffs 2.1.6.1

The plaintiff in a negligence case may be impacted in various ways, due to both direct and indirect consequences of the incident.

Table 1 The impact of negligence on plaintiffs

Impact	Explanation
Physical injuries	Negligence can result in physical injuries, such as broken bones, head trauma, food poisoning, or rashes.
Psychological impact	Psychological damages incurred due to the negligence of the defendant can lead to various issues, such as fear of returning to work or frustration stemming from physical injuries. Stress-related claims for workplace injury are becoming more prevalent, whilst psychological suffering following incidents on the roads or in the workplace can also occur.
Financial impact	A plaintiff may suffer financial loss if they are required to pay medical bills or their injuries force them to be absent from work. The high costs associated with bringing a negligence claim to court, such as legal fees and court fees, may also contribute to a plaintiff's financial loss. However, if they are successful in their claim and receive damages as a remedy, this financial loss can be reduced.

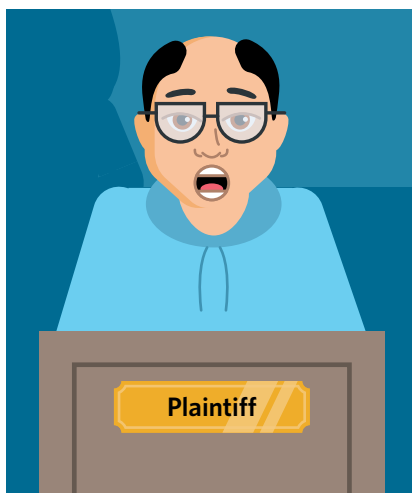


Figure 1 The plaintiff in a negligence claim

LEGAL CASE

Kozarov v State of Victoria (2022) HCA 12**Facts**

Ms Kozarov, a prosecutor in the Specialist Sexual Offences Unit (SSOU), claimed damages for psychiatric injury resulting from the nature of her work. The Supreme Court of Victoria initially ruled in her favour, but the Court of Appeal reversed the decision. Ms Kozarov appealed to the High Court of Australia, raising key issues which she believed had not been properly considered by the Court of Appeal, such as notice of the risk, breach of duty of care, and causation.

Legal issue

The main legal issues in the case were whether the SSOU had notice that there was a foreseeable risk that Ms Kozarov may incur psychiatric injury due to her work, whether the State of Victoria breached its duty of care, and whether the breach caused Ms Kozarov's injury.

Decision

The High Court unanimously ruled in favour of Ms Kozarov. It held that the State of Victoria had a duty to take proactive measures to reduce the risk of psychiatric injury from the beginning of her employment. The Court found that the state was aware of the risk based on the SSOU's policy on vicarious trauma. The Court also determined that the state breached its duty by failing to offer Ms Kozarov a rotation out of the SSOU. It was concluded that such a rotation would likely have prevented her psychiatric injury.

Significance

The outcome of the case was a victory for Ms Kozarov, as the High Court decided in her favour. The ruling established important principles regarding the assessment of liability for psychiatric injury in the workplace, including the need to identify foreseeable risks, the employer's duty to reduce those risks, and the importance of an analysis of the workplace as a whole when collecting evidence to determine causation.

The impact of negligence on defendants 2.1.6.2

The defendant in a negligence case is also impacted in various ways, regardless of whether they are found liable or not. Such impacts may be devastating, especially for a business, and many precautions are often taken within industries to avoid negligence claims. For example, most workplaces aim to promote safe work practices to prevent injuries at work and associated legal proceedings.

Table 2 The impact of negligence on defendants

Impact	Explanation
Reputational damage	Often one of the most significant impacts of a negligence case on a defendant is the reputational damage it can inflict on a business. Accusations of negligence can cause consumers to associate a business's goods or services with a breach in duty of care, which can have detrimental consequences on the business's future and its likelihood of success.
Financial impact	Another major impact of negligence for the defendant is the compensatory damages they may be ordered to pay, if found liable, to restore the plaintiff/s to their original position. These damages may be costly and only partially covered by insurance. A defendant who is found liable could be required to pay: • damages to the plaintiff • a large portion of the plaintiff's legal expenses, including court fees and the cost of legal representation • their own legal costs.

Continues →



Figure 2 The defendant in a negligence claim

Table 2 Continued

Impact	Explanation
Cultural changes	In some instances, major negligence cases can prompt cultural changes and behavioural improvements within an industry in order to avoid future negligence. The defendant within this industry will then be expected to comply with new industry standards, possibly having to change their procedures or alter their building safety to comply with these standards. 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 class action. 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. - claims with multiple plaintiffs can often be time-consuming, due to their complexity, and are difficult to resolve quickly.

LEGAL VOCABULARY

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts.

LEGAL CASE

Image: Ground Picture/Shutterstock.com

Figure 3 Reputational damages and financial loss are both impacts of negligence that affected Cotton On as a defendant

Cotton On Group Services Pty Ltd v Golowka [2022] VSCA 279**Facts**

A picker at Cotton On's warehouse suffered left knee injuries when pushing a trolley loaded with eight to nine boxes. She initiated a negligence claim in the County Court of Victoria accusing Cotton On of breaching its duty of care as an employer.

Legal issue

The court had to determine whether or not Cotton On had been negligent to its staff members and breached its duty of care.

Decision

In the County Court, damages were awarded to the plaintiff and Cotton On was found liable for negligence. However, the Supreme Court of Victoria overturned the decision due to the plaintiff's unreasonable refusal to have physiotherapy treatment. Consequently, the amount of damages was reduced from \$250,000 to \$25,000.

Significance

Although Cotton On was able to reduce the amount of damages it had to pay after the final appeal, it still suffered some reputational damages and financial loss as a result of the claim.

Lesson summary

Negligence claims can impact both plaintiffs and defendants. The plaintiff may endure:

- physical injuries
- psychological damages
- financial loss.

The defendant may endure:

- reputational damage
- financial loss
- cultural changes
- third-party claims and class actions.

7C Questions

Check your understanding

Question 1

The only person impacted by a claim in negligence is the plaintiff as they are the individual who sustained the injuries.

- A. True
- B. False

Question 2

Which of the following statements are correct about the impacts negligence may have on a plaintiff?

(Select all that apply)

- A. A plaintiff may sustain physical injuries due to the negligent act of the defendant. For example, an employee may injure themselves on workplace machinery due to the employer having insufficient precautions in place.
- B. A class action may be brought against a plaintiff by a defendant if they initiate a negligence claim in court.
- C. A plaintiff may face psychological injuries if they lose a claim in negligence as they may endure public humiliation.
- D. A plaintiff may sustain financial losses from bringing a claim in negligence to court, due to taking time off work and having to pay their own legal fees.

Question 3

Both a plaintiff and defendant involved in a negligence case are likely to sustain:

- A. financial injuries, due to the costs of paying for legal representation and court fees, alongside the cost of damages that one of the parties may have to pay.
- B. physical injuries, as for a case in negligence to be made out, some form of physical injury must have occurred to either party.

Question 4

Fill in the blanks with the following terms:

reputational damage

financial loss

A defendant involved in a negligence case may incur [], especially if the defendant is a business, as other customers may negatively perceive the business in the future. A defendant can also face [] as they may be required to pay their own legal expenses alongside the plaintiff's legal expenses.

Question 5

If a defendant loses a negligence case, they may have to pay:

(Select all that apply)

- A. damages to the plaintiff.
- B. a large proportion of the plaintiff's legal expenses, including court fees and legal representation costs.
- C. a fine as a sanction for their negligence.
- D. their own legal costs.

Question 6

There are no positive impacts, on either the plaintiff or the defendant, of a negligence case. Therefore, due to their lack of beneficial outcomes, these cases are becoming increasingly infrequent.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Explain **one** impact of negligence on the plaintiff.

Question 8

(4 MARKS)

Describe **two** potential impacts that a negligence claim can have on the defendant.

Extended response

Use your answer to question 9 to support your response to question 10.

Use the following information to answer questions 9 and 10.

Kirra, the plaintiff, sought compensation for a back injury she sustained at work. She paid a large sum of money for legal representation. However, the claim failed as the court determined that Kirra's injury resulted from her own carelessness in handling machinery, rather than any mistakes made by the employer. The court found the employer had fulfilled its duty of care and was not the cause of the plaintiff's injury. Kirra has continued to work for her employer.

Question 9

Tick the box to indicate whether each of the following statements are **true** or **false** about the impacts of this negligence case on Kirra.

Statement	True	False
I. Kirra will have to pay for her legal costs as the case was unsuccessful.	☐	☐
II. Kirra must pay damages to her employer for causing inconvenience.	☐	☐
III. Continuing to work for the employer may cause Kirra to experience anxiety and stress.	☐	☐

Question 10

(6 MARKS)

Analyse the impacts of this negligence case on Kirra.

Linking to previous learning

Question 11

(5 MARKS)

Marlon tripped and broke his leg after walking past a construction site that extended onto the footpath. There was no sign indicating to use the other sidewalk.

- a. Explain whether the element of 'breach of duty' would likely be satisfied. 3 MARKS
- b. Describe **one** impact on Marlon of this potential negligence claim. 2 MARKS

7D Defamation – elements

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
 - possible remedies
 - the impact of the breach on the parties

7A 7B 7C 7D 7E 7F 7G 7H 7I

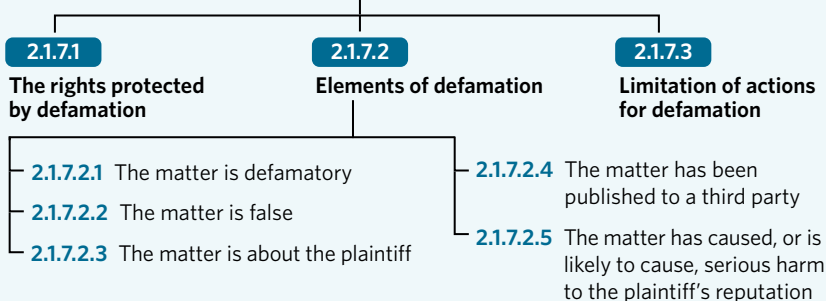


Image: MVolodymyr/Shutterstock.com

The 'burn book' in the 2004 movie 'Mean Girls' contained fabricated allegations against students and teachers at North Shore High School, which could cause severe reputational damage if made public. Could the creators and publishers of the book be legally liable for defamation based on these false claims? What legal grounds would the aggrieved students and teachers have to fight against reputational harm?

Lesson introduction

When a defendant communicates false information that negatively impacts the reputation of the plaintiff, a court action can be brought in defamation. This is a tort of strict liability, meaning there is no need to prove the defendant had any intention to cause harm towards the plaintiff, only that they published defamatory information.

LESSON LINK

You learnt about tort law in **6A Purposes and types of civil law**.

The rights protected by defamation 2.1.7.1

Defamation is a field within civil law that seeks to safeguard a plaintiff from experiencing unjust harm to their reputation. An action in defamation cannot be pursued if the defamatory statement is true, meaning it only protects the plaintiff from false statements that unjustly damage their reputation. Defamation law focuses on balancing the protection of a person's reputation against the protection of freedom of speech.

KEY TERM

Defamation an area of civil law that aims to protect a plaintiff from having their reputation unfairly damaged.

Table 1 The reputations that can be protected by defamation law

Type of reputation protected by defamation law	Example
Personal reputation	A false statement claiming a student stole the answers to a chemistry test.
Professional reputation	A false statement claiming a person is acting unethically or irresponsibly in their workplace.
Business reputation	A false statement claiming a small business is supplying faulty goods.

LEGISLATION

Defamation Act 2005 (Vic)

The *Defamation Act 2005* (Vic) prohibits certain corporations from commencing an action in defamation. In today's society, social media enables users to post negative comments about businesses instantly, making large corporations more susceptible to defamation. However, if every defamatory statement against a corporation was legally actionable, courts would be overwhelmed with cases. Victorian defamation laws prioritise safeguarding individual reputations, recognising that large corporations are impacted differently compared with individuals. The only corporations excluded from this prohibition are:

- not-for-profits and charities
- companies with fewer than 10 employees.

Defamation laws in Victoria do not extend to deceased individuals. If a deceased person published defamatory content prior to their death, legal action cannot be taken against them. Additionally, a person is not allowed to take legal action on behalf of a deceased person if statements have been made about them that are defamatory.

REAL WORLD EXAMPLE



Image: Vicki L. Miller/Shutterstock.com

Figure 1 The defamation claim made by Michael Jackson's estate failed as defamation laws do not extend to deceased people

CONTENT WARNING This section mentions content that is sensitive in nature, relating to sexual and child abuse.

Defamation lawyers told to 'Beat It'

The estate of the late Michael Jackson tried to sue Home Box Office (HBO) in defamation after the release of the documentary, 'Leaving Neverland.' The documentary featured men who alleged they were groomed and sexually molested as children at the hands of the pop star. The estate filed a lawsuit against HBO, claiming the documentary defamed Jackson's character and reputation. In Australia, this case would not have been considered by a court as defamation rights do not extend to deceased individuals. Similar laws apply in the United States, meaning Jackson's estate was unable to sue for defamation.

Adapted from 'Can Michael Jackson's estate sue HBO for defamation?' (The Reeves Law Group, 2023)

LESSON LINK

You learnt about the balance of probabilities in **6B Key concepts of civil law**.

LEGAL VOCABULARY

Defamatory matter material, such as an article, electronic communication, picture, or oral statement, that is likely to tarnish a person's reputation.

Elements of defamation 2.1.7.2

For a claim in defamation to be successful, five elements must be proven in court on the balance of probabilities:

1. The matter is defamatory
2. The matter is false
3. The matter is about the plaintiff
4. The matter has been published to a third party
5. The matter has caused, or is likely to cause, serious harm to the plaintiff's reputation

Defamatory matter can come in many forms. Some examples of defamatory matter are included in s 4 of the *Defamation Act 2005* (Vic).

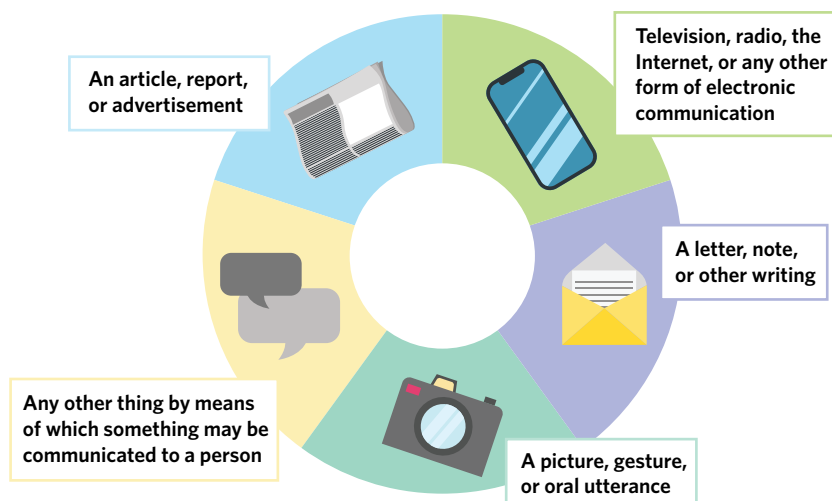


Figure 2 Defamatory matter can be portrayed in various different forms

LEGAL CASE

Burrows v Houda [2020] NSWDC 485**Facts**

The plaintiff, Burrows, a well-known lawyer, was mentioned in an article that stated a judge suggested her legal conduct should be investigated by the Law Society. The defendant, Houda, a well-known criminal lawyer, created two Twitter posts linking to the article, which were subsequently retweeted and liked by other users. In response to a comment on one of the posts, Houda used a zipper face emoji. Third parties also made additional retweets and comments using various emojis. The plaintiff filed a defamation action against Houda, arguing that the tweets, retweets, and comments implied her guilt and misconduct.

Legal issue

The legal issue in the case was whether the use of emojis on social media can be considered defamatory material.

Decision

Judge Gibson DCJ ruled in favour of the plaintiff. She concluded that a reasonable social media reader would understand the emojis were used as an indication of the plaintiff's guilt, which could harm her reputation and career.

Significance

Burrows was successful and Houda was ordered to pay her legal costs. This case demonstrates that emojis can be considered defamatory in certain contexts where they are used to portray false information about a person.

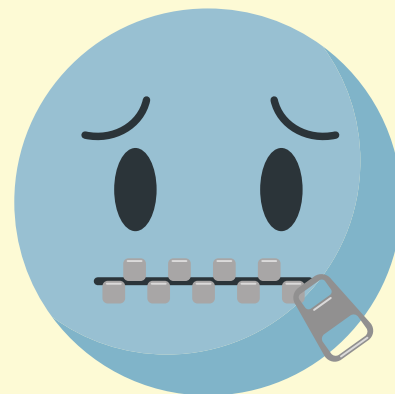


Figure 3 The court held that emojis can be deemed defamatory

The matter is defamatory 2.1.7.2.1

The first element that must be satisfied is that the matter must be defamatory, meaning the overall message that is published must lower the plaintiff's reputation. The court will consider what an **ordinary or reasonable person** would infer from the matter and whether the reputation of the plaintiff would be lowered as a result.

The ordinary or reasonable person will consider the full context in which the allegedly defamatory words or images were used when determining this. The plaintiff's claim will fail if one part of the matter conveys a defamatory meaning, but another part neutralises this.

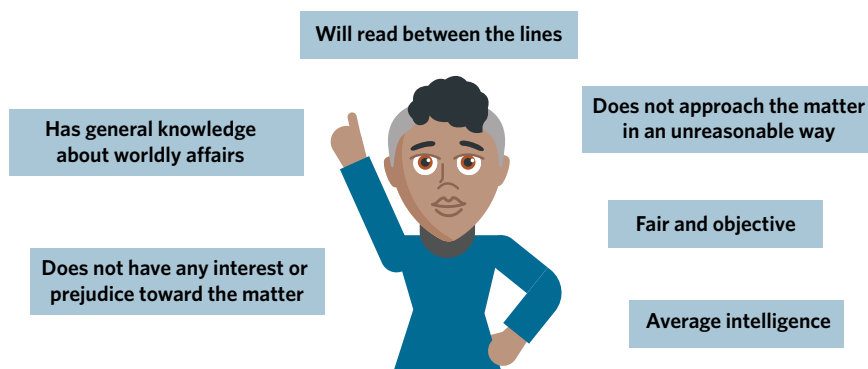


Figure 4 The reasonable person test is used to determine whether the matter is defamatory

The main question posed by the court is whether an ordinary or reasonable person would think less of the plaintiff as a result of the defamatory matter, hence indicating their reputation has been damaged. Some defamatory comments that are actionable in a defamation case include those stating the plaintiff:

- has committed a crime
- associates with known criminals
- is dishonest or deceitful
- has been adulterous
- is a hypocrite
- engaged in misconduct in public office
- is incompetent or lacks qualification to hold a specific job.

LEGAL VOCABULARY**Ordinary or reasonable person**

a hypothetical person representing the average, rational person in the community.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying defamation, you may be asked to demonstrate this skill by applying the elements of defamation to a given scenario. For example, this would mean you would need to consider what an ordinary or reasonable person would infer from the matter in the scenario, and whether the reputation of the plaintiff in the scenario would be lowered as a result.

DEEP DIVE



Figure 5 Erin Molan sued the Daily Mail after it implied she had acted based on racial prejudice

What is considered defamatory?

The determination of whether a statement is defamatory or not depends on the societal beliefs and values prevailing at the time of publication. As these views and values change over time, what constitutes a defamatory statement also changes. For example, in 2023, an insinuation of racial prejudice could harm a person's reputation, but that might not have been the case in the past.

Erin Molan, an Australian sports presenter, filed a defamation lawsuit against Daily Mail for accusing her of showing disrespect towards Polynesian culture. Molan argued that the Daily Mail's statements were defamatory as they implied she held racial prejudices, which she claimed was untrue. Initially, she was awarded \$150,000 in damages, but this decision was later overturned on appeal. The parties settled in mediation where they mutually agreed to discontinue the proceedings. According to previous societal standards, when racial prejudices were often accepted in society, such an accusation may not have been considered defamatory.

Adapted from 'Erin Molan and Daily Mail settle defamation case' (Bolza, 2023)

The matter is false 2.1.7.2.2

To succeed in a defamation case, the plaintiff must demonstrate that the statement made against them is false. If the statement is found to be substantially true, the plaintiff cannot be defamed. Therefore, it is crucial for the plaintiff to prove the statement in question is false and has caused harm to their reputation.

REAL WORLD EXAMPLE



Figure 6 Brian Burston was unsuccessful in his defamation case against Pauline Hanson after the court found the matters of the claim to be true

Burston his bubble: Pauline's victory

Australian Senator Pauline Hanson was ordered by the court to pay \$250,000 in damages for defamation of former Senator Brian Burston. Hanson accused Burston of sexually harassing a staff member in 2018, making these allegations during a television media interview.

Burston denied the allegations and sued Hanson for defamation in 2018. After a lengthy legal battle, a court ruled in Burston's favour, finding that Hanson had defamed him as her allegations were not supported by evidence and were substantially untrue. However, Hanson appealed the decision and, in August 2023, was successful in doing so after Justices Michael Wigney, Michael Wheelahan, and Wendy Abraham agreed that Burston's actions towards his staffer satisfied sexual harassment.

Therefore, this case highlights that for a successful claim in defamation to be made, the statements against the person must be false. If the statements are found to be true, the element of 'the matter is false' is unable to be met, as in the case of Burston, resulting in a failed defamation claim.

Adapted from 'Pauline Hanson wins appeal against \$250,000 defamation finding awarded to Brian Burston' (Australian Associated Press, 2022)

The matter is about the plaintiff 2.1.7.2.3

The plaintiff must be either explicitly, or through implication, identifiable as the person defamed by the matter. This is often self-evident by the matter clearly naming the plaintiff but can be more difficult if the plaintiff is not expressly identified, or if the publication is 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.

A defendant can still be liable for defamation even where:

- they were unaware of the plaintiff's existence.
- they were referring to an imaginary character.
- they were referring to a different person with the same name.

LEGAL CASE

Lee v Wilson (1934) 51 CLR 276**Facts**

A newspaper report of a police inquiry into police officer corruption 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.

Legal issue

There were two other Victorian police officers, Arthur Lonsdale Lee and Clifford Lee, who were also known as 'Detective Lee' and, consequently, sued the newspaper for defamation, arguing that a reasonable person could identify the article as being about them. The court noted that liability in defamation is not dependent 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.

Decision

In this case, the court held that readers of the article could reasonably identify all three Detective Lees as being the subject of the newspaper report.

Significance

It is important for newspapers to be specific about the subject matter of their articles to ensure defamatory statements are not inadvertently made.



Image: Copyright Lawrey/Shutterstock.com

Figure 7 Newspapers must ensure they are specific when writing articles about people, otherwise they may be subject to legal action in defamation

The matter has been published to a third party 2.1.7.2.4

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. Defamatory matter is considered published when it is fully understood by the third party. For an allegedly defamatory matter that has been published online, the plaintiff must provide evidence that it was actually downloaded and comprehended by at least one third party to satisfy this element.

Publication can include:

- a defendant posting defamatory material online, to a large or small audience.
- a defendant sharing defamatory material, such as re-tweeting a defamatory article or sharing a defamatory post on Facebook, that was authored by a person other than the defendant.

HYPOTHETICAL SCENARIO

Troublesome tweets

Georgia posted a tweet about her friend stating 'Vanessa copied my test paper. She is a dishonest cheater!'. This was retweeted by their classmates and shared 257 times. Georgia has 400 followers on Twitter. This post would satisfy the element of publishing the matter to a third party as it is available for all of Georgia's followers to see. The 257 people who reshared the tweet may also be liable for defamation.

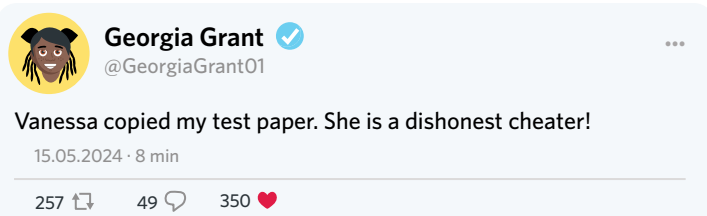


Figure 8 Matter, such as social media posts, can be defamatory if the post is published to a third party

The matter has caused, or is likely to cause, serious harm to the plaintiff's reputation 2.1.7.2.5

As of July 2021, to be successful in a defamation claim, the plaintiff must prove on the balance of probabilities that the matter has caused, or is likely to cause, serious harm to their reputation. The serious harm element is outlined in s 10A of the *Defamation Act 2005* (Vic). It is the responsibility of the judge, not the jury, to determine whether the serious harm element is satisfied. The process of determining whether the 'serious harm' element is satisfied occurs before the trial commences. However, this process may be delayed and can take place during the trial in 'special circumstances' relating to:

- the cost implications for the parties
- the resources available to the court at the time
- the extent to which establishing the serious harm element is linked to other issues in the determination trial.

If the serious harm element is not satisfied, the case will be dismissed. This element seeks to prevent frivolous and trivial defamation claims where the costs of taking the case to court exceed the damages awarded. Therefore, this encourages parties to resolve cases without going to court, avoiding the high costs of court proceedings. As there is no set definition for it, the scope of what constitutes 'serious harm' is determined by the case's judge, utilising precedent established in previous defamation cases. Some factors the courts have considered in recent defamation claims when determining whether or not this element is satisfied include:

- the meaning of the words and gravity of the allegations
- the 'grapevine effect', that is, whether or not the allegations spread beyond the recipients to a wider audience
- the identity of the recipients and whether or not they have a relationship with the plaintiff
- the reaction of the recipients.

LEGAL CASE

CONTENT WARNING This section explores content that is sensitive in nature, relating to offensive language.

***Martin v Najem* [2022] NSWDC 479**

Facts

Isaac Martin, a social media food blogger, brought a defamation claim against Fouad Najem, another food blogger and influencer, following a series of Instagram posts. On 22 April 2022, Najem posted a video on Instagram, labelling Martin a 'paedophile' and a 'racist'. The following day, Najem posted a second video to Instagram, repeating the imputations from the first video, labelling the plaintiff a 'pedo dog'.

Legal issue

The court was first required to determine whether the serious harm element was satisfied.

Decision

The court held that serious harm requires 'fact-rich proof of harm which is actually or likely to be serious, rather than inferences of serious harm'. The court held that the serious harm element had been satisfied, allowing the case to proceed to trial. Martin was able to prove the other elements of defamation on the balance of probabilities and Najem was ordered to pay \$300,000 in damages.

Continues →

LEGAL CASE

Martin v Najem [2022] NSWDC 479 – Continued**Significance**

In relation to this case, the court noted a number of factors that indicated the serious harm element was satisfied, such as:

- the extreme nature of the allegations
- the fact the defendant threatened the plaintiff with serious physical and professional harm
- the manner of publication as Najem threatened to harm Martin and requested that his followers help him
- the extent of the publication was very wide as Najem posted the videos to both of his Instagram accounts, one of which had approximately 24,500 followers and the other had 1,422 followers
- there was an extensive 'grapevine effect', meaning the posts and comments were spread.

These factors will likely be considered in future defamation claims when a court is assessing whether the matter has caused, or is likely to cause, serious harm to the plaintiff's reputation.

Limitation of actions for defamation 2.1.7.3

A person who feels 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 the specific civil wrong. This is known as **limitation of actions**. Section 5(1AAA) of the *Limitation of Actions Act 1958* outlines that a claim of defamation must be brought within one year of the date of publication.

This can be extended by a court in certain circumstances to up to three years if it was not reasonable for the plaintiff to have commenced action within the one year period, as outlined by s 23B of the *Limitation of Actions Act 1958* (Vic).

KEY TERM

Limitation of actions a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.

LEGISLATION

Limitation of Actions Act 1958 (Vic)

HYPOTHETICAL SCENARIO

Student's slanderous YouTube sensation

Brianna posted a YouTube video on 21 February 2020, in which she defamed her school teacher, implying he was associated with known criminals and had stolen IT equipment from the school. The YouTube video had 1000 views by April 2020. By March 2021, the video had gone viral and was shared with the teacher who was defamed. He initiated an action in defamation in April 2021. The court stated that the *Limitation of Actions Act 1958* (Vic) prohibited him from bringing the action as one year had passed. He argued it was unreasonable for him to have brought the action more than a year after the defamatory material was published as he had not seen the video until March 2021. The court accepted this argument and he was able to proceed with the case.

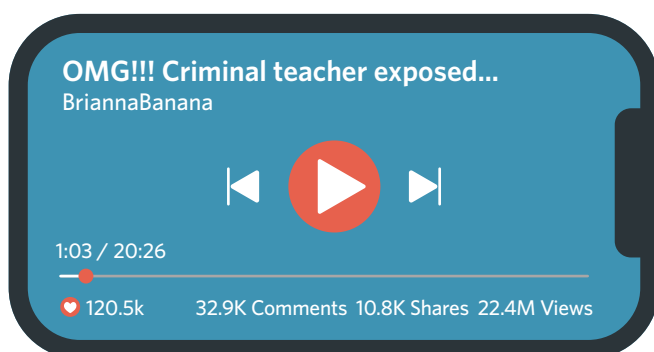


Image: Alex Gontar/Shutterstock.com

Figure 9 The one-year limitation period may be extended if this is considered reasonable in the given circumstances

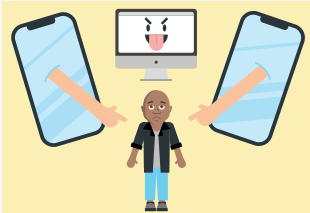
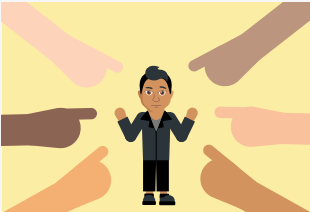
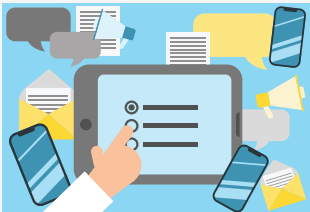
USEFUL TIP

In 2021, amendments to the *Limitation of Actions Act 1958* (Vic) introduced a single publication rule under s 5B of the Act. The limitation period for online publications commences upon uploading or sending the communication to the recipient, rather than upon its receipt or download.

Lesson summary

Defamation protects individuals from damages to their reputation, including their personal, professional, and business reputation.

Table 2 Defamation elements summary

Elements of defamation		
The matter is defamatory	The court will assess whether an ordinary or reasonable person would think less of the plaintiff as a result of the defamatory matter, hence indicating their reputation has been damaged.	
The matter is false	The court will assess whether the plaintiff has demonstrated that the statement made against them is false. If the statement is found to be substantially true, the plaintiff cannot be defamed.	
The matter is about the plaintiff	The plaintiff must be either explicitly, or through implication, identifiable as the person defamed by the matter.	
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. Defamatory matter is considered published when it is fully understood by the third party.	
The matter has caused, or is likely to cause, serious harm to the plaintiff's reputation	Before the trial commences, the judge will consider a range of factors when assessing whether the matter has caused, or is likely to cause, serious harm to the plaintiff's reputation, including the gravity of the allegations.	

The *Limitation of Actions Act 1958* (Vic) restricts the time frame within which a defamation claim can be brought. A claim must be brought within one year of the publication date of the defamatory matter unless the court finds that this amount of time is unreasonable.

7D Questions

Check your understanding

Question 1

Which of the following statements best describes the law of defamation?

- A. It protects people from mean comments that aim to make them look bad.
- B. It protects people from being sued for sharing their opinion.
- C. It protects people from having their reputations unfairly tarnished.

Question 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.

Question 3

Which of the following elements must be shown in a defamation case? **(Select all that apply)**

- A. The matter has been published to a third party.
- B. The matter is mean.
- C. The matter is determined by a person.
- D. The matter conveys defamatory meaning.
- E. The matter identifies, either expressly or impliedly, the plaintiff as the person defamed.
- F. The matter is false.
- G. The matter has caused, or is likely to cause, serious harm to the plaintiff's reputation.

Question 4

Which of the following individuals or companies would be prohibited from commencing an action in defamation?

- A. WonderWorld, which is a multinational business that has 300 employees.
- B. John Blackbox, who is the CEO of WonderWorld.
- C. Helping Hands, which is a not-for-profit organisation that has 50 employees.
- D. DangerCo, which is a business that has 6 employees.

Question 5

Fill in the blanks with **two** of the following terms:

Parties wishing to instigate a claim in defamation have year/s from the date of publication under the *Limitation of Actions Act 1958 (Vic)*. This may be extended by a court to year/s under certain circumstances.

Question 6

During the trial, it is the responsibility of the jury to determine whether the matter has caused, or is likely to cause, serious harm to the plaintiff's reputation.

- A. True
- B. False

Question 7

To be successful in a defamation claim, a plaintiff must be able to prove, on the balance of probabilities, all five elements of defamation.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Describe **one** right protected by defamation law.

Question 9

(3 MARKS)

Explain the limitation of actions in defamation cases.

Question 10

(5 MARKS)

Identify the **five** elements that must be proven in order for a claim in defamation to be successful.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information for questions 11 and 12.

Stephan and Paul were in a happy relationship for two years, until Stephan decided to break up with Paul. Out of rage, Paul posted a status online that stated 'I have suffered years of mental abuse from Stephan and I've finally built up the courage to dump him!'.

Paul is aware this claim is false, as Stephan was always very kind to him, but wanted to make him suffer for breaking his heart. The status was seen by Stephan's friends and had two responses:

- 'Stephan is a bully! I'm always here for you if you need a friend.'
- 'I never thought Stephan was so abusive, you both seemed so happy.'

The next day, Stephan's friends avoid him. He also overhears one whisper, 'I won't talk to Stephan, didn't you hear that he is a bully'. Stephan has just learned about defamation and is considering commencing an action against Paul.

Question 11

Which of the following are elements Stephan must prove if he decides to pursue a claim in defamation?

(Select all that apply)

- A. Paul's status update was defamatory and a reasonable person would consider Stephan's reputation tarnished.
- B. Stephan's statements identified Paul.
- C. The matter was published to a third party, being Paul's Facebook friends.
- D. Paul's statements were true but insulted Stephan, which prompted him to spiral into a depression.

Question 12

(6 MARKS)

Assume that Stephan has successfully proven the first element of defamation; the matter is defamatory, as the status suggests that Stephan is abusive and a bully. Both of these claims would damage his reputation in the eyes of the ordinary or reasonable person.

To what extent would Stephan successfully establish the elements of defamation in a claim against Paul?

Limit your discussion to the following elements: the matter is false, the matter is about the plaintiff, and the matter has been published to a third party.

Use your answer to question 13 to support your response to question 14.

Use the following information for questions 13 and 14.

Hai sees Fleur looking at his work during their maths exam. When the exam finishes, Hai confronts Fleur who states 'you can't prove anything'. Hai then approaches her maths teacher, Ms Blackwood, and informs her about the situation. Ms Blackwood then compares the answers of Fleur's exam to Hai'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 Fleur's exam result.

Fleur immediately claims that Hai defamed her as she implied to Ms Blackwood that Fleur is a cheat and her reputation has been damaged because of this.

Question 13

Which of the following are elements that Fleur must prove if she decides to pursue a claim in defamation?

(Select all that apply)

- A. Hai's statements are defamatory and a reasonable person would view her reputation as tarnished.
- B. Hai's statements were true but hurt Fleur's feelings and damaged her reputation.
- C. Hai's statements identified Fleur.
- D. The matter was published to a third party, that being Ms Blackwood.

Question 14

(6 MARKS)

Analyse the likely success of Fleur's claim in defamation, by applying each of the **five** elements to the scenario.

Linking to previous learning

Question 15

(2 MARKS)

Describe the standard of proof required in a defamation claim.

7E Defamation – defences and remedies

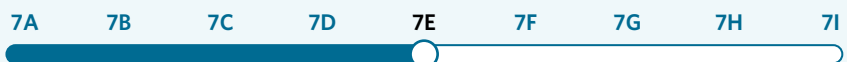


Image: Andrey_Kuzmin/Shutterstock.com

Defences to defamation are like sturdy shields protecting one's right to free speech from a defamation claim. They act as a legal fortress, guarding against unwarranted attacks and providing a safeguard to uphold one's honour in the face of slander.

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
 - possible remedies
 - the impact of the breach on the parties



2.1.8.1

Possible defences to defamation

- 2.1.8.1.1 Justification
- 2.1.8.1.2 Contextual truth
- 2.1.8.1.3 Honest opinion
- 2.1.8.1.4 Absolute privilege
- 2.1.8.1.5 Qualified privilege

2.1.8.2

Possible remedies for defamation

Lesson introduction

In order to uphold fairness, the defendant to a defamation claim has the opportunity to present counter-arguments and protect their reputation. However, a defendant has no obligation to present an argument in court if they do not think the plaintiff has successfully proven the elements of defamation on the balance of probabilities. Just as there are elements that need to be proven to have a successful claim in defamation, there are also specific elements that must be satisfied in order to have a successful defence against defamation.

Possible defences to defamation 2.1.8.1

If a case of defamation is brought 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:

- justification
- contextual truth
- honest opinion
- absolute privilege
- qualified privilege.

Please be aware that the defences mentioned above are not exhaustive. There may be additional complex defences and rules that have not been discussed here.

LESSON LINK

You learnt about defamation in
7D Defamation – elements.

Justification 2.1.8.1.1

Matter cannot be defamatory if it is true. If the plaintiff has actually done something that tarnishes their reputation and information is published about it, this cannot be defamation. **Justification** is a defence that the defendant can raise when the matter is of **substantial truth**.

To satisfy the defence of justification, the defendant must prove that the statements were true in substance or not materially different from the truth. Generally, the justification defence requires the defendant to provide evidence that the statements are true. The justification defence will still be satisfied even when the matter contains errors, so long as the errors do not alter the overall meaning that the ordinary or reasonable person would conclude from the publication.

HYPOTHETICAL SCENARIO

Omar's oopsies! Radio host overstates bank robbery amount

Radio host, Omar, misspoke while reporting a robbery. He stated that the criminals stole \$50,000 from a bank when they only stole \$40,000. He is worried that he is going to be liable for defamation, as he may have damaged their reputations by overstating the amount stolen.

Omar is relieved when his lawyer advises him that a defence of justification would likely succeed. This is because the overall implication of the statement, that the robbers are criminals, has not been altered by Omar's mistake.

Contextual truth 2.1.8.1.2

If a defendant can prove their statements had **contextual truth**, as they did not damage the plaintiff's reputation when read alongside other truthful statements, they also may no longer be liable for defamation. This occurs where the matter includes a mixture of defamatory statements, some of which are true and others that are false.

There are two elements of contextual truth that both must be satisfied for this defence to be made out:

1. The defamatory statements were published alongside one or more statements that are largely based on truth.
2. Due to the existence of truthful statements that lower the plaintiff's reputation, the false statements do not further damage the plaintiff's reputation.

HYPOTHETICAL SCENARIO

Harry's poisonous predicament

Harry commenced a defamation claim against Tones Media Pty Ltd after it published an article that stated he unlawfully killed animals on his farm, including 15 kangaroos and two eagles. Harry claimed that he only poisoned and killed the kangaroos, and the statement implying his cruelty towards the eagles was defamatory. The court held that the overall implication from the article, that Harry had unlawfully killed the 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-tarnished reputation.

KEY TERM

Justification a defence to defamation that may be raised where the defendant has published information that is substantially true.

LEGAL VOCABULARY

Substantial truth a defence for defamation that may be raised where the statements are true in substance or not materially different from the truth.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying defamation, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence, such as contextual truth, might be successful if argued in court. This means you would need to consider whether the two elements of contextual truth could be proven by the facts of the scenario.

KEY TERM

Contextual truth a defence to defamation that may be raised where the statement does not damage the plaintiff's reputation when read in context with other truthful statements.



Figure 1 Contextually true statements cannot be deemed as being defamatory

Honest opinion 2.1.8.1.3

Honest opinion is a defence that protects a statement of opinion that was honestly held by the defendant. The defence of honest opinion requires the defendant to prove all three of the following elements:

1. The matter was a statement of opinion rather than a statement of fact.
2. The opinion was related to a matter of public interest.
3. The opinion was based on proper material.

KEY TERM

Honest opinion a defence to defamation that may be raised when the defendant's statement was a statement of opinion.

Table 1 Elements of the honest opinion defence

Element	Explanation	Examples
The matter was a statement of opinion rather than a statement of fact	The matter must be a statement of opinion that the defendant honestly held at the time of publishing the material. This means the defendant must have honestly believed their statements. A factual basis must be provided in the publication, or referenced in support of the honest opinion.	The defendant publishes a statement that a celebrity is rude after that celebrity pushed a fan to clear their path. In the publication, the defendant provides a photo of the celebrity pushing their fan.
The opinion was related to a matter of public interest	For a matter to be of public interest, the audience must have an interest in receiving the information.	Matters could include: - political matters - activities of large corporations - conduct of sportspersons - quality of literary and artistic works.
The opinion was based on proper material	The opinion must be supported by evidence that is substantially true.	Proper material could include: - public documents - reports of public proceedings.

REAL WORLD EXAMPLE



Figure 2 Shane Bazzi won an appeal against Peter Dutton (pictured) after a successful 'honest opinion' defence

Defence against Dutton

In 2022, Shane Bazzi won an appeal in a defamation case against him, over a tweet he posted in 2018 about current Opposition Leader, Peter Dutton. The tweet suggested that Dutton was involved in corruption and that he excuses rape.

Dutton sued Bazzi for defamation in 2019. The court initially ruled in Dutton's favour, ordering Bazzi to pay \$35,000 in damages. However, Bazzi appealed the decision, arguing that his tweet was protected by the defence of honest opinion.

The appeal court agreed with Bazzi, stating that the tweet was a 'statement of opinion' rather than a statement of fact and that Bazzi had a reasonable basis for holding that opinion. The court also noted that the tweet was made in the context of a public debate about government corruption and that it was unlikely to have caused serious harm to Dutton's reputation.

As a result of the appeal, the initial ruling against Bazzi was overturned, and Dutton was ordered to pay Bazzi's legal costs. The case has been seen as a significant victory for free speech and the defence of honest opinion in Australia.

Adapted from 'Shane Bazzi wins appeal in defamation case over Peter Dutton tweet' (Knaus, 2022)

LEGISLATION

Defamation Act 2005 (Vic)

KEY TERM

Absolute privilege a defence to defamation that may be raised when statements were made in situations where unrestricted communication is crucial and immune to defamation law.

LEGAL VOCABULARY

Parliamentary proceedings any verbal exchanges or actions taken during or related to the conduct of a House of Parliament.

Judicial proceedings any pre-trial, trial, or hearing over which a judge or magistrate presides.

Absolute privilege 2.1.8.1.4

Absolute privilege is a defence that applies to statements made on an occasion where the free communication of information is considered to be of such importance that it must be exempt from defamation law. The defence is provided by s 27 of the *Defamation Act 2005 (Vic)*.

According to the Australian Law Reform Commission (2014), this aims to 'protect and facilitate frank and fearless communication even if it is damaging to reputations because it is considered in the public interest to do so'.

The three situations where the publication of information is completely protected are communications:

- made during the course of **parliamentary proceedings**
- made during the course of **judicial proceedings**
- 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
- substantial harm results from the statement.

However, it should be noted that although a person cannot be found liable in defamation when making untrue statements in these settings, they may be liable for other offences if they make false statements. For example, if a witness being examined in a court refuses to give direct answers to a question in order to hide the truth, they may be found guilty of contempt of court, which can result in fines or imprisonment.

HYPOTHETICAL SCENARIO

Exaggerating justice

During an assault case in which one of his friends was seriously injured, Finley served as a witness. He believed the accused deserved severe punishment, so he exaggerated the incident's severity while giving his testimony. As a result of his exaggeration, some of the statements he made about the accused were partially untrue.

After the trial, Finley's friend, who was aware of the real severity of the assault and knew that Finley was exaggerating, cautioned him that he could be liable for defamation due to his deviation from the truth. However, this friend's advice was incorrect. Finley was aware that witnesses cannot be liable in defamation if they make untrue or malicious statements during court proceedings.

Although Finley would not be liable in defamation, he may be found guilty of contempt of court, which is punishable by a fine or, in serious cases, imprisonment.



Figure 3 Witnesses are immune from actions in defamation against them, but this does not necessarily mean they can lie during testimony

Qualified privilege 2.1.8.1.5

If a defamatory matter was published due to the publisher having a reasonable belief that it was in the interest of the recipient to publish the communication, the defence of **qualified privilege** may be raised. In order for qualified privilege to apply, the court must consider the matter to be of public interest. The court will decide whether the public has a right to know about the information, and if so, the defence of qualified privilege will be successful.

According to s 30(1) of the *Defamation Act 2005* (Vic), for a defence of qualified privilege to apply, the defendant must prove that:

- the recipient has an interest or apparent interest in having information on some subject; and
- the matter is published to the recipient in the course of giving to the recipient information on that subject; and
- the conduct of the defendant in publishing that matter is reasonable in the circumstances.

According to the s 30(3) of the *Defamation Act 2005* (Vic), when considering if the conduct of the defendant was reasonable, and thus whether a defence of qualified privilege applies, a court can consider factors such as:

- the seriousness of any defamatory imputation carried by the matter published
- the extent to which the matter published distinguishes between suspicions, allegations and proven facts
- the nature of the business environment in which the defendant operates
- whether it was appropriate in the circumstances for the matter to be published expeditiously
- any other steps taken to verify the information in the matter published.

KEY TERM

Qualified privilege a defence to defamation that may be raised where the defendant had a reasonable belief that it was in the interest of the recipient to publish the communication.

Some circumstances that are protected by qualified privilege include:

- journalists who publish stories about high-profile public figures, such as politicians
- a former employer providing a reference for a past employee to a new employer
- reporting a suspected crime to the police
- reporting suspected misconduct of an employee to a manager.

The privilege is lost if the plaintiff proves that the defendant was driven by malice or that the publication 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.

HYPOTHETICAL SCENARIO



Figure 4 Kevin felt it was his legal and moral obligation to keep his workplace safe

Fuel fiasco

Kevin works as a truck driver and often drives with his colleague, Sarah. Kevin notices that when Sarah refuels their truck, she occasionally uses cheaper fuel that is dangerous to use for the truck. Kevin has tried to raise it with Sarah but she denies it as she keeps the additional fuel money for herself and does not want to stop doing so. One day, Kevin is driving the truck and it starts to smoke. He pulls over to call his boss, Angela, as he knows the smoke is a result of Sarah's fuel misconduct. Angela issues Sarah a warning about the fuel and expresses that she is very disappointed with her careless conduct.

Sarah brings an action against Kevin in defamation, but Kevin's lawyer advises him that he would be able to raise the defence of qualified privilege as he had a reasonable belief that it was in the interest of Angela to share the information to ensure all workers at the company remained safe and followed protocol.

WANT TO KNOW MORE?

There is a defence to a defamation claim if the alleged defamatory material is published in scientific or academic journals. You can find out more about defences that promote the expression of opinion by academics by searching 'Changes to defamation laws in Victoria 2021' and clicking the Marshalls+Dent+Wilmoth Lawyers (2021) webpage.

KEY TERMS

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.

Injunction a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action.

Possible remedies for defamation 2.1.8.2

Remedies are orders from the court that uphold the plaintiff's civil rights by providing them with compensation for the loss or injury they have suffered. In defamation cases, the most common remedies are **damages** or an **injunction**.

Damages are an award of monetary compensation to the plaintiff, to be paid by the defendant. The amount of damages is determined by the judge in defamation cases, not the jury. The main form of damages awarded in defamation cases is compensatory damages, which fall into three categories.

Table 2 Type of compensatory damages

Type of compensatory damages	Explanation	Example
Specific damages	Specific damages have a precise value and are easily quantifiable. The amount can be calculated.	If defamatory statements cause a plaintiff to lose work, they may be awarded specific damages for the amount of lost income.
General damages	General damages do not have a precise value and are not easily quantifiable. These are awarded where the plaintiff has endured general pain and suffering, loss of quality of life, or a shortened life expectancy.	If the defamatory statements caused the plaintiff pain and suffering, such as receiving online hate comments, they may be awarded general damages.

Continues →

Table 2 Continued

Type of compensatory damages	Explanation	Examples
Aggravated damages	Aggravated damages aim to further compensate the plaintiff for the humiliation suffered or where they have been insulted.	If the defamatory statements were particularly insulting or accused the plaintiff of a serious crime, the plaintiff may be awarded aggravated damages.

Exemplary damages cannot be awarded in defamation cases in an effort to ensure free speech is not hindered. Exemplary damages are an additional sum of money awarded to a plaintiff in addition to other damages. They aim to deter others from undertaking similar actions. Therefore, if such damages were applicable to cases where defamation had been proven, legitimate investigative journalism and freedom of expression may be hindered due to people fearing the repercussions of accidentally publishing an untrue statement.

Injunctions may also be awarded by the courts in response to a defamation claim. 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.

LESSON LINK

You will learn more about remedies in **9B Types of remedies**.

Table 3 Types of injunctions

Type of injunction	Explanation	Examples
Mandatory injunction	Forces parties to do something.	The defendant may be forced to publish a statement revoking the defamatory matter.
Restrictive injunction	Prevents parties from doing something.	The defendant may be prevented from publishing anything about the plaintiff again.

LEGAL CASE

Hunt v Bailey and Anor [2017] VCC 990

Facts

Hunt ran a business that exported various meat products to China. Bailey had sent numerous emails and WeChat messages to Hunt's meat suppliers that were defamatory in nature. In one of the emails to a meat supplier, Bailey had said 'Hunt is a crook... Hunt is offending every countries' law by evading tax and smuggling'.

Legal issue

Hunt commenced an action in defamation and claimed that Bailey damaged his business reputation. After Hunt commenced legal action, Bailey continued to send emails and messages of a defamatory nature.

Decision

The court held that the emails and WeChat messages were defamatory as they implied that Hunt engaged in crime, evaded tax, and was corrupt. If the suppliers believed the emails and messages, this would likely damage Hunt's business reputation and result in the suppliers no longer wanting to do business with Hunt.

Significance

The court awarded Hunt \$220,000 in damages which consisted of:

- general damages for the harm to Hunt's business reputation.
- 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 continuing to send defamatory emails and messages.

Lesson summary

A person accused of defamation has the chance to present counter arguments and establish their innocence through defences. These defences include:

- justification
- contextual truth
- honest opinion
- absolute privilege
- qualified privilege.

Remedies are available to the successful party in order to uphold their rights and restore them to their original position. These remedies include:

- damages
- injunctions.

7E Questions

Check your understanding

Question 1

Fill in the blank with **one** of the following terms:

parole

accused

defendant

prosecution

If a case of defamation is brought against the [], they may raise one or more defences to avoid being held liable.

Question 2

Which of the following best describes the defence of justification?

- The defendant must prove the statements were partially true in the context.
- The defendant must prove the statements were true in substance or not materially different from the truth.
- The defendant must prove the statements were their personal opinion that they believed to be true.

Question 3

If some of the statements are true and some statements are defamatory, the defendant can raise the defence of contextual truth.

- True
- False

Question 4

Fill in the blank with **one** of the following terms:

absolute privilege

justification

honest opinion

If an opinion is honestly held, the defence of [] can be raised.

Question 5

Which of the following circumstances would have the defence of absolute privilege apply?

(Select all that apply)

- A. Reporting a suspected crime to the police.
- B. Giving evidence in court.
- C. Speaking during parliamentary proceedings.
- D. Reporting workplace misconduct.

Question 6

Which of the following best describes qualified privilege?

- A. A defence that can be raised where the defendant had a reasonable belief that it was in the interest of the recipient to publish the communication.
- B. A defence that can be raised where a witness lies during their testimony.
- C. A defence that can be raised to protect members of parliament.

Question 7

Tick the box to indicate whether each of the following statements describe circumstances where the defence of **absolute privilege** or **qualified privilege** could be raised.

Statement	Absolute privilege	Qualified privilege
I. A defamatory matter stated during question time in parliament.	☐	☐
II. A defamatory matter made by a previous employer, about their former employee, to a future employer.	☐	☐
III. A defamatory matter stated by a witness on the stand.	☐	☐
IV. A defamatory matter about a suspected crime to the police.	☐	☐

Question 8

Fill in the blank with **one** of the following terms:

general

specific

aggravated

If defamatory statements cause a plaintiff to lose work, they may be awarded damages for lost income.

Question 9

Injunctions aim to compensate the victim by awarding monetary compensation.

- A. True
- B. False

Question 10

(Select all that apply)

Defences to defamation include:

- A. self-defence.
- B. honest opinion.
- C. duress.
- D. justification.
- E. absolute privilege.
- F. genuine belief.
- G. qualified privilege.

Preparing for exams

Standard exam-style

Question 11

(2 MARKS)

Identify **two** remedies that could be awarded to a successful plaintiff in a defamation claim.

Question 12

(2 MARKS)

Gossip Magazine published defamatory matter about a small influencer, Paola. She brought an action in defamation and received damages, but Gossip Magazine is continuing to post untrue and defamatory statements about her.

Describe why an injunction may be an appropriate remedy in Paola's defamation case.

Question 13

(3 MARKS)

Explain **one** defence to defamation.

Question 14

(3 MARKS)

A member of parliament, Kathy, made untrue and defamatory statements about another member of parliament during question time.

Identify and outline **one** appropriate defence in Kathy's case.

Extended response

Use your answer to question 15 to support your response to question 16.

Use the following information to answer questions 15 and 16.

Hai sees Fleur looking at his work during their maths exam. When the exam finishes, Hai confronts Fleur who states 'you can't prove anything'. Hai goes to his maths teacher, Ms Blackwood, and informs her about the situation. Ms Blackwood then compares the answers of Fleur's exam to Hai'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 Fleur's exam result.

Fleur immediately claims that Hai defamed her as he implied to Ms Blackwood that she is a cheat and her reputation has been damaged because of this.

Question 15

Which of the following statements are correct? **(Select all that apply)**

- A. Justification would likely succeed here as Hai saw Fleur copying his test and their answers were the same.
- B. Absolute privilege would likely succeed here as Hai spoke to Ms Blackwood who has the right to know the conduct of students in her class.
- C. Contextual proof would likely succeed here as Hai's statement to Ms Blackwood does not damage Fleur's reputation because she is an honest student.
- D. Qualified privilege would likely succeed here as Hai had a reasonable belief that it was in the interest of the teacher to publish the communication.

Question 16

(6 MARKS)

Explain **two** possible defences that would be appropriate for Hai to raise against Fleur's claim in defamation.

Use your answer to question 17 to support your response to question 18.

Use the following information to answer questions 17 and 18.

Zephyra is an award-winning Australian actress. In 2023, an article was published by Giselle who owns The New York Second, a newspaper that publishes celebrity drama. The article claimed that Zephyra was difficult to work with and that all the cast mates in her recent film hate her because of her rudeness. As a result of these statements, no one wants to work with Zephyra. She has been fired from four movies she was supposed to star in. Hearing that all of her cast mates allegedly resent her, Zephyra has also spiralled into a depressive state and has suffered significant emotional pain.

After lengthy court proceedings against Giselle, Zephyra was successful in proving the statements were defamatory. Giselle was unsuccessful in raising any defences.

Question 17

Which of the following would be appropriate remedies for Zephyra? **(Select all that apply)**

- A. Specific damages for loss of employment.
- B. Exemplary damages to punish Giselle.
- C. General damages for pain and suffering.

Question 18

(6 MARKS)

Explain **two** remedies that Zephyra may be awarded for being defamed.

Linking to previous learning

Question 19

(7 MARKS)

Carissa and Alyssa are competing restaurant owners. Carissa emailed Alyssa stating that the pizza at her restaurant is the 'Best In Town'. Alyssa is infuriated as she believes she has the best pizza in the area. Alyssa believes a reasonable person would infer that her pizza is worse than Carissa's pizza after viewing the email. Alyssa initiates a claim of defamation against Carissa.

- a. Outline **two** elements of defamation that may be difficult for Alyssa to prove.
- b. Hypothetically, if all the elements of defamation were successfully made out, identify and describe **one** defence Carissa could raise in this case.

4 MARKS

3 MARKS

7F Defamation – impact

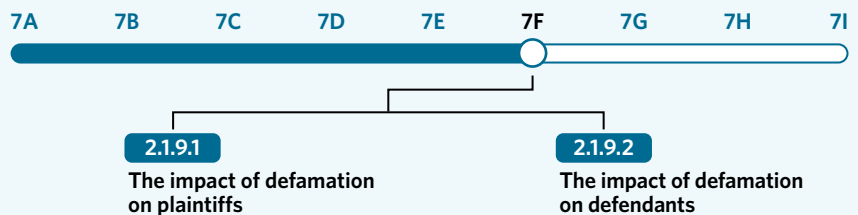


Image: MarTata/Shutterstock.com

Lies can be similar to a boomerang – if you throw it carelessly, it might retract and hit you in the face! Just like a boomerang needs to be handled with precision and care, one must be cautious of the words they say or write in order to avoid the legal repercussions that result from defamation. After all, just like a boomerang, once you throw words out there, you might not be able to retrieve them!

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
 - possible remedies
 - the impact of the breach on the parties



LESSON LINK

You learnt about defamation in **7D Defamation – elements**.

Lesson introduction

Defamation laws in Australia are known for their strict nature, strongly emphasising the safeguarding of an individual's reputation as opposed to upholding the free-speech rights of a defendant. Consequently, in a defamation case, regardless of the verdict, both the plaintiff and the defendant can experience significant financial and emotional consequences.



Figure 1 The impacts of defamation on the parties involved

The impact of defamation on plaintiffs 2.1.9.1

For the plaintiff, a successful defamation case may result in compensation for any harm or damage to their reputation. However, pursuing such a claim can be a lengthy and expensive process, requiring significant resources to build and present a strong case. Additionally, the process can be emotionally burdensome for the plaintiff, who may experience anxiety and stress over the course of pursuing legal action. In a case where the plaintiff is unsuccessful in their claim, the financial and emotional impact may be even greater.

Table 1 The impact of defamation on plaintiffs

Impact	Explanation
Tarnished reputation	When a defamatory statement is made, a plaintiff has suffered some degree of damage to their public image, reputation, and/or character. A plaintiff who succeeds in a defamation claim may suffer some reputational damage that cannot be undone by the court's decision. For example, some members of the public may continue to hold a negative view towards the plaintiff, based on the original publication, which they are unlikely to simply forget, despite the court declaring the publication to be defamatory. If the plaintiff is unsuccessful in their claim, the impact on their reputation will be even worse. This may be amplified if there is significant media coverage of the case.
Unemployment	When a defamatory statement adversely affects the reputation of an employee, it can result in serious repercussions, including diminished job opportunities. However, it should be noted that the <i>Fair Work Act 2009</i> (Cth) protects against unfair dismissal, therefore an employer can not terminate an employee on the basis of false claims.
Emotional impact	The plaintiff may face significant humiliation and shame due to defamatory statements, which can persist until the matter is resolved in court. Even if the court rules a remark regarding the plaintiff was defamatory, the plaintiff may still feel humiliated due to the misconceptions surrounding them. Testifying in court and discussing the impact of a defamatory publication may also be a challenging experience for many plaintiffs.
Financial impact	If the plaintiff is unsuccessful in a defamation claim, they may have to bear the cost of their own legal expenses as well as a significant portion (if not all) of the defendant's legal costs. Even if the plaintiff is successful in their claim, they may not receive the full amount of damages sought and may only recover their legal expenses. Therefore, the outcome of the case may fail to fully compensate the plaintiff for the harm to their reputation.

LEGISLATION*Fair Work Act 2009* (Cth)**REAL WORLD EXAMPLE****Rushed to defend his reputation**

Australian actor, Geoffrey Rush, was defamed by The Daily Telegraph who accused him of inappropriate behaviour towards a co-star, actions that Rush consistently denied. He initiated a claim of defamation against the newspaper, which soon became a high-profile case in Australia. After a long and public legal battle, Rush was awarded a large sum of damages, but the experience took a toll on his emotional health. Rush described feeling isolated and humiliated by the accusations and the public scrutiny, whilst also experiencing a loss of trust in his fellow actors and the industry as a whole. In Rush's words 'there [were] no winners in this case – it [was] extremely distressing for everyone involved'. Rush stated that he felt like he was fighting for his life during the trial, and the negative publicity had a lasting impact on his mental health. Although Rush won the case and was awarded a large sum of damages, he still suffered the emotional impact of his defamation claim.

Adapted from 'Why Geoffrey Rush and his accuser say there's 'no winners' in defamation case' (SBS News, 2019)



Figure 2 Geoffrey Rush was involved in a high-profile legal battle following the publication of a defamatory statement that has left a lasting emotional impact

The impact of defamation on defendants 2.1.9.2

For the defendant, the consequences of a defamation case can also be severe. If found liable, the defendant may be required to pay substantial damages, face a tarnished reputation, whilst also suffering from emotional stressors associated with the legal process.

Table 2 The impact of defamation on defendants

Impact	Explanation
Tarnished reputation	Following the publication of defamatory information, the credibility, integrity, and/or accuracy of the defendant's conduct and speech may be questioned in the future.
Unemployment	When a person makes defamatory statements, this can negatively impact their reputation, and they may be viewed as lacking integrity. This can lead to detrimental consequences, including a loss of potential job prospects. However, an employer requires a valid reason for dismissing an employee in order to legally comply with job termination laws, as outlined in the <i>Fair Work Act 2009</i> (Cth).
Emotional impact	The defendant may feel frustrated or angry, especially if they believe the statement they made was true or was a matter of their opinion. Being accused of making a false statement that harms someone's reputation can also cause feelings of stress, anxiety, and shame. The process of defending one's publication in court can also carry stress and induce further anxiety.
Financial impact	In the event that a plaintiff successfully pursues a defamation claim, the defendant may be required to make multiple payments. These payments may include compensatory damages to the plaintiff for their harm, their own legal fees, or payment of the plaintiff's legal expenses. This is particularly true if the defamation led to substantial income loss for a highly-paid public figure, such as an actor or athlete.

HYPOTHETICAL SCENARIO

How Leila's words came back to haunt her

Leila, a successful blogger, wrote a defamatory blog post about Siena, a TV show host, accusing her of being rude, nasty, and untrustworthy. Siena took legal action against Leila for defamation, and the case was decided in Siena's favour. Leila was ordered to pay damages to compensate Siena, putting her in a financially difficult position. The high-profile nature of Siena's case received significant media coverage and, as a result, Leila lost hundreds of subscribers on her blog, and is considering changing career paths.



Figure 3 The reputation of a defendant can be damaged as a result of a defamation claim against them

LEGAL CASE

School for Excellence Pty Ltd v Trendy Rhino Pty Ltd [2018] VSC 514**Facts**

In July 2018, the School for Excellence Pty Ltd (TSFX) complained to Facebook that the popular Facebook group, VCE Discussion Space, had breached copyright laws by publishing numerous TSFX practice exams on its Facebook page. Consequently, Facebook shut down the group due to these copyright claims. The defendant, Trendy Rhino Pty Ltd, who created the original Facebook group, almost immediately formed a new Facebook group with a similar name (VCE Discussion Space Backup). The new account urged the estimated 11,000 followers in the second group to 'reclaim the group that [was] rightfully [theirs]', inciting followers to criticise the School for Excellence Pty Ltd for being the reason the group's original page was taken down. VCE Discussion Space Backup told its followers that TSFX had been 'sneaky' and 'bullied and strong-armed' VCE Discussion Space.

Legal issue

The contentious issue was whether the claims made by Trendy Rhino were defamatory towards TSFX.

Decision

Justice Dixon granted an interlocutory injunction against Trendy Rhino for defamation and copyright breach. In posting to 'reclaim the group', the page was, in effect, provoking a campaign of harassment against the plaintiff.

Outcome

The case highlights the potential harm that can arise from social media pages that share untrue and slanderous material about a business and call for 'discussions' of a similar nature from their followers. For Trendy Rhino, the defendant, its credibility was likely impacted by its defamatory statements against TSFX, therefore, influencing the likelihood of other educational companies wanting to work with the business. It also raises concerns about the tension between freedom of speech and defamation law on social media platforms like Facebook.

WANT TO KNOW MORE?

Have you ever had an argument where someone has told you to 'be quiet' and you have remarked with 'Australia is a free country and I have a right to speak'? Whilst this statement has validity, there are limits on what constitutes freedom of speech and what is considered defamatory. You can find out more about your legislated rights to free speech by searching 'Right to freedom of opinion and expression' and clicking the relevant webpage (Attorney-General's Department, n.d.).

It has been suggested that the 'plaintiff-friendly' defamation laws that operate in Australia may have a potentially negative impact on freedom of speech. Free speech in Australia is not included in statute law and, as a result, it is difficult to enforce in court. Strict defamation laws exist and are enforceable in the courts. This can work to decrease the likelihood of people coming forward with controversial allegations, especially against people in power or authority.

DEEP DIVE

Free speech v upholding reputations

While all accusations should be taken seriously, it is important to remember that they do not automatically make someone liable. One tweet or Facebook post does not have the power to enforce an injunction. The legal system is designed to ensure individuals are protected from false accusations and that justice is served. Simultaneously, exercising free speech should not come at the expense of harming another person's reputation. However, this is a more difficult protection to offer through legislation.

Accusations of misbehaviour can have significant repercussions, including damage to one's reputation, loss of employment, and emotional distress. For this reason, it is important to recognise that an accusation does not automatically make someone liable or guilty. On the other hand, the accuser making the false claims can also face severe, legal ramifications. If someone makes a defamatory statement about another person, they could be held liable for defamation.



Image: Jorm Sangsorn/Shutterstock.com

Figure 4 There needs to be a balance between the right to free speech and defamation laws

Lesson summary

Defamation laws in Australia are recognised for their strict nature, as they prioritise the protection of an individual's reputation over the free-speech rights of a defendant. Consequently, in a defamation case, both the plaintiff and defendant are likely to face substantial financial and emotional repercussions.

7F Questions

Check your understanding

Question 1

Which of the following are likely to be direct impacts of defamation? **(Select all that apply)**

- A. Legal costs
- B. Medical costs
- C. Emotional distress

Question 2

Fill in the blanks with **two** of the following terms:

prosecution

plaintiff

can

cannot

A [] who succeeds in a defamation claim may still suffer some reputational damage that [] be undone by the court's decision.

Question 3

A successful claim in defamation can have an impact on both the defendant's and plaintiff's reputation.

- A. True
- B. False

Question 4

Which of the following statements best describes the financial impact that an unsuccessful defamation claim can have on a plaintiff?

- A. If the plaintiff is unsuccessful in a defamation case, they will not be awarded damages.
- B. If the plaintiff is unsuccessful in a defamation case, they may have to bear the cost of their own legal expenses as well as a significant portion (if not all) of the defendant's legal costs.
- C. If the plaintiff is unsuccessful in a defamation case, they will receive damages but not an injunction.

Question 5

It is important that defamation laws do not compromise free speech. The rights of plaintiffs are secondary to free speech in Australia.

- A. True
- B. False

Question 6

Fill in the blanks with **two** of the following terms:

guilty

defamatory

liable

damages

If found [], the defendant may be required to pay [] to the plaintiff and may also suffer emotional distress as a result of the legal process.

Preparing for exams

Standard exam-style

Question 7

(4 MARKS)

Outline **two** potential impacts of defamation on the plaintiff.

Question 8

(4 MARKS)

Describe **two** ways a case in defamation impacts the defendant.

Question 9

(7 MARKS)

Stella has made a potentially defamatory post on her social media account about Ellie, falsely portraying her as a bad person and discouraging others from befriending her. As a result, Ellie has been absent from school for two weeks and Stella's classmates now view Stella as a bully and have distanced themselves from her. Ellie has consulted a lawyer and is intending to launch a defamation claim against Stella.

- Outline **one** impact of the defamation case on the plaintiff and **one** impact on the defendant. 4 MARKS
- With reference to this scenario, explain the balance between the rights of plaintiffs and the protection of freedom of speech in Australia's defamation laws. 3 MARKS

Extended response

Use your answer to question 10 to support your response to question 11.

Question 10

Which of the following is **not** a likely impact of a defamation claim on the defendant?

- Difficulty in finding employment due to a lack of credibility and integrity if a defendant is revealed to have defamed someone.
- Stress and humiliation of being defamed.
- Financial loss as a result of paying damages, their own legal fees, and payment of the other parties' legal expenses.
- Emotional distress as a result of defending their innocence.

Question 11

(5 MARKS)

'Defamation only affects the plaintiff. There is no impact on the defendant.'

Do you agree with this statement? Justify your response.

Linking to previous learning

Question 12

(3 MARKS)

Explain how the amount of damages awarded affects the plaintiff in a defamation case.

7G Misleading or deceptive conduct - elements



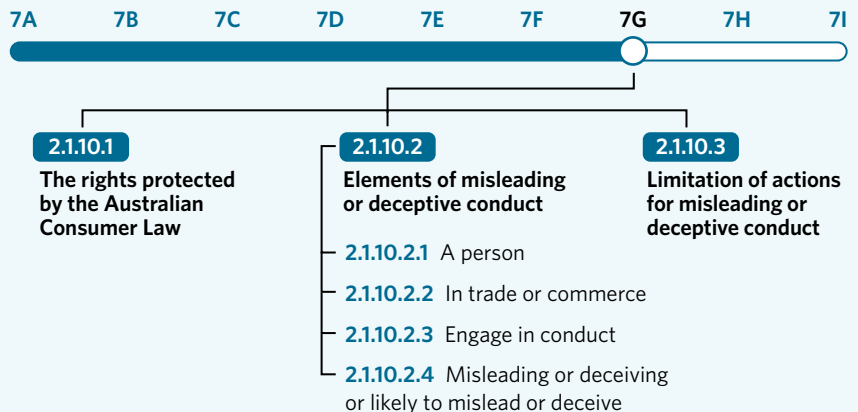
Image: Berke/Shutterstock.com

'Love me, love me – say that you love me! Fool me, fool me – go on and fool me!'

As The Cardigans sang in 1996 in their hit song, Lovefool, no one likes to be deceived, and while it does not apply to the world of romance, in real life, misleading conduct is illegal.

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
 - possible remedies
 - the impact of the breach on the parties



LEGISLATION

Competition and Consumer Act 2010 (Cth)

LESSON LINK

You learnt about defamation and strict liability claims in **7D Defamation - elements**.

KEY TERM

Misleading or deceptive conduct
a type of civil law that aims to protect consumers and businesses from being misguided when engaging in commercial transactions.

Lesson introduction

When engaging in commercial transactions, there are laws that prevent consumers from being tricked or swindled when making their purchases. Misleading or deceptive conduct legislation under the Australian Consumer Law (ACL) contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth), protects consumers and businesses. This is Commonwealth Law and therefore, applies to all individuals and organisations Australia-wide. Similar to defamation, 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. It only must be shown that they engaged in conduct that was, or is likely to be, misleading or deceptive.

The rights protected by the Australian Consumer Law 2.1.10.1

The rights of Australian consumers are protected by **misleading or deceptive conduct**, outlined in section 18 of the Australian Consumer Law (ACL), which states that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.

The ACL protects consumers in the areas of:

- unfair contract terms
- consumer guarantees
- product safety
- unsolicited consumer agreements, including door-to-door sales and telephone sales
- lay-by agreements.

Table 1 Areas protected by the Australian Consumer Law (ACL)

Area protected by the ACL	Specific rights
Unfair contract terms	Contract terms are considered unfair if they cause an imbalance in the rights and obligations of parties involved, are not necessary to protect the parties' interests, and/or would cause one party detriment if they were applied. For example, if a contract with a telecommunications company allows the provider to cancel or suspend services with the customer due to excessive or unusual use without notice, this would be considered an unfair contract term.
Consumer guarantees	Under the ACL, consumers are entitled to guarantees when they purchase a product. These guarantees require a good or service: • to be of an acceptable quality • to match the provided description • to fulfil any warranties • is fit for purpose. The length of these consumer guarantees depends on various factors, including the type of product and the amount the customer has used the product.
Product safety	Products that are supplied to customers must be safe, comply with relevant standards before they are sold, and meet all consumer guarantees. Recalled or banned products cannot be sold to consumers.
Unsolicited consumer agreements	An unsolicited consumer agreement often arises when a salesperson approaches someone to sell goods, such as via phone or door knocking. Consumers must be provided with a copy of an unsolicited consumer agreement. Consumers have the right to terminate an unsolicited agreement within 10 business days of its establishment.
Lay-by agreements	Lay-by agreements occur when individuals make payments for a good or service in instalments, rather than paying the total amount upfront. Consumers must be provided with a lay-by agreement in writing. Consumers have the right to terminate a lay-by agreement at any time before the good or service is provided. Suppliers can only terminate the agreement under specific circumstances.

In addition to protecting consumer rights, the ACL also provides remedies for injured parties and penalties for breaches of misleading or deceptive conduct that the courts may impose. In Australia, regulators, such as the **Australian Competition and Consumer Commission (ACCC)**, can take legal action against businesses that engage in conduct that is prohibited by the ACL.

In Victoria, the ACL is applied through the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*.

LEGAL VOCABULARY

Australian Competition and Consumer Commission (ACCC)
an independent, Commonwealth statutory authority that enforces the Australian Consumer Law (ACL), whilst promoting fair trading and competition in markets.

Protection of consumers' rights under the ACL

Direct protection of consumer rights

- Victorian consumers can take legal action against misleading or deceptive businesses.
- Enabled under the *Australian Consumer Law and Fair Trading Act 2012 (Vic)*.
- This law allows a Victorian consumer to seek a remedy.

Indirect protection of consumer rights

- The ACCC can initiate court proceedings against misleading or deceptive businesses.
- Financial penalties are usually imposed upon businesses that mislead or deceive consumers.
- The threat of financial penalties is usually enough to deter businesses from misleading or deceptive conduct, thus protecting consumers.

LEGISLATION

Australian Consumer Law and Fair Trading Act 2012 (Vic)

Figure 1 Direct and indirect protections provided by the Australian Consumer Law (ACL)

Elements of misleading or deceptive conduct 2.1.10.2

In a misleading or deceptive conduct claim, the following four elements must be proven by the plaintiff:

1. A person
2. In trade or commerce
3. Engage in conduct
4. Misleading or deceptive or likely to mislead or deceive



A person



In trade or commerce



Engage in conduct



Misleading or deceptive or likely to mislead or deceive

Images (left to right): tadamichi, Prostock-studio, Aleks2410, Bits And Splits/Shutterstock.com

Figure 2 The four elements of misleading or deceptive conduct

KEY TERM

Person an individual or corporation that is treated as a legal entity under the law.

LEGAL VOCABULARY

Corporation a legal entity that is considered distinct or separate from its owners.

A person 2.1.10.2.1

Section 18 of the ACL defines **a person** in misleading or deceptive conduct. In most cases, a person is a **corporation** and, in the case of misleading or deceptive conduct, it is a trading corporation. Trading corporations are those largely involved in the selling and purchasing of goods or services.

LEGAL CASE



Image: myphotobank.com.au/Shutterstock.com

Figure 3 Australian Red Cross was found to not be liable for misleading or deceptive conduct as the error in question did not occur in trade or commerce

E v Australian Red Cross Society (1991) 27 FCR 310

Facts

A recipient of a blood transfusion by the Australian Red Cross contracted HIV from infected blood. He commenced proceedings against the Red Cross and the public hospital, where he received the blood transfusion, for misleading or deceptive conduct. He claimed he was misled in regard to the quality of the blood.

Legal issue

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 are not categorised as trading activities.

Decision

The court held that both the Australian Red Cross and the hospital were trading corporations as they engaged in trading activities on a large scale. The Australian Red Cross has gift shops and training courses which, at the time, contributed towards 5% of their overall revenue. However, whilst the Australian Red Cross and the hospital were considered trading corporations, they were both ultimately found to not be liable as the conduct did not occur in trade or commerce, which is another element of misleading or deceptive conduct.

Significance

This case illustrates that a not-for-profit organisation can be considered 'a person' even if the income from trading activities contributes a relatively minor percentage to its overall revenue.

In trade or commerce 2.1.10.2.2

Misleading or deceptive conduct, as stated in s 18 of the ACL, only applies to conduct that occurs **in trade or commerce**. When making a claim for misleading or deceptive conduct, the plaintiff must ensure the activity occurred in trade or commerce, otherwise, such actions are not protected under the ACL. For example, in the Red Cross case study earlier in this lesson, the legal case was ultimately dismissed as the activity of providing infected blood is not considered to be within 'trade or commerce'.

The term 'in trade or commerce' includes a large variety of dealings, such as:

- selling goods or services to consumers
- pre-contractual negotiations
- professional advice.

KEY TERM

In trade or commerce an element of misleading or deceptive conduct requiring that the conduct occurred during a commercial dealing or transaction, where goods and services were sold or purchased.

LEGAL CASE

Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594

Facts

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 false 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 or deceptive conduct.

Legal issue

The main issue, in this case, was whether the foreman engaged in misleading or deceptive conduct by telling the plaintiff false information about the air-conditioning shaft.

Decision

The High Court held that Concrete Constructions' conduct did not occur 'in trade or commerce'. Therefore, it was not enough that the conduct occurred within the corporation's overall trading or commercial activities, it needed to be part of a particular transaction.

Significance

This case demonstrates that a successful claim for misleading or deceptive conduct will involve a situation occurring strictly and directly in trade or commerce. If a claim is made within the commerce or trade industry, this does not necessarily satisfy the 'in trade or commerce' element of misleading or deceptive conduct.



Image: Bannafarsaj_Stock/Shutterstock.com

Figure 4 The conduct of Concrete Constructions was found not to be misleading or deceptive as it did not occur 'in trade or commerce'

Engage in conduct 2.1.10.2.3

For a person to **engage in conduct**, they must do or refuse to do an action. Under s 18 of the ACL, the 'engage in conduct' element is focused on whether the defendant was involved in misleading or deceptive actions. It also evaluates whether there is a cause-and-effect relationship between the alleged conduct being disputed and the error of the consumer involved. For example, engaging in misleading or deceptive conduct could involve a person displaying false advertising and promotions that are intended to fool a consumer.

Some examples of conduct that may be considered in cases of consumers being misled or deceived are:

- advertisements
- promotions
- quotations
- in-person and online statements
- posting information online
- withholding or interfering with the accuracy of information.

For a plaintiff to successfully claim misleading or deceptive conduct, they must be able to prove they were led into error by the direct and specific actions or inactions of the defendant.

KEY TERM

Engage in conduct an element of misleading or deceptive conduct, requiring that the conduct involved the defendant performing or omitting to perform an act.

LEGAL CASE



Image: ymgerman/Shutterstock.com

Figure 5 Meriton's conduct was considered misleading or deceptive by the court

Australian Competition and Consumer Commission (ACCC) v Meriton Property Services Pty Ltd (2017) 350 ALR 494

Facts

Meriton, a large hotel provider, participated in a review service 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 it was interfering with this review service. If staff were concerned that a guest may leave a negative review, they would modify their email addresses before providing it to TripAdvisor. Staff would also withhold guest information from TripAdvisor during periods of service disruptions, such as hot water outages or problems with their elevators.

Legal issue

The court had to consider whether Meriton's interference with the review service contravened s 18 of the ACL by engaging in conduct that was likely to mislead or deceive potential consumers about the quality of its accommodation services.

Decision

The court held that, by reducing the number of negative reviews, Meriton was creating a false impression of the quality of the hotel service it provided. This was then found to likely mislead or deceive TripAdvisor users.

Significance

In their decision, the court reiterated the need for a direct link between the conduct of the defendant and the tangible error of the target audience. In this case, the error of the target audience would be the assumption that Meriton accommodation is of a higher quality than it actually is.

LEGAL VOCABULARY

Target audience the intended group of consumers to which conduct or communication is directed towards.

WANT TO KNOW MORE?

Various advertising techniques can often lead to misleading or deceptive conduct or conduct that is likely to mislead or deceive. You can find out more about misleading or deceptive conduct in advertising by searching 'False or misleading claims' and clicking the 'Australian Competition and Consumer Commission (n.d.)' webpage.

Misleading or deceptive or likely to mislead or deceive 2.1.10.2.4

Whilst s 18 of the ACL does not define the terms 'misleading or deceptive' or 'likely to mislead or deceive', the courts have determined that conduct is misleading or deceptive if it conveys a meaning that is likely to lead an ordinary or reasonable member of the person's **target audience** into error.

When conduct is directed towards a broad and diverse group within the general population, the target audience is considered to be:

- inexperienced in transactions of that kind
- of average education
- not careless or gullible.

When making a misleading or deceptive conduct claim, the plaintiff does not have to show that the defendant intended to mislead or deceive, but doing so can enhance their case.

LEGAL CASE

Targetts Pty Ltd v Target Australia Pty (1993) 26 IPR 51

Facts

Targetts had operated a retail clothing and footwear business in Launceston, Tasmania, for a number of years with an established reputation in the area. Targetts commenced a claim of misleading or deceptive conduct against Target Australia to prevent them from trading in Launceston.

Legal issue

Targetts claimed that if Target Australia were to trade in Launceston, it 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 its trading name.

Continues →

LEGAL CASE

Targetts Pty Ltd v Target Australia Pty (1993) 26 IPR 51 – Continued**Decision**

The court held that the word 'Target' would mislead the ordinary or reasonable member of Launceston's target audience into believing that Target Australia had a connection with Targetts. Here, the target audience applied only to consumers in Launceston and this was the only place that the court's decision would apply.

Significance

This case indicates that misleading or deceptive conduct claims can be specific and only apply to certain audiences. It also highlights that the definition of an ordinary or reasonable person can vary and will need to be appropriately considered depending on the context.

If a company makes wildly exaggerated claims that are intended to gain attention rather than make factual statements about a good or service, this is known as **puffery**. Under the ACL, such statements are not considered misleading or deceptive as they are obviously not to be treated seriously by the ordinary or reasonable consumer.

In order for a claim to be considered puffery, it must be obvious and self-evident to the ordinary and reasonable member of the target audience that it is not meant to be taken seriously.

Puffery often includes:

- quirky or abnormal language
- imprecise and indefinite claims
- exaggerated and self-serving claims
- a high level of generality.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying misleading or deceptive conduct, you may be asked to demonstrate this skill by applying the elements of misleading or deceptive conduct to a given scenario. For example, this might mean you need to consider whether a claim made by a business is misleading or deceptive, or whether it is mere puffery.

LEGAL VOCABULARY

Puffery hyperbolic, unrealistic, or vague claims about a good or service that no one could possibly treat seriously or find misleading.

DEEP DIVE

The best of puffery in advertising

When advertising, many companies will use puffery to enhance the appearance and perception of their products. This is not considered misleading or deceptive conduct as the claims these businesses are making are clearly hyperbolic and would not misguide an ordinary or reasonable person.

Some common examples of puffery are:

- 'Open a Coke. Open happiness'. Any ordinary or reasonable person understands that opening a bottle or can of Coca-Cola is not guaranteed to provide them with a feeling of happiness.
- 'The happiest place on Earth'. As happiness is an emotional perception and is, therefore, considered subjective, the ordinary or reasonable person understands that Disneyland is not necessarily the happiest place on Earth for all people.
- 'America runs on Dunkin'. The ordinary or reasonable person is aware that America does not literally operate on Dunkin' Donuts.



Image: Konstantin Yolshin/Shutterstock.com

Figure 6 Disneyland advertises itself as 'The happiest place on Earth', using puffery in its advertising

Limitation of actions for misleading or deceptive conduct 2.1.10.3

There is a **limitation of actions** for misleading or deceptive conduct claims, meaning a plaintiff has a specific amount of time within which they can take action. Under s 236 of the ACL, 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 arising. The cause of action is the date the alleged misleading or deceptive conduct occurred.

KEY TERM

Limitation of actions a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.

HYPOTHETICAL SCENARIO



Image: Wstockstudio/Shutterstock.com

Figure 7 Enzo is instigating proceedings against Cool and Fresh Pty Ltd after it refused to honour the warranty on his broken air conditioner

Enzo's breath of fresh air

In the middle of a brutal Australian summer, Enzo's air conditioner fails and only blows hot air. He bought the air conditioner seven years ago but remembers the warranty covers such occurrences for up to eight years. Enzo double-checks the warranty documentation which confirms complete unit failure is covered.

When he rings the manufacturer, Cool and Fresh Pty Ltd, it informs him that he is not covered. This is because his warranty only applies during the wintertime. He asks where this is stated and it informs him that there are two parts to the warranty; the consumer warranty and the retailer warranty. The retailer warranty is briefly mentioned in the consumer warranty but there are no details on how to access it.

Enzo believes that this is actively misleading under the ACL. Luckily, the limitation of actions still permits him to instigate proceedings against Cool and Fresh Pty Ltd as under the ACL, the six-year period begins after the day the cause for action occurred.

Here, the cause for action was the phone call to Cool and Fresh, where it informed him of the retailer warranty.

Lesson summary

- Misleading or deceptive conduct is a type of civil law that primarily aims to protect the rights of consumers during commercial transactions.
- The four elements of misleading or deceptive conduct are:
 - a person
 - in trade or commerce
 - engage in conduct
 - misleading or deceptive or likely to mislead or deceive.
- The limitation of actions for misleading or deceptive conduct outlines that misleading or deceptive conduct claims must be made within six years of the cause of action arising.

7G Questions

Check your understanding

Question 1

The law that governs misleading or deceptive conduct for Australia is:

- A. the *Australian Consumer Law and Fair Trading Act 2012*.
- B. s 18 of the Australian Consumer Law.

Question 2

Which of the following areas are protected by the Australian Consumer Law?

(Select all that apply)

- A. Product safety
- B. Guaranteed product replacements after seven years
- C. Consumer guarantees
- D. Product plagiarism rights

Question 3

Fill in the blanks with the following terms:

direct

indirect

When the ACCC initiates court proceedings against misleading or deceptive businesses, this is considered protection of consumer rights. However, when a Victorian consumer commences legal action against misleading or deceptive businesses, this is considered a protection of consumer rights.

Question 4

The four elements of misleading or deceptive conduct are:

- A. an individual, in finance or trade, engage in conduct, misleading or deceptive.
- B. a person, in trade and commerce, misleading conduct, likely to mislead or deceive.
- C. a person, in trade and commerce, engage in conduct, misleading or deceptive or likely to mislead or deceive.

Question 5

The limitation of actions for misleading or deceptive conduct requires a person or business who feels they have been misled or deceived in a commercial transaction to initiate proceedings within six years of the cause of action.

- A. True
- B. False

Question 6

Puffery is considered misleading or deceptive conduct under the Australian Consumer Law.

- A. True
- B. False

Question 7

Misleading or deceptive conduct laws protect consumers from being falsely informed when making commercial transactions.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(1 MARK)

Define the term misleading or deceptive conduct.

Question 9

(2 MARKS)

Describe **one** element of misleading or deceptive conduct.

Question 10

(2 MARKS)

Outline the legislation that governs misleading or deceptive conduct.

Question 11

(3 MARKS)

Mee purchased a new apartment in St Kilda 'off the plan', meaning she committed to the purchase before the apartment was built. The plans Mee was shown when signing up for the purchase included a balcony facing south-west, with an accompanying pamphlet showing an image of a sunset and the claim 'Watch the sun set over St Kilda beach from your own private balcony'. When the apartment is finally built, the balcony is actually facing north and Mee is unable to see even a glimpse of beach from it

Explain how the limitation of actions for misleading or deceptive conduct may impact any claim Mee may have against the builder who sold her the apartment.

Question 12

(4 MARKS)

Savon was at a shopping centre and saw that the Hung Out to Dry store was having a sale. He was in need of a new washing machine and saw a sign that read:

'Voted the number 1 best washing machine in the world. Guaranteed 5 years of the greatest clothes washing with no faults and now 50% off!'

Savon was excited about the amazing offer and bought the washing machine. However, two years later, Savon's machine started breaking down and the inside of the drum was rusting. He called Hung Out to Dry and was told that he must have been using the wrong washing powder and was, therefore, the one at fault. When conducting further research, Savon found that his washing machine was never voted the best washing machine in the world.

Describe **two** elements of misleading or deceptive conduct that are relevant to Savon's case.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

Lacey recently purchased a knitting set from a telephone marketer who was from a local craft trader, Stitched Up. Following her purchase, she received her knitting kit but she was missing multiple inclusions, such as the wool and the knitting needles. After emailing Stitched Up, she was told that the wool and knitting needles were never to be included in the set and that she would now be invoiced for these inclusions. Despite this, Lacey's unsolicited consumer agreement confirmed that she was entitled to her missing inclusions.

Question 13

Which of the following statements are correct about the four elements of misleading or deceptive conduct in Lacey's case? **(Select all that apply)**

- A. As Stitched Up is a craft trader that sold the knitting kit to Lacey, the transaction occurred 'in trade and commerce'.
- B. The 'a person' element of misleading or deceptive conduct is unable to be met in Lacey's case as Stitched Up is a local trader and not a corporation.
- C. Lacey has no evidence of the local craft trader 'engaging in conduct', as they never tried to mislead or deceive her.
- D. Stitched Up has acted against their contract and failed to provide Lacey with the goods she is entitled to, therefore the trader was intending to 'mislead or deceive'.

Question 14

(6 MARKS)

Discuss the extent to which you believe Lacey's claim, for misleading or deceptive conduct, would be successful if it were tested in a court of law. Refer to **three** elements of misleading or deceptive conduct in your response.

Linking to previous learning**Question 15**

(3 MARKS)

With reference to misleading or deceptive conduct, outline **two** purposes of civil law.

7H Misleading or deceptive conduct – defences and remedies

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
 - possible remedies
 - the impact of the breach on the parties

7A 7B 7C 7D 7E 7F 7G 7H 7I



Image: Yevhen Prozhyrko/Shutterstock.com

Imagine you purchased a phone from a company that advertised the phone as 'waterproof'. After falling out of a kayak with your mobile phone in your pocket, you are dismayed to find the phone is no longer working. You contact the company but they refuse to replace the phone, claiming the phone was not supposed to be submerged, but 'should be able to withstand some moisture'. What should happen in this situation? Does the company have a good defence for its actions? Should you be entitled to a refund or some other remedy in this situation?

Lesson introduction

When a consumer or business files a misleading or deceptive conduct claim, there are various defences the defendant can utilise to refute the allegations and avoid the negative repercussions associated with misleading or deceptive conduct. However, if these defences are unsuccessful, there are remedies available to the plaintiff.

Possible defences to misleading or deceptive conduct 2.1.11.1

If a case of misleading or deceptive conduct is brought against an individual, company, or organisation, the best way for this party to defend itself is by challenging one of the elements of misleading or deceptive conduct. The defences a defendant can use against a claim for misleading or deceptive conduct are:

- not in trade or commerce
- not misleading or deceptive or likely to mislead or deceive
- confusion
- erroneous assumption.

USEFUL TIP

To defend misleading or deceptive conduct, a defendant can disprove two elements of this claim: in trade or commerce, and misleading or deceptive or likely to mislead or deceive. Therefore, it may be helpful to recall these two elements to help you remember the defences of 'not in trade or commerce' and 'not misleading or deceptive or likely to mislead or deceive'.

LESSON LINK

You learnt about misleading or deceptive conduct in **7G Misleading or deceptive conduct – elements**.

KEY TERM

In trade or commerce an element of misleading or deceptive conduct requiring that the conduct occurred during a commercial dealing or transaction, where goods and services were sold or purchased.

Not in trade or commerce 2.1.11.1

One of the four elements that must be proven for a successful misleading or deceptive conduct claim is **'in trade or commerce'**. Under s 18 of the Australian Consumer Law (ACL), this means that misleading or deceptive conduct only applies to activities associated with commercial dealings or transactions, where a product is sold or purchased. Therefore, if a defendant can prove that the relevant conduct occurred privately or did not involve a commercial dealing or transaction, they may not be found liable for misleading or deceptive conduct.

HYPOTHETICAL SCENARIO

Figure 1 RUFF publicly spoke out about Pawsome Leashes' torturous dog leashes to protect the welfare of Australian pets

A ruff case for local dogs

Pawsome Leashes is a commercial company that produces pet products in Australia. Last year, Pawsome Leashes created a pet collar that enabled dog owners to shock disobedient pets with an electric current when misbehaving. The Royal Union for Furry Friends (RUFF), the nation's leading animal protection agency, responded to the product launch in a public statement featured in an Australian newspaper, claiming the device was torturous and inhumane.

Following the release of this statement, Pawsome Leashes filed a claim against RUFF for misleading or deceptive conduct claiming that the public statement sought to incorrectly inform and deceive potential consumers. The case went to court and RUFF successfully disproved the element of 'in trade or commerce' as the court recognised that although RUFF and Pawsome Leashes are trading corporations that generate revenue, the comments that RUFF made to the newspaper were for educational purposes and not commercial in nature. Hence, RUFF was able to use the defence of 'not in trade or commerce' to disprove its liability.

Not misleading or deceptive or likely to mislead or deceive 2.1.11.2

A defendant can argue against a claim of misleading or deceptive conduct by claiming their conduct did not satisfy the element of being misleading or deceptive or likely to mislead or deceive. In order to disprove this element, the defendant must show their conduct is unlikely to lead an ordinary or reasonable member of the person's target audience into error.

HYPOTHETICAL SCENARIO

Figure 2 Shoe-la-la's imitation of Heel Your Sole's shoes was not enough to mislead or deceive consumers

The footwear fiasco

Heel Your Sole is a luxury shoe manufacturer and retailer. Another shoe distributor, Shoe-la-la, released a pair of shoes imitating Heel Your Sole's iconic stilettos and advertised them in a manner similar to its competitor. Consequently, Heel Your Sole commenced action against Shoe-la-la, arguing that consumers would be misled into believing Shoe-la-la's imitation stilettos were actually Heel Your Sole's iconic stilettos.

However, Heel Your Sole's claim was unsuccessful as the court recognised that purchasers of Heel Your Sole stilettos were generally of a younger demographic than Shoe-la-la's consumers. Therefore, Heel Your Sole's target audience would know about the existence of imitation products, like that of Shoe-la-la, and differentiate between the two stilettos. Consequently, Heel Your Sole's misleading or deceptive conduct claim was unsuccessful.

Confusion 2.1.11.1.3

When a misleading or deceptive conduct claim is made against a defendant, they can argue that confusion was the cause of the plaintiff's error. The defence of **confusion** requires the defendant to convince the court that whilst an ordinary or reasonable member of the target audience would be confused by their conduct, the conduct would not result in the audience actually being misled or deceived.

LEGAL CASE

McWilliam's Wines Pty Ltd v McDonald's System (Aust) Pty Ltd (1980) 33 ALR 394

Facts

McWilliam's, a wine manufacturer, produced an extra large bottle of its wine that was advertised and sold as 'The Big Mac', with the use of the term 'Mac' an ode to the 'Mc' in McWilliam's. However, the fast food company, McDonald's, sought an injunction to prohibit McWilliam's use of the term 'Big Mac'. McDonald's argued that it would cause customers to falsely believe there was a connection between the two companies.

Legal issue

In this case, the issue was whether customers would be confused by McWilliam's use of the phrase 'The Big Mac' or whether they would actually be misled or deceived into believing the wine was associated with McDonald's.

Decision

The court refused to award an injunction to McDonald's on the basis that although readers of McWilliam's advertisements might have been confused about the existence of a relationship between the companies, they would not actually have been misled into believing that such a connection occurred. The court recognised that although consumers may have wondered whether McDonald's had branched out into the wine industry, this mere confusion was not enough to establish misleading or deceptive conduct under s 18 of the ACL.

Significance

Therefore, this case highlights that although conduct may be confusing for some consumers, if it does not lead the target audience to draw a particular conclusion, then it is not considered misleading or deceptive conduct under the ACL.



Image: KULLAPONG PARCHERAT/Shutterstock.com

Figure 3 McDonald's claim was unsuccessful as whilst McWilliam's conduct may have been confusing, it was not considered misleading or deceptive conduct

KEY TERM

Confusion a defence to misleading or deceptive conduct in which it is claimed that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 2 VCE Legal Studies is to 'apply legal reasoning and principles to identify and argue the elements, possible defences and civil liability in relation to actual and/or hypothetical scenarios'. If studying misleading or deceptive conduct, you may be asked to demonstrate this skill by considering whether the facts of a given scenario suggest that a defence, such as confusion, might be successful if argued in court. This means you would need to consider whether an ordinary or reasonable member of the target audience would be puzzled by the conduct outlined in the scenario.

Erroneous assumption 2.1.11.1.4

Another defence against a misleading or deceptive claim is arguing that the error was due to the plaintiff's own **erroneous assumption**. This requires a defendant to convince the court that an ordinary or reasonable person in its target audience would not be led into error by its conduct, and rather, that the error had only occurred due to the plaintiff's own false assumptions. For example, a defendant seller can claim the plaintiff made an erroneous assumption about a product's features when deciding whether to purchase the product or not.

KEY TERM

Erroneous assumption a defence to misleading or deceptive conduct in which it is claimed that an error by the plaintiff was caused by the plaintiff's own incorrect assumption.

LESSON LINK

You learnt about an ordinary or reasonable person in **7D Defamation - elements**.

LEGAL CASE



Image: Paskaran.T/Shutterstock.com

Figure 4 Bega successfully filed a misleading or deceptive conduct claim against Kraft after it continued to trade with similar branding on its peanut butter

Kraft Foods Group Brands LLC v Bega Cheese Ltd (2020) 377 ALR 387

Facts

In 2017, Mondelez Australia, the Australian business that operates under Kraft, was sold to Bega. Bega gained ownership over the peanut butter portion of Kraft's business and its products. However, following this, Kraft continued to sell its peanut butter with the exact same branding, look, colour, and feel, known as the product's 'trade dress'. Bega filed a case against Kraft, arguing it had acquired the trade dress for Kraft's peanut butter when it purchased Mondelez, and therefore should be the only business able to sell peanut butter with this appearance. Kraft argued that Bega did not acquire the trade dress for the peanut butter when it purchased Mondelez and that a consumer would only mistakenly purchase Kraft peanut butter instead of Bega due to an erroneous assumption.

Legal issue

The issue was whether the similar branding and trade dress of the Kraft peanut butter and Bega peanut butter would be sufficient to mislead a person or whether such an error would be the result of an individual consumer's erroneous assumption.

Decision

The court ruled that Bega acquired all rights to the trade dress of the peanut butter following the purchase of Mondelez and that the ordinary or reasonable person would believe Kraft and Bega peanut butter were associated because of their similar packaging. The court determined believing the two were associated would not be a result of an erroneous assumption. The trade dress of Kraft's peanut butter was already well-established amongst consumers, so continuing to trade with this branding would likely mislead customers into believing that the Bega and Kraft products were related.

Significance

In some cases where a brand or business has a long-established reputation, an erroneous assumption is less likely to be considered a valid argument as a defence for misleading or deceptive conduct.

Possible remedies for misleading or deceptive conduct 2.1.11.2

In a case of misleading or deceptive conduct, a **remedy** is a court order designed to restore a plaintiff to the position they were in prior to the conduct occurring.

A consumer or business who succeeds in a misleading or deceptive conduct claim may ask the court to order particular remedies, including:

- entitling the plaintiff to reject the goods and obtain a refund of the purchase price
- instructing the defendant to repair the item
- instructing the defendant to replace the item
- receiving compensatory **damages** for any additional loss caused by the misleading conduct.

When the Australian Consumer and Competition Commission (ACCC) makes a successful misleading or deceptive conduct claim against a defendant, the court may impose a **pecuniary penalty**. This financial punishment aims to deter businesses from exploiting imbalances of power between themselves and consumers.

KEY TERMS

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.

LEGAL VOCABULARY

Pecuniary penalty a monetary fine that is imposed and collected exclusively by civil courts.

LESSON LINK

You will learn more about remedies in **9B Types of remedies**.

Lesson summary

- In a misleading or deceptive conduct claim, the defendant can utilise various defences to argue their case and prove that they did not intend to mislead or deceive.
- Defences for misleading or deceptive conduct include disproving the elements of a misleading or deceptive conduct claim, by arguing the conduct was:
 - not in trade or commerce
 - not misleading or deceptive or likely to mislead or deceive.
- If a plaintiff proves all the elements of a misleading or deceptive conduct claim, the defendant can rely on the defences of:
 - confusion
 - erroneous assumption.
- Remedies are court orders that a plaintiff can receive in order to compensate and return them to their original position prior to the misleading or deceptive conduct, and include:
 - receiving a refund
 - receiving a repaired item
 - receiving a replacement item.

Table 1 Summary of defences for misleading or deceptive conduct

Defence	Explanation
Not in trade or commerce	The defendant argues that the relevant conduct did not involve a commercial dealing or transaction, disproving this element of misleading or deceptive conduct.
Not misleading or deceptive or likely to mislead or deceive	The defendant argues that its target audience would not be misled or deceived by its conduct, disproving this element of misleading or deceptive conduct.
Confusion	The defendant argues that the conduct, whilst confusing, was not intended to mislead or deceive.
Erroneous assumption	The defendant argues that an ordinary person would only be led into error due to their own incorrect assumptions.

7H Questions

Check your understanding

Question 1

Defences against misleading or deceptive conduct enable a defendant to argue their case and prove they were not liable for the plaintiff's claim.

- A. True
B. False

Question 2

Fill in the blanks with the following terms:

in trade or commerce

confusion

When a defendant argues that the error did not occur via a dealing or transaction, the element of is disproved, preventing the defendant from being found liable for the loss of the plaintiff. A defendant can also use the defence of by arguing that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.

Question 3

Proving an ordinary or reasonable member of the target audience would not be deceived or misled by conduct, and that such deception would only occur due to the plaintiff's false ideas, is the defence of:

- A. not in trade or commerce.
- B. confusion.
- C. erroneous assumption.
- D. not misleading or deceptive or likely to mislead or deceive.

Question 4

Under s 18 of the ACL, the defendant must prove that an ordinary or reasonable person of the particular class, being the defendant's target audience, would not be misled or deceived by their conduct.

- A. True
- B. False

Question 5

Which of the following are examples of remedies for misleading or deceptive conduct? **(Select all that apply)**

- A. Allowing the plaintiff to reject the goods and obtain a refund.
- B. Instructing the defendant to replace or repair the item.
- C. Supporting the plaintiff to write negative reviews online about the business and its products.
- D. Providing the plaintiff with \$1000 of monetary compensation regardless of the outcome.

Question 6

Fill in the blanks with the following terms:

plaintiff

defendant

Defences to misleading or deceptive conduct are important in allowing the [] to argue their case. On the other hand, remedies for misleading or deceptive conduct are ordered for the benefit of the [] .

Preparing for exams

Standard exam-style

Question 7

(1 MARK)

Define the term 'erroneous assumption'.

Question 8

(2 MARKS)

With regard to the Australian Consumer Law, outline the defence of 'not in trade or commerce'.

Question 9

(3 MARKS)

Explain **one** possible defence to misleading or deceptive conduct.

Question 10

(4 MARKS)

Elordi's is a streaming service in Australia that advertises using the slogan 'Elordi's is for everyone, everywhere'. However, a new customer of the business, Jacob believes Elordi's may have engaged in misleading or deceptive conduct, because he was unable to use the streaming service when he was in England.

Assuming Elordi's had to defend a claim for misleading or deceptive conduct, identify **four** possible defences to misleading or deceptive conduct it may be able to use.

Question 11

(4 MARKS)

Kari believes she has a misleading or deceptive conduct claim against ZoomAir airline after she purchased a flight from Melbourne to Auckland based on advertising that she could 'be in New Zealand in less time than it takes to cook a roast dinner'. Kari booked an onward journey from Auckland to New York departing just a few hours after the departure of the Melbourne flight, thinking she'd arrive in plenty of time to make the second flight. The flight to Auckland took much longer than cooking a roast dinner and Kari missed her flight to New York.

Explain **one** possible defence to misleading or deceptive conduct that ZoomAir could claim and **one** possible remedy that Kari could seek.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Lucy was listening to the radio and heard the following advertisement from phone manufacturer, Yao:

'The all-new y-Phone! Yao's newest and best device on the market, with all new listening features, including the ability to control music using the famous Yao headphones.'

Consequently, Lucy ordered Yao's y-Phone online and was disappointed when the phone did not come with the brand's headphones. Lucy felt that by mentioning the ability to listen to music, the advertisement implied headphones would be included with the purchase.

Question 12

Which of the following statements are correct about defences and remedies in relation to the dispute between Lucy and Yao? **(Select all that apply)**

- A. Yao could use the defence of erroneous assumption and argue that it was Lucy's own mistaken understanding that caused the error when purchasing the y-Phone.
- B. A remedy that provides Lucy with a second phone from Yao to compensate for the error is highly appropriate.
- C. The defence of not misleading or deceptive could be used by Yao as its radio advertisement was intended to scam Lucy and lead her into error.
- D. Lucy could use the defence of confusion as she was confused by Yao's conduct.
- E. Lucy could request a remedy that entitles her to a refund from Yao.

Question 13

(5 MARKS)

Justify **two** possible defences to misleading or deceptive conduct that Yao could raise in this situation and outline **one** remedy that could be sought by Lucy if Yao's defences fail and it is found liable.

Linking to previous learning**Question 14**

(2 MARKS)

Outline how the limitation of actions may influence a plaintiff when seeking possible remedies for misleading or deceptive conduct.

71 Misleading or deceptive conduct - impact

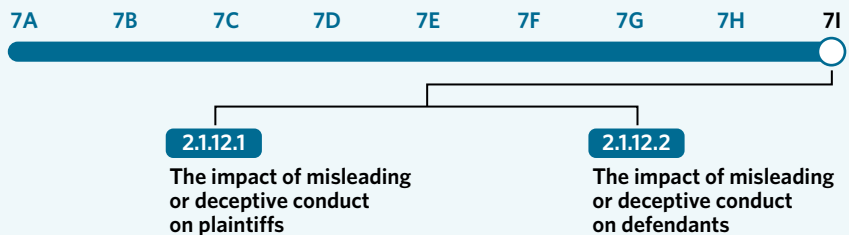


Image: Kikujarm/Shutterstock.com

At a school fete, you enter a raffle. Your ticket wins you an all-expenses paid trip to China for three weeks, promising a luxurious getaway for the winner and two family members. You are set to leave in four weeks. You have spent money on clothes for hiking the Great Wall, buying a sim card, and getting new luggage. Your two sisters have taken the month off work. A week before you are set to leave, the raffle company reveals the prize was for a motel stay in Chinatown, Melbourne. You and your sisters are extremely disappointed, you have lost money, and you feel deceived.

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
 - possible remedies
 - the impact of the breach on the parties



LESSON LINK

You learnt about the Australian Consumer Law (ACL) in **7G Misleading or deceptive conduct - elements**.

Lesson introduction

Misleading or deceptive conduct is governed by s 18 of the Australian Consumer Law (ACL) and exists to protect parties, including individuals, businesses, and suppliers, when completing commercial transactions, such as purchasing goods and services from a business. A breach of s 18 of the ACL not only has negative consequences on the defendant, such as damaging their reputation, but also has detrimental impacts on the plaintiff. Misleading or deceptive conduct often has financial, emotional, and psychological impacts on both the plaintiff and defendant.

The impact of misleading or deceptive conduct on plaintiffs 2.1.12.1

In the case of misleading or deceptive conduct, the plaintiff is usually financially impacted by the error that has occurred. However, they may also experience emotional and psychological impacts as a result of being misled or deceived. It is important to note that many cases involving misleading or deceptive conduct will not need to be resolved in a court, so the consumer who has been affected by the misleading or deceptive conduct would not necessarily be referred to as a plaintiff in that case. Many disputes over claims of misleading or deceptive conduct are resolved informally or with the help of an organisation such as **Consumer Affairs Victoria (CAV)**. Some disputes may also use **mediation** as a means of resolution. The word 'plaintiff' is used in this section to mean the consumer whose rights have potentially been breached by misleading or deceptive conduct, and who has taken the claim to court.

LEGAL VOCABULARY

Consumer Affairs Victoria (CAV) the Victorian civil complaints body that provides information and helps resolve disputes to create a fair and competitive marketplace for consumers and businesses.

Mediation a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.

Table 1 The impact of misleading or deceptive conduct on plaintiffs or consumers

Impact	Explanation
Psychological impact	When a consumer is misled or deceived by a business, they are likely to experience distrust in society, especially commercial and trading institutions. Consequently, they may be paranoid and mentally traumatised by the experience, thus preventing them from visiting certain locations and purchasing products they once enjoyed. This can ultimately lower the plaintiff's quality of life and standard of living.
Emotional impact	Initiating a misleading or deceptive conduct claim against a business, especially one with great influence and power, can be stressful and draining. A plaintiff may experience feelings of anger, anxiety, and manipulation both during and after misleading or deceptive conduct, particularly when confronting situations of a similar nature.
Financial impact	Misleading or deceptive conduct claims are made in response to goods or services a consumer has purchased. Therefore, plaintiffs have likely already incurred direct financial losses associated with the price they paid for the item. However, misleading or deceptive conduct claims often have other costs, especially if the case is taken to court. A plaintiff may incur costs associated with a loss of income if they attend court, pay for legal fees, and cover administrative expenses to receive a replacement product.

HYPOTHETICAL SCENARIO

Under the hammer

Damon is a successful property developer and owns Matthew's, a home renovations business. Two months ago, Damon purchased a block of land from a real estate company, which informed him that a luxury outdoor park and reservoir were to be developed in the adjacent area. However, last week, Damon was told that this was not true. He spent a large proportion of his business's money on purchasing this block, believing it was a favourable investment for the future of Matthew's. Damon has since sought legal advice and is preparing to file a misleading or deceptive conduct claim against the real estate company. However, Damon is already feeling the financial and emotional burdens of this loss. His legal fees are not cheap and the business operations of Matthew's are at a stand-still as a result of the case, minimising his income. The stress of managing his business and navigating the legal situation is also taking its toll.



Figure 1 Damon was falsely led into purchasing a block of land and is already facing the consequences

The impact of misleading or deceptive conduct on defendants 2.1.12.2

The impacts of a case of misleading or deceptive conduct on a defendant may occur both during and after the claim has been made. These impacts include reputational damage, emotional stress, and financial losses.

Table 2 The impact of misleading or deceptive conduct on defendants

Impact	Explanation
Tarnished reputation	A business that is found liable for misleading or deceptive conduct is likely to have a tarnished reputation. The business's honesty and integrity may be questioned and loyal consumers may turn to industry competitors to purchase their products from instead of the business. The way a defendant interacts with other businesses following a misleading or deceptive conduct claim may be negatively impacted. For example, the defendant may lose business partnership opportunities or suppliers may be unwilling to engage with them anymore.
Emotional impact	Defending a misleading or deceptive conduct claim, especially one that is untrue, may take a significant toll on a defendant. The stress, potential embarrassment, and reputational damage a defendant may endure can lead to a lower quality of life and decreased level of personal wellbeing for the individual's involved. As defendants to misleading or deceptive conduct claims are usually businesses, it is the owners or managers of the business who could suffer adverse emotional effects, as well as any employees who may have been responsible for the conduct.
Financial impact	If a plaintiff successfully pursues a misleading or deceptive conduct claim, the liable individual or business can face significant costs, including: • paying damages to the plaintiff • repair or replacement costs • their own and a portion, or the entirety, of the plaintiff's legal fees. If found liable for misleading or deceptive conduct, a defendant may also face additional costs imposed by the Australian Competition and Consumer Commission (ACCC) or the Australian Securities and Investments Commission (ASIC). Part IV of the <i>Competition and Consumer Act 2010</i> (Cth) entitles the courts to penalise individuals or businesses that engage in misleading or deceptive conduct. Penalties include a maximum payment of one of the following options, depending on which is most significant in amount: • \$50,000,000 • three times the value of the benefit the defendant received from the conduct • 30% of the defendant's adjusted turnover for the next 12 months. As a result of its tarnished reputation, the business may also experience a decrease in business sales and profits as customers purchase from competitors.

LEGISLATION*Competition and Consumer Act 2010 (Cth)*

Image: kailim/Shutterstock.com

Figure 2 Optus has been found to be misleading or deceptive to Australian consumers on multiple occasions**WANT TO KNOW MORE?**

Telecommunications company, Optus, has been involved in various misleading or deceptive conduct claims throughout its history and has been forced to pay up to \$10 million as a result of such behaviour. You can find out more about Optus' unlawful, commercial practices and its impact on the business by searching 'Optus' misleading or deceptive conduct' and exploring the relevant 'Australian Competition and Consumer Commission (ACCC)' webpages.

LEGAL CASE**Google Inc v Australian Competition and Consumer Commission (2013) 249 CLR 435****Facts**

When conducting a Google search, two types of search results appear, including organic results, which are based on relevance, and sponsored results, which companies pay for as advertisements. In 2013, Google was tried in the Federal Court by the Australian Competition and Consumer Commission (ACCC) after it claimed that Google's sponsored links were misleading consumers. This is because businesses were able to pay to have their website links appear when a consumer searched online for a competitor's website. Google claimed that the appearance of sponsored links was determined by its AdWords program, a software that uses a keyword algorithm to associate businesses and products with Google searches.

Legal issue

The issue was whether Google should be held responsible for the misleading or deceptive conduct that was created through the AdWords program.

Decision

The Federal Court initially found that Google was liable for misleading or deceptive conduct as it had acted to mislead or deceive customers through its sponsored links. However, Google appealed this decision in the High Court, which ultimately reversed the Federal Court's finding because Google did not actually author or endorse the sponsored links.

Significance

This case highlights the various considerations associated with search engine advertising, including which party should be held accountable for ensuring communications do not mislead or deceive consumers. The case also shows that the impacts of a legal case can be felt by all parties involved.



Image: Sundry Photography/Shutterstock.com

Figure 3 The High Court reversed a decision that Google misled or deceived customers through sponsored links

Lesson summary

- Misleading or deceptive conduct can have various impacts on both plaintiffs and defendants ranging across their financial, emotional, psychological, and reputational wellbeing.
- In some cases, the process and overall outcome of such a claim may cause more harm than good for the plaintiff, especially if the compensation received does not cover the financial and personal costs endured, or they are unsuccessful in their claim.

71 Questions

Check your understanding

Question 1

Misleading or deceptive conduct will only negatively impact a plaintiff if their claim against the defendant is not successful.

- A. True
- B. False

Question 2

(Select all that apply)

Financial impacts of a misleading or deceptive conduct claim on a plaintiff include:

- A. legal fees.
- B. loss of income.
- C. paying the defendant to appear in court.
- D. the price they paid for the item.

Question 3

Fill in the blank with **one** of the following terms:

liable

not responsible

guilty

If a defendant is found to be [] for misleading or deceptive conduct, this can cause consumers to question their honesty and integrity, potentially causing them to seek alternative businesses.

Question 4

Under the ACL, the courts can penalise corporations up to \$50,000,000 for engaging in misleading or deceptive conduct.

- A. True
- B. False

Question 5

When a consumer is misled or deceived:

- A. they may feel more trusting and comfortable when purchasing goods or services from a business.
- B. their distrust and paranoia, when making purchases, is likely to increase.

Question 6

Fill in the blanks with the following terms:

defendant

plaintiff

Whilst a misleading or deceptive conduct claim is initiated by a [] to compensate for their loss, they are likely to be further impacted by this claim, both financially and emotionally, alongside the [] .

Preparing for exams**Standard exam-style****Question 7**

(4 MARKS)

Chirag purchased a juicer from Emily. Emily falsely advertised the juicer as having state-of-the-art juicing technology in an attempt to increase the business' sales after a period of financial loss. After discovering the juicer lacked any sophisticated technology, Chirag filed a misleading or deceptive conduct claim.

Outline **two** impacts of misleading or deceptive conduct on Chirag and **two** impacts on Emily in the scenario.

Question 8

(4 MARKS)

'Misleading or deceptive conduct will only impact a plaintiff, as the defendant is not held accountable for their actions.'

To what extent do you agree with this statement?

Extended response

Use your answer to question 9 to support your response to question 10.

Use the following information to answer questions 9 and 10.

Scotty filed a misleading or deceptive conduct claim against Enter Your Cam-Era after it failed to acknowledge the warranty on his camera, stating the shutter fault was not due to technological error but overuse. The plaintiff requires the camera for his job as a professional photographer and invested a large sum of money in what he believed was a high-quality product for this reason. Scotty has been unable to work as a result of this error and is desperately seeking compensation in order to financially support himself.

Question 9

Tick the box to indicate whether each of the following statements are **true** or **false** about the impact of Enter Your Cam-Era's misleading or deceptive conduct on Scotty.

Statement	True	False
I. Scotty may be positively impacted if he pursues the case in court and is awarded damages, a replacement or repair of the camera, and/or payment of his legal fees.	☐	☐
II. Enter Your Cam-Era's misleading or deceptive conduct towards Scotty may have induced feelings of distrust and the experience could psychologically traumatise him when making large investments in his camera equipment in future.	☐	☐
III. Following the misleading or deceptive conduct, Scotty may have experienced feelings of greater trust and loyalty towards Enter Your Cam-Era.	☐	☐
IV. Scotty is currently not being financially impacted by the faulty camera and conduct of Enter Your Cam-Era.	☐	☐

Question 10

(6 MARKS)

Discuss the impacts on Scotty bringing his misleading or deceptive conduct claim to court.

Linking to previous learning

Question 11

(4 MARKS)

Identify **one** element of misleading or deceptive conduct and explain how raising a defence against this element can impact a defendant.

UNIT 2 AOS 2

Remedies

Remedies may be available to a wronged party where there has been a breach of civil law. In this area of study, students develop an appreciation of how civil disputes are resolved, including the methods and institutions available to resolve disputes, and the purposes and types of remedies. Through an investigation of civil cases from the past four years, students apply their knowledge to discuss the effectiveness of remedies and the ability of the civil justice system to achieve the principles of justice.

Outcome 2

On completion of this unit the student should be able to explain the key concepts in the resolution of a civil dispute, discuss the principles of justice in relation to experiences of the civil justice system, and discuss the ability of remedies to achieve their purposes.

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KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about civil law and recent civil cases
- describe the institutions that resolve civil disputes
- explain the role of the Victorian courts and juries in civil disputes
- discuss the principles of justice in relation to experiences of the civil justice system
- discuss the ability of remedies to achieve their purposes
- synthesise and apply legal information to actual and/or hypothetical scenarios.

Image: Bidgee/Wikimedia

8

CHAPTER 8

The Victorian civil justice system

LESSONS

- 8A** The principles of justice in the civil justice system
- 8B** Methods of civil dispute resolution
- 8C** Institutions that resolve civil disputes
- 8D** Civil jurisdictions of Victorian courts
- 8E** The jury in a civil trial
- 8F** First Nations people and the civil justice system
- 8G** Difficulties faced by some groups in the civil justice system

KEY KNOWLEDGE

The principles of justice and experiences of the civil justice system

- 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 difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas.

8A The principles of justice in the civil justice system



Image: Luisa Leal Photography/Shutterstock.com

In a game of snakes and ladders, the ladders are beneficial, whilst snakes cause setbacks. Aspects of the civil justice system can be compared to these snakes as they cause certain groups to be disadvantaged, compared to other groups who may have advantageous access to 'ladders' to justice. In an ideal system where all the principles of justice are achieved, there would be no snakes or ladders.

STUDY DESIGN DOT POINT

- the principles of justice: fairness, equality and access

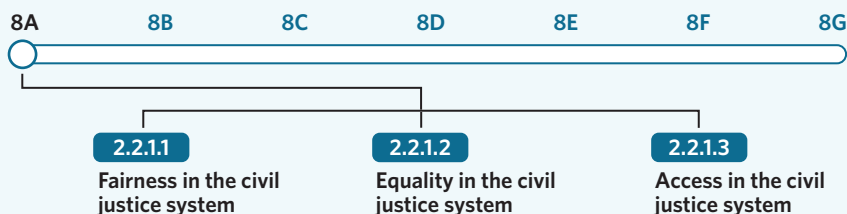


Figure 1 The principles of justice



Lesson introduction

The Victorian civil justice system is grounded by the principles of justice, which serve as a foundational framework for evaluating the achievement of justice. These principles embody the underlying purposes of the justice system, including its availability to everyone and that all individuals are treated equally and receive fair treatment. The civil justice system's processes, policies, and institutions can be assessed to determine whether they uphold these principles.

Fairness in the civil justice system 2.2.1.1

The principle of **fairness** is central to the civil justice system as each plaintiff has the ability to protect their civil rights before the law, and each defendant is able to defend themselves against claims. In Victoria's civil justice system, this is achieved through a variety of legal principles and procedures.

Table 1 Legal principles, procedures, or institutions that achieve fairness in a civil dispute

Legal principle, procedure, or institution	How it contributes to the achievement of fairness
The burden of proof lies with the plaintiff	Given the plaintiff is pursuing a claim, the onus is on them to prove the facts against, and liability of, the defendant. It is not the responsibility of the defendant to prove they are not liable, as this would be unfair.
The standard of proof is on the balance of probabilities	The standard of proof in civil disputes is lower than that of criminal cases. This is because imprisonment is never a consequence of a civil claim, meaning no one's freedom is at risk. In a civil dispute, it is usually one person suing another person, whereas, in criminal trials, it is the state against one person. The law perceives the two parties to be on equal footing in a civil dispute, thus the standard of proof is lowered, to lead to a fairer outcome. If the standard of proof was the higher threshold of 'beyond reasonable doubt' in civil disputes, plaintiffs may struggle to prove a defendant's liability, impeding their ability to participate in the civil justice system.

Continues →

KEY TERM

Fairness the principle that all people can participate in the justice system and its processes should be impartial and open.

LESSON LINKS

You learnt about the burden of proof and the standard of proof in **6B Key concepts of civil law**.

You learnt about plaintiffs and defendants in **6C Plaintiffs and defendants**.

Table 1 Continued

Legal principle, procedure, or institution	How it contributes to the achievement of fairness
The defendant has the opportunity to present their case	The defendant has the right to defend a civil claim by raising defences to disprove the plaintiff's case. They also have the opportunity to present their own evidence and witnesses if they wish to do so, ensuring this party can participate in civil proceedings.
An independent judge and/or jury adjudicates civil disputes	The judge and jury must be impartial and unbiased, basing their decisions solely on the facts of the case. A civil jury can be used in civil cases if requested by a party. Juries can contribute to fairness as they represent a cross-section of the community and should therefore make a decision about liability that reflects community values and is impartial.
Reducing delays	Reducing delays in legal proceedings can alleviate the stress and anxiety experienced by the parties. Delays can be reduced in the civil justice system by: - the structure of the Victorian court hierarchy. - using alternative methods of resolving civil disputes, such as mediation. - the presence of civil bodies that can resolve disputes outside of the courts, such as the Victorian Civil and Administrative Tribunal (VCAT) and Consumer Affairs Victoria (CAV). This ensures more people in Victoria can participate in resolving a civil dispute in the courts as the court's backlog of cases can be limited.

LESSON LINKS

You will learn more about a jury in a civil trial in **8E The jury in a civil trial**.

You will learn more about the Victorian court hierarchy in relation to civil disputes in **8D Civil jurisdictions of Victorian courts**.

You will learn more about alternative methods of civil dispute resolution in **8B Methods of civil dispute resolution**.

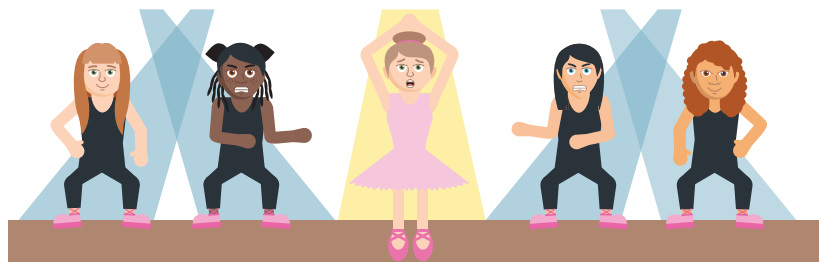
LEGAL VOCABULARY

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes.

Consumer Affairs Victoria (CAV) the Victorian civil complaints body that provides information and helps resolve disputes to create a fair and competitive marketplace for consumers and businesses.

HYPOTHETICAL SCENARIO
Ballet burden of proof

Melissa brought a case against Kelly after a fight at a ballet concert broke out and many of Melissa's expensive costumes were damaged. Kelly is relieved when she finds out the burden of proof is on Melissa, as she is the plaintiff. Therefore, it is Melissa who must prove Kelly is more likely liable than not as the standard of proof is on the balance of probabilities. Kelly believes this upholds fairness as Melissa initiated the case and, therefore, should be the one to prove her case.


Figure 2 The burden of proof is on Melissa as she initiated the civil claim against Kelly

USEFUL TIP

In your responses, avoid using the word 'fair' to define 'fairness'. Instead, try using words such as 'impartial', 'just', or 'open'.

USEFUL TIP

Although the principles of justice are the same in both criminal and civil contexts, it is important to use the correct language when referring to the civil justice system. Remember the parties in a civil dispute are the plaintiff and the defendant and the standard of proof is 'on the balance of probabilities'. Make sure to practise analysing the principles of justice in relation to both criminal and civil law.

Equality in the civil justice system 2.2.1.2

The principle of **equality** aims to ensure the uniform treatment of all individuals in the civil justice system. However, equal treatment does not necessarily eventuate to equitable outcomes. In such circumstances, appropriate actions should be taken to rectify these inequalities. In the civil justice system, the principle of equality is crucial to prevent discrimination based on personal attributes, such as age, gender, wealth, native language, ethnicity, and religion. Victoria's civil justice system implements several legal principles and procedures to contribute to equality.

Table 2 Legal principles, procedures, or institutions that achieve equality in a civil dispute

Legal principle, procedure, or institution	How it contributes to the achievement of equality
Court procedures are applied equally to both parties engaged in a civil dispute	Procedures in the courts are applied in the same manner in all civil cases, regardless of personal characteristics, such as age, gender, wealth, language background, ethnicity, or religion. However, if a party is self-represented, the judge has an obligation to assist them to understand the proceedings, in order to encourage equal footing between the parties.
The rule of law prevents any community members from being exempt from the law	Under the rule of law , all members of the community are held to the same standards of behaviour set by civil law. For example, those in more powerful positions in society, such as Members of Parliament, police officers, and wealthy individuals, are not entitled to preferential treatment by the courts as a plaintiff or a defendant.
An independent judge and/or jury adjudicates civil disputes	The judge and jury must strive to be impartial and unbiased, basing their decisions solely on the facts and not the characteristics of the plaintiff or the defendant. Jury members with preconceived ideas or biases about either party will be found ineligible to be a jury member for the particular case.
Organisational support	Organisations, such as Victoria Legal Aid (VLA) , provide extra support to individuals who do not have the resources to uphold their civil rights, leading to more equitable outcomes. The government provides funding to these organisations to provide free legal advice and information, so everyone, not just those with money, has the ability to uphold their rights in the civil justice system.
Alternative methods of civil dispute resolution	Legal representation is usually not required for methods of dispute resolution outside the courts, such as mediation. Therefore, unrepresented parties, who may be unable to afford legal representation, are not disadvantaged. The more flexible nature of these alternative dispute resolutions, compared to the courts, which are bound by strict rules, also allows both parties involved in the dispute to equally present their arguments and discuss the issue at hand.

While equality is often associated with equal treatment of all people, it is more accurately described as an equal result for everyone involved. Equality can be attained by ensuring individuals ultimately reach the same outcome, which may require treating them differently through the use of equitable policies. Equity can be described as the mechanisms in place to ensure those who face difficulties before the law, such as people of colour, people with disabilities, or people with mental health issues, are still able to reach the same result as those who are not disadvantaged by the judicial system.



KEY TERM

Equality the principle that all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage.

LEGAL VOCABULARY

Rule of law the principle that the law applies to everyone equally regardless of status.

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

USEFUL TIP

In your responses, avoid using the word 'equal' to define 'equality'. Instead, try using words such as 'the same', 'equivalent', or 'without disparity/ disadvantage'.

Thus, an example of an equitable mechanism in the Victorian civil justice system is the presence of alternative methods of dispute resolution, such as the procedures provided by the Victorian Civil and Administrative Tribunal (VCAT). VCAT provides low-cost dispute resolution, allowing people to access civil justice for a lower cost. This is an equitable policy implemented by the government to ensure all people have the ability to reach the same legal outcomes regardless of socioeconomic status.

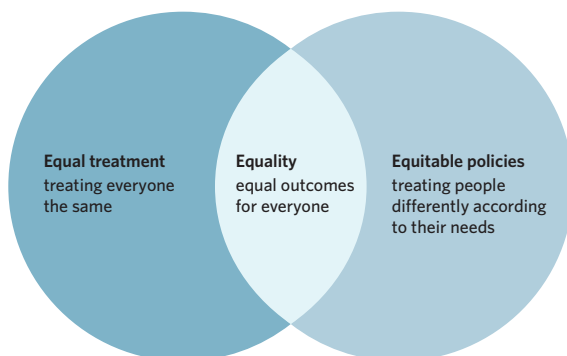


Figure 3 Understanding the relationship between equal treatment and equitable policies

REAL WORLD EXAMPLE

Never an easy day at the office

In February 2023, the federal independent Member of Parliament (MP) for Kooyong, Monique Ryan, was ordered by the Federal Court of Australia to partake in court-ordered mediation. The dispute was brought forward by Ms Sally Rugg, Ryan's former chief of staff, who alleged she was told her employment was being terminated due to her refusal to work 'unreasonable' hours. She sought an injunction to keep her job and pursued compensation from the Commonwealth, as well as Dr Ryan, for their alleged breaches of the *Fair Work Act 2009* (Cth).

The fact the court ordered Ryan to attend mediation illustrates that Members of Parliament are not above the law and must still comply with legislation and orders issued by the courts. Thus, the rule of law is upheld as the law applies to all people equally, including MPs. The use of mediation can also be seen as a procedure promoting equality for parties as, if either Rugg or Ryan were unable to afford legal representation, they would not be disadvantaged since mediation can occur without the presence of legal representation.

Adapted from 'Sally Rugg accepts \$100,000 to settle workplace dispute with MP Monique Ryan' (Karp, 2023)



Image: Benjamin Crone/Shutterstock.com

Figure 4 Federal MP, Monique Ryan, was ordered by the Federal Court to engage in mediation with her former employee

LEGISLATION

Fair Work Act 2009 (Cth)

Access in the civil justice system 2.2.1.3

The principle of **access** aims to ensure everyone has the opportunity to participate in the civil justice system and its proceedings with adequate knowledge. In the civil justice system, access is crucial as it allows parties to comprehend their legal entitlements and the different elements involved in their dispute. In Victoria's civil justice system, access is enabled through a range of legal principles and procedures.

Table 3 Legal principles, procedures, and institutions that achieve access in a civil dispute

Legal principle, procedure, or institution	How it contributes to the achievement of access
Reducing delays	Delays are reduced in the civil justice system in various ways, including: - courts often refer parties to alternative methods of dispute resolution, such as mediation, before attempting to resolve an issue in the courts, reducing a court's caseload. - the Victorian court hierarchy allowing courts to process cases with greater efficiency due to the court's organisation. Reducing delays in legal proceedings can alleviate the stress and anxiety experienced by the parties, allowing efficient access to the legal system.
Alternative methods of civil dispute resolution	There are out-of-court settlement options for civil disputes where the parties negotiate with an independent third party who facilitates discussion and encourages, or determines, a fair resolution. This allows access to a just resolution in a timely manner as these methods are often cheaper to engage in.
Remedies awarded in a civil dispute	Damages and injunctions allow the plaintiff to be compensated and returned to their original position before the civil breach occurred. However, if the defendant does not have the capacity to pay the required damages, the plaintiff will not be adequately compensated.
The availability of translators	Court processes can be confusing for a defendant, particularly if English is not their first language. Therefore, in each court in the Victorian court hierarchy, the parties involved may be able to arrange an interpreter to ensure they can participate in civil proceedings on an informed basis. However, the party involved in the civil matter who requires the interpreter must arrange and pay for this service, not the courts.
Class actions	In a class action, costs are covered by the lead plaintiff or a third-party litigation funder. Therefore, individuals who cannot afford to initiate a civil claim alone can still access the justice system by joining a class action.



KEY TERM

Access the principle that all people should be able to engage with the justice system and its processes on an informed basis.

LESSON LINKS

You will learn more about damages and injunctions in **9B Types of remedies**.

You learnt about class actions in **6C Plaintiffs and defendants**.

LEGAL VOCABULARY

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts.

REAL WORLD EXAMPLE

Concussion clanger causes class action

Former football players, led by Jarad Maxwell Rooke from the Geelong Football Club, initiated a class action to gain compensation for serious damage suffered from concussions. The action was lodged in the Supreme Court of Victoria on behalf of all professional AFL players who have suffered concussion-related injuries over the course of training or playing AFL. 60 players came forward to join the class action, supporting the argument that the AFL failed to conduct risk assessments for head strikes and enforce adequate rules and policies. This is an example of how access is achieved through class actions as 60 football players are able to protect their civil rights and initiate a claim together.

Adapted from 'Landmark class action chases up to \$1bn compensation for alleged long term concussion damage to AFL players' (Australian Associated Press, 2023)



Image: Neale Cousland/Shutterstock.com

Figure 5 AFL players lodged a class action in the Supreme Court of Victoria

Lesson summary

The principles of justice are an essential aspect of the Victorian civil justice system.

- Fairness requires all processes to be impartial and open, allowing all people to participate if they want to, in order for just outcomes to a civil dispute to be achieved.
- Equality requires that all individuals engaging with the justice system are treated the same, regardless of personal characteristics such as gender or religion. However, if the same treatment creates disparity or disadvantage, adequate measures should be taken to prevent this.
- Access requires that all individuals are able to engage with the justice system with as few barriers as possible.

8A Questions

Check your understanding

Question 1

The two principles of justice are fraternity and liberty.

- A. True
B. False

Question 2

Fill in the blank with **one** of the following terms:

fairness

equality

The principle of [] ensures all people can participate in the justice system and that its processes are impartial and open.

Question 3

Which of the following statements is incorrect in terms of fairness?

- A. A civil jury can be used in civil cases if requested by a party. Juries can contribute to fairness as they represent a cross-section of the community and should, therefore, make a decision about liability that reflects community values and is impartial.
- B. Given the plaintiff is pursuing the dispute, the onus is on them to prove the facts and claims against the defendant, promoting fairness.
- C. In civil cases, the defendant cannot present their case as this would be unfair.

Question 4

Fill in the blank with **one** of the following terms:

access

equality

The principle of aims to ensure uniform treatment of all individuals in the civil justice system, with the exception of instances where it may lead to disadvantage.

Question 5

Nadja, the Prime Minister of Australia, was accused of negligently causing injury to her staff after leaving the floors of her office wet with no warning signs. Since she is travelling to China next week for trade discussions, the court has decided to dismiss her case and she will never be tried for her alleged civil breach.

Equality has been achieved in this case.

- A. True
- B. False

Question 6

Access is achieved when:

- A. everyone is able to engage with the justice system and its processes on an informed basis.
- B. everyone is able to gain resources, such as funding from Victoria Legal Aid (VLA), regardless of their personal characteristics, such as whether they are wealthy or not.

Question 7

Justice is a multifaceted concept that aims to ensure all people can have meaningful interactions with the legal system.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Define access and give **one** example of the way the Victorian civil justice system seeks to uphold this principle of justice.

Question 9

(3 MARKS)

Explain **one** civil process that upholds equality.

Question 10

(5 MARKS)

'All people receive a fair trial due to the processes of the civil justice system.'

To what extent do you agree with this statement? Explain your response.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

Imagine the Commonwealth Parliament introduced a new law, the Politician Exemption Act 2050 (Cth), that allows politicians to be exempt from liability in civil proceedings.

Question 11

Which of the following statements are correct about how the principles of justice would be undermined by this law?

- A. Procedures in the courts should be applied in the same manner in all civil cases, regardless of personal characteristics, such as age, gender, wealth, native language, ethnicity, or religion.
- B. All members of the community are subject to the same standards of behaviour set by civil law and people with a higher social status should not have a separate set of laws as this is unequal.
- C. Politicians should be exempt from certain laws due to the fact they create the laws and represent the people.

Question 12

(5 MARKS)

Analyse the effect this law would have on the principle of equality in the civil justice system.

Linking to previous learning

Question 13

(3 MARKS)

Explain how laws created to regulate **one** civil breach uphold fairness. In your answer, refer to **one** of the following civil breaches:

- Negligence
- Defamation
- Misleading or deceptive conduct

Question 14

(6 MARKS)

In 2024, a group of 100 film stars, crew, and producers on the set of a new hit show 'The Spring I Became Cool' came together to launch a civil claim against the director of the show for underpaying all staff. This class action was successful after the impartial judge and jury heard the facts of the case and determined, on the balance of probabilities, that the director was breaching their rights by not paying minimum wages. All the staff received damages from the director for the breach.

- a. Describe **one** possible party to the civil dispute in this scenario. 2 MARKS
- b. Outline **two** ways the principles of justice have been upheld with reference to the scenario. 4 MARKS

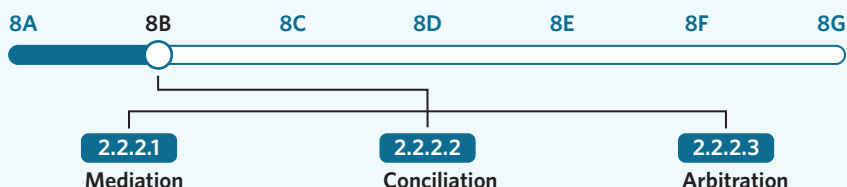
8B Methods of civil dispute resolution



The reality television show, Judge Judy, was centred around the concept of dispute resolution, whereby Judge Judy would act as the arbitrator in real-life disputes in the United States. Whilst the show was often humorous and largely mocked the disputes presented, it highlighted the concept of arbitration, which is one of the key methods of civil dispute resolution used in the legal system.

STUDY DESIGN DOT POINT

- methods used to resolve a civil dispute such as mediation, conciliation and arbitration



LESSON LINK

You will learn more about courts and civil disputes in **8D Civil jurisdictions of Victorian courts**.

KEY TERM

Mediation a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.

LEGAL VOCABULARY

Deed of settlement a legal document signed by parties to a dispute that states the agreed outcome of the dispute and is legally binding on the parties.

USEFUL TIP

To familiarise yourself with the features of each method of civil dispute resolution, extract the keywords from each dot point. For mediation, these would include 'facilitation not advice', 'non-legally-binding', 'less formal', 'rarely involves legal representation', and 'fewer time and monetary expenses'. You should be able to expand on these features, but this is just one way to additionally memorise the core ideas of each method.

Lesson introduction

Disputes, disagreements, and conflicts can arise between groups within society, such as organisations and businesses. To resolve these conflicts, disputing parties can use various civil dispute resolution methods. The three dispute resolution methods are mediation, conciliation, and arbitration, which each offer their own strengths and limitations with regard to upholding the principles of justice. These methods are often used to avoid going to court as they take less time and involve fewer financial expenses.

Mediation 2.2.2.1

Mediation is a method of dispute resolution that involves an independent, third-party mediator who encourages constructive communication between disputing parties to help them reach a voluntary resolution.

Some of the key features of mediation as a method of dispute resolution are that:

- the mediator facilitates conversation between disputing parties but does not provide any legal advice, opinions, or recommendations.
- the resolution that is reached through mediation is not legally binding, meaning disputing parties can go back on what was agreed upon during the mediation process. However, disputing parties can choose to sign a **deed of settlement** or contract to legally bind the final agreement.
- the mediation process is less formal and more supportive than other methods of civil dispute resolution, meaning disputing parties do not require legal representation when negotiating.
- case evidence is usually not presented during mediation as the focus is primarily on reaching a resolution.
- the process involves less time and monetary expenses.

Mediation is often the first method used when resolving a civil dispute. Many court cases are referred to mediation in accordance with s 66 of the *Civil Procedure Act 2010* (Vic) to avoid the high cost and time expense associated with a trial. Cases that are referred to mediation include workplace and neighbourly disputes, divorce and child custody issues, and property settlements between separating couples. Alternatively, individuals may choose to engage in mediation before using the court system.

LEGISLATION

Civil Procedure Act 2010 (Vic)

Table 1 The appropriateness of mediation

Circumstances when mediation is appropriate	Circumstances when mediation is not appropriate
- The parties are willing to negotiate, participate, and resolve the dispute. - The mediation process is understood by disputing parties. - The disputing parties want to maintain their relationship in future. - Privacy and confidentiality need to be maintained. - Parties are aiming to save time and money.	- A vulnerable party is involved in the dispute, such as an individual who has experienced abuse. - Parties are unwilling to discuss the issues associated with the dispute. - The disputing parties are highly emotional or hostile. - Mediation has previously failed or there is a history of betrayal between disputing parties. - There is a power imbalance between disputing parties that creates a risk of reaching an unjust resolution. - A legally binding agreement needs to be established.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. These tables showing the strengths and limitations of dispute resolution methods in relation to each principle can assist you in developing a discussion of how these methods can uphold the principles of justice.

Evaluating mediation's ability to achieve the principles of justice

STRENGTHS

- Parties are able to control the outcome, which can result in a fair, mutually agreed resolution being reached.
- The mediator is impartial, meaning there is no favouritism for one party.
- Mediation is faster than a trial, it reduces the courts' workload, and minimises delays in cases, therefore promoting fairness.

LIMITATIONS

- There may be a power imbalance between parties that can cause the party with more power to force a resolution that both parties do not mutually agree upon.
- The decision reached through mediation is not legally binding, meaning there is a risk that a party may breach the agreement. This may limit the achievement of fairness for the other party involved.
- Disputing parties must compromise and resolve the dispute without the opinion of the independent third party, which can limit fairness if one party is unwilling to negotiate.
- Mediation is generally conducted in private, which may be seen as undermining fairness as the processes are not open to the general public.



STRENGTHS

- As formal rules of evidence and procedure do not apply, each party in the dispute has the same opportunity to speak freely and present their perspective.
- Legal representation is usually not required for mediation, therefore removing any disadvantage that may be associated with unrepresented parties.
- The mediator is an independent third party who must treat parties the same, regardless of personal characteristics such as race, ethnicity, or gender, promoting equality.

LIMITATIONS

- If one party is more vulnerable or there is a power imbalance between parties, especially if no legal representation is present, a 'forced' outcome may be reached that does not equally benefit both parties.
- As there are no formal rules of evidence and procedure, both parties may not have the opportunity to present their case equally, especially due to the limited role of the mediator.





STRENGTHS

- Mediation does not involve any court proceedings and legal representation is not required, therefore saving costs and enabling those with limited financial means to access civil dispute resolution.
- The process of mediation is confidential with disputes being resolved discreetly with less media attention, therefore reducing intimidation associated with dispute resolution and improving access.
- There are no formal rules of evidence and procedure in mediation and parties are supported by the mediator to speak freely with flexibility. Therefore, further reducing intimidation associated with defending oneself in a dispute.

LIMITATIONS

- If one party does not wish to make or offer a reasonable resolution, mediation may be a waste of time and money, consequently limiting access for individuals with lower available finances or time.
- In long-running and hostile disputes, mediation may be inaccessible as parties are unlikely to constructively communicate and reach a resolution. If parties are ordered to attend mediation when the dispute is hostile and unlikely to be resolved, it negatively adds to the time taken to reach a resolution.

HYPOTHETICAL SCENARIO

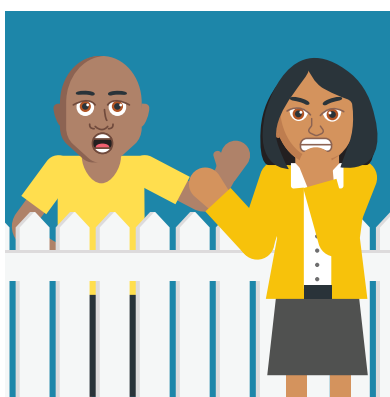


Figure 1 Jimmy and Mika sought mediation to resolve their neighbourhood fence dispute

Watch your words

Mika and Jimmy are neighbours who have a fence dividing their properties. Last year, they discussed having a new fence installed in February, which they would equally pay for. Mika was persistent with installing the fence, however, Jimmy failed to respond or take action. Subsequently, Mika had the fence installed and paid for all the costs up-front with the expectation that Jimmy would reimburse her.

Two months later, Jimmy had still not compensated Mika for the costs and claimed that as she booked the fence installation, she was required to pay for it because he never wanted a new fence in the first place. Mika sought mediation through the Dispute Settlement Centre of Victoria.

The mediator, Louis, enabled Jimmy and Mika to communicate their misunderstandings to each other and through these conversations, Mika and Jimmy have resolved their dispute. Jimmy is now willing to pay for the fence as they originally agreed upon. During the mediation process, Jimmy and Mika were mutually respectful and willing to negotiate, which enabled them to maintain an amicable relationship.

KEY TERM

Conciliation a non-judicial dispute resolution method involving an independent third party, known as a conciliator, who possesses specialist knowledge about the type of dispute in question and assists parties in a dispute reach a resolution.

Conciliation 2.2.2.2

Conciliation is a method of civil dispute resolution that involves an independent third party, known as the conciliator, who assists the negotiation process. The conciliator facilitates communication between disputing parties, whilst also providing them with their own opinions, perspectives, and possible solutions. When resolving civil disputes, conciliation is often considered the next step or step up from mediation.

Some of the key features of conciliation as a method of dispute resolution are that:

- the conciliator can offer their own suggestions and solutions to assist disputing parties in reaching a voluntary resolution.
- any resolution that is reached through conciliation is not legally binding, meaning disputing parties can go back on the agreed-upon resolution. However, disputing parties can choose to sign a deed of settlement or contract to legally bind the final agreement.
- it is a less formal method of dispute resolution and is similar to mediation in that it occurs in a supportive environment where legal representation is often not used.
- the main focus of conciliation is on reaching a resolution and resolving the dispute.

Like mediation, conciliation is often ordered by the courts in accordance with s 66 of the *Civil Procedure Act 2010* (Vic) and is used particularly in cases of unlawful discrimination.

Table 2 The appropriateness of conciliation

Circumstances when conciliation is appropriate	Circumstances when conciliation is not appropriate
- Parties are willing to negotiate, participate, and resolve the dispute. - The conciliation process is understood by disputing parties. - The disputing parties want to maintain their relationship in future. - Privacy and confidentiality need to be maintained. - There is an admission by one party that they are responsible for the situation, potentially increasing the willingness of parties to negotiate. - Disputing parties require third-party knowledge and expertise in resolving the dispute and negotiating a resolution. - Parties are aiming to save time and money.	- A vulnerable party is involved in the dispute, such as an individual who has experienced abuse. - Parties are unwilling to discuss the issues associated with the dispute. - The disputing parties are highly emotional or hostile. - A legally binding agreement needs to be established.

Evaluating conciliation's ability to achieve the principles of justice

STRENGTHS

- Parties are in control of the final outcome, enabling a fair negotiation process to occur and a beneficial resolution to be reached.
- The conciliator acts as an unbiased, impartial third party that favours neither party, whilst the advice and experience they offer may enable a more fair and mutually beneficial resolution to be reached.
- Conciliation is faster than a trial, it reduces the courts' workload, and minimises delays in cases, therefore promoting fairness.

LIMITATIONS

- There may be a power imbalance between parties that can cause the party with more power to force a resolution that both parties do not mutually agree upon.
- The decision reached through conciliation is not legally binding, meaning there is a risk that a party may breach the agreement, jeopardising a fair case outcome.
- Conciliation is generally conducted in private, which may be seen as undermining fairness as the processes are not open to the general public.



STRENGTHS

- Legal representation is not required for conciliation, therefore reducing costs and any disadvantage associated with unrepresented parties.
- As formal rules of evidence and procedure do not apply, each party in the dispute has the same opportunity to speak freely and present their perspective.
- The conciliator is an independent third party who must treat parties the same, regardless of personal characteristics such as race, ethnicity, or gender, promoting equality.

LIMITATIONS

- If one party is more vulnerable or there is a power imbalance between parties, especially if no legal representation is present, a 'forced' outcome may be reached that does not equally benefit both parties.





STRENGTHS

- Conciliation does not involve any court proceedings and legal representation is not required, therefore saving costs and enabling those with limited financial means to access civil dispute resolution.
- The process of conciliation is confidential with disputes being resolved discreetly with less media attention, therefore reducing intimidation associated with dispute resolution and improving access.
- There are no formal rules of evidence and procedure in conciliation and parties are supported by the conciliator to speak freely, therefore further reducing intimidation associated with defending oneself in a dispute.
- The third party has greater flexibility than a judge or magistrate in that they can talk openly with disputing parties and encourage communication, creating a more supportive, friendly, and accessible environment.

LIMITATIONS

- In long-running and hostile disputes, conciliation may be inappropriate as parties are unlikely to constructively communicate and reach a resolution, thus limiting access.
- There is no obligation for parties to reach a resolution through conciliation, meaning more time and money is wasted if the matter ends up proceeding to a trial or hearing, reducing access to justice.
- The decision reached through conciliation is not legally binding, meaning there is a risk that a party may breach the agreement, reducing access to justice.

HYPOTHETICAL SCENARIO



Figure 2 Nat sought conciliation after being terminated from her job

Unfair dismissal at work

Nat has been working for a large manufacturing business for three years, has always gotten along with her manager, and regularly receives positive performance reviews. Recently, a new manager, Gian, was appointed and Nat has not been happy with the way she has been treated. She feels Gian has been unfairly criticising her performance and has been rude to her. Nat has been late to work lately and was subsequently called in to speak with Gian. Gian told Nat that the business needed to 'let go' of some employees as there wasn't enough work and, because of Nat's performance recently, she would be terminated.

Nat believed this decision was unfair and sought advice from the Fair Work Commission. Nat and Gian took part in a conciliation meeting via a phone call, with a Fair Work Commission conciliator, Kristen. Kristen helped Nat and Gian explore the issues and ensured conversations remained polite and on-topic. Nat believed she was unfairly dismissed, but she wanted to keep her job. Kristen enabled Nat and Gian to reach a resolution whereby Nat can remain employed but will move to another division of the business where she is no longer managed by Gian.

KEY TERM

Arbitration a non-judicial dispute resolution method involving an independent third party, known as the arbitrator, who listens to parties present evidence and makes a binding decision.

Arbitration 2.2.2.3

Arbitration is a method of civil dispute resolution that involves an independent third-party arbitrator hearing arguments from disputing parties and making a final, legally binding decision. This method of civil dispute resolution is more serious and formal than both mediation and conciliation.

Arbitration is commonly used to resolve disputes relating to large commercial contracts privately, as an alternative to conducting a trial in court. When businesses establish commercial agreements, they will often include a clause that requires any dispute between the parties to be resolved through arbitration. These arbitration proceedings are usually conducted within the Victorian Supreme Court and are much faster and cheaper than a trial. Additionally, the Magistrates' Court can refer disputes involving claims of less than \$10,000 to arbitration by a magistrate.

Some of the key features of arbitration as a method of dispute resolution are:

- it is less formal than a civil trial in that it involves looser rules than those used in court, although it is the most formal method of civil dispute resolution when compared to mediation and conciliation.

- parties have control over the arbitration process, such as the rules of procedure. For example, the parties may agree on the time by which evidence is to be submitted.
- the final outcome is a legally binding decision that is made by the arbitrator and enforceable by law.
- parties are able to self-represent during arbitration, however, arbitration officers may assist these individuals or groups as most parties will have external legal representation considering the binding nature of arbitration.
- proceedings are often private and occur in a court-like setting.

Table 3 The appropriateness of arbitration

Circumstances when arbitration is appropriate	Circumstances when arbitration is not appropriate
• Parties agree to arbitrate, including if arbitration has been included in a contractual agreement. • The civil dispute requires a binding and enforceable decision to be made. • Parties are wanting a cheaper and quicker resolution than the courts. • Parties want the matter to be heard in private rather than in the courtroom.	• Clarification is needed by a judge due to the complexity of the issues. • Parties are comfortable navigating complex court rules of evidence and procedures associated with a trial. • Parties would prefer matters to be resolved by a jury. • Parties do not agree to arbitrate. • Parties prefer to resolve the dispute themselves without a legally binding outcome. • Parties want to have their case heard in court.

Evaluating arbitration's ability to achieve the principles of justice

STRENGTHS

- Parties are able to decide on an arbitrator panel or make a request for the person responsible for appointing the arbitrator, enabling them to participate in the selection process. For example, an arbitrator could be selected from the Victorian Commercial Arbitration Scheme or Arbitration Victoria.
- Arbitration results in a legally binding decision that both parties are forced to follow, promoting impartial processes.
- The arbitrator is an independent third party that has no association with either disputing party, therefore ensuring the decision is solely based on the law and facts.

LIMITATIONS

- If one or both parties are unhappy with the final legally binding decision, they have limited rights to appeal the decision.
- If one party has legal representation, they may be able to present a stronger case, therefore creating a power imbalance that could result in an unfair outcome if the other party is unrepresented.
- Arbitration is generally conducted in private, which may be seen as undermining fairness as the processes are not open to the general public.



STRENGTHS

- Arbitration is not bound by formal court procedures, meaning the parties can agree on the procedure and consequently achieve a more flexible process that supports each party to freely represent themselves.
- The arbitrator is an independent third party who must treat parties the same, regardless of personal characteristics such as race, ethnicity, or gender, promoting equality.

LIMITATIONS

- If one party has legal representation and the other does not, this can create a power imbalance and the unrepresented party may not fully understand the proceedings, creating inequality between the parties.
- The lack of publicity of the arbitration process means the outcomes of previous arbitrated disputes are difficult to access or unknown and therefore, may limit consistency and equality across similar arbitration cases.





STRENGTHS

- Arbitration is not bound by formal court procedures, meaning the parties can agree on the procedure and consequently achieve a more flexible, efficient, and less intimidating process than a trial.
- The arbitration process cannot be viewed publicly and those involved cannot disclose information, therefore encouraging the use of arbitration in sensitive cases.

LIMITATIONS

- Arbitration is often more expensive than mediation and conciliation as there is an increased need for legal representation, potentially preventing individuals with limited financial means from pursuing arbitration as a viable dispute resolution method.
- Arbitration is conducted in private and is therefore not accessible for public viewing.

HYPOTHETICAL SCENARIO

The unbaked half of the dough

Callista owns a bakery called Doughlicious, that receives its supplies from a large supplier managed by Otto. Recently, Callista has expressed that the ingredients supplied by Otto's company have been of lower quality and are arriving days after they are scheduled without notice. The company has also been invoicing Doughlicious much higher prices than was agreed upon in their contract. Otto's company has failed to respond to Callista's inquiries regarding the conduct. Since the supply contract included a clause stipulating that any disputes that arise are resolved through commercial arbitration, Callista has sought arbitration through the Victorian Bar Commercial Arbitration Appointment Service.

The arbitrator, Romy, heard evidence from Otto's company alongside Callista's small business and made a legally binding decision to resolve the dispute. The pair are required by law to abide by the conditions of the decision, whereby Otto's company must only charge prices agreed upon in the business contract and deliver supplies on schedule where possible. Otto and Callista both seemed happy with Romy's decision, however, if Otto's company fails to support Doughlicious as required, Callista plans to commence legal action and terminate her contract with the supplier.



Figure 3 Callista and Otto sought arbitration after a supply disagreement

Lesson summary

When individuals or organisations want to resolve a civil dispute, they can employ the civil dispute resolution methods of:

- mediation, which involves an independent third party facilitating communication between parties without offering any input to the resolution.
- conciliation, which involves an independent third party assisting the negotiation process by offering specialist knowledge on the dispute.
- arbitration, which involves an independent third party listening to both sides of a dispute and making a legally binding decision to resolve the dispute.

8B Questions

Check your understanding

Question 1

Methods of civil dispute resolution, including mediation, conciliation, and arbitration enable disagreements between individuals, groups, and organisations to be resolved in the court with a judge and jury.

- A. True
- B. False

Question 2

Tick the box to indicate whether each of the following statements are characteristics of **mediation** or **arbitration**.

Statement	Mediation	Arbitration
I. A third party facilitates conversation between disputing parties in a less formal environment.	☐	☐
II. A legally binding decision is reached at the end of the process.	☐	☐
III. No opinions, advice, or recommendations are offered by the third party.	☐	☐
IV. A third party hears evidence from each side of the dispute and then makes the final legally binding decision themselves.	☐	☐

Question 3

An example of how mediation upholds the principle of access is that:

- A. the process does not require parties to have legal representation, therefore enabling people with limited financial means to utilise this form of civil dispute resolution.
- B. hostile disputes can be discussed equally on both sides with no resolution being reached.

Question 4

Fill in the blanks with the following terms:

conciliation

mediation

When a third party encourages and enables conversation between disputing parties without contributing to the resolution itself, this is . However, when the independent third party is an expert in the specific dispute and offers their advice and perspective in the resolution process, this is .

Question 5

Tick the box to indicate whether each of the following statements demonstrate circumstances where conciliation is **appropriate** or **not appropriate**.

Statement	Appropriate	Not appropriate
I. When parties are cooperative and willing to engage in the dispute-resolution process.	☐	☐
II. When vulnerable parties are involved in the dispute or the dispute includes highly emotional and hostile situations.	☐	☐
III. When further knowledge and expertise are required about the dispute being resolved.	☐	☐
IV. When the disputing parties want to, or are required to, maintain their relationship in the future.	☐	☐

Question 6

The principle of equality may be limited in civil dispute resolution if one party has legal representation whilst the other does not, as this can create a power imbalance where the unrepresented party may present a weaker case, causing an unequal resolution.

- A. True
- B. False

Question 7

Which of the following statements are examples of arbitration upholding the principle of fairness?

(Select all that apply)

- A. A legally binding decision is made that guarantees a resolution is reached in a timely manner.
- B. Disputing parties have limited rights if they want to appeal the final legally binding decision.
- C. The arbitrator is an independent third party who does not hold any biases towards either disputing party, enabling a decision to be made exclusively based on law and fact.
- D. Disputing parties can agree on an arbitrator together.

Question 8

Civil dispute resolution methods are non-judicial processes that can be used to resolve disputes in a less formal and expensive manner than the court system.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Define mediation as a method of civil dispute resolution.

Question 10

(3 MARKS)

Identify **three** features of conciliation as a method of civil dispute resolution.

Question 11

(3 MARKS)

Distinguish between mediation and arbitration as methods of civil dispute resolution.

Question 12

(5 MARKS)

Camilla is a horse trainer who recently started purchasing feeding material from Palace Stables, a large business owned by Charles. After a month of feeding her horses this new food, she noticed balding and increased shedding of their hair. She contacted Palace Stables about the issue, however, Charles claimed these side effects were listed on the feeding packet. When Camilla checked her feeding material, there was no list of side effects listed. Consequently, Camilla has now terminated her use of this horse food and is seeking compensation for her loss, but is unable to afford arbitration or judicial determination.

With reference to the situation between Camilla and Palace Stables, determine whether conciliation or mediation is more appropriate.

Question 13

(4 MARKS)

Anna and Hayley are famous co-artists who have their paintings displayed in galleries across the globe. However, last month, following the opening of a new, exclusive gallery in New York, a well-esteem guest publicly declared that Anna and Hayley were 'snobbish, rude, and arrogant people who exploit unknown, talented artists and claim their work as their own'. This defamatory statement was published in the renowned newspaper Manhattan Mayhem and received reposts worldwide. Anna and Hayley are now trying to resolve this dispute without court proceedings but want to ensure that a legally binding resolution is reached.

Identify and explain **one** method of civil dispute resolution that would be appropriate for Anna and Hayley.

Extended response

Use your answer to question 14 to support your response to question 15.

Question 14

Tick the box to indicate whether the following statements are **strengths** or **limitations** of arbitration as a method of dispute resolution to uphold the principles of justice.

Statement	Strengths	Limitations
I. Arbitration results in a legally binding decision that both parties are forced to follow, therefore ensuring fairness is upheld.	☐	☐
II. The high expense of arbitration may prevent parties with limited financial means from pursuing arbitration as a viable method of dispute resolution.	☐	☐
III. A lack of legal representation for one of the disputing parties may create a power imbalance that causes the represented party's arguments to appear stronger.	☐	☐
IV. As arbitration is not bound by formal court proceedings, parties can agree on a procedure and achieve a more flexible process that is supportive of each of their needs.	☐	☐
V. The arbitrator is an independent third party with no biases, therefore the final decision is solely based on facts and law.	☐	☐
VI. There are limited rights to appeal the legally binding decision if one or both parties are unhappy with the resolution.	☐	☐

Question 15

(6 MARKS)

'Engaging in arbitration allows all the principles of justice to be upheld to the highest degree.'

Discuss the extent to which you agree with this statement.

Linking to previous learning

Question 16

(4 MARKS)

Identify **one** purpose of civil law and explain how **one** method of civil dispute resolution could help achieve this purpose.

8C Institutions that resolve civil disputes

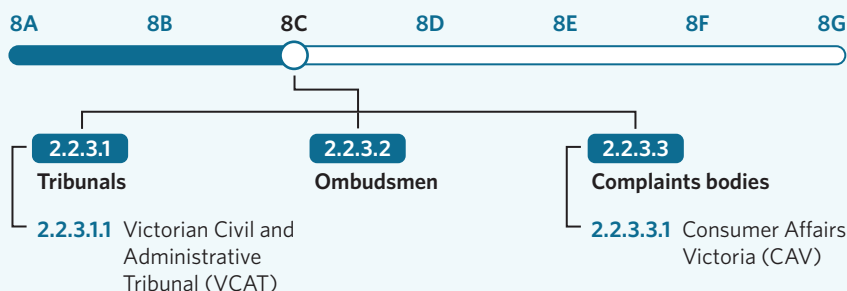


Image: David Peperkamp/Shutterstock.com

Imagine you bought a new pair of shoes online, but the store sent you the wrong pair! You demand your money back, but the store keeps ignoring your emails. Frustrated, you decide to take the matter to court, but is this the wisest option? There are alternative institutions that can help you resolve this dispute that are less formal, more efficient, and cheaper than the courts.

STUDY DESIGN DOT POINT

- institutions that resolve civil disputes such as tribunals, ombudsmen and complaints bodies



LESSON LINK

You learnt about mediation, conciliation, and arbitration in **8B Methods of civil dispute resolution**.

KEY TERMS

Tribunal an institution with the authority to judge, adjudicate, or determine civil claims or disputes.

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes.

LEGAL VOCABULARY

Administrative dispute a dispute involving an administrative decision-maker, such as a government agency or statutory authority.

LEGISLATION

Victorian Civil and Administrative Tribunal Act 1998 (Vic)

Lesson introduction

Parties have many different options available to them when resolving a civil dispute. Alongside various methods of dispute resolution, including mediation, conciliation, and arbitration, there are also many institutions that use these methods to resolve civil disputes.

Tribunals 2.2.3.1

Tribunals have the authority to resolve civil disputes, doing so in a less formal, more timely manner than the courts. Tribunals are similar to the courts, in that a third party encourages the disputing parties to engage in mediation first, before hearing their case and making a binding decision. The purpose of tribunals is to offer a low-cost, efficient, and accessible alternative to the courts.

Parliament passes legislation to create tribunals and define their jurisdiction at both state and Commonwealth levels. The Fair Work Commission, The National Sports Tribunal, and the **Victorian Civil and Administrative Tribunal (VCAT)** are all examples of tribunals in Australia.

Victorian Civil and Administrative Tribunal (VCAT) 2.2.3.1.1

The Victorian Civil and Administrative Tribunal (VCAT) is a tribunal with the power to hear a wide range of civil and **administrative disputes**. Created by the *Victorian Civil and Administrative Tribunal Act 1998 (Vic)*, VCAT is the largest tribunal in Victoria. Even though the 2021–22 financial year included COVID-19 restrictions, VCAT still heard 68,095 applications and answered 172,030 calls (VCAT, 2022). The resolution rate for cases at mediation or compulsory conference was 46%, meaning resolutions were found for approximately half of all matters that came before VCAT.

However, VCAT is not suitable for complex claims, such as **class actions**, defamation cases, personal injury claims, or disputes pursuing large amounts of monetary compensation. VCAT also has **exclusive jurisdiction** over some disputes, such as domestic building disputes, meaning these cases must be heard and determined by VCAT, rather than the courts. VCAT is divided into five divisions and within each division, cases are grouped together in what VCAT refers to as a list.

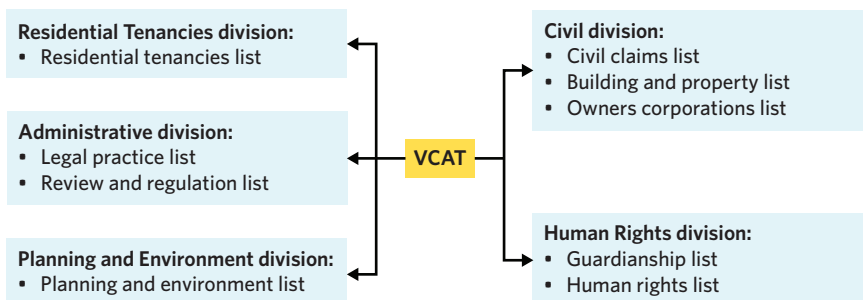


Figure 1 The five divisions of VCAT

Table 1 Purposes of VCAT

Purpose	How VCAT achieves this purpose
Provide low-cost dispute resolution services	- Parties do not require legal representation and can represent themselves, minimising the costs associated with pursuing a civil dispute. In some disputes, legal representation is not permitted, therefore removing this expense entirely. - VCAT fees are low, particularly when compared to the courts. This is because some VCAT lists have no application fee and fees may be waived or postponed for those in financial hardship.
Provide efficient dispute resolution services	- Hearings are less time consuming as VCAT is not bound by the same rules of evidence and formal procedures as the courts. - Many cases can be resolved relatively quickly through mediation or compulsory conferences with VCAT. - For cases that proceed to a VCAT hearing, there are fewer pre-hearing procedures compared to the courts, so there is less time between initiating a claim and receiving a resolution.
Provide accessible dispute resolution services	- VCAT's low costs can ensure more people have access to dispute resolution bodies and remedies. - VCAT uses phone and video conferences for some hearings, mediations, and compulsory conferences, improving accessibility as parties do not have to travel long distances and arrange transport to achieve a resolution. - VCAT uses informal procedures, compared to the courts, which can be more easily understood by parties. For example, there are no strict rules of evidence and procedure during the hearing.

LEGAL VOCABULARY

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts.

Exclusive jurisdiction the legal authority of a body, such as a court or tribunal, to determine a legal case that no other institutions have the authority to hear.

Compulsory conference a private meeting between parties in a civil dispute to discuss ways to resolve their dispute with the assistance of a VCAT member.

LEGAL VOCABULARY

Question of law an issue of law that is resolved by a judge, often concerning the interpretation and application of legal principles or legislation.

Question of fact an issue within a case whereby the material facts of the case need to be determined by weighing up the credibility of the evidence.

USEFUL TIP

Many tribunals, including VCAT, offer mediation, conciliation, and arbitration to assist individuals when resolving a dispute. A common misconception is that VCAT only conducts hearings. However, parties are usually encouraged to attempt mediation or conciliation first at a pre-hearing conference, and only have a legally-binding decision imposed in a hearing if the dispute cannot be resolved.

Dispute resolution by agreement

- Prior to a hearing, VCAT will encourage the disputing parties to settle the disagreement through alternative dispute resolution methods, such as mediation or conciliation.

VCAT hearing

- If the matter is not settled, a hearing will be conducted, whereby a binding decision is handed down by members of the tribunal after parties present evidence and legal arguments.
- The outcome of the hearing is legally binding and can be enforced by the courts.
- In many cases, no legal representation is used and parties prepare and present their own claim or defence.

Outcome

- The defendant may be ordered to pay a sum of money to the plaintiff or 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**, that is, how the relevant legal principles are applied, not on **questions of fact** or the amount of damages awarded.

Figure 2 The process of a claim being heard in VCAT

Table 2 The appropriateness of VCAT

Circumstances when VCAT is appropriate	Circumstances when VCAT is not appropriate
• The dispute falls within VCAT's jurisdiction. • Parties prefer an informal dispute resolution process. • Parties want to resolve the dispute themselves and have some control over the outcome. • Parties desire an option to negotiate but, if this is unsuccessful, wish to have a legally-binding decision enforced in a hearing. • Both parties are willing to comply with the agreement reached during mediation or a compulsory conference. • Parties are willing to appeal only on questions of law. • Parties want a low-cost and time-efficient resolution to their dispute.	• The case does not fall within VCAT's jurisdiction. • One or both parties are unwilling to negotiate to resolve their dispute or parties have tried and failed to negotiate their dispute. • The case is a class action. • Parties want a greater ability to appeal the final outcome. • Parties would prefer to have legal representation when conducting their case. • The claim is for a large amount of damages, meaning the courts may be more appropriate. • The dispute involves complex legal issues and would be better resolved through more formal court procedures. • There is a better way to resolve the dispute, such as through an alternate organisation that is better suited to deal with the matter.

USEFUL TIP

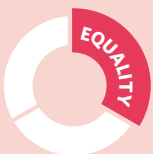
An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. These tables showing the strengths and limitations of institutions in relation to each principle can assist you in developing a discussion of how these institutions can uphold the principles of justice.

Evaluating VCAT's ability to achieve the principles of justice**STRENGTHS**

- VCAT encourages parties to resolve matters through less formal dispute resolution methods, such as mediation. This promotes fairness by allowing the parties to be directly involved in resolving their dispute and therefore, be more satisfied with the process and outcome.
- In many cases VCAT hearings are resolved more quickly as they have fewer pre-hearing steps and more informal rules of procedure. This promotes fairness by reducing delays for those entitled to a remedy, as delays can add to a plaintiff's injury and stress.

LIMITATIONS

- VCAT cannot use juries and therefore, does not provide parties with the opportunity to have their dispute heard by their peers.
- VCAT often requires parties to self-represent, which can create difficulties for those from non-English speaking backgrounds or who are poorly educated. This may undermine the principle of fairness for these parties if they cannot prepare and present their case adequately.
- There is a limited right to appeal VCAT decisions. This compromises the achievement of fairness for parties that are dissatisfied with the outcome of their case. Furthermore, if a decision is made by VCAT, the appeal must be brought to the Supreme Court Trial Division or Court of Appeal, which can be costly.

**STRENGTHS**

- 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 strict rules of evidence and procedure that exist in the courts.
- All parties have the right to appeal a VCAT decision regardless of their personal characteristics, such as race or gender, provided they have the appropriate grounds.

LIMITATIONS

- VCAT often requires parties to self-represent, which can create difficulties for those from non-English speaking backgrounds. These parties may be disadvantaged and less able to present a case of equal quality.
- To appeal a decision, the VCAT case proceeds to the Supreme Court of Appeal, and hence the filing fees of the Supreme Court must be paid. This will disproportionately impact those who are financially disadvantaged.

**STRENGTHS**

- VCAT is less formal than taking a matter to court and provides significant support to the parties, making dispute resolution a less intimidating process that is more accessible to both parties.
- Dispute resolution through VCAT is relatively cheap, as filing fees are usually low and parties often do not use legal representation. This, consequently, promotes the achievement of access for parties with limited financial capacity.

LIMITATIONS

- 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 the achievement of access for these parties if they cannot bring a civil claim to VCAT.
- VCAT can only resolve civil matters within its jurisdiction. Whilst VCAT resolves a very high volume of minor cases, some complex civil matters, such as class actions, must proceed to the courts.

LEGAL CASE



Image: fizkes/Shutterstock.com

Figure 3 The residential tenancy division is one of the five divisions in VCAT's jurisdiction

MelbRH Pty Ltd v Disney (Residential Tenancies) [2023] VCAT 935

Facts

A tenant rented a room for six months from a rooming house operator, MelbRH. He vacated the house having not cleaned his room, whilst also failing to pay utility costs and rent for three weeks. The rooming house operator made a civil claim for \$1,202.07.

Legal issue

VCAT had to determine whether the tenant's failure to clean his room and fulfil unpaid costs was a breach of the agreement between the parties.

Decision

VCAT determined that the tenant owed the rooming house operator the total of the bills and rent, alongside a cleaning fee for his room, totalling \$1,202.07. The hearing member then deducted the bond the tenant paid at the start of the lease, meaning the tenant owed \$652.07 to MelbRH.

Significance

MelbRH had to pay a filing fee of \$100.20 for their claim as a business (VCAT, n.d.). Contrastingly, if heard in the Magistrates' Court, this claim would have cost MelbRH \$338.70 in filing fees (Magistrates' Court of Victoria, 2023). This case demonstrates how VCAT can be used as a low-cost alternative dispute resolution service.

KEY TERM

Ombudsman an independent authority that operates on state and federal levels and is created to investigate complaints against a company or organisation.

USEFUL TIP

The word 'ombudsman' is singular and should be used when referencing a specific ombudsman, for instance, the Victorian Ombudsman. Contrastingly, the word 'ombudsmen' is in plural form and should be used to refer to the concept of ombudsmen as a whole.

LEGISLATION

Ombudsman Act 1973 (Vic)

Ombudsmen 2.2.3.2

The role of an **ombudsman** is to investigate complaints against a company or organisation, particularly public authorities. Ombudsman services are free in Australia and provide both parties with the opportunity to submit their case, whilst acting impartially to resolve the dispute. There are two main types of ombudsmen:

- government ombudsmen, which handle complaints about government institutions. In Victoria, this is the Victorian Ombudsman.
- industry-based ombudsmen, which handle complaints regarding specific categories of the private sector, such as the Telecommunications Industry Ombudsman.

Ombudsmen will usually only intervene in a dispute if the parties have not first attempted to resolve the dispute themselves. If the parties cannot find a solution, then the ombudsman can make a legally-binding decision, however, this will depend upon the nature of the complaint and the powers of the ombudsman in question.

In some serious cases, the Victorian Ombudsman may decide to investigate a matter. The Victorian Ombudsman has significant powers that it may use when investigating matters, including:

- issuing a summons to a person to attend an interview or produce documents
- entering the premises of an organisation to inspect the premises
- issuing a confidentiality notice to any person.

Ombudsmen derive their power from statutes made by parliament. For instance, the Victorian Ombudsman was established by the *Ombudsman Act 1973 (Vic)*.

Some examples of ombudsmen in Victoria and Australia include:

- the Fair Work Ombudsman, which hears disputes concerning workplace issues.
- the Energy and Water Ombudsman Victoria, which hears complaints from Victorians about energy or water companies.
- the Victorian Ombudsman, which hears disputes about Victorian Government Departments, public statutory authorities, and officers of municipal councils.

DEEP DIVE

The Fair Work Ombudsman

The Fair Work Ombudsman provides free information and investigates complaints in relation to:

- pay and entitlements, including for employees who claim they were underpaid.
- awards and workplace agreements, including for employees who claim their award has not been upheld.
- leave entitlements, including for employees who claim their leave entitlements have not been upheld.
- ending employment, including for employees who claim their employment was unlawfully terminated.

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. For example, providing its workers with appropriate pay.
- commence legal action against an employer who breaches workplace laws, which will also deter other employers from doing so.
- refer disputes to the Fair Work Commission, such as instances of unfair dismissal.
- 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.

REAL WORLD EXAMPLE

Ombudsman demanding secret documents

The Victorian Ombudsman was pressuring the Victorian Government to release secret documents from the December 2020 decision that put certain public housing towers under an immediate lockdown during the global coronavirus pandemic, amid growing cases of the virus in the area. A Victorian Ombudsman report determined that the snap lockdown was not based on health advice, but instead, a crisis cabinet meeting. The Victorian Ombudsman, Deborah Glass, was refused access to the documents, with the government claiming they were legally privileged, meaning only parliamentarians could see them.

In the same press conference, Glass highlighted the 'bad principle' in the Victorian Ombudsman's funding. The funding received is determined by the government of the day, therefore this may disincentivise the ombudsman from investigating complaints of government officials thoroughly, in a clear conflict of interest. Glass called for an independent tribunal to determine funding so that the funding process is 'entirely removed from political processes'.

Adapted from 'Secrecy over cabinet documents hampering investigations, Victorian ombudsman says' (Ore, 2023)



Image: ANDRANIK HAKOBYAN/Shutterstock.com

Figure 4 The Victorian Ombudsman, Deborah Glass, was denied access to classified government documents

Evaluating ombudsmen's ability to achieve the principles of justice

STRENGTHS

- Ombudsmen have special powers of investigation, enabling them to access a large amount of evidence, ultimately leading to a fair and just outcome based on the evidence of the case.

LIMITATIONS

- Decisions are not automatically binding, meaning there is a risk that an agreement reached using mediation services provided by an ombudsman may not be adhered to. This limits the achievement of fairness as the just outcome may not occur.
- Sometimes ombudsmen are prevented from accessing privileged documents when assessing government-related complaints. This limits the achievement of fairness as not all evidence comes before the ombudsman, which can unjustly affect the outcome of a decision.



**STRENGTHS**

- Ombudsmen offer advice and mediation services to all complainants, regardless of their personal characteristics, whilst impartial and objective investigators are used when determining the outcome of civil matters.

LIMITATIONS

- Ombudsmen do not investigate every complaint, nor do they take legal action against all government institutions that have allegedly committed wrongful acts.

**STRENGTHS**

- The free nature of most ombudsmen's services increases access to their information and services.

LIMITATIONS

- Most industry ombudsmen, such as 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 through the courts. This may be inaccessible to those with limited finances.
- In the 2021–22 financial year, the Victorian Ombudsman heard approximately 19,000 jurisdictional complaints (Victorian Ombudsman, 2022). That is an average of 73 complaints per working day, which may result in delays and backlogs in cases, therefore reducing access.

Complaints bodies 2.2.3.3

KEY TERMS

Complaints bodies organisations that can deal with complaints and assist with dispute resolution in relation to the provision of goods and services, or decisions made by authorities.

Consumer Affairs Victoria (CAV) the Victorian civil complaints body that provides information and helps resolve disputes to create a fair and competitive marketplace for consumers and businesses.

Complaints bodies assist parties to a civil dispute by investigating and/or attempting to resolve their dispute through conciliation. 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, unlike a tribunal or ombudsman that generally can. However, in some cases, they can 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 Victorian complaints bodies include:

- **Consumer Affairs Victoria (CAV)**, which provides advice about, and can assist in the resolution of, disputes relating to the provision of goods and services.
- Health Complaints Commissioner, which hears disputes about health services or concerns about health information privacy.
- Victorian Legal Services Commissioner, which hears and investigates complaints about lawyers.
- Inspector-General of Intelligence and Security, which operates on a national level regarding complaints about Australian security agencies, such as the Australian Security Intelligence Organisation (ASIO).

Consumer Affairs Victoria (CAV) 2.2.3.3.1

Consumer Affairs Victoria (CAV) is a complaints body that provides advice in civil disputes regarding the provision of goods and services. In some cases, CAV can assist parties to resolve the dispute through conciliation. Parties must first attempt to settle the dispute themselves and, if this is unsuccessful, CAV will provide the service of a conciliator.

Table 3 Types of disputes CAV will and will not conciliate

Disputes CAV will conciliate	Disputes CAV will not conciliate
A dispute will be conciliated by CAV when it is: - initiated by a consumer against a business. - initiated by a tenant against a landlord.	A dispute is unable to be conciliated by CAV when it is: - between businesses. - initiated by landlords against tenants. - initiated by a business against a consumer.

USEFUL TIP

You may come across the term 'rental provider' when learning about disputes that are resolved by CAV. This term has an equivalent meaning to that of 'landlord'.

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
- 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 can assist in resolving 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 their property, but the repair work is not completed.
 - a landlord who has given notice to a tenant to vacate a property so they can move into the property themselves, but the tenant believes this is not a genuine reason.

LEGISLATION

Consumer Law and Fair Trading Act 2012 (Vic)

LEGISLATION

Residential Tenancies Act 1997 (Vic)

The primary dispute resolution method of CAV is conciliation, as it allows parties to resolve disputes efficiently and constructively either in person or over the phone. The conciliation process encourages parties to voluntarily resolve the dispute, increasing the likelihood of a successful resolution, as each party has substantial control over the final decision reached.

The final resolution that may be reached through CAV is non-binding unless both parties sign a **deed of settlement**. CAV cannot force either party to attend conciliation and does not have the power to make a legally-binding decision or enforce any agreement between the parties.

LEGAL VOCABULARY

Deed of settlement a legal document signed by parties to a dispute that states the agreed outcome of the dispute and is legally binding on the parties.

Table 4 Appropriateness of CAV

Circumstances when CAV is appropriate	Circumstances when CAV is not appropriate
- The dispute falls within CAV's jurisdiction. - Parties have attempted to resolve the dispute themselves. - Both parties are willing to attend and participate in conciliation. - Parties wish to avoid costs and delays associated with resolving disputes through the courts or VCAT.	- The dispute does not fall under CAV's jurisdiction. - Parties have not attempted to resolve the dispute themselves. - One or both parties are not willing to attend and participate in conciliation. - There is a better method of resolving the dispute, including via an alternate organisation that is better suited to dealing with the matter.

Continues →

Table 4 Continued

Circumstances when CAV is appropriate	Circumstances when CAV is not appropriate
- Parties are willing to settle the dispute, therefore increasing the likelihood of a successful resolution. - Both parties are willing to comply with the agreement reached during conciliation.	- The court or VCAT has already ruled on the matter, or the case is currently waiting to be heard. - The dispute is initiated by a landlord or business. - The dispute is a class action. - One or more parties want a legally binding decision.

HYPOTHETICAL SCENARIO

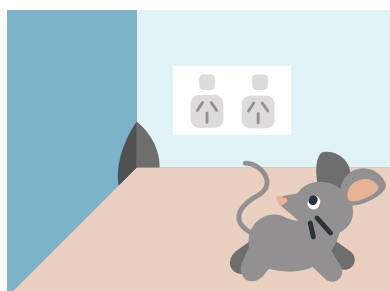


Figure 5 Ahmen and Catriona utilised CAV to resolve their dispute with Phillipa as the relevant residential tenancies legislation does not clearly specify who is responsible for pest extermination in rental properties

A squeaky squabble

Ahmed and Catriona have been renting a home in North Melbourne for the last eight months. Shortly after they moved in they started seeing mice around the house and tried everything to exterminate them. The problem progressed and it was determined the mice were entering the house via openings that should have been sealed. They contacted the landlord, Phillipa, and she initially refused to do anything about the mice, claiming the tenants should ensure they take their rubbish out regularly as this would solve the problem. However, Phillipa recently visited the property and acknowledged that some repairs to seal the house more effectively could alleviate the situation. Despite this, Phillipa refused to spend as much on the repairs as the tenants requested. Both parties were keen to resolve the issue but could not reach an agreement on the details. Ahmed and Catriona contacted Consumer Affairs Victoria to request a conciliation process via phone with Phillipa. The phone conciliation was effective, in that the conciliator assisted the parties to talk through the problem and identify a compromise that everyone was happy with.

Evaluating CAV's ability to achieve the principles of justice



STRENGTHS

- Parties to a civil dispute tend to have increased control over the outcome of their dispute, as resolutions through CAV are conciliation-based and aimed at finding a solution.
- CAV provides a quick method of dispute resolution that allows parties to reach a just outcome without experiencing the stress and delay associated with a trial.
- CAV is free, which ensures parties that cannot afford to bring their claim through the courts or VCAT are still able to receive a just outcome to their dispute.

LIMITATIONS

- CAV is unable to legally enforce the decisions reached at conciliation, meaning there is a risk that one party will not adhere to the decision reached during conciliation. This limits the achievement of fairness as the injured party may still be required to take further action to claim a remedy against the business or landlord.
- CAV cannot force parties to attend and participate in conciliation, which can be unfair if one party is willing to reach a resolution through conciliation but the other is not.



STRENGTHS

- 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 characteristics, such as race and wealth.
- CAV uses a conciliator to facilitate discussions between parties, which can ensure both parties have the same opportunity to present their perspective and reach a mutually acceptable resolution, thus achieving equality.

LIMITATIONS

- 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.
- CAV has limited jurisdiction and is only available as a means of dispute resolution for a small proportion of civil matters. Thus, the ability to obtain CAV's services is not provided equally to all civil parties.

STRENGTHS

- CAV is a free service. This can increase access to civil justice for individuals who may not have the financial capacity to have a civil matter heard by a different dispute resolution body, such as the courts or a tribunal.
- The informal process of conciliation used by CAV promotes the continuation of a positive relationship between the parties, as constructive conversations are encouraged and a resolution can be reached that equally benefits each individual or group.
- Conciliation is a less intimidating process for parties than taking the matter to court. CAV also provides individuals with the opportunity to resolve disputes, especially those with larger organisations and government agencies, in a less intimidating way.
- CAV's conciliation process can be conducted over the phone, enabling individuals across Victoria to access this service.

LIMITATIONS

- 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, and CAV believes they have acted lawfully and have no case to answer to, the tenant or consumer will need to pursue legal action through a different institution, such as VCAT.
- CAV has limited jurisdiction, meaning many disputes cannot be resolved using CAV's conciliation, limiting access to justice.
- CAV's conciliation process may not result in an agreement to resolve the dispute, limiting access to justice.



Lesson summary

Table 5 A summary of institutions that resolve civil disputes

	Purpose	Example
Tribunals	Provide a low-cost, efficient, and accessible alternative to the courts.	Victorian Civil and Administrative Tribunal (VCAT)
Ombudsmen	Investigate complaints against the government and businesses.	The Fair Work Ombudsman
Complaints bodies	Provide an informal service for dispute resolution in specific areas.	Consumer Affairs Victoria (CAV)

8C Questions

Check your understanding

Question 1

The courts are the only institution that can make a binding decision regarding the outcome of a civil dispute.

- A. True
B. False

Question 2

Fill in the blanks with **two** of the following terms:

formal

accessible

Tribunals

Courts

[] aim to resolve civil disputes in a less [], more timely manner.

Question 3

Which of the following are examples of complaints bodies? **(Select all that apply)**

- A. The Fair Work Ombudsman
- B. Consumer Affairs Victoria
- C. The Fair Work Commission
- D. The Inspector-General of Intelligence and Security

Question 4

The Victorian Ombudsman has the ability to enter the premises of any organisation.

- A. True
- B. False

Question 5

Which of the following reflects the **three** purposes of VCAT?

- A. Low-cost, accessible, and prolonged 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, efficient, and accessible resolution of civil cases.

Question 6

Which of the following disputes are within the jurisdiction of CAV? **(Select all that apply)**

- A. A dispute initiated by a tenant against a landlord.
- 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.

Question 7

Tick the box to indicate whether the following institutions are **tribunals**, **ombudsmen**, or **complaints bodies**.

Institution	Tribunals	Ombudsmen	Complaints bodies
I. CAV	☐	☐	☐
II. The Victorian Ombudsman	☐	☐	☐
III. The Fair Work Commission	☐	☐	☐
IV. VCAT	☐	☐	☐

Preparing for exams**Standard exam-style****Question 8**

(3 MARKS)

Explain **one** limitation of ombudsmen in their ability to uphold the principle of fairness in the civil justice system.

Question 9

(3 MARKS)

Jack is having an issue with his landlords, Matt and Cameron, over a leaky iron pipe that is causing water damage to his rental apartment. The parties have previously tried to negotiate a settlement but could not reach an agreement. Jack believes if they had some assistance they would be able to resolve the issue.

Identify an appropriate institution to assist Jack. Justify your response.

Question 10

(4 MARKS)

Describe **two** ways VCAT upholds the principle of access.

Extended response

Use your answer to question 11 to support your response to question 12.

Question 11

Tick the box to indicate whether the following statements are **strengths of VCAT** or **limitations of CAV**.

Statement	Strengths of VCAT	Limitations of CAV
I. It has the ability to hand down legally-binding decisions through hearings, meaning the outcome of the dispute is enforceable through the courts.	☐	☐
II. It provides a low-cost alternative to bringing a claim through the courts for parties who cannot afford or are unwilling to engage in court proceedings.	☐	☐
III. The process of conciliation requires parties to cooperate and find resolutions to disputes together, which may be unrealistic in some civil matters.	☐	☐
IV. Its resolution processes rely heavily on collaboration between parties and their willingness to resolve the dispute and enact the resolution reached.	☐	☐

Question 12

(6 MARKS)

Leo is in an ongoing dispute with his landlord, Rushil, who refused to repair a broken oven and stovetop despite Leo contacting him several times to fix it. As a low-income earner and single father, Leo found it difficult to feed his child without a kitchen and thus, repaired it himself. Leo is angry and wishes to claim not only the cost of repairing the kitchen but a large amount of additional damages for the pain and suffering he and his child were forced to endure. Leo is seeking a legally-binding resolution to this matter as he does not trust Rushil, who has been unwilling to negotiate or cooperate on the matter. Leo's friend, Kaven, has advised him that the Victorian Civil and Administrative Tribunal (VCAT) is the most appropriate institution to resolve his dispute.

Is VCAT or CAV a more appropriate body to handle this dispute? Justify your answer.

Linking to previous learning

Question 13

(4 MARKS)

Define the term 'conciliation' and explain how CAV uses this dispute resolution method to uphold the principle of fairness.

8D Civil jurisdictions of Victorian courts



Image: Stokkete/Shutterstock.com

Imagine you bought a new filing cabinet and you are wanting to organise your schoolwork. In the top drawer, you put your favourite subject as you rank this most important, whilst the bottom drawer is used for your least favourite subject. Similar to the way you have chosen to organise your filing cabinet, the Victorian courts are arranged in a hierarchy that enables the civil justice system to function efficiently and effectively. Every case has its place!

STUDY DESIGN DOT POINT

- an overview of the role and civil jurisdictions of the Victorian courts



LESSON LINKS

You learnt about alternative dispute resolution methods in **8B Methods of civil dispute resolution**.

You learnt about the Victorian Civil and Administrative Tribunal (VCAT) in **8C Institutions that resolve civil disputes**.

You learnt about the Victorian court hierarchy, original and appellate jurisdiction, and appeals in **1F The Victorian court hierarchy**.

KEY TERMS

Court hierarchy the arrangement of courts in order of superiority.

Appeal a legal process that a dissatisfied party may pursue to have a court's decision reviewed by a higher court.

LEGAL VOCABULARY

Jurisdiction the legal power of a court or other authority to make decisions.

Original jurisdiction the legal power of a court or other authority to hear a case for the first time.

Appellate jurisdiction the legal power of a court to review a decision of a lower court or tribunal on appeal.

Lesson introduction

Each court within the Victorian court hierarchy has its own jurisdiction that enables it to hear and determine various civil disputes. For disputes that have not been resolved using alternative dispute resolution methods or institutions, such as mediation or the Victorian Civil and Administrative Tribunal (VCAT) respectively, the courts can also be an effective dispute resolution body. The Victorian court hierarchy enables civil disputes to be heard efficiently and fairly, therefore enabling the achievement of civil justice.

Civil jurisdictions of Victorian courts 2.2.4.1

The Victorian **court hierarchy** ranks the courts from least to most superior and enables civil disputes to be appropriately and efficiently heard. The courts have their own **jurisdiction**, which enables them to hear particular types of civil disputes.

A court can have **original jurisdiction**, providing it with the ability to hear certain civil disputes for the first time. Additionally, some courts may have **appellate jurisdiction**, allowing these courts to hear a civil dispute on **appeal**, which occurs when a party is seeking a review of, or challenge to, the original outcome given by an inferior court.

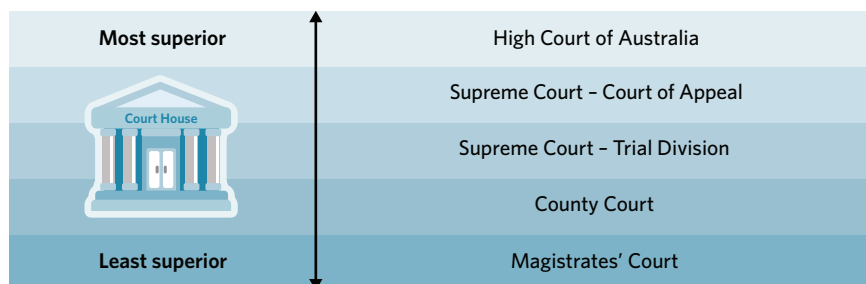


Figure 1 The Victorian court hierarchy

The Magistrates' Court 2.2.4.1.1

As the lowest court in the Victorian court hierarchy, the **Magistrates' Court of Victoria** hears a number of minor civil disputes. Plaintiffs and defendants do not have access to trial by jury in the Magistrates' Court. Instead, the verdict is determined by the magistrate alone.

Table 1 The civil jurisdiction of the Magistrates' Court

Original jurisdiction	Appellate jurisdiction
The Magistrates' Court has the power to hear: minor civil disputes with claims up to \$100,000, such as negligence claims, contractual disputes, and injury compensation claims. If a claim for damages of less than \$10,000 is made, the Magistrates' Court will refer the case to be resolved via arbitration.	The Magistrates' Court does not have any appellate jurisdiction, meaning it cannot hear cases on appeal.

KEY TERM

Magistrates' Court of Victoria the first level of the Victorian court system in which relatively minor matters are heard and determined by judicial officers, such as magistrates.

LESSON LINKS

You learnt about arbitration in **8B Methods of civil dispute resolution**.

You will learn more about a civil trial by jury in **8E The jury in a civil trial**.

The County Court 2.2.4.1.2

Unlike its criminal jurisdiction, the **County Court of Victoria** only has original jurisdiction for civil disputes. Plaintiffs and defendants have access to a trial by jury in the County Court, meaning they have the option of having their dispute heard by a judge alone or by a judge and jury of six. If a party requests to have a trial by jury, they must fund the cost of the jury.

Table 2 The civil jurisdiction of the County Court

Original jurisdiction	Appellate jurisdiction
The County Court has the power to hear: civil disputes with claims of any amount. However, it will usually only hear claims exceeding \$100,000, such as defamation claims and property purchasing disputes.	The County Court does not have any appellate jurisdiction, meaning it cannot hear cases on appeal.

KEY TERM

County Court of Victoria Victoria's principal trial court that hears and determines criminal and civil matters.

HYPOTHETICAL SCENARIO

Sounds like an Aunt Julia problem

Two brothers, Jeremiah and Conrad, are suing their Aunt Julia over the terms of their mother's estate. Aunt Julia is planning on selling her sister's holiday house as she has a 50% share in the property. However, the boys do not want the house to be sold and believe it is their right to make the final decision, as they received half of the share in the property from their mother's estate following her death. Consequently, Jeremiah and Conrad initiated a civil claim in the County Court accusing their Aunt Julia of breaching their rights by selling the property they have a 50% share in without prior consultation. Their claim is being heard by Judge Laurel alone, as neither the boys nor Aunt Julia were willing to fund the costs of a jury. If Judge Laurel does not rule in Jeremiah and Conrad's favour, they have already told their lawyer that they will be filing an appeal in the Supreme Court to have the case reheard, as long as they have grounds to do so.



Figure 2 Jeremiah and Conrad initiated a civil claim in the County Court against their Aunt Julia over their late mother's holiday house

KEY TERM

Supreme Court of Victoria the most superior court in Victoria that deals with the state's most serious criminal and civil cases.

LEGAL VOCABULARY

High Court of Australia the most superior court in Australia that hears matters of federal significance and appeals from federal, state, and territory courts.

Question of law an issue of law that is resolved by a judge, often concerning the interpretation and application of legal principles or legislation.

Question of fact an issue within a case whereby the material facts of the case need to be determined by weighing up the credibility of the evidence.

LESSON LINK

You learnt about class actions in **6C Plaintiffs and defendants**.

The Supreme Court 2.2.4.1.3

The **Supreme Court of Victoria** consists of two divisions: the Supreme Court – Trial Division and the Supreme Court – Court of Appeal. Whilst the Supreme Court is the most superior Victorian court, the highest Australian court is known as the **High Court of Australia**, a court that can hear appeals from, and sits above, all state and territory courts.

Table 3 The civil jurisdiction of the Supreme Court – Trial Division

Original jurisdiction	Appellate jurisdiction
The Supreme Court – Trial Division has the power to hear: civil claims of any amount. However, it will usually only hear large and complex civil disputes with claims greater than \$100,000, such as class actions and commercial disputes.	The Supreme Court – Trial Division has the power to hear civil appeals from: - the Magistrates' Court on questions of law. - the Victorian Civil and Administrative Tribunal (VCAT) on questions of law.

Table 4 The civil jurisdiction of the Supreme Court – Court of Appeal

Original jurisdiction	Appellate jurisdiction
The Supreme Court – Court of Appeal only hears cases on appeal, therefore it has no original jurisdiction.	The Supreme Court – Court of Appeal has the power to hear civil appeals from: - the County Court and the Supreme Court – Trial Division on questions of law, questions of fact, or an allegedly unjust remedy awarded. - cases heard by the President or Vice President of VCAT.

The role of Victorian courts 2.2.4.2

Victorian courts serve to interpret civil laws, determine the liability of a party, and provide remedies, where appropriate, to compensate plaintiffs for the loss or suffering they have endured. The Victorian court hierarchy enables these roles to be effectively achieved in the civil justice system.

Table 5 The role of the courts in the civil justice system

Role	How the courts achieve their role
Provide access to an independent, experienced, and knowledgeable judicial officer	The magistrates and judges presiding over civil disputes are experienced in and knowledgeable about civil laws and court rules and procedures. These judicial officers must determine the outcome of a dispute in an impartial and competent manner to ensure parties receive a fair outcome.
Ensure the swift delivery of justice to minimise delays experienced by parties	Judges in civil cases have case management powers that allow them to give orders and directions about court proceedings with the aim of ensuring justice is delivered efficiently. The judge may use these powers to: - direct the order and timeframe in which evidence is presented by each party. - limit the number of witnesses and the length of opening statements. - set deadlines for the parties to submit documents or evidence. This can reduce delays to ensure civil cases are heard in a timely manner.

Continues →

LEGAL VOCABULARY

Case management powers the ability of a judge or magistrate to make orders and provide directions to the parties about the proceedings, with the aim of ensuring justice is delivered efficiently.

Table 5 Continued

Role	How the courts achieve their role
Enforce procedural fairness	The formality and structure of court processes support procedural fairness as existing rules and directions equally apply to both parties, whilst judges ensure such rules are appropriately followed. For example, the right to present a case and cross-examine witnesses is afforded to both parties in a civil dispute, reinforcing procedural fairness.
Provide access to a trial by jury	In civil trials, parties can access a jury trial at their own expense to have the outcome of their dispute determined by a cross-section of the community that reflects the wider views and values of society.
Provide an efficient and consistent system of dispute resolution	The organisation of the courts in the civil justice system enables minor, less serious cases to be heard in lower-ranked courts, such as the Magistrates' Court. Alternatively, superior courts can devote more time and resources towards resolving long, complex disputes as they are not delayed by less serious cases. This benefit of the court hierarchy is known as administrative convenience .
Provide a dispute resolution avenue for class actions	Class actions are often complex and long civil disputes that are usually initially heard in the Supreme Court – Trial Division, where judges have specialised knowledge in resolving such cases. Consequently, individuals who have experienced a breach of their rights by the same defendant under similar circumstances can launch a claim together.
Provide a legally-binding outcome	Civil claims resolved in the court will result in a final, legally-binding decision, meaning parties are obliged to comply with the outcome. For example, if the outcome of a case requires the defendant to complete a property transfer where they transfer land to the plaintiff, they will be legally bound to do so.
Order a remedy	When resolving civil grievances where the defendant is found liable, the courts will order a remedy for the plaintiff, which may be in the form of damages or an injunction. The remedy awarded will aim to restore the plaintiff to their original position prior to incurring the loss or suffering.
Provide an opportunity to appeal the outcome of a case	When one or both parties are unsatisfied with the final outcome of the dispute, if they have the appropriate grounds, they can appeal this decision in a superior court, as a result of the Victorian court hierarchy.
Set precedent for future cases	The courts have a role in developing common law by establishing precedents. Precedent refers to a legal principle established by a court that must be followed by inferior courts or those at the same hierarchical level in subsequent cases that share similar material facts. Through the establishment of precedent, the courts seek to achieve justice and consistency by upholding civil rights in society.

WANT TO KNOW MORE?

The impacts of various events, including the Covid-19 pandemic, on the courts, worsened their already overrun conditions. Consequently, this has greatly impacted the delivery of justice for various parties. You can find out more about court delays in the civil justice system by searching 'Like being suspended in mid-air': The enduring impact of ongoing delays in Australia's courts' and clicking the article by ABC News.

LEGAL VOCABULARY

Administrative convenience the systematic benefit derived from legal matters being distributed amongst the courts according to their complexity and severity.

LESSON LINKS

You will learn more about remedies in **Chapter 9: Remedies**.

You learnt about precedent in **1E Sources of law**.

USEFUL TIP

When referring to the achievement of a principle of justice in your SAC and exam answers, try and use synonyms of the words 'fairness', 'equality', and 'access'. For example, when discussing the achievement of access, you can state that when courts publish the outcomes of their cases, parties to a civil dispute can engage with and remain informed about court processes and procedures, thus achieving access. Using phrases, such as 'engage with' and 'remain informed' when referring to access, can enhance the quality of your answers.

LEGAL CASE



Image: Arif Supriyadi/Shutterstock.com

Figure 3 Environment East Gippsland Inc and Kinglake Friends of the Forest Inc were successful in their civil action against VicForests, after its operations were threatening the survival of gliding mammal species

VicForests v Environment East Gippsland Inc & Anor [2023] VSCA 159

Facts

Environment East Gippsland Inc (EEG) and Kinglake Friends of the Forest Inc (KFF) are associations that have an interest in preserving East Gippsland and Central Highlands forests. These parties initiated a civil action in the Supreme Court – Trial Division against VicForests, a timber harvesting business owned by the state of Victoria, after believing its operations were threatening the survival of two gliding mammal species. The trial judge found that VicForests' operations did threaten the species' survival as the business was not complying with relevant precautionary standards. Consequently, VicForests was ordered to only operate in the area if certain actions were taken. VicForests appealed the decision in the Supreme Court – Court of Appeal.

Legal issue

The judge in the Supreme Court – Court of Appeal had to decide whether to alter the decisions made by the original trial judge in the Supreme Court – Trial Division.

Decision

The Court of Appeal upheld the decision made by the original trial judge. Therefore, VicForests was unsuccessful in its appeal.

Significance

The initial civil case launched by EEG and KFF against VicForests was heard in the Supreme Court – Trial Division, using its original jurisdiction, whilst the appeal made by VicForests was heard in the Supreme Court – Court of Appeal, using its appellate jurisdiction. In order to make an appeal, VicForests would have had the appropriate grounds to do so.

Evaluating the ability of the Victorian courts to achieve the principles of justice in relation to their civil jurisdiction



STRENGTHS

- Judges and magistrates of the civil justice system have specialised knowledge and skills as a result of the Victorian court hierarchy, therefore enabling them to deliver consistent and impartial outcomes for civil disputes.
- All parties have the same right to apply for leave to appeal the outcome of their case if they have the legal grounds to do so. This ensures errors made by lower courts can be corrected, achieving fairness.
- The court hierarchy provides a consistent and efficient means of dispute resolution through the principle of administrative convenience. The organisation of the courts in the hierarchy, as well as the case management powers of judges, can help minimise delays and backlogs, consequently, reducing the stress associated with a civil trial. This enables a fair outcome for parties to be achieved, as key evidence is less likely to deteriorate over time so the jurors can receive the best evidence in order to make an impartial decision.
- When courts set precedent for future civil cases, greater consistency and fairness can be provided for future cases as the reasoning behind the court's decisions is more open.

LIMITATIONS

- The expense of appealing to a superior court may be unrealistic for some parties, as they may be unable to afford the associated court fees and cost of legal representation. Therefore, parties dissatisfied with a decision made by a lower court may be unable to have any errors corrected as they cannot participate in an appeal, leading to an unfair outcome.
- Whilst the court's hierarchical arrangement supports administrative convenience and a judges' case management powers can minimise delays, backlogs may still occur. Hence, the timely determination of a civil dispute can be limited, which may disproportionately impact vulnerable parties and limit fairness. This is because, as a result of the delays, physical evidence may deteriorate and people's personal accounts of the events that occurred may be forgotten, resulting in the judge and/or jury being unable to make an impartial decision.
- If an unfair precedent was established in a superior court, a lower court is still obliged to follow the legal principles of that case when handing down a decision related to similar facts in future cases. Consequently, courts may have to deliver an unjust outcome to the parties in the dispute.

STRENGTHS

- Court rules and procedures are enforced by judges and magistrates, who ensure these rules apply equally to all parties.
- Provided an individual has the appropriate grounds, all parties have the right to apply for permission to appeal the decision made in relation to their case, no matter their race, sex, gender, or any other personal characteristics. This ensures all people involved in a civil case can engage in the appeals process in the same way.
- The Victorian court hierarchy ensures civil disputes are heard by the appropriate court, thus enabling consistent outcomes for similar disputes.

LIMITATIONS

- The high cost of appeals means they are not equally accessible to all parties. Individuals with greater financial capacity may be more capable of pursuing an appeal compared to those of lower socioeconomic status. Resultantly, equality may not be achieved as the capacity of a party to appeal the outcome of their dispute is limited for some parties on the basis of their wealth.
- The formality of the courts and their procedures may cause parties in a civil dispute to feel overwhelmed and stressed. This may prevent them from presenting evidence in a confident manner, therefore providing them with unequal footing in the dispute.

**STRENGTHS**

- The appeal process allows parties to have a court's decision reviewed by a superior court, therefore ensuring any mistakes are corrected and that all parties have access to just outcomes.
- As various Victorian courts publish the outcomes of disputes on their website, parties have access to previous civil matters heard in court, making them more informed about their rights and the process of legal proceedings. Therefore, parties may be able to better understand where to commence proceedings and what the likely outcome of their case may be, enabling them to access the most appropriate court for their civil dispute. This also allows parties to determine whether to initiate a dispute, as if plaintiffs of a similar case have been previously unsuccessful, it is likely they will also not succeed, due to the operation of precedence. Therefore, the plaintiff may decide to not waste their resources attempting to have their civil dispute heard in the courts due to the likelihood of failure.
- The Victorian courts each have their own websites that can provide information to parties in a civil trial, informing them about the judicial processes, court procedures, and other relevant information.

LIMITATIONS

- Some cases may be ineligible for a review by a superior court if the grounds for an appeal do not exist. Thus, this can limit access to appeals.
- The expenses associated with an appeal due to the need to pay court fees and possibly engage legal representation again, may make the process of appealing inaccessible for some parties, due to their financial position. Consequently, a party's access to a civil remedy may be limited.
- Decisions made in the Magistrates' Court are not publicly available and, therefore, are inaccessible to parties in future cases. This may make parties that will be involved in a civil dispute heard in the Magistrates' Court less informed about their rights and the proceedings that will occur.
- A party may struggle to understand the civil processes and procedures of the courts if they have no prior knowledge, therefore limiting their access to justice.



Lesson summary

Within the Victorian civil justice system, some of the courts can have original and appellate jurisdiction. The Victorian courts have various roles in the civil justice system, including to:

- provide access to an independent, experienced, and knowledgeable judicial officer
- ensure the swift delivery of justice to minimise delays experienced by parties
- enforce procedural fairness
- provide access to a trial by jury
- provide a dispute resolution avenue for class actions
- provide a legally-binding outcome
- order a remedy
- provide an opportunity to appeal the outcome of a case
- set precedent for future cases.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. Therefore, the tables showing the strengths and limitations of the Victorian courts in relation to each principle can assist you in developing a discussion of how the courts can uphold the principles of justice.

8D Questions

Check your understanding

Question 1

The civil jurisdiction of the Victorian courts can include both original and appellate jurisdiction, but not all courts have both.

- A. True
- B. False

Question 2

Fill in the blanks with the following terms:

original

appellate

The Magistrates' Court has no [] jurisdiction. However, its [] jurisdiction enables it to hear minor civil disputes with claims of up to \$100,000.

Question 3

Which of the following statements are correct about the civil jurisdiction of the County Court?

(Select all that apply)

- A. The County Court can only hear civil claims of less than \$100,000.
- B. The County Court can hear a defamation claim for \$500,000.
- C. The County Court has no appellate, civil jurisdiction.
- D. The County Court can hear appeals from the Magistrates' Court and Victorian Civil and Administrative Tribunal (VCAT) on questions of law relating to a civil dispute.

Question 4

The Supreme Court of Victoria has a:

- A. Trial Division with only original jurisdiction and a Court of Appeal with only appellate jurisdiction.
- B. Trial Division with original and appellate jurisdiction and a Court of Appeal with only appellate jurisdiction.
- C. Trial Division with only original jurisdiction and a Court of Appeal with original and appellate jurisdiction.
- D. Trial Division with original and appellate jurisdiction and a Court of Appeal with original and appellate jurisdiction.

Question 5

Which of the following statements correctly identify the roles of the Victorian courts when making determinations for civil disputes? **(Select all that apply)**

- A. Providing access to a biased and inexperienced judge in the County Court to ensure experienced judges are reserved for the Supreme Court.
- B. Enforcing procedural fairness by ensuring both parties have the opportunity to present evidence.
- C. Providing a remedy to the plaintiff if the defendant is found liable.
- D. Providing only the plaintiff with the opportunity to appeal the decision made by a lower court.

Question 6

The Victorian court hierarchy is beneficial in the civil justice system because it can:

- A. allow fairness, equality, and access to be achieved.
- B. create a more inefficient and ineffective legal system.
- C. ensure defendants are always found liable.

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Describe the civil jurisdiction of the County Court.

Question 8

(4 MARKS)

A restaurant owner, Clayton, took civil action against chefs Christian and Angus after they failed to uphold the terms of their contract. The case was heard in the Magistrates' Court by a well-versed magistrate, Magistrate Gawn, who competently and impartially heard both sides of the dispute. Magistrate Gawn found Christian and Angus liable for breaching the terms of their contract with the restaurant owner and they were required to pay damages to Clayton for a loss of income due to their behaviour.

Outline **two** roles of the Victorian courts that have been demonstrated in this scenario.

Question 9

(4 MARKS)

'The only role of the courts, when deciding on civil matters, is to determine the appropriate remedy to award the plaintiff for the breach they endured.'

Do you agree with this statement? Justify your response.

Extended response

Use your answer to question 10 to support your response to question 11.

Use the following information to answer questions 10 and 11.

Kozzy and Steven, along with several other soccer players, initiated a class action against their league's major soccer association for injury compensation, after failing to properly handle on-field concussions for several years, resulting in damaging mental health issues. The class action was heard in the Supreme Court – Trial Division and the judge found the defendant liable. However, an appeal of the decision has been filed by the soccer association.

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Supreme Court's ability to achieve the principles of justice in this civil case.

Statement	Strengths	Limitations
I. If the soccer association is successful in its appeal in the Supreme Court of Appeal, the players may not have the financial means to initiate a further appeal to the High Court.	☐	☐
II. Despite characteristic differences, such as race, gender, and religion, the judge should treat all individuals in the same manner.	☐	☐
III. By having a serious and complex case, like a class action, heard in the Supreme Court, delays can be minimised and a consistent outcome can be determined for the players and association.	☐	☐
IV. Kozzy and Steven, alongside the other players, may be able to access information on the Supreme Court's website that allows them to better understand the judicial process of a class action.	☐	☐
V. If the players are unable to afford an appeal, parties will not have equal access to challenging the court's decision.	☐	☐

Question 11

(6 MARKS)

Evaluate the ability of the Supreme Court to uphold the principles of justice in this civil case.

Linking to previous learning

Question 12

(2 MARKS)

Compare the criminal and civil jurisdictions of the Magistrates' Court.

8E The jury in a civil trial

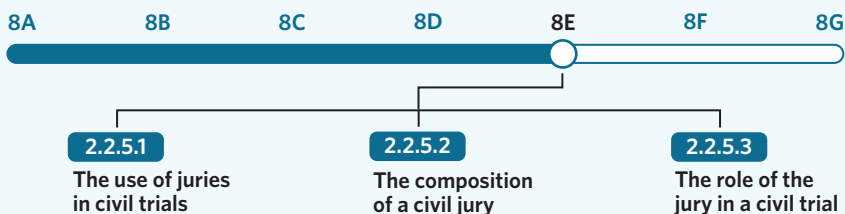


Image: Corona Borealis Studio/Shutterstock.com

You are watching the finale of 'Love Island' and want your favourite couple to win. The voting lines are open for Australians to cast their verdict and your family has gotten on board to support the lovebirds you are advocating for. In the same way you, and other Australians, vote for your favourite couple on 'Love Island', a jury must make an informed decision and vote to determine the overall verdict of a civil dispute based on the evidence presented.

STUDY DESIGN DOT POINT

- the role of the jury in a civil trial



LEGISLATION

Juries Act 2000 (Vic)

KEY TERM

Jury a group of randomly selected people who are required to deliver a verdict in a trial based on the evidence presented to them in court.

LEGAL VOCABULARY

Electoral roll the list of names of all Australians who are enrolled to vote. In order to enrol to vote, an individual must be an Australian citizen and over 18 years old.

Verdict a decision made by a judge or jury regarding the guilt or liability of a party.

LESSON LINK

You learnt about the use of juries in criminal trials in **4E The jury in a criminal trial**.

Lesson introduction

When a civil dispute is settled in the courts, plaintiffs and defendants have the option of having a trial by jury. The parties to a civil dispute can request to have the outcome of their case determined by a jury instead of a judge alone, providing them with more diverse perspectives of society as jury members are randomly selected individuals of the general public. The *Juries Act 2000 (Vic)* outlines the roles and responsibilities of juries in civil trials to ensure the principles of justice are upheld for both parties.

The use of juries in civil trials 2.2.5.1

The **jury** in a civil trial is a group of six individuals who are randomly selected from the Victorian **electoral roll** to attend and hear a civil dispute in a court. The jury must then determine the final **verdict** based on the evidence presented. Unlike in criminal trials, the cost of a jury in a civil dispute is not paid for by the courts. Instead, the parties must bear the expenses associated with a trial by jury themselves. The party that requests the jury will usually be required to cover the associated costs. As a result of this financial burden, juries are not often used in the civil justice system.

In civil disputes, the use of a jury depends on two factors. The first is whether one or both parties wish, and apply, to have their trial heard by a jury. Under law, both plaintiffs and defendants have the right to request a jury. Although, if only one party makes this request and the other party does not want a trial by jury, it is their responsibility to convince the court why a jury should not be used. The second factor is whether the trial is being heard in a court that is eligible to hear civil trials by jury. For a jury to be used in a civil trial, the plaintiff must be initiating their claim in the County Court or Supreme Court – Trial Division. In some rare cases, a judge may request the use of a jury, in which case, the state pays for the jury.

In some cases, parties do not have access to a trial by jury, including when:

- the dispute is heard in the Magistrates' Court
- the dispute is heard on appeal
- a judge orders the dispute to be heard by a judge alone.

WANT TO KNOW MORE?

Have you ever wondered what it would be like to be summoned for jury service? In 2022, it was reported that 328,135 people were selected for jury duty across both criminal and civil trials.

You can find out more about the experience of serving on a jury by searching 'Record numbers of Victorians are being called for jury duty. Here's what to expect' and clicking the relevant article by ABC News (Crabtree, 2022).

The composition of a civil jury 2.2.5.2

In civil trials, six jurors are selected to determine the outcome of the dispute via the process of **jury empanelment**. In order to serve, these individuals must be qualified and able to partake in jury service, meaning they are both:

- 18 years or older
- enrolled to vote in Victoria.

Whilst a person may satisfy these two conditions, other factors may prevent them from being selected for jury duty, including having a pre-existing relationship with one or both of the parties or working in the legal field. The reasons why a person may be prevented from serving on a jury in Victoria are set out in the *Juries Act 2000* (Vic).

LEGAL VOCABULARY

Jury empanelment the process of selecting the jurors for a trial, whereby potential jurors can be found ineligible, or be disqualified or excused from jury duty for a range of reasons.

Table 1 Reasons for being unable to serve on a jury in Victoria

Reason for inability	Explanation	Conditions
Disqualified	The potential juror has committed crimes and may be unable to be impartial and unbiased when determining a verdict as a result.	A person who has been: • convicted of treason or an indictable offence and sentenced to a term of imprisonment or detention of three years or more. • sentenced to a term of imprisonment of three months or more, within the last 10 years. • sentenced to a term of imprisonment of three months or less, received a Community Corrections Order (CCO), or has received a suspended sentence within the last five years. • sentenced for an offence in any court, including the Magistrates' Court, in the last two years. • charged with an indictable offence and is released on bail. • remanded in custody. • declared bankrupt.
Ineligible	The potential juror possesses personal characteristics that make it difficult for them to participate in the jury in a representative, standard capacity.	Those who currently, or have in the last 10 years, held a position, such as: • Governor or Official Secretary to the Governor • judge, magistrate, or any other judicial officer • lawyer • police officer • Member of the Victorian Parliament. Individuals who may not be able to perform the necessary tasks of a juror due to a personal reason, such as: • a physical disability that renders the person incapable of performing the duties of jury service • an intellectual disability • an inability to communicate in, or understand, the English language adequately.
Excused	The potential juror is initially selected but then, by the choice of one of the parties or the court, they are excused for a select reason.	The court may excuse a potential juror if they: • are unable to consider the case impartially due to reasons, such as having a personal connection to the case • were a victim of a similar crime.

Continues →

Table 1 Continued

Reason for inability	Explanation	Conditions
Excused	The potential juror is initially selected but then, by the choice of one of the parties or the court, they are excused for a select reason.	A potential juror may request to excuse themselves and can be approved to be excused, if they meet criteria, such as: • they live more than 50km from Melbourne CBD or 60km from a regional court • substantial financial hardship would result from attending jury service • they have an illness or poor health • they bear significant caring duties • their religious beliefs are incompatible with jury service • they are of old age.

USEFUL TIP

In particularly complex or long civil trials, a jury of eight individuals can be selected, instead of six, to account for circumstances where a juror may need to be excused, such as falling ill or unintentionally engaging with information about the dispute in the media. However, before deliberations occur, two of the empanelled jurors will be dismissed, meaning the verdict is always only determined by six members of the general public.

DEEP DIVE**Jury empanelment**

Jury empanelment is the process of selecting the members of a jury. The jury empanelment process includes:

- the preparation of a jury roll by the Victorian Electoral Commission
- the release of a questionnaire to potential jurors to determine if they can conduct their role as a juror and, therefore, assess their eligibility
- the opportunity for jurors to excuse themselves if there is good reason for doing so, such as living far away from the court or poor health
- the random selection of six jurors
- the opportunity for the plaintiff or defendant to challenge the presence of certain jurors
- the taking of an oath by selected jurors.

The role of the jury in a civil trial 2.2.5.3

In order to uphold the principles of justice, juries in a civil trial have various roles and responsibilities that enable them to deliver a just and fair outcome to the plaintiff and defendant that reflects the broader views of society. If the civil jury is unable to reach a final verdict, the judge may declare a hung jury, meaning a retrial will need to occur for the dispute.

Table 2 Role of the jury in a civil dispute

Role	Explanation
Be objective	When determining the final verdict of the civil dispute, the jury must ensure their decision is made in an independent and unbiased manner. Jurors who believe they cannot remain objective must ask to be excused during the jury empanelment process.
Listen to evidence and submissions	Throughout all court proceedings, jurors should remain alert, take notes, and recall information presented in court by listening to both the plaintiff's and defendant's cases. In order to form their final verdict, jurors must be aware of the facts and laws relevant to the case and determine what they accept as accurate and reliable.
Listen to the directions of the judge	A judge will provide the jury with directions they must follow regarding the law, evidence, and the decision they need to make.

Continues →

USEFUL TIP

In civil trials, a majority verdict occurs when five out of the six jurors believe, on the balance of probabilities, that the defendant is liable for the civil wrong. A unanimous verdict occurs when all six jurors find the defendant liable.

On the other hand, a majority verdict in criminal trials occurs when 11 of the 12 jurors believe, beyond reasonable doubt, that the accused is guilty of the criminal offence. A unanimous verdict occurs when all 12 jurors find the accused guilty.

Table 2 Continued

Role	Explanation
Determine liability	The jury is mainly responsible for determining the civil liability of the defendant, on the balance of probabilities, for the harm or loss suffered by the plaintiff. For a defendant to be found liable, a majority verdict or unanimous verdict must be achieved amongst jurors. A majority verdict occurs when at least five jurors of the six agree on the decision, whilst a unanimous verdict involves all jurors reaching an agreement on the outcome of the dispute. In some matters, the jury may also have a role in calculating damages awarded. A majority verdict by the jury can only be accepted by the judge in a civil trial where the jury has been deliberating for three hours or more. However, the judge will not accept a majority verdict if they believe the jury has been deliberating for an unreasonable period of time, given the complexity and severity of the trial.
Decide on a remedy	The jury may be responsible for deciding the appropriate remedy to award the plaintiff, which can include damages, compensation, or other relief. In some cases, the jury may only make a decision about the defendant's liability, but not provide a decision as to the remedy to be awarded. For example, in defamation cases, the jury is responsible for the decision in relation to fault, whilst the judge is responsible for determining a remedy, if the defendant is found to be liable.

LESSON LINKS

You learnt about the balance of probabilities in **6B Key concepts of civil law**.

You will learn more about remedies in **Chapter 9: Remedies**.

You learnt about beyond reasonable doubt in **2C Key concepts of criminal law**.

REAL WORLD EXAMPLE

Does Ed have a 'bad habit' of copyrighting songs?

In 2017, Ed Sheeran was sued by the heirs of Ed Townsend, the songwriter of the Marvin Gaye hit 'Let's Get It On', claiming Sheeran's song 'Thinking Out Loud' copied the 'melody, harmony, and rhythm' of the song written by Townsend in 1973. The civil trial was heard in May 2023, at a US court in New York with both a judge and jury.

Throughout the trial, the jury was required to listen to both songs. They were then directed to consider the 'raw elements of melody, harmony, and rhythm' of the 'Let's Get It On' composition. The lyrics of the songs were considered 'legally insignificant'. Sheeran's lawyers argued against all evidence presented, posing that the similarities between the songs were a result of the 'common foundations of popular music', rather than direct, conscious copying.

The final verdict handed down by the jury was that Townsend's heirs, as the plaintiff, had 'not proven Sheeran had infringed his copyright interest in the Gaye song'.

Whilst this was a case heard in the US rather than in a Victorian court, it is still an interesting example of evidence a jury might be directed to consider in any jurisdiction.

Adapted from 'Ed Sheeran has won a copyright case over Marvin Gaye's Let's Get It On. These were the key moments in his trial' (ABC News, 2023)



Image: yakub88/Shutterstock.com

Figure 1 The verdict of a copyright infringement lawsuit against Ed Sheeran was determined by a civil jury

Evaluating the jury's ability to achieve the principles of justice in a civil trial

**STRENGTHS**

- A jury consists of a random cross-section of the community, therefore, fairness is promoted as the parties are able to have their case determined by their peers, who are also members of the general public.
- Jurors must disregard prior knowledge and cannot seek additional information about a dispute, therefore, making them as close to impartial as possible and promoting fairness.
- Jurors can be excused if they are in any way connected to either party or believe they hold certain biases due to their personal beliefs or values, therefore, upholding fairness.

LIMITATIONS

- Jurors must undertake the complex task of determining the verdict of a civil trial with minimal or no legal training, meaning there is a real risk of an unfair and uninformed verdict.
- As jurors do not provide the rationale for their verdict, there is no guarantee the law has been correctly applied in accordance with the facts presented.

**STRENGTHS**

- Both the plaintiff and defendant have the right to request a jury trial in a civil dispute regardless of personal characteristics, therefore upholding equality.
- Jurors must be impartial when determining their verdict and treat all parties equally, regardless of characteristics, such as race, religion, or gender.

LIMITATIONS

- As the civil parties must bear the cost of a trial by jury, equality may be limited for individuals of low socioeconomic status as they may be less likely to utilise a jury.
- A jury may not be a true representation of society as individuals who are ineligible or disqualified from jury duty are not accounted for, potentially undermining equality to a trial by one's peers for the parties.
- Although jurors are instructed to remain impartial, they may hold subconscious biases that may limit their ability to treat both parties equally.

**STRENGTHS**

- When a jury is present, the use of plain English is increased, making a trial more understandable and accessible to jurors, plaintiffs, and defendants. This can ensure all participants in the civil dispute understand the courts' processes and rules of evidence being used in the determination of the case, promoting access to justice.

LIMITATIONS

- It may not be financially viable for parties to request a trial by jury as additional fees are required for jury trials. This financial constraint means a trial by jury as a form of justice may be inaccessible for some parties.
- In the case of a hung jury or mistrial due to juror misconduct, the resolution to the civil dispute is likely to be delayed, hindering access to a timely and efficient justice system for parties.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. These tables showing the strengths and limitations of juries in relation to each principle can assist you in developing a discussion of how the use of juries can uphold the principles of justice.

Lesson summary

- In a civil trial, a jury of six members from the electoral roll can be used if requested by the plaintiff, the defendant, or both parties.
- A civil trial by jury is not permitted where:
 - the dispute is heard in the Magistrates' Court
 - the dispute is being heard on appeal
 - a judge ordered for the dispute to be heard by a judge alone.

- Individuals may be excused from jury duty if they are:
 - disqualified
 - ineligible
 - excused.
- Jurors have various responsibilities, including to:
 - determine liability
 - decide on a remedy
 - be objective
 - listen to evidence and submissions
 - listen to the directions of the judge.

Table 3 Comparing criminal and civil juries

Similarities	Differences
• Both criminal and civil juries determine the verdict of the trial. • Jurors must determine the final verdict solely based on the evidence presented and are not permitted to conduct their own research about the trial or use prior knowledge, such as information exposed in the media. • To determine the guilt or liability of an accused or defendant respectively, a majority or unanimous verdict must be established. However, in both trials, a majority verdict, as opposed to a unanimous verdict, can only be accepted where the jury has deliberated for a reasonable period of time, given the complexity and severity of the trial. • The judge's orders must be followed by all jurors. • A member of the electoral roll is able to participate on a jury, and whether they are disqualified, ineligible, or excused from doing so is the same for both civil and criminal trials.	• There are 12 jurors on a jury for criminal trials, whereas there are only six jurors on a civil jury. • A trial by jury is required in all criminal cases where the accused has pleaded not guilty to an indictable Commonwealth offence. However, there is no automatic right to trial by jury for civil trials, meaning parties must request one if desired. • Civil juries are used less frequently than criminal juries. • Although jurors in criminal trials determine the verdict of an accused, they are not involved in the sentencing or the imposition of an appropriate sanction. However, jurors in civil trials may be consulted to assess what remedies should be awarded. • The standard of proof is different in criminal and civil trials. Jurors in criminal trials must determine whether the accused is guilty beyond reasonable doubt, whereas the jury in a civil trial considers the liability of the defendant on the balance of probabilities. • In criminal trials, the jury decides on the accused's guilt, whilst in civil trials, it determines the defendant's liability. • The courts cover the cost of a jury in criminal trials, whilst in civil trials, the parties must finance this expense themselves.

8E Questions

Check your understanding

Question 1

In a civil trial, a jury consists of:

- six people randomly selected from the electoral roll.
- 12 people randomly selected from the electoral roll.
- six people chosen from the community the defendant resides in.
- 12 people chosen from the community the defendant resides in.

Question 2

When a party requests a jury in a civil trial, the courts cover the costs of the jury.

- True
- False

Question 3

Which of the following are **not** conditions that would permit a civil trial by jury? (Select all that apply)

- A. The parties have requested the use of a jury.
- B. The judge has requested the use of a jury.
- C. The dispute is heard on appeal.
- D. The dispute is heard in the Magistrates' Court.

Question 4

Fill in the blanks with **two** of the following terms:

disqualified

ineligible

excused

When a jury member is [], this means they were initially selected but the individual requested, with a good reason for doing so, to no longer be included in the civil dispute. Alternatively, an individual is considered [] from jury duty if they have committed crimes that make it difficult for them to be an impartial determiner of liability.

Question 5

Tick the box to indicate whether each of the following statements are **true** or **false** about the role of the jury in civil trials.

Statement	True	False
I. The jury must determine the outcome of the civil dispute in a biased manner.	☐	☐
II. Jurors determine the liability of the defendant, on the balance of probabilities, by considering all the evidence presented by both parties during the trial.	☐	☐
III. Jury members are only permitted to consider the evidence presented by the plaintiff, as defendants are only allowed to bring their case to the judge in a civil trial.	☐	☐
IV. The jury must listen to the directions of the judge to ensure they correctly apply the facts and law to the dispute at hand.	☐	☐

Question 6

The parties to a civil dispute can request to have the outcome of their case determined by a jury instead of a judge as this allows them to have a cross-section of the community determine the outcome of the trial, potentially providing a more just verdict.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Identify **two** conditions under which parties cannot request a civil trial by jury.

Question 8

(3 MARKS)

Explain the composition of a jury in a civil trial.

Question 9

(4 MARKS)

Martha and Stewart were recently selected for jury duty in a high-stakes class action involving a number of plane crash victims and their families.

Describe **two** roles of Martha and Stewart as jurors in this civil dispute.

Extended response

Use your answer to question 10 to support your response to question 11.

Question 10

Which of the following statements are correct about the ability of a jury to achieve the principles of justice in a civil trial? **(Select all that apply)**

- A. As jurors are required to provide reasoning for their decision before delivering the verdict of the trial, a judge can ensure the facts and law have been correctly applied to the dispute, upholding fairness.
- B. Fairness can be upheld as the jury consists of a random cross-section of the community. Therefore, parties are having their case determined by their peers who are also members of the general public, reducing the risk of bias when a decision about a defendant's liability is being made.
- C. Equality may be limited as the civil parties must bear the cost of a trial by jury themselves. Therefore, parties of low socioeconomic status may be denied a trial by jury due to limited financial capacity.
- D. The principle of equality may be limited as only the plaintiff has the right to request a trial by jury.
- E. Access can be achieved as the use of a jury can increase the use of plain English, consequently making a trial more understandable and accessible to all parties.
- F. In the case of a hung jury or mistrial due to juror misconduct, the resolution of the civil dispute is likely to be delayed, hindering access to a timely and efficient justice system for parties.

Question 11

(6 MARKS)

Evaluate the ability of a jury in a civil dispute to achieve the principles of justice.

Linking to previous learning

Question 12

(4 MARKS)

Compare juries in a criminal trial to juries in a civil trial.

8F First Nations people and the civil justice system



Image: Brooke Ottley/Shutterstock.com

'I'm frustrated with this white system, it's not a system of the land. It doesn't give us a say.'
—Uncle Dennis (2023)

When the British colonised Australia in 1788, they brought and installed the British legal system. Despite Australian laws having experienced significant reform since then, Australia's legal system is still founded upon Western ideals. Subsequently, First Nations peoples, who had their own legal system prior to colonisation, must conform to laws and procedures foreign to their own moral and cultural standards. This has led to negative experiences in the justice system for many Aboriginal and Torres Strait Islander peoples.

STUDY DESIGN DOT POINT

- the difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas

8A 8B 8C 8D 8E 8F 8G

2.2.6.1

The experiences of First Nations people in the civil justice system

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to people who have passed, inappropriate language, or distressing events, such as the Stolen Generations.

LESSON LINKS

You learnt about First Nations peoples' difficulties in the criminal justice system in **4F First Nations people and the criminal justice system**.

You learnt about the limitation periods for civil law in **6B Key concepts of civil law**.

You will learn more about the difficulties faced by people of low socioeconomic status in the civil justice system in **8G Difficulties faced by some groups in the civil justice system**.

LEGAL VOCABULARY

Limitation period the length of time in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant..

Lesson introduction

When seeking to pursue a civil claim, legal advice and representation often remain disproportionately inaccessible to First Nations peoples. For example, the Indigenous Legal Needs Project (ILNP) identified areas of civil law where Aboriginal and Torres Strait Islander peoples face difficulties, including housing, discrimination, credit and debt issues, child protection, social security, and wills and estates. In order to rectify these disparities and challenges, the social, cultural, and structural obstacles faced by Aboriginal and Torres Strait Islander peoples in the civil justice system must first be understood.

The experiences of First Nations people in the civil justice system 2.2.6.1

Many of the hurdles that Aboriginal and Torres Strait Islander peoples must overcome when dealing with the criminal justice system also act as similar barriers to justice in the civil context. For example, language barriers, cultural differences in presenting evidence, and socioeconomic disadvantage are relevant challenges that are also present in the civil justice system. Moreover, negative interactions with civil law can also lead to further difficulties in the criminal justice system for First Nations peoples, and vice versa. For example, the Indigenous Legal Needs Project (2015) reported that a lack of assistance with civil issues causes criminal repercussions, expressing that if 'they're having tenancy problems and they lose their house, they're homeless. Leads them to drinking. Police surveillance. Then people get themselves into trouble, because they're angry'. Subsequently, the difficulties experienced by First Nations peoples in the civil context must be addressed to minimise the issues most significantly affecting First Nations peoples, such as high incarceration rates.

Table 1 The difficulties faced by First Nations peoples in the civil justice system

Difficulty faced in the civil justice system	Explanation
Cultural practices make it inappropriate for people of Aboriginal and Torres Strait Islander heritage to discuss certain topics when giving evidence or being questioned	• Within certain First Nations communities, it is considered disrespectful to talk about particular topics. For example, speaking the name of a recently deceased person is considered inappropriate amongst several Aboriginal communities and can cause sadness, distress, and offence. As a result, a plaintiff or defendant may feel uncomfortable or find it culturally insensitive to present certain evidence to the judge and/or jury adjudicating the civil dispute. • Direct questioning is considered rude in some Aboriginal cultures. Therefore, if being questioned by the other party's lawyer for evidence, Aboriginal and/or Torres Strait Islander parties in a civil dispute may feel 'shamed'. A judge or jury may subconsciously perceive the embarrassment or discomfort experienced by the First Nations party as an indication of liability or evasiveness. • According to the Australian Human Rights Commission, 'gratuitous concurrence' is a widely-recognised cultural tendency among Aboriginal witnesses, whereby Aboriginal peoples 'will agree with questions put to him or her in order to placate [the person asking the question]'. This may result in a party unintentionally agreeing with the questions or statements made by the opposing party's lawyer, hindering the possibility of a fair outcome. • Some First Nations Australians may avoid eye contact and remain silent more often than non-Indigenous Australians as this is considered respectful within some communities. A lack of eye contact or silence can be misunderstood as dishonesty and evasiveness by those working within the justice system who do not understand this cultural practice, including judges and jurors.
Government-funded legal services help First Nations peoples deal with civil matters less than criminal issues	• The Indigenous Legal Need Project (2016) identified that many government-funded agencies 'focus on providing criminal rather than civil or family law services beyond city centres'. • Submissions to the Parliament of Australia's (2016) 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services' report revealed 'there is increasing evidence of unmet legal needs experienced by Aboriginal people in Victoria, particularly for civil and family law services'. • The lack of legal services for First Nations peoples' civil law disputes makes it more difficult for Aboriginal and Torres Strait Islander peoples to find representation, gain legal advice, and obtain information about different civil issues they may encounter.
Intergenerational trauma	• The National Association of Community Legal Centres (NACLC) listed intergenerational trauma as a barrier to accessing legal assistance services (Parliament of Australia, 2016). • Previous unpleasant interactions with the criminal justice system, or a lack of confidence in its ability to produce justice for First Nations peoples, may prevent an Aboriginal and/or Torres Strait Islander plaintiff, who believes they have had their rights breached, from attempting to seek remedies. This can prevent justice from being achieved as it is never pursued.
Language barriers due to pronunciation and grammar differences in Torres Strait Islander languages or Australian Aboriginal English compared to Standard English	• In more remote areas of Australia, some First Nations peoples' proficiency in speaking Standard English differs significantly. • Some English words may have different meanings, creating miscommunications and misinterpretations for First Nations individuals being questioned or presenting evidence as a plaintiff or defendant. For example, 'home' could mean a person's place of residence, language group, or national area. • This can negatively impact the degree of understanding the jury has of the statements given by the party. • Many Aboriginal peoples also speak 'non-standard English'. The Australian Law Reform Commission (2005) consequently found that 'the way in which questions are asked, especially direct questions, may often lead to misunderstanding and incorrect answers being given'. • The Parliament of Australia's (2016) report on 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services' found that 'a lack of interpreters' was a barrier to First Nations peoples accessing justice. Without an interpreter, it may be difficult for a plaintiff to establish their case on the balance of probabilities, or for a defendant to defend their actions in a convincing manner.

Continues →

Table 1 Continued

Difficulty faced in the civil justice system	Explanation
Socioeconomic disadvantages	- The social and economic disadvantage suffered by Aboriginal and Torres Strait Islander peoples has been attributed to higher levels of unemployment that are influenced by higher incarceration rates (Parliament of Australia, 2004). - Aboriginal employment dropped from 54% to 49% between 2007 to 2019, while the rate for non-Indigenous Australians remained relatively stable at roughly 76% (Australian Institute of Health and Welfare, 2023). - As a result of socioeconomic disadvantage, an Aboriginal and/or Torres Strait Islander plaintiff may find it difficult to afford the legal advice or representation required to bring an action against the defendant. A defendant may also experience difficulties due to socioeconomic disadvantage as they may find it difficult to obtain representation to defend themselves if the civil dispute is taken to court. - In civil law, many civil breaches have a limitation period, meaning an action cannot be brought against the defendant after its expiry. Therefore, a lack of financial resources can prevent plaintiffs from accessing justice in the permitted time frame, possibly resulting in them never receiving compensation for the civil breach.
Geographical barriers	- Many Aboriginal and Torres Strait Islander people live in extremely remote areas, affecting their ability to access the courts and legal facilities. In rural areas, for example, there are typically low numbers of legal practitioners offering legal aid, therefore reducing a plaintiff's access to legal resources, information, and ultimately, justice. - Due to the lack of Aboriginal and Torres Strait Islander government-funded services focusing on civil matters, there are 'large geographic areas in which Indigenous people live without any access to civil and family law legal assistance' (Parliament of Australia, 2016). - For people living in extremely remote communities, weather conditions, such as flooding, storms, and cyclones, can make roads inaccessible for parts of the year, preventing any face-to-face contact with legal assistance services. - In rural areas, there may be a lower quality of electricity and telecommunications services, limiting the effectiveness of accessibility mechanisms such as online calls with legal representatives. This may impact the ability of a plaintiff to initiate civil proceedings or the ability of a defendant to defend against the alleged civil wrong. - When a plaintiff or defendant lives in a remote area, often the only way to receive legal advice is through online calls. However, telephone conferencing may be inappropriate in some cases, such as family violence matters, where a plaintiff or defendant must share deeply personal information or traumatic stories online, possibly while in the presence of their kids or violent partner.
A lack of knowledge about the existence of civil law	- Although criminal law is better understood by First Nations peoples, due to their unjust overrepresentation in this system, they may be unaware of their rights under civil law, including those relating to employment and consumer laws. They may also be unaware of the legal processes available if one believes their rights have been breached in an area of civil law (Cunneen & Schwartz, 2011). - Aboriginal and Torres Strait Islander peoples may 'think the only thing those [legal] services are there for are the courts, for fighting, or when you are in trouble with the police... They don't know there's other stuff out there you can see [them] about' (Indigenous Legal Needs Project, 2015). - As many Aboriginal and Torres Strait Islander peoples live in remote communities, where 'legal information on consumer rights, employment, discrimination, and credit/debit issues is virtually non-existent' (Parliament of Australia 2016), many First Nations peoples fail to seek legal advice. Where advice is not being sought about matters relating to finances, this is particularly detrimental and can have long-term effects as debt can accumulate, increasing the financial toll the civil issue may have on the First Nations person involved.

Continues →

Table 1 Continued

Difficulty faced in the civil justice system	Explanation
Colonial history	- Asserting property rights is an area of civil law that has become particularly relevant for First Nations peoples since the Mabo Case, which introduced the concept of 'Native Title', formally recognising that Indigenous rights to the land existed at the time of British colonisation. - There is limited written evidence about the property holdings and history of Aboriginal and Torres Strait Islander sites, considering the oral history of their connection to the land extends for anywhere between 60,000 to 80,000 years. This can make it difficult for Aboriginal and Torres Strait Islander peoples to assert their property rights in court. - The <i>Native Title Act 1993</i> (Cth) enables Aboriginal peoples to negotiate for recognition of their connection to the land. However, the Act provides a weak protection of rights as First Nations peoples making claims under this Act are often unable to prove that traditional laws and customs have continued to exist on the land since European settlement. - Furthermore, the 'Native title' right has minimal application since people claiming native title must provide evidence of a continuous system of law and custom that gives rights to the land, which is difficult to establish.

LEGISLATION

Native Title Act 1993 (Cth)

LESSON LINK

You will learn more about the Mabo Case in **10C Australia's protection of human rights** – statute and common law.

REAL WORLD EXAMPLE

CONTENT WARNING This section explores content that is sensitive in nature, relating to sexual and physical abuse.

Justice denied for First Nations woman

In 2023, the Queensland Court of Appeal ruled that Woka Woka woman, Joanne Willmot, would be unable to pursue legal action for damages from the State of Queensland. Willmot was seeking to launch a civil case against the state, alleging its actions had led her to suffer abuse for over a decade whilst living in a foster home, ultimately causing psychiatric injury. During Willmot's childhood, Australian legislation deemed that the State's Director of Native Affairs was the 'legal guardian of every Aboriginal child under 21', during a period of time known as the 'Stolen Generations'. After being placed in foster care under this law, Willmot alleged she was abused when she was three to four years old. She was later moved to the care of a girl's dormitory where she alleged she was subjected to 'severe floggings' by staff.

She argued the State of Queensland failed to protect her from abuse when she was under its care by not properly training her guardians in regard to caring for children and not enforcing sufficient monitoring procedures to ensure she was receiving sufficient care.

Both the Supreme Court of Queensland and the Court of Appeal ruled that, due to the fact that 60 years had passed since the alleged abuses, the civil trial would not be fair as several key witnesses had since passed and evidence had been corrupted. Therefore, the trial was not allowed to proceed as the limitation period had passed and an application to extend that period was rejected by the court.

Willmot contended she had not come forward sooner about the abuses because she only finally recalled the abuse when reconnecting with other foster children in 2016. This demonstrates the difficulties faced by First Nations peoples in the civil justice system. Due to years of intergenerational trauma, memories can be repressed, meaning the limitation period for civil actions may pass without an Aboriginal and/or Torres Strait Islander plaintiff commencing an action in court, resulting in the denial of justice. This case demonstrates how the limitation period can prevent Aboriginal and Torres Strait Islander peoples from seeking damages for past horrors committed against them.

Adapted from 'Willmot v State of Queensland [2022] QSC 197' (Ames, 2022) and 'Queensland court quashes First Nations woman's lawsuit due to length of time since alleged sexual abuse' (Gillespie, 2023)



Image: Alex Cimbai/Shutterstock.com

Figure 1 A Woka Woka woman sought damages from the State of Queensland for the abuse she endured as a child of the Stolen Generations

LEGAL VOCABULARY

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes.

Victoria Legal Aid (VLA)

a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

LESSON LINKS

You learnt about VCAT in **8C Institutions that resolve civil disputes.**

You learnt about the areas of civil law in **6A Purposes and types of civil law.**

WANT TO KNOW MORE?

Victorian Aboriginal Legal Service (VALS) will not give legal advice or provide casework for civil matters relating to defamation, bankruptcy, and intellectual property. You can find out more about the areas of civil law that VALS does and does not assist in by searching 'VALS' and clicking the 'Civil and Human Rights' link on its website.

Several mechanisms exist in the civil justice system that aim to reduce difficulties faced by Aboriginal and Torres Strait Islander peoples interacting with this system, either as plaintiffs or defendants.

- Victorian Aboriginal Legal Service (VALS) provides Aboriginal peoples with information, referrals, legal advice, and representation for a number of different family and civil law matters, such as tenancy and discrimination disputes. According to their 2021–22 Annual Report, the organisation has regional client service offices located in Bairnsdale, Ballarat, Mildura, Shepparton, Swan Hill, and Warrnambool, as well as offices in Metropolitan Melbourne. Therefore, civil legal assistance can be accessed by Aboriginal peoples across Victoria, even in rural areas.
- The **Victorian Civil and Administrative Tribunal (VCAT)** has a 'Koori Support Team' that conducts culturally-safe hearings. For example, Aboriginal peoples seeking to settle a civil dispute can book Koori hearing rooms at VCAT that may provide a more informal environment conducive to resolving a dispute.
- **Victoria Legal Aid (VLA)** can provide representation for First Nations peoples in matters relating to family law, child support, immigration, residential tenancy, and anti-discrimination. It also offers culturally-safe family dispute resolution through collaborations with the VALS.
- Parties to a civil dispute can request an interpreter if needed, however, the party requiring the interpreter must pay for this service. Furthermore, in the 2016 report produced by the Parliament of Australia, titled 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services', a key barrier to Aboriginal and Torres Strait Islander peoples accessing justice was identified as being 'a lack of interpreters'.
- The Koori Engagement and Consultation (KEC) Framework has been developed to implement cultural awareness training for all staff across Court Services Victoria. This aims to counteract the biases or unfair outcomes that can occur in civil disputes involving an Aboriginal and/or Torres Strait Islander plaintiff or defendant due to prejudices held by staff across the Victorian courts.

DEEP DIVE**Victorian Aboriginal Legal Service**

In 2017, the Parliament of Australia released a report titled 'Aboriginal and Torres Strait Islander experience of law enforcement and justice services'. In the report, experiences of government-funded legal assistance services provided to First Nations peoples were collated. It established that, from 2012 to 2013, there were eight Aboriginal and Torres Strait Islander legal services (one in each state). The Report received submissions from members of the community when researching the experiences of First Nations peoples with law enforcement in Australia. One submission stated that the presence of 'legal assistance providers play[s] a crucial role in the Australian legal system for vulnerable and disadvantaged members of the community and are vital to ensuring access to legal assistance for Aboriginal and Torres Strait Islander peoples'.

In Victoria, this legal service is the Victorian Aboriginal Legal Service (VALS). In May 2023, the Victorian Government announced a significant investment in the services it provides, committing \$7.1 million across the next two years to assist VALS in opening hubs in Aboriginal communities across Victoria. Such investment can help VALS continue to support Aboriginal and Torres Strait Islander peoples in Victoria with both criminal and civil matters, as long as they meet the criteria requiring them to pass both a means test and merit test, whilst also proving their Aboriginal heritage. The areas of civil law that VALS provides casework services to, and representation for a plaintiff or defendant, include:

- consumer complaints
- debt collection
- discrimination
- employment termination
- government complaints
- motor vehicle accidents
- police complaints.

Adapted from 'Civil and Human Rights' (VALS, n.d.)

Evaluating the ability of the civil justice system to achieve the principles of justice for First Nations peoples

STRENGTHS

- VLA can provide free legal advice and representation for certain civil disputes. This ensures a plaintiff or defendant's case can be presented in the best possible light, leading to a fairer trial.
- VALS is a specialised service for Aboriginal peoples in Victoria that can provide information, referrals, legal advice, and representation for a number of different family and civil law matters. Therefore, parties making use of these services are likely to have a better understanding of civil legal proceedings, leading to more just outcomes by ensuring they can participate in a civil trial on an educated basis.

LIMITATIONS

- First Nations defendants and plaintiffs may face difficulties when presenting evidence, due to language barriers, different body language practices, and various cultural practices of certain Aboriginal and Torres Strait Islander communities. Such differences in cultural norms may result in the judge and/or jury misinterpreting the facts of a civil dispute or may prevent an Aboriginal and/or Torres Strait Islander person from participating in civil proceedings as they fear they will not be understood, leading to incorrect or unjust verdicts.
- The civil justice system may produce an unjust outcome when a plaintiff is unable to pursue civil action against a defendant due to an expired limitation period. The reason for the person's delay in initiating a civil action could be the result of factors such as limited financial resources or intergenerational trauma, ultimately restricting a First Nations person's ability to seek justice and participate in a fair trial.



STRENGTHS

- VLA can provide low-cost legal representation to parties in a civil dispute, including First Nations plaintiffs, as long as these individuals meet specific requirements. It may provide representation in matters relating to family law, child support, immigration, residential tenancy, and anti-discrimination.
- VALS provides information, legal assistance, and casework for First Nations peoples interacting with the civil justice system. Its ability to provide casework services to Aboriginal parties in a civil dispute is limited to certain areas of civil law, such as discrimination.
- The Koori Engagement and Consultation (KEC) Framework has been developed to implement cultural awareness training for all staff across Court Services Victoria, aiming to counteract biases or unfair outcomes. This may prevent judges from making a decision against an Aboriginal and/or Torres Strait Islander party in a civil dispute on the basis of their race.

LIMITATIONS

- There are fewer government-funded services that help First Nations peoples deal with civil matters, compared to those available to help in criminal cases. This may prevent a party to a civil dispute from receiving advice or representation from an organisation, potentially causing them to self-represent in court, putting them on unequal footing compared to the other party.
- First Nations peoples may face difficulties when presenting evidence as plaintiffs or defendants due to different cultural standards, body language customs, or language barriers, which could undermine the equal treatment of First Nations peoples in the civil justice system.
- Aboriginal and Torres Strait Islander peoples typically live in more rural areas of Australia. Therefore, their access to legal representation may be limited due to geographical barriers. This can lead to unequal footing between parties in a civil dispute, as an Aboriginal and/or Torres Strait Islander plaintiff or defendant may have reduced access to legal advice and resources.
- Aboriginal and Torres Strait Islander peoples suffer from high proportions of socioeconomic disadvantage. This may result in First Nations defendants or plaintiffs being unable to afford quality legal representation, leading to unequal footing between parties.
- There is a lack of qualified interpreters who are able to assist Aboriginal and Torres Strait Islander peoples in court. Therefore, it may be difficult for parties in a civil dispute to communicate the facts of the case to the judge and/or jury, or to understand the civil proceedings taking place.





STRENGTHS

- VALS provides tailored assistance to First Nations peoples interacting with the civil justice system, therefore ensuring Aboriginal and Torres Strait Islander persons involved in a civil dispute understand legal proceedings and their obligations if facing the courts.
- VALS has client-serving offices in several regional locations across Victoria, therefore ensuring First Nations peoples living in remote areas of the state can access legal advice and information.

LIMITATIONS

- Due to intergenerational trauma, First Nations individuals may have lost trust in the justice system. Consequently, those who have their civil rights breached may refrain from accessing justice due to being hesitant to interact with the justice system.
- Access to the courts, legal advice, information, and services can be limited, as 61% of First Nations peoples live in regional or remote areas (Blackwell, 2023). Therefore, defendants in rural areas may be unable to seek legal assistance to defend themselves in a civil dispute, whilst potential plaintiffs may be unable to access legal information to initiate or pursue a civil action.
- The limitation period for certain areas of civil law may prevent an Aboriginal and/or Torres Strait Islander plaintiff from accessing justice as, after the limitation period has passed, civil action can no longer be commenced against a defendant, limiting access to a remedy.
- Many Aboriginal and Torres Strait Islander peoples may be unaware of their rights under civil law, therefore limiting their access to justice as a person may not realise their civil rights have been breached.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. These tables showing the strengths and limitations of the criminal justice system's ability to achieve the principles of justice for First Nations people can assist you in developing a discussion on this topic.

Lesson summary

First Nations Australians face several difficulties in the civil justice system due to various factors that limit the achievement of justice, including:

- cultural practices or misunderstandings
- limited government-funded, First Nations services for civil matters
- intergenerational trauma
- language barriers
- socioeconomic disadvantage
- geographical barriers
- a lack of knowledge about the existence of civil law
- colonial history.

However, mechanisms, such as the Victorian Aboriginal Legal Services (VALS) and the culturally-safe options of the Victorian Civil and Administrative Tribunal (VCAT), aim to assist First Nations peoples in accessing justice via civil law.

8F Questions

Check your understanding

Question 1

Unlike the high incarceration rates that demonstrate Aboriginal and Torres Strait Islander peoples face difficulties in the criminal justice system, these difficulties are not present in the civil justice system.

- A. True
- B. False

Question 2

Which of the following statements are correct about difficulties faced by First Nations peoples in the civil justice system? **(Select all that apply)**

- A. There are fewer government-funded services that help First Nations peoples deal with civil matters than there are for criminal issues.
- B. Geographical barriers, whereby more Aboriginal and Torres Strait Islander peoples live in metropolitan areas than rural or remote towns, mean First Nations peoples find it more difficult to access legal information and services.
- C. Generally, evidence suggests there is a lack of knowledge among First Nations peoples about the existence of civil law and civil breaches, such as employment and consumer law.
- D. Considering many Aboriginal and Torres Strait Islander peoples face socioeconomic disadvantage, many commit civil breaches, such as theft or cybercrime, causing them to interact with the civil justice system.

Question 3

Fill in the blanks with **two** of the following terms:

appropriate

rude

shame

support

Direct questioning is generally considered [] in some Aboriginal cultures. Therefore, an Aboriginal party to a civil dispute may feel [] when being questioned by a lawyer during a civil dispute.

Question 4

One way the civil justice system seeks to address difficulties faced by First Nations peoples is through:

- A. Victorian Aboriginal Legal Service (VALS), which provides information, referrals, legal advice, and casework for a number of different family and civil law matters, such as tenancy and discrimination disputes.
- B. Victoria Legal Aid (VLA), which may provide representation in crimes including serious indictable offences, such as murder.

Question 5

Which of the following statements are correct about ways the civil justice system seeks to address difficulties faced by First Nations peoples? **(Select all that apply)**

- A. The Victorian Civil and Administrative Tribunal (VCAT) has a 'Koori Support Team' that enables culturally-safe hearings to be conducted.
- B. Parties to a civil dispute are allowed to request an interpreter if needed and the court will pay for this whether the person requiring it is a defendant or plaintiff.
- C. Victoria Legal Aid (VLA) may provide representation in matters relating to family law, child support, immigration, residential tenancy, and anti-discrimination.

Question 6

Fill in the blanks with the following terms:

limited

upheld

The principle of access is [] for Aboriginal and Torres Strait Islander plaintiffs as, if the limitation period has passed in the relevant area of civil law the breach occurred under, they can no longer commence a civil action against a defendant. On the other hand, access can be [] as Victorian Aboriginal Legal Service (VALS) has client-serving offices in several metropolitan and regional locations across Victoria.

Question 7

The principle of equality is limited in the civil justice system as First Nations peoples may be less capable of presenting evidence due to language barriers and different cultural practices, undermining the equal treatment of First Nations peoples in the civil justice system.

- A. True
- B. False

Question 8

One strength of the civil justice system in achieving the principle of fairness for First Nations peoples is that:

- A. the Koori Engagement and Consultation (KEC) Framework has been developed to implement cultural awareness training for all staff across Court Services Victoria, helping counteract biases so judges are more impartial when deciding on a civil dispute.
- B. high proportions of First Nations peoples live in rural and remote areas which affects their ability to access the courts and legal facilities as a defendant or plaintiff.

Question 9

The principles of justice are not achieved to any extent in relation to the difficulties faced by First Nations peoples in the civil justice system.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 10

(2 MARKS)

Outline **one** difficulty faced by First Nations peoples in the civil justice system.

Question 11

(2 MARKS)

Describe how **one** difficulty experienced by First Nations peoples in the civil justice system limits the achievement of the principle of access.

Question 12

(4 MARKS)

Explain **one** difficulty faced by First Nations peoples in the civil justice system and identify **one** process, procedure, or institution that seeks to address this difficulty.

Question 13

(4 MARKS)

'The civil justice system in Australia makes no effort to rectify the difficulties experienced by First Nations peoples.'
To what extent do you agree with this statement? Justify your response.

Extended response

Use your answer to question 14 to support your response to question 15.

Use the following information to answer questions 14 and 15.

Jedda is a 60-year-old Yorta Yorta woman who lives in Wahgunyah, a Victorian rural town. She recently was evicted from her apartment by her landlord. When she asked them why, they yelled racial slurs at her and gave her no valid reason for the lease's termination. She is unsure of whether she has any grounds to fight against the termination. She is currently unable to afford new accommodation and requires assistance immediately.

Question 14

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the civil justice system to achieve the principles of access and equality for Jedda.

Statement	Strengths	Limitations
I. Jedda may be unable to access justice if she does not pursue civil action against the landlord, considering she seems unaware of how to go about doing so, likely due to a lack of knowledge of civil law.	☐	☐
II. VALS provides tailored assistance to Aboriginal peoples who are interacting with the civil justice system. Therefore, Jedda can develop a better understanding of the legal proceedings and her obligations if the matter goes to court.	☐	☐
III. Victoria Legal Aid (VLA) provides representation in matters relating to residential tenancy disputes. Therefore, since Jedda does not have the required financial resources, and may be unable to afford legal representation, VLA may be able to provide free legal services or representation to Jedda so that she is still represented if the matter goes to court, allowing her case to be presented in the best possible light.	☐	☐
IV. Since Jedda is currently unable to afford new accommodation, she is likely experiencing financial hardship and, therefore, may be unable to afford quality legal representation, leading to unequal footing between parties.	☐	☐

Question 15

(5 MARKS)

Discuss the ability of the civil justice system to achieve the principles of access and equality for Jedda.

Linking to previous learning

Question 16

(4 MARKS)

- Identify the limitation period for **one** civil matter. 1 MARK
- Explain how limitation periods for civil matters may limit the ability of the civil justice system to achieve the principle of access for First Nations peoples. 3 MARKS

8G Difficulties faced by some groups in the civil justice system

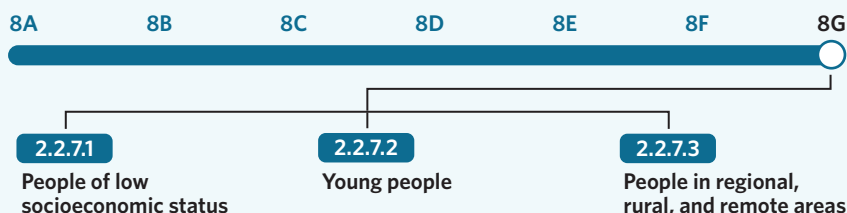


Image: Dikushin Dmitry/Shutterstock.com

You buy a new computer from an electronics store to prepare for year 12. Eager to open your new, prized possession, you begin unwrapping it as soon as you arrive home, only to realise the store sold you a phony laptop that has the appearance of a computer, but no functionality. You spent all your savings on this computer, but won't be able to use it. You go back to the store and are told that you cannot return it since it has already been opened. What should you do? Is there any way to get your money back? As a young person, you might be unaware of your legal rights or unsure of who can help with the civil wrong you have endured.

STUDY DESIGN DOT POINT

- the difficulties faced by different groups in the civil justice system, such as First Nations people, people of low socioeconomic status, young people, and people in regional, rural and remote areas



Lesson introduction

People of low socioeconomic status, young people, and people in regional areas may all face difficulties in accessing and engaging with different aspects of the civil justice system, due to factors such as a lack of education, limited financial resources, and/or geographic barriers. Consequently, it can be difficult for these groups to achieve justice when resolving civil disputes.

The *Civil Procedure Act 2010* (Vic) requires parties to a civil dispute to take 'reasonable' steps to resolve their differences before commencing litigation, such as considering alternative dispute resolution processes or attempting to negotiate a settlement. Therefore, large numbers of civil disputes are resolved outside of the courts. However, difficulties still exist for parties when resolving disputes in more informal settings due to power imbalances and the expense of these processes. Whilst there are processes, procedures, and institutions in Victoria that seek to address these difficulties, the civil justice system continues to marginalise certain groups, preventing the principles of justice from being achieved.

LEGISLATION

Civil Procedure Act 2010 (Vic)

LESSON LINK

You learnt about alternative methods of civil dispute resolution in **8B Methods of civil dispute resolution**.

LEGAL VOCABULARY

Socioeconomic status the social standing or class of an individual or group, often measured by reviewing a combination of factors including education, income, and occupation.

People of low socioeconomic status 2.2.7.1

A person may be considered to be of low **socioeconomic status** if they experience conditions such as:

- low income
- unstable living arrangements
- minimal education.

Parties often incur high costs when resolving civil disputes, considering the expenses associated with court fees, expert witnesses, and legal representation. For complex claims that require the use of the courts, legal representation is often necessary and the high associated fees can often prevent individuals from pursuing a civil claim and accessing justice.

Table 1 Types of legal costs incurred during a civil dispute

Type of legal cost	Explanation
Barristers' fees	While most civil claims are settled without a trial, such as via mediation, disputes that must go to trial will often require a barrister to present legal arguments and examine witnesses. Depending on the level of the barrister's experience, the cost of hiring a barrister for a full day may be up to \$25,000 (Wells, 2018).
Solicitors' fees	Parties often require a solicitor when preparing their case to help with various tasks, including: • drafting court documents and letters • researching the law and preparing evidence • advising and instructing barristers on behalf of their clients.
Expert witness fees	If a party intends to use an expert witness to provide evidence in court, the witness will often charge fees. Examples of expert witnesses include doctors, psychiatrists, and other professionals with expertise in a particular area.
Court fees	To commence and progress a court proceeding, parties must pay court fees. Court fees vary across the different courts and the fees are set at corporate, standard, and concession rates.
Fees to file court documents	There are fees that parties are required to pay for each stage of a civil proceeding.
Use of a jury	If a party is successful in their request for a jury trial, they will need to cover the cost of the jury.
Appeals	A party seeking to appeal the outcome or remedy awarded in a dispute will need to pay a filing fee in the appeal court, solicitor's documentation fees, and cover the expense of the barrister to present their legal arguments to the judges in the appeal court, if they chose to be represented by a barrister, although this is not mandatory.

LEGAL VOCABULARY

Barrister a self-employed lawyer who regularly appears in court and is responsible for representing a party in a trial by making legal arguments, questioning witnesses, and summarising the case to the judge and/or jury.

Solicitor a lawyer who advises clients about legal matters, prepares legal documentation for trial, communicates with the other party's legal representation, researches the relevant laws, and when required engages the services of a barrister and briefs them to represent a client in court.

DEEP DIVE

Court fees for civil disputes

There is a wide range of court fees that can significantly add to the expenses involved in a civil dispute. As of 2023:

- filing fees in the Victorian Magistrates' Court can cost between \$156 and \$743.10.
- court hearing fees in the Victorian Magistrates' Court, after the first day, cost \$637.60.
- standard court hearing fees for a trial or appeal for the first day in the Supreme Court of Victoria cost \$740.

Adapted from 'Magistrates' Court of Victoria Fees and Costs Ready Reckoner' (Magistrates' Court of Victoria, 2023) and 'Fees' (Supreme Court of Victoria, 2023)

LEGAL VOCABULARY

Adverse cost orders an order by the court that one party must pay for part of, or all of, another party's legal costs.

Table 2 The difficulties faced by people of low socioeconomic status in the civil justice system

Difficulty faced in the civil justice system	Explanation
Due to financial difficulties, parties may decide to settle a civil dispute outside of the courts	• Given the costly nature of court proceedings, some parties may be forced to settle out of the courts. When parties agree to settle outside of the courts, the plaintiff may receive some form of compensation of a lesser amount than what a court would have ordered. This may prevent justice from being delivered to its fullest extent, as access to a trial and equality within the civil justice system are denied if a party decides to avoid pursuing civil court action due to the costs of doing so. • Parties may also agree to settle outside of the courts due to the adverse costs orders that a court can make at the conclusion of a dispute. Usually, a court will order the losing party to pay its own costs, as well as some or all of the other party's costs. Therefore, parties risk a higher financial burden if they lose a civil dispute that is determined by the courts.

Continues →

Table 2 Continued

Difficulty faced in the civil justice system	Explanation
Unequal legal representation between parties if one is unable to afford a lawyer	- Considering the fees associated with a barrister and solicitor, a party to a civil dispute may be unable to afford legal representation. Consequently, there may be unequal footing in disputes where one party utilises legal representation, whilst the other is forced to self-represent due to limited finances. - Typically, in alternative forms of civil dispute resolution, if one party is unable to afford legal representation, the other party will also be asked to self-represent. However, in the courts, such orders cannot be made. - Reports have found that most self-represented litigants choose to not engage a lawyer 'involuntarily because they cannot afford legal representation' (Richardson et al., 2018).
A party may find it difficult to understand court proceedings if they are unable to afford translator services	- In civil matters, Victorian courts do not make arrangements for an interpreter to attend proceedings and are not responsible for paying for a translator. - Court interpreters must be accredited, therefore hiring a professional interpreter may incur a significant cost for a civil party. - If a party is unable to afford an interpreter, they may have difficulty presenting evidence related to the civil dispute, or understanding court proceedings.
Parties may not be able to access a jury due to the expense of arranging one	- Unlike in a criminal trial, where the cost of a jury is paid for by the courts, parties in a civil trial must cover jury costs themselves if one is requested and approved. - As of 2023, the fee for conducting a civil trial by jury, including the first day of using the jury, costs \$1,611.60 in the Victorian County Court and \$301.20 per day for the remaining six days. If a jury is required for more than six days, the cost of a jury per day increases. - Therefore, parties may decide to not use a jury due to its expense, possibly limiting the ability for a fair outcome to be achieved as a jury better represents a cross-section of the community as opposed to a single judge.
Parties may be unable to afford the cost of appealing a court decision	- In order to appeal a decision made by the courts in a civil trial, a party must pay a filing fee in the appeal court, solicitor's documentation fees, and cover the expense of a barrister to present their legal arguments to the judges in the appeal court, should they chose to be represented by a barrister. - Therefore, a party may be discouraged from appealing an unfair decision due to its financial burden.
People with minimal education may be unaware of their civil rights	- People with lower levels of education tend to experience fewer civil legal problems. However, research suggests this may be due to a failure to recognise they have legal problems (Richardson et al., 2018). - The Australian Institute of Judicial Administration (2018) found that people with lower education levels, who are unemployed, and do not speak English as their primary language, are less likely to seek advice when initiating legal action. - Having inadequate legal literacy may make it difficult for a party to a civil dispute to understand proceedings or legal principles, therefore making it challenging for these individuals to self-represent and, in turn, access justice.

LEGAL VOCABULARY**Victoria Legal Aid (VLA)**

a government-funded agency that provides free legal information, advice, and free or low-cost legal representation.

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes.

Despite the difficulties people of lower socioeconomic status may experience, there are processes, procedures, and institutions in place that seek to rectify these difficulties.

- Victoria Legal Aid (VLA)** is available for financially-disadvantaged parties in a civil case, though only to a limited degree. For example, VLA can provide some assistance to parties with migration matters, Centrelink payments, and parties with cognitive disabilities. However, VLA's resources are limited.
- There are other dispute resolution bodies, such as the **Victorian Civil and Administrative Tribunal (VCAT)**, that are low-cost alternatives to the courts. Although there can still be costs associated with pursuing such a case, it is usually cheaper than the courts. For example, if an individual is making a claim that is less than \$100,000 in relation to goods and services, they will not incur a hearing fee if the hearing only occurs over one day.

- **Fee waivers** may be available for certain parties to a civil dispute. A fee may be automatically waived if the person is granted legal aid or faces financial hardship. A party must apply for a fee waiver in order to be considered.
- Alternative forms of dispute resolution, such as mediation, conciliation, and arbitration, are often less expensive than the cost of reaching a civil settlement in the courts. Therefore, when parties to a civil dispute are of low socioeconomic status, they may opt to resolve their dispute using these alternative resolutions.
- **Class actions** can assist plaintiffs of lower socioeconomic status to come together in order to seek compensation from a defendant. Often, the lead plaintiff, which may be a law firm, will incur all the costs of the class action if it fails. If the class action succeeds, on the other hand, the money gained through remedies are shared amongst the group of plaintiffs. Therefore, plaintiffs who may be unable to pursue legal action alone can join together in the pursuit of justice.

WANT TO KNOW MORE?

Did you know that for a company or business that has a VCAT hearing for a residential tenancy dispute that lasts for 10 days or more, the hearing fee is at least \$1669.50? You can find out more about the current costs of VCAT hearings by searching 'Fees at VCAT' and clicking the relevant link.

LEGAL VOCABULARY

Fee waivers when there is no longer a requirement for a party's court fees to be paid as the courts recognise various factors that may limit such a payment, such as financial difficulties and young age.

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts.

LESSON LINKS

You learnt about class actions in **6C Plaintiffs and defendants**.

You learnt about the jury in a civil trial in **8E The jury in a civil trial**.

You learnt about the Victorian Civil and Administrative Tribunal (VCAT) in **8C Institutions that resolve civil disputes**.

REAL WORLD EXAMPLE

The dismal victory for Shine Lawyers' plaintiffs

In September 2022, Shine Lawyers received a \$300 million settlement agreement after launching two class actions against Johnson & Johnson Medical and Ethicon on behalf of Australian women who had received mesh implants. Women who had received one or more mesh implant devices produced by these companies were, therefore, eligible for compensation, due to the erosion of mesh in their bodies.

After receiving the settlement, Shine Lawyers proposed taking up to \$99.5 million from the payout to cover its own present and future costs, alongside interest for the liability it took by funding the case. The 11,000+ pelvic mesh victims that joined together as plaintiffs in the class actions were immensely upset by this, considering they were only to have access to a \$7,500 payment each from the \$300 million settlement. One of the plaintiffs estimated she had spent more than \$70,000 on four surgeries to remove the mesh, funding them by withdrawing from her super. She now has no savings, is on a disability pension, and is struggling to pay for her ongoing medical requirements.

This case demonstrates how, even though class actions may be helpful for plaintiffs who cannot afford to initiate litigation themselves, they can also result in plaintiffs receiving less compensation than they expected. Subsequently, the socioeconomic disadvantage they may have experienced as a result of the breach remains relatively unaddressed.

Adapted from 'Pelvic mesh victims left unsure of futures as legal fees threaten to slash class action payout' (Longbottom, 2022)



Image: Olivier Le Moal/Shutterstock.com

Figure 1 Plaintiffs in a class action felt they were not compensated adequately after a \$300 million settlement was reached

Young people 2.2.7.2

In the Australian justice system, those aged 10 to 18 years are considered **young people**. An adolescent's brain is not fully developed and only reaches full maturity when one is in their twenties. Therefore, the ability of a young person to make conscientious, informed decisions and, in turn, understand the law and access financial resources, may be limited.

LEGAL VOCABULARY

Young people people aged 10 to 18 years who are subject to different legal processes.

Community legal centres (CLCs) not-for-profit community organisations that provide free legal information, advice, education, and casework services.

Table 3 The difficulties faced by young people in the civil justice system

Difficulty faced in the civil justice system	Explanation
Lack of understanding about the civil legal system	- According to surveys conducted by Youthlaw, a community legal centre (CLC) dedicated to upholding the rights of people under the age of 25, issues facing young people most, with regard to the legal system, included: - understanding their rights, especially for people under 18 - knowing what can be done if the law itself is thought to be unjust - knowing how to make someone recognise their legal rights, such as tenancy rights (Youthlaw, 2008). - Surveys indicate that there is a substantial knowledge deficit when it comes to civil law. Scores for understanding the law are usually lower among younger respondents, indicating a lack of understanding of civil rights among young people (Pleasence et al., 2015). - If young people do not understand civil law, they are likely unaware of when their civil rights, such as employment and consumer rights, are breached. - People may take advantage of the likelihood of young people not defending their civil rights. For example, employers may underpay young staff members as they are aware the majority of them will not understand their employment rights. - Children may become embroiled in a civil dispute without knowing they have breached the law. For example, a child may be unaware that posting lies about another person on social media can amount to defamation and therefore, may do so without considering the legal issues that may arise.
Lack of financial ability to initiate action or afford legal representation	- Social and economic disadvantage can exacerbate the vulnerability of young people in the civil justice system. - From 2008 to 2018, disposable income per person declined by 1.6% per year among those aged between 15 to 24, indicating that many young people have limited finances (Australian Institute of Health and Welfare, 2021). Considering the expense of civil litigation, this prevents young people from being able to afford legal representation or initiate civil action. - However, in civil proceedings, when a person is under the age of 18, a guardian must act in place of the child and is responsible for the conduct of the proceedings. This includes incurring the liability for litigation costs, therefore reducing the financial burden on a child when they are the plaintiff or defendant in a civil dispute.
Stress stemming from legal issues	- In 2014, the Law and Justice Foundation of New South Wales reported that ‘stress-related illness, physical health, relationship breakdown, moving home, and loss of income or financial strain, were all adverse consequences attributed to the legal problems reported by respondents to the Legal Australia-Wide (LAW) Survey’. - Young people experience these consequences too, with 15% of 15 to 17-year-old respondents reporting that their legal problems caused stress-related illness. - The stress of everyday life for a young person is likely to be exacerbated by the burden of encountering legal troubles.
Ability to present evidence in a court	- As children are represented by a guardian in civil actions, a child will usually not need to present evidence as a plaintiff or defendant in a civil dispute. However, a child may need to provide evidence in court as a witness of a civil wrong. - Within the courtroom, ‘children are often subject to harassing, intimidating, confusing, and misleading questioning’ (Australian Law Reform Commission, 2010). Therefore, providing evidence as a young person may be a stressful experience. - Some young people may be deterred from initiating a civil claim to begin with on the basis they do not want to present evidence or experience the harsh questioning in the courts of the opposing party’s barrister.
Lack of involvement with alternative forms of dispute resolution, such as mediation	- Children’s interests may not be appropriately represented during mediation in family law. This can be challenging as the end resolution of the civil dispute may not reflect the best interests of the child. - When children are involved in the alternative dispute resolution process, significant power imbalances can arise when there are various participants involved in the dispute, such as parents, family and relatives, and government agencies. This is because the child is likely to have less of a voice and may be perceived as less educated on the situation (Law and Justice Foundation, 2003).

Despite the difficulties children may face in the civil justice system, there are mechanisms in place that seek to counteract these challenges and ensure equality for children.

- Just as people facing financial difficulties may have their fees waived by the court, people under 18 years of age are also entitled to have the court cover their costs, reducing the impact of financial burdens associated with being involved in a civil dispute.
- Community legal centres (CLCs) are independent community organisations that can provide free advice, casework, and legal education to members of the community. Youthlaw is a CLC that specifically focuses on providing free legal advice to people under the age of 25, including on issues like cyberbullying and family violence.
- Victoria Legal Aid (VLA) may be able to help young people experiencing discrimination, or racial or religious vilification during the course of their education and employment. VLA has several online resources tailored to issues facing young people, providing them with information and advice about their working rights, their ability to access a youth allowance, and information about child abuse and neglect.
- A minor is considered to not have the capacity to enter a contract agreement until they are over the age of 18. They are only able to enter contracts for employment or purchasing necessities, such as food and clothes, that are required for life. If a contract does not fall within either of those categories, it is voidable and therefore, a minor does not have to uphold their contractual obligation. This protects a minor, who may be uneducated about the consequences of entering a contract, from having to uphold their contractual obligations, such as paying a provider of luxurious services.
- A child involved in a civil dispute is always represented by a guardian above the age of 18. This person may be appointed by or removed by the court where there is no person available to be the child's guardian or the person is not appropriate to represent the child's interests. This ensures a child does not have to present evidence to defend themselves in court, mitigating the stress and costs associated with a civil trial.
- Children are held to a lesser standard than adults in civil law. When a judge or jury is assessing the liability of a child for committing a civil wrong, they must have regard for the ability of the child to foresee the consequences of their actions.
- Considering many children fail to have the time, resources, or knowledge to initiate civil action against a defendant when they are young, the limitation period for certain civil wrongs has been reformed to ensure children who endure a civil wrong are able to seek damages for this when they become an adult and are in the right frame of mind to initiate a civil action. The *Limitation of Actions Amendment (Child Abuse) Act 2015* (Vic) states that time limitation laws do not apply to sexual, physical, or psychological abuse of a minor.

LESSON LINK

You learnt about the age of criminal responsibility in **2C Key concepts of criminal law**.

LEGISLATION

Limitation of Actions Amendment (Child Abuse) Act 2015 (Vic)

LEGAL CASE

Glover v Fuller (No 2) [2023] ACTSC 12

Facts

In 2015, a 12-year-old was tubing in a dam in New South Wales, which involved him sitting in an inflatable circular tube while the defendant drove the motor boat. The tube flipped, causing the 12-year-old plaintiff to experience spinal injuries. Three years later, in 2018, the plaintiff pursued legal action against the defendant for breaching his duty of care by failing to instruct the plaintiff about the activity. This included not telling him any hand signals that could be used to ensure the motorboat slowed down if needed, and driving the boat faster than he should have been, considering the boy was only 12 years old.

Legal issue

The court had to determine whether tubing was an 'obvious risk', in that it was obvious to the plaintiff that injury would amount from the activity. If the defendant could prove the plaintiff had willingly partook in an activity with an obvious risk, he would not be found liable for negligence.



Image: Aerial-motion/Shutterstock.com

Figure 2 The court determined a child should not be held to the same standard as an adult in a civil matter, considering their inexperience

Continues →

LEGAL CASE

Glover v Fuller (No 2) [2023] ACTSC 12 – Continued**Decision**

The court determined the obvious risk defence required that the risk was obvious to the reasonable person in the position of the plaintiff. Therefore, the obviousness of the risk had to be judged from the perspective of the 12-year-old who had received no instruction about tubing and who had only ever experienced tubing where he was driven in a straight line in the past. Subsequently, the court found there was no obvious risk and that the defendant had, therefore, breached his duty of care to the young boy by not exercising sufficient levels of precaution. The boy was awarded a total of \$92,585 in damages.

Significance

This case illustrates an advantage of the civil justice system for young people, in that, when reviewing their subjective intention or knowledge about a risk, the court must consider the age and inexperience of a child rather than holding them to the same standard as an adult. If it had been an adult who agreed to tubing, the risk of injury likely would have been considered 'obvious' to the adult, and the defendant would, therefore, not have been found liable.

CONTENT WARNING This section explores content that is sensitive in nature, relating to child abuse.

REAL WORLD EXAMPLE

Justice at last or never?

In 2015, reforms to Victorian laws that removed the limitation period for sexual, physical, or psychological abuse of a minor, resulted in a number of child abuse survivors finally speaking out and seeking compensation for the trauma they endured. In 2023, one child abuse survivor sought civil compensation for the abuse he endured for three years, under his scout leader from 1979 to 1982.

In June 2020, the scout leader admitted to abusing not only the plaintiff but three other boys in the same scouts groups. The plaintiff then initiated legal action for compensation from the Scouts Institution for the lifetime of pain the abuse caused. In April 2023, the court awarded Scouts NSW a permanent stay, preventing the dispute from ever going to court again, as they considered it would be oppressive to hold Scouts liable for the actions of one Scout leader against the plaintiff. Therefore, although these legislative reforms have the potential to allow child abuse victims to seek justice, in reality, it may be difficult for them to achieve justice for events that occurred years, or even decades, ago.

Adapted from 'The extraordinary legal tactics institutions are using to fight compensation claims by abuse victims' (Milligan et al., 2023)

DEEP DIVE



Image used with permission from Youthlaw

Figure 3 Youthlaw focuses on helping young people navigate the legal system

Youthlaw community legal centre supports young people

Youthlaw assists young people under 25 with navigating the legal system. It understands that young people who are either defendants or plaintiffs in a civil dispute may also be dealing with other complex issues, such as mental health problems, homelessness, or substance abuse. Therefore, working in collaboration with other community services, it provides a holistic approach to supporting young people involved in civil disputes. It also provides educational resources that aim to inform young people of their rights under civil law.

Adapted from 'Victims of Crime' (Youthlaw, 2018)

People in regional, rural, and remote areas 2.2.7.3

In regional, rural, and remote areas, often referred to as 'RRR' areas, 'access to justice ... is a real challenge' (Bailes, 2018). In Australia, around 28% of the Australian population lives in rural and remote areas, equating to around 7 million people (Australian Institute of Health and Welfare, 2023). Living in these locations can hinder one's ability to access legal services and the courts, therefore limiting the achievement of the principles of justice.

Table 4 The difficulties faced by people in regional, rural, and remote areas in the civil justice system

Difficulty faced in the civil justice system	Explanation
Lack of access to the courts	• ‘Those unable to travel long distances may miss out on obtaining legal advice or attending court’ (The Justice Project, 2016). • Although there are a number of Magistrates’ Court locations in remote areas of Victoria, this access is restricted in terms of the County Courts and Supreme Courts. Therefore, if resolving a civil dispute where a plaintiff is claiming significant compensation, hence requiring a higher court to adjudicate the trial, RRR parties may face difficulties accessing the court. • Furthermore, many courthouses in remote areas of Victoria are in a state of disrepair after not receiving required funding to fix infrastructural issues. Therefore, this discourages judges from adjudicating disputes in these courts, resulting in delays and inefficiencies.
Lack of access to legal services	• National data indicates that just 10.5% of practising solicitors nationally are practising in a rural area (The Justice Project, 2016). • Without being able to easily consult a lawyer, many people in RRR areas may be unable to identify their legal problem or the area of law it falls under. • If there is a limited number of lawyers in a certain region, it may result in conflict of interest issues, as one of the lawyers in the town may already be representing the plaintiff, so they are unable to offer any advice or representation to the defendant.
The use of online platforms to gain legal advice may be less personable or appropriate for certain civil disputes	• Although parties can obtain legal advice online, through organisations such as VLA, the advice these organisations can give is often limited. For example, VLA states that staff can only provide general information to those who call their help line and are unable to give tailored advice for a specific issue. Therefore, it may be difficult for people in RRR areas to find tailored legal assistance online. • Certain civil disputes, such as family law matters involving separation or child custody, are sensitive in nature and can be distressing for the parties involved. Therefore, divulging personal and vulnerable information online may be uncomfortable for certain people, who feel that sharing this information in person creates a more comforting environment.
Lack of access to technology	• ‘Poor quality internet connections and limited telephone coverage create barriers, particularly in more remote communities’ (The Justice Project, 2016). • Although people in remote areas can often gain legal advice or consultations through online means, such as video calls, in certain remote areas, accessing devices or the internet to do so may be limited. • As a result, a party to a civil dispute may have to travel to seek in-person advice or consultations, which can result in time-consuming periods of commute.

REAL WORLD EXAMPLE**The ‘disgraceful’ state of regional courts**

In 2023, the opening of Bendigo’s Law Courts precinct, which received \$152 million in funding, sparked controversy due to the lack of funding being directed towards other regional courts. John Sullivan claimed many of these regional courts have fallen into a state of disrepair, asserting that ‘it’s really disgraceful, the condition of the court’, in relation to Sale’s courthouse. There have been calls for similar upgrades to that of Bendigo’s to be implemented in other regional courts.

Mr Sullivan reported the condition of the Sale courtroom was ‘so bad that the judges of the County Court refused to [go there] to conduct County Court sittings’. As a result of the courtroom’s infrastructural issues and lack of upgrades, other problems have occurred, including court delays and inefficiencies. According to the president of the Law Institute of Victoria, Tania Wolff, these delays and inefficiencies ‘could potentially increase legal costs [and] limit access to justice’.

Adapted from ‘Bendigo’s \$152m law precinct highlights ‘disgraceful’ state of regional courts, lawyers say’ (Schubert & Schapova, 2023)



Image: ribeiroantonio/Shutterstock.com

Figure 4 The state of disrepair of courts in RRR areas can cause delays and inefficiencies, hindering justice for those attending court in these regions of Victoria

Whilst people in RRR areas may struggle to access courts, legal services, or technology, aspects of the civil justice system seek to ensure the principles of justice are still upheld for individuals living in these areas.

- When a plaintiff files a civil matter, they must do so at the ‘proper venue’ in consideration of where the defendant lives, where the defendant conducts their business if the civil matter is related to their business, and where the issue occurred. Therefore, defendants living in RRR areas will have their location considered by the plaintiff to ensure they do not have to travel to a court far away from their business or place of residence.

WANT TO KNOW MORE?

Did you know that there are 41 regional locations of the Victorian Magistrates' Court? You can find out more about where these courts are located by searching 'Magistrates' Court of Victoria – Find a court' (Magistrates' Court of Victoria, 2022) and clicking the relevant link.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is to 'discuss the principles of justice in relation to experiences of the civil justice system'. These tables showing the strengths and limitations of the Victorian criminal justice system's ability to achieve the principles of justice for groups facing difficulties can assist you in developing a discussion on this topic.

- The Magistrates' Court has 51 court locations across Victoria, 41 of which are in regional areas.
- VCAT offers video conference hearings to ensure those who may have difficulties attending a VCAT location are still able to resolve their civil disputes.
- VLA provides funding to 43 community legal centres (CLCs) across Victoria, administering approximately \$57 million to these centres between 2020 to 2021. One of these is the Victorian Aboriginal Legal Service (VALS), which has regional client support officers that connect solicitors to clients and local communities across Victoria, providing representation to those with hearings in various regional courts. Regional client support officers are located in Bairnsdale, Ballarat, and Shepparton, alongside other regional locations.

Lesson summary

In the civil justice system, there are various groups that may be at a disadvantage due to their personal characteristics including:

- having a low socioeconomic status
- being young
- living in regional, rural, and remote areas.

However, various processes, procedures, and institutions exist in the civil justice system with the aim of ensuring the principles of justice are still achieved for these groups.

Evaluating the ability of the Victorian civil justice system to achieve the principles of justice for groups facing difficulty



STRENGTHS

- The court can order adverse cost orders that encourage a fair outcome, as the successful party may have some or all of their legal costs compensated.
- Community legal centres (CLCs) are independent community organisations that can provide free advice, casework, and legal education to members of the community. This promotes a fair civil outcome, especially for children, as they can gain legal representation or advice at no cost, allowing them to participate in a civil trial.
- People of low socioeconomic status who have a limited understanding of their legal rights can join a class action, removing the financial burden of initiating civil action against a defendant. This promotes a fair outcome for participants if everyone is able to gain compensation for a loss they all endured at the hands of the defendant.
- A child involved in a civil dispute is always represented by a guardian above the age of 18. This promotes fairness for the child as the older guardian is more likely to understand court proceedings, be able to present evidence, and have the means to liaise with lawyers, promoting a just outcome to the case.
- Children are held to a lesser standard than adults in civil law. When a judge or jury is assessing the liability of a child for committing a civil wrong, they must consider a child's ability to foresee the consequences of their actions. This ensures children who were possibly unaware of the civil breach they were committing are not held to a high standard, promoting a fairer outcome.

LIMITATIONS

- The high costs associated with defending a civil claim may encourage some defendants to settle rather than challenge a claim, leading to an unfair outcome.
- If an individual in a civil dispute cannot afford legal representation, they may have to self-represent, which can increase the likelihood of an unfair outcome due to the individual's lack of objectivity, legal experience, and knowledge.
- Young people may find it difficult to present evidence in court as they may be subject to misleading questioning or intimidation, possibly resulting in inaccurate evidence being shared by the young person, hence preventing a fair outcome from being achieved.
- The limited access to legal services that people in RRR communities experience could limit their ability to find a lawyer to represent their case, possibly resulting in their dispute not being presented in the best light and potentially producing an unfair outcome.

STRENGTHS

- Parties that are eligible for VLA may acquire legal representation, reducing the likelihood of unequal footing in the courtroom.
- Less costly dispute resolution bodies, such as VCAT, may not require legal representation, enabling both parties to present their version of events and mutually reach a resolution.
- Considering many children fail to have the time, resources, or knowledge to initiate civil action against a defendant when they are young, the limitation period for certain civil wrongs has been reformed to ensure children who endured a civil wrong can pursue a civil claim when they are adults. This uplifts young people before the law, therefore promoting equality, as it provides a way for people who endured a breach as a child to still seek justice.
- VCAT offers video conference hearings to ensure those who may have difficulties attending a VCAT location are still able to resolve their civil disputes, promoting equality for people in RRR areas.

LIMITATIONS

- Even if both parties have legal representation, the quality of legal representation can vary drastically, impacting how a case is presented and whether the facts of the case are shown in the best light.
- Self-represented parties may be on unequal footing with skilled lawyers in the courtroom and may not possess the same ability to argue their case. This can particularly impact financially-vulnerable populations and lead to unequal and unjust outcomes.
- Courts in rural regions may not be physically maintained to the same standard as metropolitan courts, resulting in people who attend these courts experiencing delays and inefficiencies. Therefore, people in rural areas may not be able to gain the same justice as those living in the metropolitan region, limiting equality.
- Children may have a difficult time presenting evidence in a civil case, resulting in inequalities between parties if a young person's case is contingent on evidence provided by a child or themselves.



STRENGTHS

- VCAT adjudicates civil disputes in a less costly manner than traditional courts and offers online hearings via video conferencing, promoting access to justice for those of low socioeconomic status or people living in RRR areas.
- The use of alternative dispute resolution methods prior to trial, or instead of a trial, promotes access, as these processes are low cost and relatively informal.
- A party to a civil dispute may be eligible for a fee waiver, whereby they do not have to pay any of their court fees, if they can prove they are facing financial hardship, have been granted legal aid, or are below the age of 18. This may allow parties to better access civil dispute resolutions in the courts as financial difficulties are less likely to act as a barrier to their pursuit of justice.
- Victoria Legal Aid (VLA) may provide advice or assistance to parties in a civil dispute dealing with financial difficulties, enabling them to access justice by removing cost barriers to pursuing a civil case.
- Class actions allow a number of plaintiffs to join together to pursue civil action against a defendant. In some circumstances, a law firm will bear the costs of the class action, therefore allowing plaintiffs who would be unable to pursue legal action alone to still seek justice.
- Community legal centres (CLCs), such as YouthLaw, provide free advice and information accessible to children so they are able to better understand their rights under civil law.

LIMITATIONS

- The high costs associated with civil proceedings, such as court and legal representation expenses, can discourage individuals from initiating civil cases, hindering access to justice.
- The high costs associated with defending a civil claim may encourage some defendants to settle, rather than challenge a claim, limiting access to justice in the courts for defendants.
- The high costs of filing an appeal and the legal representation needed to present an appeal may discourage dissatisfied parties from taking such action, undermining the access of these parties to a just outcome.
- A party may be unable to afford interpreter services in a civil dispute, therefore limiting their ability to understand court proceedings or evidence presented in the trial.
- Parties may be unable to access a jury due to the expense of arranging one to adjudicate a civil dispute, which can impact those of lower socioeconomic status to a greater extent.
- Parties of low socioeconomic status or young people, may be uneducated and therefore, unaware of their civil rights, limiting access to justice as their lack of knowledge about when their rights have been breached or how to go about remedying this breach may prevent them from pursuing civil justice.
- People in RRR areas may struggle to access quality courts, legal services, or technology to receive online advice or legal support due to the location they live in.



8G Questions

Check your understanding

Question 1

All people in Australia can equally engage with the civil justice system, regardless of personal characteristics, such as their age or economic status.

- A. True
- B. False

Question 2

Fill in the blank with **one** of the following terms:

limited

upheld

The principle of fairness can be [] for people of lower socioeconomic status who are successful in a civil dispute as the court can order adverse cost orders, allowing the successful party to have some or all of their legal costs compensated.

Question 3

Which of the following statements are correct about the difficulties faced by young people in the civil justice system?

(Select all that apply)

- A. Children may have a limited ability to present evidence in court due to potential intimidation or misleading questions given by the opposing party's lawyer.
- B. Young people may experience a financial inability to initiate action or afford legal representation.
- C. Children usually understand the legal system to a greater degree than adults, due to the prevalence of students learning legal studies, therefore children have a greater ability to self-represent in civil disputes.

Question 4

The principles of justice are upheld for young people in the civil justice system because of various mechanisms, including:

- A. the fact that children are held to a higher standard than adults in civil law.
- B. community legal centres (CLCs), such as YouthLaw, that provide free advice and information accessible to children so they are better able to understand their civil rights.

Question 5

Many CLCs and legal aid services have expanded to rural areas. Consequently, living in metropolitan Melbourne now creates more difficulties for plaintiffs and defendants than living in rural areas.

- A. True
- B. False

Question 6

Which of the following statements are correct about difficulties faced by people living in RRR areas in the civil justice system? **(Select all that apply)**

- A. People in RRR areas may have poor-quality internet connections or an entire lack of access to technology, limiting their ability to seek free legal advice online.
- B. There are more Magistrates' Courts in rural Victoria than in the city, therefore, people in rural areas have greater access to high-quality courts compared to metropolitan dwellers.
- C. The use of online platforms to gain legal advice may be less personable or appropriate for certain civil disputes, yet, people in RRR areas are often limited to this option due to the limited legal services in their areas that prevent them from receiving advice in person.
- D. Reports revealed that 80% of practising solicitors are practising in a rural area, therefore people living in these regions are inundated with support from lawyers.

Question 7

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the civil justice system in upholding the principles of justice for people of low socioeconomic status, young people, and people in rural regions.

Statement	Strengths	Limitations
I. Access to a jury in a civil proceeding may be limited by its associated high costs.	☐	☐
II. Community legal centres (CLCs) are independent community organisations that can provide free advice, casework, and legal education to members of the community.	☐	☐
III. Courts in rural regions may not be physically maintained to the same standard as metropolitan courts, ultimately resulting in delays and inefficiencies.	☐	☐
IV. Young people can find it difficult to present evidence in court as they may be subject to confusing questioning or intimidation, possibly resulting in misleading evidence being shared by the young person, which can prevent a fair outcome.	☐	☐

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify **two** difficulties faced by people of low socioeconomic status in the civil justice system.

Question 9

(3 MARKS)

Juniper is 15 years old. Her favourite popstar, Justin, posted on social media revealing that he has a new girlfriend. Juniper believes that she belongs with Justin, so in a ploy to break him and his new girlfriend up, she posts false rumours about the girlfriend on social media. She was unaware that, in doing so, she had defamed the new girlfriend, which is a civil breach. The new girlfriend sent Juniper a letter threatening legal action.

Explain **one** difficulty Juniper may face in the civil justice system.

Question 10

(4 MARKS)

Describe **two** difficulties faced by people in remote, rural, or regional (RRR) areas in the civil justice system.

Question 11

(6 MARKS)

Belly lives 30 minutes outside of Swan Hill, a regional town in Victoria. She owns a bakery that advertises meat pies for only \$1. Considering she is on the verge of bankruptcy, Belly resorted to filling the pies with lentils instead of meat to save costs, assuming no customers would notice. She labelled them as 'meat pies' and never mentioned to purchasers of the pies that they were, in fact, lentil pies. Customers quickly realised that they had been misled by the contents of the pie and brought a civil action against Belly for misleading or deceptive conduct. Belly knows no lawyers in her area and is unsure of where to seek help.

Explain **two** difficulties Belly may face in the civil justice system.

Extended response

Use your answer to question 12 to support your response to question 13.

Use the following information to answer questions 12 and 13.

Susannah, a 50-year-old woman who has lived in Mortlake, a rural town in Victoria, her entire life has recently been diagnosed with an illness caused by a faulty implant in her knee. Many patients who received the same knee implant during a 10-year period have been similarly diagnosed with the illness, which has resulted in patients being unable to walk. Subsequently, these patients have joined together to form a class action. Susannah dropped out of school in year 10 in order to work, due to her family's financial hardship, which they still experience now. She is not knowledgeable of the legal system and unsure of who to go to for advice, considering she lives in a rural area. She read a news story on her computer about the class action being filed against the knee implant manufacturer that provided her implant and is interested in becoming a member of the class action.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the civil justice system in upholding the principles of access and fairness.

Statement	Strengths	Limitations
I. Susannah can join the class action being filed against the knee implant manufacturer, facilitating her access to justice.	☐	☐
II. Susannah lives in a rural area and, therefore, may experience difficulties in seeking legal advice due to the lack of legal aid services and practising solicitors in rural areas.	☐	☐
III. Susannah's low socioeconomic status and noted lack of education, having dropped out of school in year 10, may prevent her from understanding how to access this class action.	☐	☐
IV. Susannah may be able to access free legal advice online through her computer, considering several community legal centres (CLCs) and legal aid services publish their information online or have phone or email services.	☐	☐

Question 13

(6 MARKS)

Analyse the ability of the civil justice system to uphold the principles of access and fairness in Susannah's case.

Linking to previous learning

Question 14

(3 MARKS)

Explain how mediation may help overcome the difficulties faced by people of low socioeconomic status in the civil justice system.

9



CHAPTER 9

Remedies

LESSONS

- 9A** Purposes of remedies
- 9B** Types of remedies

KEY KNOWLEDGE

Remedies

- the purposes of remedies
- types of remedies, such as damages and injunctions.

Image: Billion Photos/Shutterstock.com

9A Purposes of remedies



Image: piksik/Shutterstock.com

Just as a doctor's appointment aims to alleviate illness and provide the necessary treatment, remedies in civil disputes seek to facilitate the recovery of a plaintiff from a specific loss or harm. While a doctor diagnoses the illness and prescribes medicines accordingly, the legal system evaluates the loss suffered by a plaintiff, offering appropriate remedies to restore them to their original position where appropriate.

STUDY DESIGN DOT POINT

- the purposes of remedies

9A

9B

2.2.8.1

The purposes of remedies

- 2.2.8.1.1** To return the plaintiff to their original position
- 2.2.8.1.2** To uphold the plaintiff's rights
- 2.2.8.1.3** To deter others from civil breaches

Lesson introduction

Plaintiffs initiating civil proceedings seek to have their physical, emotional, or financial loss compensated in some way. While the loss suffered cannot be undone, the courts aim to return these aggrieved parties to their original position prior to the civil breach and compensate them for their loss.

The purposes of remedies 2.2.8.1

The overarching purpose of every civil **remedy** is to restore the plaintiff to their original position before their rights were infringed and they suffered a **loss**. A remedy is provided at the conclusion of a civil dispute if a defendant is found liable in order to affirm the plaintiff's civil rights. If the defendant is not found liable, a remedy will not be awarded to the plaintiff. The main purposes of remedies are to:

- return the plaintiff to their original position
- uphold the plaintiff's rights
- deter others from civil breaches.

KEY TERM

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.

LEGAL VOCABULARY

Loss a disadvantage experienced by a party due to an action or the inaction of another party.

USEFUL TIP

Remember to use the term 'remedies', not 'compensation', when answering exam or SAC questions. Remedies are awarded by a court and compensation is what a remedy tries to achieve for a successful plaintiff. Remedies should also not be confused with the sanctions imposed at the conclusion of a criminal case.

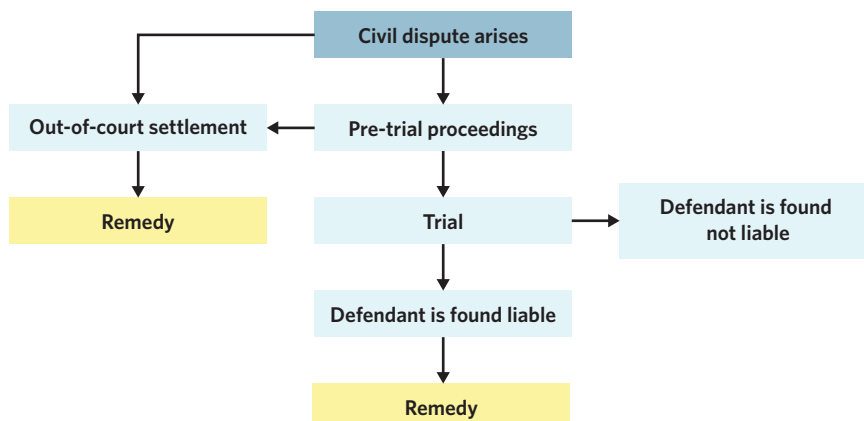


Figure 1 Remedies and the process of resolving a civil dispute

To return the plaintiff to their original position 2.2.8.1.1

The overarching and primary purpose of remedies is to restore the plaintiff to their original position before the civil breach occurred. The focus is on the plaintiff and ensuring the breach of their civil rights is rectified, as opposed to criminal law, where the focus is on punishing the accused for their past behaviour and improving their future behaviour with the imposition of sanctions. A common means of attempting to restore plaintiffs to their original position is through an order for **damages**, which is monetary compensation for a loss experienced by the plaintiff.

LEGAL CASE

James v USM Events Pty Ltd (2022) 11 QR 156

Facts

In 2018, USM held a triathlon event in Gold Coast. A majority of athletes participating in the triathlon were able-bodied, whilst there were a small number of para-athletes competing too, using wheelchairs. The course required both the athletes and para-athletes to pass through the same point during the race to complete the run leg of the event. The plaintiff, James, an able-bodied athlete, was running to this point in the course when she was struck by a para-athlete in a racing wheelchair, resulting in her sustaining both brain and psychiatric injuries.

Legal issue

The trial judge determined that USM had breached its duty of care to James by failing to use proper barriers to mitigate the risk of athletes colliding with one another. The judge on appeal had to determine whether to uphold this judgment and, if they did find USM liable, what damages James should be awarded.

Decision

The judge on appeal agreed that USM had breached its duty of care. In doing so, USM had caused James to sustain post-traumatic stress disorder (PTSD), a head injury, cervical spine injury, chronic headaches, tinnitus, lumbar spine injury, bruising, and vertigo. This resulted in a decreased ability to work, increased expenses from medical bills, requirements for ongoing care and assistance, and pain and suffering. In total, James was awarded \$1,062,351.20 in damages to compensate her for USM's breach.

Significance

The substantial damages received by James aimed to restore her to her financial position prior to the breach. The court also aimed to account for her pain, suffering, and psychological injuries by awarding these damages in order to return her to the emotional, psychological, and financial position she was in prior to USM's negligence.

LEGAL VOCABULARY

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.

USEFUL TIP

The main purpose of remedies is to return the plaintiff to their original position. This is a key purpose that should be included in most responses when referring to remedies, whether that be damages or injunctions, which you will learn about in the next lesson.

LESSON LINK

You will learn more about damages in **9B Types of remedies**.

To uphold the plaintiff's rights 2.2.8.1.2

Remedies also serve to uphold a plaintiff's civil rights. By awarding a remedy, the court acknowledges the plaintiff has been wronged and their rights have been violated. Recognising the plaintiff's rights through the award of a remedy provides a sense of justice and closure to the plaintiff, demonstrating the effectiveness of the civil justice system in restoring injured parties.

REAL WORLD EXAMPLE

Influencer rights

A rival influencer, Fouad Najem, who falsely accused prominent food blogger, Isaac Martin, of being a 'paedophile' and a 'racist', was ordered to pay \$300,000 in damages.

The NSW District Court revealed that Najem used two separate Instagram accounts, one of which had approximately 20,000 followers, to distribute the defamatory content. Martin was deeply disturbed and offended by the post, with the offensive and vulgar language used causing him significant distress. The court issued a permanent injunction to prevent Najem from publishing any further defamatory statements 'through any means whatsoever'. By awarding damages and an injunction, the court upheld Martin's right to not be defamed and protected his reputation.

Adapted from 'Food blogger Isaac Martin awarded \$300,000 in damages from rival influencer' (McKinnell, 2022)



Image: VasilyBudarin/Shutterstock.com

Figure 2 Influencer defamation battle sees plaintiff's rights upheld

WANT TO KNOW MORE?

A plaintiff can launch a civil action against a defendant for various reasons, however, they must be legitimate and appropriate to the dispute at hand. You can find out more about a plaintiff's rights and the grounds on which a plaintiff may sue a defendant by searching 'Cause of action - LawRight' and clicking the relevant webpage (LawRight, 2023).

To deter others from civil breaches 2.2.8.1.3

When a defendant is required to pay money or forced to undertake an action as a result of a civil wrong, it serves as a warning to others in society that such behaviour will not be tolerated and may result in severe consequences.

Remedies can deter potential wrongdoers from engaging in conduct that breaches the civil rights of others, therefore promoting a more just and cohesive society.

The possibility of being legally ordered to financially compensate others or restrict one's actions can also encourage parties to take preventative measures to avoid engaging in civil breaches in the first place.

HYPOTHETICAL SCENARIO**Mopping mayhem**

A café was recently sued for \$500,000 after a customer slipped on the floor. As a result of the slip, the customer suffered a serious injury and mental health troubles, causing her to no longer be able to work. Cynthia owns a café in the area and, following the recent civil dispute, alerted her staff to only mop the floor when the store is closed and ensure that the 'wet floor' sign is always used after mopping. Therefore, the remedy of \$500,000 awarded to the injured customer acted to deter Cynthia from unintentionally breaching civil rights in a similar fashion.



Figure 3 Cynthia informed her staff to only mop at particular times to avoid a potential civil dispute

Lesson summary

There are three main purposes of remedies, the primary purpose being to return the plaintiff, as close as possible, to their original position prior to the civil breach occurring.

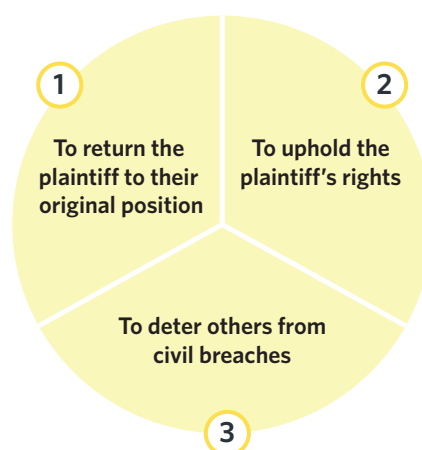


Figure 4 Purposes of remedies

9A Questions

Check your understanding

Question 1

Remedies are court orders that punish offenders if they are found guilty of criminal behaviour.

- A. True
- B. False

Question 2

Which of the following is **not** a purpose of remedies?

- A. To deter others from civil breaches
- B. To uphold the rights of the plaintiff
- C. To return the plaintiff to their original position
- D. To rehabilitate the defendant

Question 3

Fill in the blank with **one** of the following terms:

defendant

plaintiff

accused

Recognising the rights of the [] through the award of a remedy provides a sense of justice and helps restore their faith in the legal system.

Question 4

Mercedes was awarded a remedy of \$50,000 after they suffered a debilitating injury at work. Whilst this prompted Mercedes's workplace to improve its workplace safety and equipment training, Mercedes can never work again and permanently suffers from headaches and pain.

Which of the following purposes of remedies was **not** achieved in Mercedes' case?

- A. To return the plaintiff to their original position
- B. To uphold the plaintiff's rights
- C. To deter others from civil breaches

Question 5

Fill in the blanks with **two** of the following terms:

sanction

liable

guilty

remedy

A [] is the outcome of a civil trial that affirms a plaintiff's civil rights where the defendant is found [] .

Question 6

Which of the following statements most accurately describes the overarching purpose of remedies?

- A. The main purpose of remedies is to punish the defendant.
- B. The main purpose of remedies is to reward the plaintiff for bringing a civil action to court.
- C. The main purpose of remedies is to return the plaintiff to their original position before the civil breach occurred.

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Define the term 'remedy'.

Question 8

(2 MARKS)

Identify **two** purposes of remedies.

Question 9

(3 MARKS)

Kurt is suing Rachel after she stole his costume from his dressing room causing him to miss his performance, and thus lose work.

Identify and explain **one** purpose of remedies that Kurt's case could achieve.

Extended response

Use your answer to question 10 to support your response to question 11.

Use the following information to answer questions 10 and 11.

Blaine is a professional dancer who injured himself while tap dancing during a live performance. Props and costumes were negligently left on the stage, causing him to trip and fall, breaking his arm in the process. As a result, he has accrued medical expenses, been unable to perform, and lost his only source of income. He sued the stage manager for negligence and received damages for \$100, despite the significant loss of income and his medical expenses equating to \$1000.

Question 10

Which of the following statements is incorrect in relation to Blaine's case?

- A. Blaine was awarded damages, which demonstrates the judge's recognition of his rights, potentially providing Blaine with a sense of justice.
- B. Blaine's loss of income and medical expenses cost over \$1000, so receiving only \$100 from the courts is insufficient to achieve the main purpose of remedies, to restore the plaintiff to their original position.
- C. The stage manager was punished due to the high amount of damages, thus deterring other stage managers from leaving costumes and props on the stage.

Question 11

(5 MARKS)

To what extent can remedies achieve their purposes in Blaine's case?

Linking to previous learning

Question 12

(3 MARKS)

Brittany posted on her social media about Artie being a bully. The post was viewed by 50 people from Artie's school and he has been socially isolated ever since.

During his time in isolation, Artie wanted to buy a cake from 'Finn's Bakery' to cheer himself up. Finn sold a cupcake to Artie that contained a slug inside it. Finn was unaware of the slug. Artie now has contracted a serious illness as a result of the cupcake.

Explain how **one** purpose of remedies may be achieved if Artie were to initiate **either** a defamation case against Brittany or a negligence case against Finn.

9B Types of remedies

STUDY DESIGN DOT POINT

- types of remedies, such as damages and injunctions

9A

9B

2.2.9.1
Damages

2.2.9.2
Injunctions



Image: Andrey_Popov/Shutterstock.com

Imagine you have broken your leg and the doctor suggests using a band-aid as the treatment. The doctor's orders are very unlikely to treat your injury and you will not be returned to the physical state you were in prior to the incident occurring. Thus, just as doctors seek to provide remedies tailored to certain injuries or illnesses, certain civil remedies are more suitable than others in addressing specific types of civil losses.

Lesson introduction

If the plaintiff is successful in their claim, there are different types of remedies a court may enforce. One of these remedies provides financial compensation, while another mandates or prohibits certain actions. For example, in disputes where a civil wrong has already occurred, a sum of money may be a suitable remedy to restore the plaintiff to their original position. However, where a civil wrong can be avoided, or a past breach needs to be prevented from recurring, a party can initiate a civil action to compel the other party to act or stop acting in a certain manner. For example, seeking a remedy that prevents a neighbour from playing loud music during certain hours.

Damages 2.2.9.1

Damages compensate a plaintiff in a civil dispute for the financial loss or other losses caused by the breach. This includes replacing the monetary value of property, covering expenses, and compensating for the loss, pain, and suffering relating to a plaintiff's injury or death. Different types of damages cater for various types of loss by compensating for the negative tangible and intangible consequences of a civil breach. Tangible consequences of a civil breach can include medical expenses, whilst intangible consequences may be the pain and suffering a plaintiff experiences as a result of a civil breach.

Damages can be classified into different categories. **Compensatory damages** aim to restore the plaintiff to their original position. The three types of compensatory damages, which each aim to compensate the plaintiff and account for different types of loss, are:

- specific damages
- general damages
- aggravated damages.

There are also other types of damages that do not primarily aim to compensate the plaintiff but still recognise the plaintiff's loss and breach of rights.

KEY TERM

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.

LEGAL VOCABULARY

Compensatory damages monetary damages that aim to restore the plaintiff to their original position had the breach not been committed.

LEGAL VOCABULARY

Specific damages a type of compensatory damages that have a precise value, are easily quantifiable, and the amount can be calculated objectively.

General damages a type of compensatory damages that do not have a precise value and are not easily quantifiable. These are awarded when the plaintiff has endured general pain and suffering, loss of quality of life, or a shortened life expectancy.

Aggravated damages a type of compensatory damages that aim to further compensate the plaintiff for humiliation suffered or where they have been insulted due to the defendant's conduct.

Nominal damages a small monetary amount awarded to show the plaintiff has suffered a civil breach, usually valued at \$1, to uphold the plaintiff's rights without providing compensation.

Exemplary damages damages that aim to punish the defendant and are usually a large monetary amount.

USEFUL TIP

It is important to remember that damages are not the same as a fine. A fine is a sanction that requires the offender to make a monetary payment as a penalty for a criminal offence. 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 Types of damages

Type of damages	Explanation	Example
Specific damages	Have a precise value and are easily quantifiable. The amount can be calculated.	Compensation for medical expenses or loss of earnings resulting from an inability to work.
General damages	Do not have a precise value and are not easily quantifiable. They are awarded where the plaintiff has endured general pain and suffering, loss of quality of life, or a shortened life expectancy.	Compensation for a defendant's actions that resulted in the plaintiff's inability to walk and live independently, leading to a diminished quality of life.
Aggravated damages	Aim to compensate the plaintiff for the humiliation suffered or where they have been insulted.	In circumstances where a patient receives substandard medical care and is subject to ridicule or disgrace by the medical staff, they may be entitled to compensation for the humiliation and emotional distress caused.
Nominal damages	Require a small amount of money to be paid to a plaintiff, often valued at \$1. Nominal damages are usually awarded in situations where the plaintiff is not necessarily seeking compensation, but wants to prove they are legally right. Judges do not necessarily believe the defendant deserves minimal damages, rather the plaintiff is wanting to fight for moral reason with minimal monetary gain.	Where a plaintiff, usually a celebrity, sues another party to make a legal point, rather than to seek financial compensation.
Exemplary damages	Aim to punish the defendant. They usually require a defendant to pay a plaintiff large amounts of money, whilst serving to deter others from behaving in the same way. These damages may be awarded in circumstances where a civil breach is driven by cruelty, revenge, or a disregard for the plaintiff's rights.	A manufacturer knows that test results suggest the product is not safe for public use or consumption but decides to go ahead and release the product. In this scenario, the manufacturer has knowledge of the faulty product, yet is acting negligently, and if a civil dispute arose, exemplary damages may be justified.



Figure 1 Plaintiffs who are seeking financial compensation will sue for damages

REAL WORLD EXAMPLE

Meghan Markle's milestone win over the Mail

In 2019, Meghan Markle commenced a civil action against Associated Newspapers, the publisher of the 'Daily Mail'. The newspaper published five articles that included excerpts from a 'deeply personal' letter Markle had written to her estranged father in August 2018. The UK Court of Appeal, in January 2022, agreed that the actions of the publisher in making this private information public, constituted a breach of privacy. As a result, the court ordered Associated Newspapers to print an apology to Markle on the front page of its paper and pay Markle a nominal sum of £1 in damages for invading her privacy. Throughout her three-year legal battle against Associated Newspapers, the Duchess consistently emphasised that her pursuit of justice was driven by principles rather than financial gain. Although Markle does not personally benefit from such a small sum of damages, she believed the ruling was 'precedent setting', showing newspaper corporations what is considered right and wrong in the future. Whilst this is a case example from the UK and not Australia, the concept of nominal damages is the same in both countries.

Adapted from 'Meghan to receive just £1 from Mail on Sunday for privacy invasion' (Waterson, 2022) and 'Meghan Markle To Receive £1 From Newspaper Over Privacy Invasion But That's Not All' (Dellatto, 2022)



Image: Lorna Roberts/Shutterstock.com

Figure 2 Meghan Markle succeeded in her legal battle to secure a one-pound win

DEEP DIVE

Restrictions on damages

Similar to the way crimes have maximum penalties, there are statutory restrictions on damages, as outlined in the *Wrongs Act 1958* (Vic). For example, the maximum amount of general damages awarded for pain and suffering is capped to a statutory amount indexed on 1 July each year. This maximum was \$644,640 in the 2021-2022 financial year.

Adapted from 'Understanding thresholds and caps in personal injury litigation' (Victorian Government Solicitor's Office, 2022)

LEGISLATION

Wrongs Act 1958 (Vic)

LESSON LINK

You learnt about the purposes of damages in **9A Purposes of damages**.

The overarching purpose of damages is to restore the plaintiff to their original position before the civil breach occurred. The focus is on the plaintiff and ensuring the breach of the civil right(s) is remedied, as opposed to criminal law, where the focus is on the accused and changing their behaviour through the imposition of sanctions. If a defendant cannot pay the sum of civil damages, the court may seize their assets or create a payment plan. However, the purpose of compensating the plaintiff may not be achieved if the defendant has no source of income and/or limited assets.

Different types of damages serve to achieve different objectives by assigning monetary values to tangible and intangible consequences of civil breach.

Table 2 The ability of damages to return the plaintiff to their original position

Strengths	Limitations
- Compensatory damages are intended to compensate the plaintiff for their actual losses, such as medical bills, lost income, and property damage, with the purpose of making the plaintiff 'whole' again after incurring their loss. Specific damages can be quite effective at achieving this. - General and aggravated damages aim to compensate for non-quantifiable losses, such as pain, reduced life expectancy, and humiliation.	- Damages, despite providing monetary compensation, may not fully restore non-monetary losses, such as pain and suffering or emotional distress. - The amount of compensation awarded for intangible consequences of a civil breach may not fully reflect the extent of harm suffered by the plaintiff, as quantifying pain and suffering can be difficult. - In some cases, harm suffered by the plaintiff may be irreversible, such as in cases of wrongful death or permanent disability. In these cases, damages cannot fully restore the plaintiff to their original position. - If the defendant does not have sufficient assets to pay the damages awarded, the plaintiff may not be fully compensated for their losses.

Damages also serve to uphold the plaintiff's rights. By awarding damages, the court acknowledges the plaintiff has been wronged and their rights have been violated. Recognising the plaintiff's rights through the award of damages provides a sense of justice and closure to the plaintiff and helps restore their faith in the legal system.

Table 3 The ability of damages to uphold the plaintiff's rights

Strengths	Limitations
Even in cases where the damages awarded are minimal, or where the plaintiff is seeking nominal damages, the court's decision to award such compensation acknowledges the plaintiff's right to a legal remedy and upholds their right to seek justice for a violation of their civil rights.	- In some cases, the harm suffered by the plaintiff may be so significant that damages cannot fully restore their rights. For example, in cases of wrongful death, no amount of compensation can fully restore the plaintiff's right to life. - Jurors do not have the legal expertise to award damages that uphold a plaintiff's rights. In cases where the jury decides the damages awarded to the plaintiff, jurors may not understand the value of someone's rights.

When a defendant pays damages, it serves as a warning to others that such behaviour will not be tolerated and may result in severe consequences. This helps deter potential wrongdoers from engaging in similar conduct and promotes a safer and more just society. The threat of facing damages can also encourage individuals and organisations to take preventative measures to avoid engaging in a wrongful activity in the first place.

Table 4 The ability of damages to deter others from civil breaches

Strengths	Limitations
In some cases, the defendant's actions may have been intentional or reckless, and damages can be awarded to deter similar behaviour in the future. This aspect of damages upholds the plaintiff's right to be protected from future harm by holding the defendant accountable for their actions.	- While damages can be awarded to deter future harmful conduct, there is no guarantee that this will be effective, especially if others perceive the potential risk of wrongful actions to be outweighed by the benefits, or if they are unaware of the risk of being sued for damages. If the defendant is unlikely to be deterred by the damages awarded, the plaintiff's rights may not be fully upheld. - If the defendant cannot pay the damages due to limited financial means, damages cannot deter them effectively.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 2 VCE Legal Studies is 'discuss the ability of remedies to achieve their purposes'. The tables in this lesson showing strengths and limitations of each type of remedy in relation to each purpose can help you to discuss the ability of remedies to achieve their purposes.

Injunctions 2.2.9.2

Injunctions are court orders compelling a party to do something, or preventing a party from doing something. They aim to either remedy a past civil breach or prevent a potential, future civil breach from occurring. If the defendant does not comply with the terms of the injunction, they may be held in **contempt of court**, be ordered to pay damages, or be charged in criminal proceedings. There are different types of injunctions to address the broad range of civil breaches that can occur.

Table 5 Types of injunctions

Type of injunction	Explanation	Example
Mandatory injunction	Forces a party to do something.	Ordering a party to demolish a wall that they built on someone else's land.
Restrictive injunction	Prevents a party from doing something.	Preventing a property from being sold.
Interlocutory injunction	Lasts for a short time and is often awarded in urgent circumstances.	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.
Final injunction	Permanent injunction that is ongoing.	Preventing a publisher from printing a defamatory book.

KEY TERM

Injunction a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action.

LEGAL VOCABULARY

Contempt of court an act that interferes with, or undermines the authority of the courts and gives rise to a sanction, such as a fine or term of imprisonment.

Mandatory injunction an injunction that forces a party to do something.

Restrictive injunction an injunction that prevents a party from doing something.

Interlocutory injunction an injunction that is temporary.

Final injunction an injunction that is permanent.

REAL WORLD EXAMPLE

Wind farm operators blown away by an injunction

In 2022, the Supreme Court of Victoria issued an order to the operators of Bald Hills Wind Farm, requiring them to refrain from generating excessive noise during the wind farm's operation and to implement measures to reduce noise. This came after two plaintiffs, who live close to the wind farm, brought a civil action in the courts against the operators for the excessive noise it created, alleging it hindered their ability to get a good night's sleep and reduced the value of their properties.

The permanent injunction ordered by the court was deferred for three months after the decision, providing Bald Hills time to implement measures to reduce noise emissions. If they were unable to do so, the injunction would become effective, forcing the wind farm to completely cease operations.

Adapted from 'Bald Hills Wind Farm ordered to stop emitting night time noise, pay neighbours damages in landmark ruling' (Field, 2022)



Image: fokke baarssen/Shutterstock.com

Figure 3 Residents near a wind farm successfully obtained an injunction against the operator due to its loud noise

The overarching purpose of injunctions is to restore the plaintiff to their original position before the civil breach occurred or prevent a civil breach from occurring. In civil law, the emphasis is placed on the plaintiff and rectifying the violation of their civil rights, rather than modifying the accused's behaviour through the imposition of penalties, which is the focus of criminal law.

Table 6 The ability of injunctions to return the plaintiff to their original position

Strengths	Limitations
Injunctions aim to return the plaintiff to their original position by forcing the defendant to take action to prevent harm, or further harm, to the plaintiff. Injunctions can also prevent a future breach from occurring as they have the ability to restrict the defendant and prevent them from doing something.	Interlocutory injunctions are temporary and when the time period has been completed, the defendant is able to continue their disruptive behaviour.

Injunctions play a crucial role in upholding the rights of the plaintiff in civil cases. These legal remedies are often sought when the plaintiff believes their rights have been violated, or are at risk of being violated, by the actions or omissions of another party. By obtaining an injunction, the plaintiff can seek a court order to prohibit or enforce certain actions from the defendant, effectively safeguarding their rights.

Table 7 The ability of injunctions to uphold the plaintiff's rights

Strengths	Limitations
By granting an injunction, the legal system demonstrates its commitment to protecting and upholding the rights of individuals in civil matters, providing a powerful tool for plaintiffs to seek justice and remedy breaches of their rights.	Initiating a civil claim comes with high costs, meaning people of high socioeconomic status can readily protect their civil rights. In contrast, someone of medium or low socioeconomic status may not have the resources to seek out a civil remedy.

When an injunction is ordered, the defendant is ordered to perform a specific action or prevented from doing a specific action, demonstrating that such behaviour is not tolerated. This helps deter potential wrongdoers from engaging in similar conduct and promotes a safer and more just society.

Table 8 The ability of injunctions to deter others from committing civil breaches

Strengths	Limitations
Injunctions provide immediate relief to the plaintiff. When a court grants an injunction, it can swiftly halt or restrict the actions of the defendant, preventing further harm or damage to the plaintiff's interests. This prompt and decisive action can serve as a powerful deterrent to others who might consider engaging in similar civil breaches.	The court has a limited ability to monitor and ensure the defendant adheres to the terms of the injunction. If the defendant chooses to disregard the injunction, the plaintiff may need to initiate additional legal proceedings to enforce it, which can be time-consuming and costly. This limitation can undermine the deterrent effect of injunctions if they are not enforced.

Lesson summary

Damages and injunctions are types of remedies that aim to either restore the plaintiff to their original position before the civil breach occurred, or to prevent a civil breach and loss from occurring. In civil cases, injunctions and remedies may present various strengths and limitations in their ability to:

- return the plaintiff to their original position
- uphold the plaintiff's rights
- deter others from committing civil breaches.

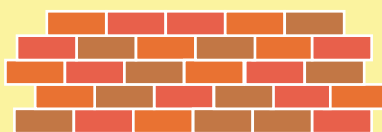
	Explanation	Purpose
Damages	Damages are an award of monetary compensation to the plaintiff. Most types of damages aim to compensate for the loss caused by the civil breach. This can include replacing the value of property, covering expenses, or compensating for loss, pain, or suffering relating to a plaintiff's injury or death. 	The main purpose of damages is to restore the plaintiff to their original position before the civil breach occurred. 
Injunctions	Injunctions are court orders compelling a party to do something, or preventing a party from doing something. 	The main purpose of injunctions is to compel someone to do an act, or prevent someone from doing an act. Therefore, injunctions achieve this by restoring the plaintiff to the position they were in before the defendant infringed their rights, or by preventing harm to the plaintiff in the future. 

Figure 4 Comparison of damages and injunctions

9B Questions

Check your understanding

Question 1

Tick the box to indicate whether each of the following statements relate to **damages** or **injunctions**.

Statement	Damages	Injunctions
I. Prevents the defendant from acting in a way that could lead to further harm.	☐	☐
II. An award of monetary compensation to the plaintiff.	☐	☐
III. Can be mandatory or restrictive.	☐	☐
IV. Can be compensatory or nominal.	☐	☐

Question 2

Which of the following are types of compensatory damages?

(Select all that apply)

- A. Aggravated damages
- B. Nominal damages
- C. General damages
- D. Specific damages

Question 3

Injunctions aim to either remedy a past civil breach or prevent a potential civil breach from occurring.

- A. True
- B. False

Question 4

Which of the following is **not** a scenario where specific damages would apply?

- A. Medical treatment
- B. Loss of work
- C. The pain of a broken arm

Question 5

Fill in the blank with **one** of the following terms:

court orders

sanctions

Injunctions are compelling a party to do something, or preventing a party from doing something.

They aim to either remedy a past civil breach or prevent potential civil breaches from occurring.

Question 6

The overarching purpose of damages is to:

- A. reward the plaintiff for initiating civil action.
- B. return the plaintiff to their original position before the civil breach occurred.
- C. provide a punishment to the defendant.

Preparing for exams**Standard exam-style****Question 7**

(2 MARKS)

Describe **one** reason why a plaintiff may seek damages.

Question 8

(3 MARKS)

Define the term 'injunction' and outline **one** type of injunction.

Question 9

(3 MARKS)

Distinguish between injunctions and damages.

Question 10

(3 MARKS)

Edward plans to build an extension onto his house. If it goes ahead, the extension will block the natural light from Jacob's window, his neighbour. Jacob wants to know what he can do about this situation.

Advise Jacob as to the most appropriate civil remedy to seek in this dispute.

Extended response

Use your answer to question 11 to support your response to question 12.

Use the following information to answer questions 11 and 12.

After false information about Rebel Wilson was published in 'Women's Day', Wilson brought a claim of defamation against Bauer Media. She was awarded \$4.7 million in specific damages, compensating for her economic loss from having less future acting roles as Wilson alleged certain roles had been cancelled after the release of the article. This decision was then appealed, with the Court of Appeal forcing Wilson to pay back \$4.1 million of those damages. Wilson admitted her legal action was 'never about the money', rather stating that she was pursuing damages in order to 'stand up to a bully'.

Source: ABC News, Rebel Wilson's legal battle ends as High Court rejects appeal over defamation payout, 16 November 2018 (Elizabeth Byrne)

Question 11

Tick the box to indicate whether each of the following statements are **true** or **false** about Wilson's dispute.

Statement	True	False
I. Given the damage had already been done and the false information had already been widely disseminated, an injunction would not be a more effective remedy than damages as it would not address the harm already suffered by Wilson.	☐	☐
II. Wilson is a famous actress and, thus, would not require a civil remedy as she is already wealthy.	☐	☐
III. The specific damages would compensate Wilson for the loss of acting roles as a result of the defamatory publication. This loss could be calculated and quantified.	☐	☐
IV. An injunction could be more effective than damages in Wilson's dispute as it could prohibit all publications from publishing further defamatory information about her.	☐	☐

Question 12

(6 MARKS)

'Damages are more appropriate than an injunction in this dispute.'

Do you agree with this statement? Justify your response.

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of damages to achieve their purposes.

Statement	Strengths	Limitations
I. Even in cases where the damages awarded are minimal, or where the plaintiff is seeking nominal damages, the court's decision to award such compensation acknowledges the plaintiff's right to a legal remedy and upholds their right to seek justice for a violation of their rights.	☐	☐
II. Compensatory damages can wholly or partially compensate the plaintiff for their actual losses, such as medical bills, lost income, property damage, pain, and suffering.	☐	☐
III. There is no guarantee that damages will deter others from enacting harmful behaviour, especially if they perceive the potential risk of the behaviour to be outweighed by the benefits, or if they are unaware of the risk of being sued for damages.	☐	☐
IV. The amount of compensation awarded for intangible consequences of a civil breach may not fully reflect the extent of harm suffered by the plaintiff, as quantifying pain and suffering can be difficult.	☐	☐
V. In some cases, the defendant's actions may have been intentional or reckless, and damages awarded can deter others from enacting similar behaviour in the future.	☐	☐
VI. In some cases, the harm suffered by the plaintiff may be so significant that damages cannot fully restore their rights, such as in the case of wrongful death.	☐	☐

Question 14

(6 MARKS)

Discuss the extent to which damages are able to achieve their purposes.

Linking to previous learning

Question 15

(3 MARKS)

Distinguish between fines and damages.

UNIT 2 AOS 3

Human rights

The protection of rights is fundamental to a democratic society. Rights are protected in Australia through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities and through common law and statute law, including in relation to discrimination and equal opportunity. In this area of study, students examine the ways in which human rights are protected in Australia and consider possible reforms to the protection of human rights. Students investigate one human rights issue in Australia, such as in relation to the right to vote, the right to freedom of religion, or the rights of First Nations peoples.

Outcome 3

On completion of this unit the student should be able to explain one contemporary human rights issue in Australia, and evaluate the ways in which rights are protected in Australia.

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KEY SKILLS

- define and use legal terminology
- research and analyse relevant information about the protection of rights
- describe the role of individuals in bringing about changes in the protection of rights through cases
- explain the meaning and development of human rights
- analyse the impact of a case study on the human rights of individuals and on the legal system
- discuss possible reforms to the protection of rights in Australia
- evaluate the ways in which rights are protected in Australia
- apply legal principles to actual and/or hypothetical scenarios.

Image: Arsenie Krasnevsky/Shutterstock.com

10

CHAPTER 10

Human rights

LESSONS

- 10A** An introduction to human rights
- 10B** Australia's protection of human rights
- the Constitution
- 10C** Australia's protection of human rights
- statute and common law

KEY KNOWLEDGE

- the meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights*
- an overview of the ways in which human rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law.

10A An introduction to human rights



Image: Jacob Lund/Shutterstock.com

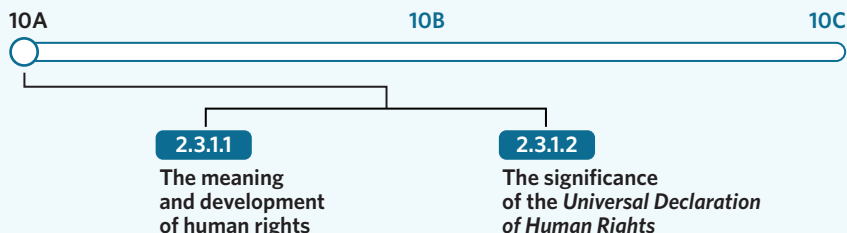
'This is a very powerful truth. All human beings are born free and equal in dignity and rights.'

—Thoraya A. Obaid (United Nations Population Fund Executive Director)

Freedom, equality, and dignity are all rights that every human deserves to be offered and, in turn, have protected. Yet who decided these rights were deserving of being upheld? What mechanisms aim to ensure freedom, equality, and dignity are preserved for every person in this world, and do these mechanisms actually work?

STUDY DESIGN DOT POINT

- the meaning and development of human rights, including the significance of the *Universal Declaration of Human Rights*



LESSON LINKS

You will learn more about the rights of the child in **11A The rights of young people**.

You will learn more about the right to vote in **11C The right to vote**.

KEY TERM

Human rights entitlements and liberties that exist for all human beings, irrespective of any personal qualities and characteristics.

Lesson introduction

Broadly speaking, there is a global consensus as to what constitutes a ‘human right’. The basis for rights being categorised in such a way stems from thousands of years of these entitlements gradually being built upon, put in writing, and reformed. As a result, global, moral standards regulating how every person should behave and what rights they should be afforded have been created and protected. However, in reality, a range of sociocultural and historical factors have made it difficult to mandate the global protection of some rights.

The meaning and development of human rights 2.3.1.1

Upholding and recognising **human rights** is a fundamental concept in democratic societies. These rights are basic entitlements that people from around the world agree are essential for all people to maintain a cohesive and functioning society. Ideally, human rights are the same for people everywhere, regardless of characteristics, such as gender, wealth, race, ethnicity, age, and sex, as they are considered ‘universal’. From country to country, perspectives on what constitutes a ‘human right’ can differ, however, common themes of upholding equality, fairness, and freedom are consistent throughout much of the world.

In democratic societies, human rights that governments aim to protect include:

- civil and political rights, such as the right to vote, right to privacy, and freedom of speech.
- economic, social, and cultural rights, such as the right to work, education, and non-discrimination.

REAL WORLD EXAMPLE

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this section may be culturally sensitive. Examples of this include references to distressing events or inappropriate language.

Australia found to have breached First Nations rights

Although Australia is a democratic country that largely upholds human rights, there are still certain areas of human rights where Australia falls below international standards. Such human rights violations, according to Amnesty International, include discrimination against First Nations peoples, indefinite detention of asylum seekers, and violating the rights of the child to freedom by detaining them at a young age, among others.

Australia has been criticised for its failure to protect the human rights of First Nations peoples in a number of ways. Firstly, as of July 2023, there have been 547 Aboriginal and Torres Strait Islander deaths in custody since 1992 (Australian Institute of Criminology, 2023). Over half of the Indigenous people who died in custody since 2008 had not been found guilty, as 56% were on remand, died while fleeing police or during arrest, or were in protective custody. Most were suspected of non-indictable offences, which typically carry sentences of less than five years (The Guardian, 2018). This violates the human right to life. Secondly, in September 2022, the United Nations Human Rights Committee (UNHCR) found that Australia breached the rights of Torres Strait Islanders to enjoy their culture by failing to address the impacts of climate change. The UNHCR determined their rights had been breached, due to a lack of climate action, as the climate inaction had meant the land to which they have a close spiritual connection is being jeopardised and threatened. Therefore, their cultural rights are being breached.

Adapted from 'UN Human Rights Committee finds Australia violated Torres Strait Islanders' human rights over climate inaction' (Human Rights Law Centre, 2022) and 'Deaths in custody in Australia' (Australian Institute of Criminology, 2023)



Image: Natalie Maro/Shutterstock.com

Figure 1 Australia breached First Nations peoples' rights to enjoy culture and life

The concept of human rights is not new. Across different cultures, the development of moral standards and human rights has occurred over thousands of years. Table 1 sets out different events that have contributed to today's broad perception of human rights, amongst other events. Different religious texts offer insights into many human rights established centuries ago, including the Bible, the Quran, and the Hindu Vedas.

DEEP DIVE

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this textbook, and their associated online resources, may be culturally sensitive. Examples of this include references to and/or images of people who have passed, inappropriate language terms or distressing events.

First Nations development of human rights

The following story was written by an Aboriginal Elder, reflecting on the human rights developments over time for First Nations peoples in Australia.

'I was born in 1963, four years prior to the 1967 Referendum that counted Aboriginals, like myself, in the census. This means that we were not counted as citizens of this beautiful country. The 1967 Referendum also transferred the powers of the states and territories, who held legislative power over us at the time, to the Commonwealth Government. The laws that were in place prior to this referendum, did not give me, my family, and my community the same rights as other Australians under the Australian Constitution. Many aspects of our lives were controlled by the state governments, including the right to:

- (a) vote in state elections
- (b) own property
- (c) marry who we wanted to
- (d) told us and restricted us to where we could live
- (e) move to wherever we chose
- (f) be legal guardians of own children
- (g) receive the same pay as non-Indigenous people for the same work
- (h) in some places, drink alcohol.

Continues →

LESSON LINK

You learnt about trial by jury in
4E The jury in a criminal trial.



'Vasudev kutumbakam', a concept in the Hindu Vedas of treating the whole world as a family, living in harmony, without inflicting harm on anyone.



'Whoever kills a human being without any reason, it is as though he had killed all mankind', a concept from the Quran relating to the right to life.



'Thou shalt love thy neighbour', a concept in the Bible about owing a duty towards all.

Figure 2 Examples of religious texts that have contributed to developing human rights

DEEP DIVE

First Nations development of human rights – Continued

These rights were denied to us. This is not stuff of the far-away past. This is stuff that has happened in my life-time. The other major violation of our rights – was our right to our identity. Laws were written in a way to out breed Aboriginality in Australia. The words ‘full-blood’, ‘half-caste’, ‘part Aborigine’, and ‘quarter-caste’ were real words used in legislation that defined me, my sisters, and brothers. It was because these wordings that prevented me from going to school, from me getting a job, and from me being able to talk about my Aboriginality. The basic human right of self-identity was taken from us’.

LEGAL VOCABULARY

United Nations (UN)

an intergovernmental organisation that aims to promote better living standards and human rights, maintain international peace and security, and develop friendly relations among nations.

However, significant progressions in protecting human rights have occurred since World War II after mass atrocities were committed, encouraging countries’ governments across the world to commit to peace and justice and ensure such events were prevented from occurring in the future. This resulted in the establishment of the **United Nations (UN)** in 1945, which intended to protect human rights and promote international peace and security.

Table 1 Examples of events that contributed to the development of human rights

Year	Event	Contribution to human rights development
600 BC	The inception of natural law theory in Greece	In the 6th century BC, there is evidence of the beginnings of philosophy in Greece and the first articulation of natural law theory. This theory suggests that humans have intrinsic morals that guide their decisions and have created the basis of law, based on what is considered ‘right’ and ‘wrong’. Subsequently, human rights derived from ethical concerns, such as most people viewing torture as immoral, were established.
632	Prophet Mohammed completes authoring the Quran	Human rights, such as the right to life, to peaceful living, and to own and protect property, have all been interpreted within the Quran.
1215	The Magna Carta is signed by the King of England	The Barons and the King of England signed an agreement that placed limits on the power of the King and established basic rights for the protection of citizens, such as the right to trial by jury.
1689	The English Bill of Rights is produced in English Parliament	An Act of the English Parliament that established principles of free elections, freedom of speech within parliament, and just treatment by the courts.
1776	The American Declaration of Independence is created	Renowned for expressing ‘we hold these truths to be self-evident, that all men are created equal’, this Declaration established the right of life, liberty, and the pursuit of happiness for US citizens.
1789	France establishes the Declaration of the Rights of Man and of the Citizen	This Declaration establishes 17 ‘natural and inalienable’ articles containing various rights, including the right to freedom, security, ownership, and resistance to oppression.
1791	United States Bill of Rights is ratified in the US	The Bill of Rights is the first 10 amendments in the US Constitution. These include amendments protecting the right to not receive excessive bail and fines, the right to just compensation when property is taken away, the right to not have one’s property unreasonably searched, the right to freedom of speech and protest, and the right to trial by jury.
1833	British Parliament abolishes slavery	The <i>Slavery Abolition Act 1833</i> was an Act that abolished slavery in most British colonies, resulting in more than 800,000 enslaved Africans being freed. This led to greater racial equality and justice.
1903	Some women are given the right to vote in Australian federal elections	Throughout the beginning of the 20th century, most states in Australia began allowing certain women to vote in state elections. In 1903, women were able to do so in Australia for federal elections after persistent efforts from the suffragette movement to grant females suffrage.
1945	United Nations establishment	The United Nations was created after World War II as 29 nations ratified the Charter. The Charter of the United Nations set out the purposes of the body, including maintaining international peace and security and encouraging respect for human rights.

Continues →

Table 1 Continued

Year	Event	Contribution to human rights development
1948	The <i>Universal Declaration of Human Rights</i> (UDHR) is created	This document set out common entitlements that everyone across the world is entitled to receive, such as the right to freedom of religion, non-discrimination, and equal pay.
1969	Stonewall Riots	In 1969, police in New York City raided a gay club, sparking a riot among bar patrons and neighbours. This led to six days of protests against law enforcement, serving as a catalyst for the gay rights movement.
1984	All Aboriginal and Torres Strait Islander people are required to enrol and vote at elections like all other Australian citizens	In 1962, the <i>Commonwealth Electoral Act 1918</i> (Cth) was amended, granting all Aboriginal and Torres Strait Islander people the option to enrol and vote in federal elections. However, enrolment was not compulsory, unlike for other Australians. It was not until 1984 that Aboriginal and Torres Strait Islander people gained equal voting rights to all other electors.
1951–2007	The creation of several human rights conventions and declarations by the United Nations	Conventions and declarations created during this time include: • <i>Convention Relating to the Status of Refugees</i> (1951) • <i>Convention on the Elimination of All Forms of Racial Discrimination</i> (1965) • <i>International Covenant on Civil and Political Rights</i> (1966) • <i>Convention on Elimination of All Forms of Discrimination Against Women</i> (1979) • <i>Convention on the Rights of the Child</i> (1989) • <i>Declaration on the Rights of Indigenous Peoples</i> (2007).

LEGAL VOCABULARY

Convention an agreement signed between two or more countries that are usually open to participation from the international community as a whole, or from a large number of countries. This is also known as a treaty.

Declaration a non-binding agreement between two or more countries that establishes the aspirational rights and obligations that parties to the agreement seek to enforce.

The significance of the *Universal Declaration of Human Rights* 2.3.1.2

The ***Universal Declaration of Human Rights* (UDHR)** was created by the United Nations (UN) in 1948, in the aftermath of World War II. The UDHR is not a treaty, therefore it cannot be signed or ratified by countries and it does not have any binding force on the laws of any country. It is aspirational, and can still influence a country's parliament to enact legislation with those aspirations in mind. There are 30 articles comprising the UDHR, some of which are summarised below:

- Article 5: No one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment.
- Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law.
- Article 18: Everyone has the right to freedom of thought, conscience and religion.
- Article 23 (2): Everyone, without any discrimination, has the right to equal pay for equal work.

KEY TERM

***Universal Declaration of Human Rights* (UDHR)** a document created by the United Nations that sets out the common entitlements that should be afforded to all peoples across all nations.

LEGISLATION

Equal Opportunities Act 2010 (Vic)
Racial Discrimination Act 1975 (Cth)
Sex Discrimination Act 1984 (Cth)

LEGAL VOCABULARY

Ratification the formal agreement or undertaking by a country to be bound by the terms of an international treaty, which provides the country time to ensure domestic legislation is consistent with the treaty.

Member State a country that is a member of the United Nations, who has accepted, and is obliged to carry out the obligations of the United Nations Charter.

LESSON LINK

You will learn more about Australian statutes protecting human rights in **10C Australia's protection of human rights – statute and common law.**

Considering the UDHR is not legally binding on States, the rights set out in the declaration did not immediately become part of Australian law. Despite the declaration being non-binding, the presence of it still exerts pressure on parliaments to enact laws with the aspirational declaration in mind. For example, certain rights of the declaration have been enshrined in Australian law through a process of parliament creating laws that align with the articles of a declaration. Australian Parliaments have created such Acts in the years following the UDHR's establishment, including:

- the *Equal Opportunities Act 2010* (Vic), which upholds Article 23(2) as it prohibits discrimination on the basis of gender identity in the course of employment.
- the *Racial Discrimination Act 1975* (Cth), which upholds Article 7 by ensuring the right to equality before the law regardless of race.

In addition, the UDHR is significant as it has formed the basis of a number of human rights declarations and conventions that have been produced by the UN since 1948. For example, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW) entered into force in 1981 and has now received **ratification** by 186 UN **Member States**. Therefore, this means that States that have ratified the treaty must implement legislation to ensure the equal rights and protection of women. For example, after ratifying CEDAW in 1983, the Commonwealth Parliament of Australia passed the *Sex Discrimination Act 1984* (Cth) which intended to prohibit acts of discrimination on the basis of sexism, therefore upholding the human rights principles set out in CEDAW.

DEEP DIVE

Are human rights really 'universal' or just a Western concept?

The UDHR applies to all humans regardless of their race, ethnicity, country they reside in, gender, and more. However, it has been criticised as being a Western document based on the Judea-Christian perception of human rights, which fails to consider different religious beliefs. The *Cairo Declaration of Human Rights in Islam* (CDHRI) was a convention adopted by 45 Member States in 1990. It defines human rights based on an interpretation of Shari'a law and differs in its protection of certain rights set out in the UDHR.

One of these differences can be seen in Article 6 of the CDHRI, which establishes 'woman is equal to man in human dignity, and has her own rights to enjoy as well as duties to perform'. This suggests that men and women have different duties that they are allowed to perform, and thus the right to equality is arguably not protected to the same extent here as in the UDHR.

REAL WORLD EXAMPLE



Image: Ingrid Pakats/Shutterstock.com

Figure 3 Australia's treatment of refugees and asylum seekers has faced significant international criticism for violating human rights

CONTENT WARNING This example explores content that is sensitive in nature, relating to refugee detention.

Certain rights still neglected by Australian law

Although Australia upholds several articles of the UDHR and ensures the protection of certain rights set out in the Declaration, other principles of the UDHR have seemingly been ignored and violated to this day. Notably, Article 9 of the UDHR sets out that 'No one shall be subjected to arbitrary arrest, detention or exile', whilst Article 14 establishes 'everyone has the right to seek and to enjoy in other countries asylum from persecution'. Australia's treatment of refugees in Australia violates these articles.

Particularly, the continued use of offshore processing and prolonged detention has been a key source of criticism. Since 2012, those seeking asylum in Australia without valid visas have been subject to offshore processing in either the Republic of Nauru (Nauru) or on Manus Island, located in Papua New Guinea (PNG). 4,183 people have been sent offshore since 13 August 2012 (Refugee Council of Australia, 2023). These asylum seekers are kept in offshore processing facilities indefinitely, as there is no limit on the length of time they are to be detained.

After facing significant backlash, the Commonwealth Parliament decided to end its offshore processing agreement with PNG in 2021. However, as of February 2023, there were still 61 asylum seekers held in Nauru. Therefore, the articles are still being contravened as refugees are indefinitely detained.

Adapted from 'Offshore processing statistics' (Refugee Council Australia, 2023) and 'A Source of Shame: Australia's Failure to Uphold the Human Rights of Refugees' (Kwon, 2020)

Table 2 Strengths and limitations of the UDHR's protection of human rights in Australia

Strengths	Limitations
- Acts as an international bill of rights by providing a guide for crucial human rights entitlements that everyone deserves. - The UDHR has been translated into 337 different languages, indicating its global significance as governments from across the world are all able to, and actively want to, comprehend the Declaration and implement the text accordingly. - Acted as the origin point of several international treaties and conventions that have come into force since the UDHR, including the: <i>Convention on the Elimination of All Forms of Discrimination Against Women</i> (1979) <i>Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i> (1984) <i>Convention on the Rights of the Child</i> (1989). - The UN studies the behaviour of States regarding human rights, through the Office of the High Commissioner for Human Rights (OHCHR) body, and then reports back to recommend where changes are needed. This holds countries accountable for their actions, and guides governments as to what legislative change they must implement.	- The UDHR is challenged by cultural differences that exist across countries. Some argue that, due to different cultural and religious ethical standards or practices, global standards cannot be created that apply to everyone, whilst simultaneously respecting religious identities. - There are limited mechanisms by which UN Member States and international organisations can enforce compliance with international law. - International declarations, including the UDHR, are not legally binding as no States can sign or ratify the UDHR. This means countries will not face legal consequences for failing to uphold the principles established in a declaration. - The UN agencies that regulate a country's adherence to the UDHR receive little funding, therefore, it is difficult to enforce the Declaration across all countries.

Lesson summary

Key global events from the past thousands of years have led to the establishment of certain entitlements that are offered to all humans, regardless of their country of origin, race, gender, or religion. One of these key events was the establishment of the *Universal Declaration of Human Rights* (UDHR), a document created by the United Nations (UN) that:

- sets out 30 broad entitlements that every human should be afforded.
- can be, and has been partially in Australia, enshrined into the country's legislation in order to make the rights binding on the people of that country, and violations of such rights illegal under domestic law.

10A Questions

Check your understanding

Question 1

Human rights are defined as:

- entitlements and liberties that should be offered to all human beings, irrespective of any personal qualities and characteristics.
- entitlements received by people who are over the age of 18 and have commenced working in the workforce in some capacity.

Question 2

Which of the following would be commonly considered human rights? **(Select all that apply)**

- The right to vote
- The right to freedom of speech
- The right to a tertiary education
- The right to non-discrimination
- The right to additional money from the government on top of one's wages

Question 3

Australia always protects human rights perfectly and has never violated human rights according to international organisations.

- A. True
- B. False

Question 4

The concept of human rights was first developed in:

- A. 1948 when the United Nations was established after World War II.
- B. 600 BC, when philosophers in Greece first considered the idea of natural law theory that intrinsic morals guide people's actions.

Question 5

The UDHR is binding on Australia, therefore all articles must be upheld by Australian citizens as, if they are not, the UN is able to imprison Australian citizens.

- A. True
- B. False

Question 6

The Victorian Parliament has enshrined the UDHR, in part, in law by creating the:

- A. *Equal Opportunities Act 2010* (Vic).
- B. *Race Discrimination Act 1975* (Cth).

Question 7

Which of the following statements is correct about strengths of the UDHR?

- A. The UN studies the behaviour of countries regarding human rights, through the Office of the High Commissioner body, and then reports back to recommend where changes are needed, therefore holding countries accountable.
- B. The UDHR is binding on all countries that have signed the Declaration, therefore it applies to these countries' internal laws.
- C. The UDHR has had no issues with being relevant to everyone, universally, as all religions value the same human rights.

Question 8

Human rights were developed over time in other countries, such as England and America, therefore they have no application to Australian citizens.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 9

(2 MARKS)

Define the term 'human rights'.

Question 10

(2 MARKS)

Identify **two** human rights in Australia.

Question 11

(3 MARKS)

Explain the significance of the *Universal Declaration of Human Rights* (UDHR).

Question 12

(4 MARKS)

Describe **two** events that contributed to the development of human rights.

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the *Universal Declaration of Human Rights* (UDHR) in protecting human rights.

Statement	Strengths	Limitations
I. The UDHR acted as the origin point of several international treaties and conventions that have come into force since 1948.	☐	☐
II. International declarations, including the UDHR, are not legally binding. This means citizens or governments will not face legal consequences for failing to uphold the principles set out in a declaration.	☐	☐
III. Although a number of countries may understand the Declaration, they may not implement it in their law due to cultural challenges it poses. The UDHR has been criticised as reflecting a Western, Judea-Christian perception of human rights and failing to consider other cultures and religious views.	☐	☐
IV. The UDHR has been translated into 337 different languages, indicative of its worldwide significance as governments from across the world are all able to comprehend the Declaration and implement the text accordingly.	☐	☐
V. Many conventions and declarations that the UN has created since the UDHR's establishment have been signed or ratified by Member States, therefore encouraging or requiring individual States to create their own laws that protect human rights in order to ratify the human rights treaties that the UDHR inspired.	☐	☐

Question 14

(6 MARKS)

To what extent does the *Universal Declaration of Human Rights* (UDHR) protect human rights? Justify your response.

Linking to previous learning**Question 15**

(5 MARKS)

In 1215, the Magna Carta was a document created in England that established the baron's ancient rights and limited the power of the King. One of the rights included in the document established that 'all free men have the right to justice and a fair trial by jury'.

- Describe the role of the jury in a civil dispute. 2 MARKS
- Explain how human rights, such as the right to trial by jury, have developed over time. 3 MARKS

10B Australia's protection of human rights – the Constitution



Image: Joe Kuis/Shutterstock.com

In 2023, thousands of Australians flocked to the city to protest abolishing (or at least changing the date of) the national public holiday on January 26. Assume that the Australian Government, annoyed about these protests, wants to ban such demonstrations, indefinitely imprison anyone who organised the protests, and raise the voting age to 25 so the young protesters cannot influence law reform. What prevents the government from implementing these actions?

STUDY DESIGN DOT POINT

- an overview of the ways in which human rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law

10A

10B

10C

2.3.2.1

The Australian Constitution

2.3.2.1.1 Express rights

2.3.2.1.2 Implied rights

2.3.2.1.3 Structural protections

Lesson introduction

Although this nation's society is not perfect, Australians are treated relatively equally regardless of gender, religion, or age. The law and courts should, in practice, treat the rich and the poor in the same way and should not mistreat certain groups in society due to their physical attributes or beliefs. Some democratic and human rights are protected by the Australian Constitution, which also establishes structural protections to uphold human rights. This ensures laws that are passed do not violate human rights but rather, protect the human rights that voters deem to be important.

The Australian Constitution 2.3.2.1

The **Australian Constitution** is a foundational piece of legislation that establishes the way in which Australia operates, regarding the composition of parliament and the powers possessed by each branch of government. Constitutional law includes rules about how laws are made, which parliament is permitted to make 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 federal and state parliaments to prevent legislation from violating certain rights and freedoms. The Constitution differs from regular legislation in Australia in that it can only be altered via a **referendum**. Therefore, both a majority of parliament and a majority of the Australian people and states must approve proposed amendments to this founding document for it to be changed.

KEY TERM

Australian Constitution the founding document of Australia that sets out the composition of the Australian Parliament, its function and layout, and its powers.

LEGAL VOCABULARY

Referendum a compulsory national vote in which everyone on the electoral roll votes 'yes' or 'no' to alter the Australian Constitution.

Express rights 2.3.2.1.1

Express rights are the five rights that every Australian is guaranteed. They are established in the Constitution with the intent of limiting the law-making powers of the Commonwealth and state parliaments, but have the effect of protecting rights. These are explicitly stated and entrenched in the Constitution, meaning they can only be removed, added to, or changed through the process of a referendum. These rights are also fully enforceable, meaning if a person or organisation believes legislation created by parliament breaches a certain express right, they may challenge the validity of the law in the High Court of Australia. However, the individual bringing the claim must have **standing**, meaning they have a meaningful case and are not initiating court action for no reason. The law in question will continue to operate until the High Court declares it to be invalid.

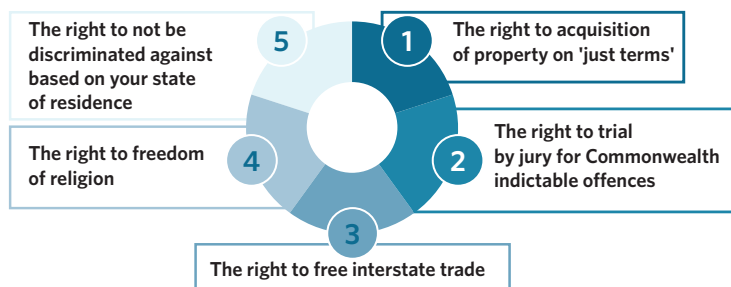


Figure 1 The five express rights set out in the Australian Constitution

Section 51(xxxi) of the Constitution 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'. This means that any time the Commonwealth makes it compulsory for it to take the land of a state or person, it must do so by providing 'just terms'. Just terms include providing fair compensation to the owner of the property.

Table 1 The strengths and limitations of the express right to acquisition of property on 'just terms'

Strengths	Limitations
The Commonwealth cannot pass a law taking a person's or company's land or possessions unless 'just terms' are provided.	- Section 51(xxxi) does not prevent the Commonwealth from acquiring property from Australian citizens. - There is no specification or statement on what constitutes 'just terms', potentially leading to some unsatisfactory outcomes for landowners. - This section does not apply to the states. There is no enshrined law ensuring states provide just terms when acquiring property from a person or business. However, many states have created legislation ensuring the acquisition of property is on 'just terms'. Therefore, this limitation is minor as legislation still exists in states to protect this right, despite the right not being applicable to states under the Constitution.

Section 80 of the Constitution requires 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury'. This means that for Commonwealth **indictable offences**, such as major drug importation cases, terrorism offences, and large fraud cases, the accused person is guaranteed to have their trial adjudicated by a jury.

KEY TERM

Express rights the five human rights that are explicitly stated and entrenched in the Australian Constitution.

LEGAL VOCABULARY

Standing the requirement that, in order to bring a case to court, an individual or group must be affected by, or have a special interest in, the issues involved in the case.

LESSON LINKS

You learnt about the High Court of Australia in **1F The Victorian court hierarchy**.

You learnt about indictable offences in **2E Summary offences and indictable offences**.

You learnt about the jury in **4E The jury in a criminal trial**.

You learnt about freedom of religion in **2D Types of crime**.

CONSTITUTION

Section 51 (xxxii)

USEFUL TIP

An important key skill in Area of Study 3 of Unit 2 VCE Legal Studies is to 'evaluate the ways in which rights are protected in Australia'. These tables showing strengths and limitations in relation to each express right can help you evaluate rights protection in Australia, but you should also consider strengths and limitations of other ways in which rights are protected in Australia, which you will learn about in **10C Australia's protection of human rights - statute and common law**.

LEGAL VOCABULARY

Indictable offence a criminal offence that is serious in nature and generally heard by a judge and jury in the County or Supreme Court.

CONSTITUTION

Section 80

Table 2 The strengths and limitations of the express right to trial by jury for a Commonwealth indictable offence

Strengths	Limitations
- This section guarantees a jury trial for individuals charged with an indictable offence under Commonwealth law. - The Commonwealth cannot legislate to have indictable offences tried by a judge alone. This can ensure trials are fair.	- Many criminal offences are created by state laws, not Commonwealth law. - Section 80 does not prevent states from passing laws to have serious offences tried by judges alone. - When the Commonwealth passes a law creating a criminal offence, the new law states whether that crime is to be tried as an indictable offence, with a jury, or as a summary offence, by a 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.

CONSTITUTION

Section 92

Section 92 of the Constitution declares that ‘trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free’. This means states are unable to block interstate trade or the movement of goods from one state to another.

Table 3 The strengths and limitations of the express right to free trade, commerce, and intercourse among states

Strengths	Limitations
- Commonwealth and state parliaments cannot pass laws that restrict the free movement of goods between states. 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. This is beneficial economically for states, which are thereby guaranteed to be trading partners with one another as a result of this protection. - Commonwealth and state parliaments cannot pass laws designed to restrict the movement of individuals from one state to another. This allows individuals to have the liberty to travel between the states as they please without discrimination based on their state of residence.	- Although designed to protect freedom of movement, in practice, s 92 applies largely to how businesses conduct trade rather than individual rights and freedoms. - The High Court has stated that laws intended to prevent interstate movement of people on a ‘discriminatory’ basis would be invalid but laws that do restrict interstate movement, but do so without ‘discrimination’, are acceptable (<i>Palmer v Western Australia</i> (2021) 274 CLR 286). - In this case, the High Court also established that a law that has some other legitimate purpose, but has the side-effect of restricting movement between states, might be valid. For example, the Western Australian border closures during COVID-19 were ruled to be constitutionally valid as the border closures did not impose ‘discriminatory’ restrictions on interstate trade, commerce, and intercourse.

CONSTITUTION

Section 116

Section 116 of the Constitution states that 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’. This means the Commonwealth Parliament cannot pass laws that restrict religious practice, impose a religion on an individual, or promote discrimination against an individual on the basis of religion.

Table 4 The strengths and limitations of the express right to freedom of religion

Strengths	Limitations
- The Commonwealth cannot pass laws that are designed to restrict the free practice of religion. - The Commonwealth cannot pass a law imposing religion on any individual. - A person cannot be denied a position in the Commonwealth Parliament or related positions because of their religious beliefs.	- Section 116 limits the Commonwealth’s law-making powers, but does not apply to the state parliaments. That is, it does not stop states from passing laws to limit the freedom of religious practices. - A law that 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 religious beliefs about protecting life for some individuals, but that would not make the law invalid under s 116.

Section 117 of the Constitution states 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 [them] if [they] were ... resident in such other State’. Therefore, states cannot pass laws that impose a burden on a person because they live in a different state. For example, assume Victoria passes a law that requires doctors to have a university degree to be admitted to work as doctors in Victorian hospitals, whilst doctors from NSW require a university degree and three years of experience to be permitted to work as doctors in Victorian hospitals. Such a law would be invalid under s 117.

CONSTITUTION

Section 117

Table 5 The strengths and limitations of the express right to protection from discrimination based on one’s state of residence

Strengths	Limitations
Section 117 ensures people are not discriminated against based on their state of residence, so equality is upheld as people of every state are awarded equal treatment before the law.	- Some laws that legislate upon residents of different states in a restrictive manner may be acceptable. For example, a Victorian law that prevents residents of NSW from 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 would or would not violate s 117.

REAL WORLD EXAMPLE

Palmer kicks up a fuss over border closure

In 2021, Clive Palmer lost a challenge in the High Court regarding the validity of Western Australia’s border closures during the COVID-19 pandemic in 2020. Palmer argued that the border closures infringed on s 92 of the Constitution as they did not permit free interstate movement. The High Court justices rejected this idea that the border closures infringed on s 92 of the Constitution on the basis that the law had a legitimate purpose as to why freedom of movement needed to be restrained. Justice Gageler asserted the lockdown measures to be of ‘reasonable necessity’ given the circumstances, whilst Justice Kiefel and Justice Keane found there was ‘no effective alternative to a general restriction on entry’, making these laws necessary for public health and safety.

The justices also all interpreted s 92 of the Constitution to be aimed at preventing discriminatory restrictions on interstate trade, commerce, and intercourse.

Thus, considering the border closure was not discriminatory against any particular state or person, the restrictions on entry into the state were justified.

Adapted from ‘Clive Palmer v Western Australia: border ban justified by risks of COVID 19, high court reveals’ (Karp, 2021)



Figure 2 The High Court ruled that the Western Australia border closures during the Covid-19 pandemic were constitutionally valid

Implied rights 2.3.2.1.2

An **implied right** is an entitlement that is not explicitly stated in the Constitution, but the High Court has ruled it is intended to exist, based on their interpretation of the meaning of the words written in the Constitution. Implied rights, like express rights, are fully enforceable. This means a person or organisation that is negatively affected by legislation breaching the implied right can challenge the law’s validity in the High Court, so long as they have standing to do so.

The High Court has interpreted the Constitution to implicitly protect rights such as the right to vote as well as the **implied freedom of political communication**. This implied freedom ensures that all communication regarding the Australian political system is protected. However, 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 political communications.

KEY TERM

Implied right a right that is not explicitly outlined in the Australian Constitution but has been interpreted by the High Court to exist.

LEGAL VOCABULARY

Implied freedom of political communication a right interpreted to be protected by the Constitution that restricts legislation that interferes with the free publication of information about government and politics.

LESSON LINK

You will learn more about the right to vote in **11C The right to vote**.

LEGAL VOCABULARY

Bill of Rights a declaration of rights that is most important to the citizens of a country, and which many common law countries have enshrined in their Constitution.

LEGISLATION

Broadcasting Act 1942 (Cth)

USEFUL TIP

When defining 'implied rights', try to avoid re-using the word 'implied'. Using repetition in your explanations is an easy and common way to miss out on marks in your assessments and in the Year 12 exam. Instead, use a definition, like the one given in this lesson, that includes synonyms.

Australia lacks a **Bill of Rights**, which is a list of protected rights that many common law countries have enshrined in their Constitutions. For example, the right to keep and bear arms is guaranteed for US citizens under the Second Amendment of the Bill of Rights of the United States. The absence of a Bill of Rights in the Australian Constitution means the five express rights and the few implied rights and freedoms that the High Court has interpreted Australians to have, are currently the only guaranteed rights for Australians, unless the High Court interprets the meaning of the words in the Constitution to imply further rights in the future.

LEGAL CASE

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

Facts

In 1991, the Commonwealth Parliament passed legislation to restrict television advertising during an election campaign through the *Broadcasting Act 1942 (Cth)*. 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.

Legal issue

The plaintiffs, Australian Capital Television and the State of New South Wales, both sought declarations that Part IIID of the *Broadcasting Act* was invalid. The plaintiffs mainly contended that the Act was constitutionally invalid on the basis that it contravened freedom of political communication, which is implied in the Constitution.

Decision

Six of the High Court Justices found that the Constitution contains an implied freedom to discuss governments, government institutions, and political matters. Sections 7 and 24 of the Constitution require the parliament to be 'directly chosen by the people'. The High Court decided that these two sections establish the principle of representative government, which is a system that requires voters to be able to hear from political parties and be free to discuss political issues, so they can make informed choices when electing law-makers. According to Chief Justice Mason, 'freedom of communication [is] an indispensable element in representative government.'

Part IIID of the *Broadcasting Act 1942 (Cth)*, which banned political advertising, was declared invalid as it breached the implied right to freedom of political communication, which is implicitly stated in s 7 and 24 of the Constitution.

Significance

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 the type of communication protected by this implied right.

REAL WORLD EXAMPLE



Image: Corona Borealis Studio/Shutterstock.com

Figure 3 The High Court rejected a Melbourne restaurant owner's argument that Victoria's lockdown laws infringed on an implied right to freedom of movement

Restaurant owner's lockdown outrage

In 2020, a restaurant owner in Melbourne brought a case to the High Court arguing the Victorian lockdown infringed on an implied right to freedom of movement that he believed to be enshrined in the Constitution. The restaurant owner, Julian Garner, argued the lockdowns were constitutionally invalid by suggesting that freedom of movement is implied in the text and structure of the Constitution. Garner stated that freedom of movement is implied by the express right to free interstate trade under s 92 of the Constitution.

The court rejected the idea that the lockdown conflicted with s 92 of the Constitution, contending that the lockdown restricted intrastate movement, within Victoria, as opposed to interstate movement across the borders of states. The court asserted that the application of s 92 was not as wide as extending to freedom of movement within a state.

Adapted from 'High Court of Australia rejects challenge of COVID 19 lockdown restrictions' (Human Rights Law Centre, 2020)

LEGAL CASE

Al-Kateb v Godwin* (2004) 219 CLR 562*Facts**

In December 2000, Ahmed Ali Al-Kateb arrived in Australia by fishing boat without a passport or visa. 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 him. He, therefore, remained in an Australian detention centre for the next four years, as the *Migration Act 1958* (Cth) requires the mandatory detention of unlawful non-citizens.

Legal issue

Al-Kateb argued the *Migration Act* empowered the Australian Government to keep him detained indefinitely and that such detention breached his human rights. Section 196 of the Act required illegal citizens to be detained until they were deported or granted a visa, however, due to Al-Kateb being stateless, he could not be deported and he was unable to gain a visa to either Australia or other countries, such as Kuwait.

Decision

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 from being passed as 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.
- 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', as stated by Justice McHugh.

Significance

This case demonstrates the limited nature of rights protection contained in the Australian Constitution. It is not the role of the courts to protect citizens' rights as they can only make decisions based on existing legislation, not on moral grounds.

LEGISLATION

Migration Act 1958 (Cth)

Structural protections 2.3.2.1.3

Structural protections for human rights have been established by the Constitution, indirectly protecting human rights through establishing the systems of:

- the **separation of powers**
- **representative government**.

The separation of powers is a principle established by the Constitution to ensure there is no abuse of power by the bodies involved in the creation of laws and the administration of justice. The three branches of government that are separated by this doctrine are the executive, the judiciary, and the legislature.

Table 6 The three branches of government

Branch of government	Explanation of branch
Legislative power	This branch has the power to make laws. This power is exercised by parliament.
Executive power	This branch has the power to administer laws and conduct the business of government, such as the collection of taxes, managing the police force, and granting visas to those who wish to migrate to Australia. This power is technically given to the Crown, but in practice is exercised by ministers who are in charge of government departments.
Judicial power	This branch has the power to resolve criminal and civil disputes, applying the law to the facts of a case and imposing sanctions and awarding remedies as appropriate. This power is exercised by the courts.

KEY TERMS

Structural protections

the systems and mechanisms established by the Constitution that indirectly protect human rights by ensuring the government's actions achieve human rights protections.

Separation of powers

a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate.

Representative government a system in which Members of Parliament are elected by the people of a community or nation to best represent the needs and views of those people.

LESSON LINK

You learnt about the Houses of Parliament in **1D Parliament and the courts in law-making**.

USEFUL TIP

In order to remember the three branches of government comprising the separation of powers, you can think about each of the powers in this way:

- The term 'judicial power' is most similar to the word 'judge' because this power judges the laws and is exercised by judges within the courts.
- The term 'legislative power' is most similar to the word 'legislation' because this power is in charge of making the legislation, or laws.
- The term 'executive power' is most similar to the word 'execute' because this power executes the laws or administers the application of laws in society.

In theory, all three powers are kept separate. However, in practice, the legislative and executive powers overlap because ministers are also members of parliament and therefore, also exercise legislative power. Judicial power is kept entirely separate and independent as judges cannot exercise legislative or executive power, and ministers and members of parliament must not exercise judicial power.

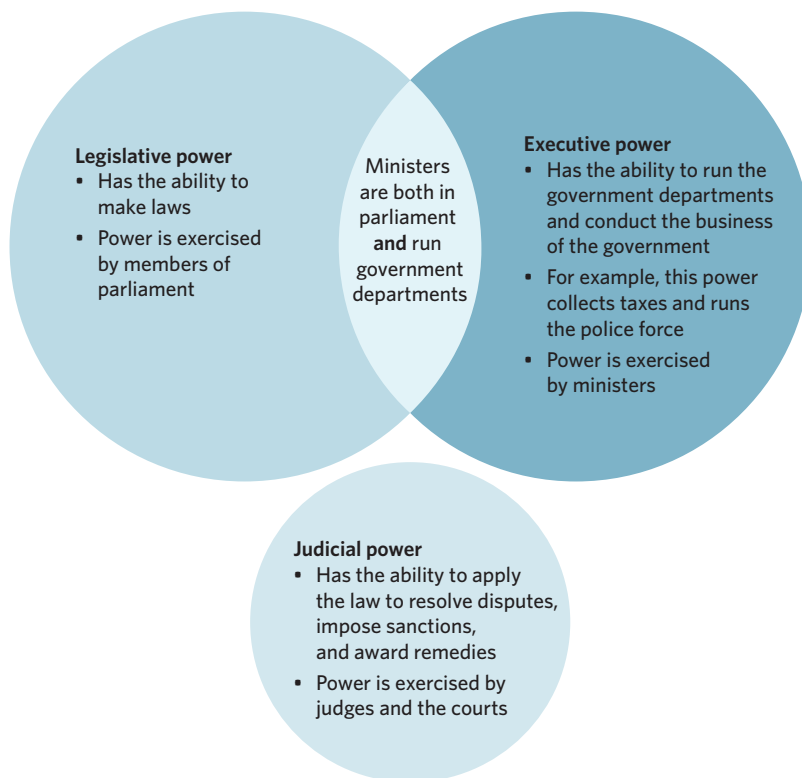


Figure 4 The separation of powers

Table 7 Ways the separation of powers protects individuals' rights

The separation of powers and the protection of rights

Only the judicial branch, being the courts, has the power to determine who has broken the law. Law-makers in parliament cannot decide who has broken the law, even though it might be politically popular to do so.

Ministers and government departments can investigate possible breaches of the law but cannot decide who has or has not broken the law.

Judges can declare legislation to be invalid, therefore, ensuring the legislature upholds rights.

For example, in the case of *Australian Capital Television Pty Ltd v Commonwealth*, the *Broadcasting Act 1942* (Cth) was declared invalid as it infringed on the implied right to freedom of political communication.

Judges are independent in reviewing whether the parliament has, or has not, passed laws in accordance with the Constitution. This independence is promoted as:

- judges are only appointed until the age of 70, at which point they must retire.
- judges are prevented from being removed by ministers unless misconduct is proven and both Houses of Parliament vote to remove a judge.
- a judge's salary cannot be reduced by ministers
- ministers or members of parliament who unfairly criticise a judge's decision may be found in contempt of court, a serious criminal offence.

Sections 7 and 24 of the Constitution enshrine the principle of representative government, as they set out the requirement for parliament to be 'directly chosen by the people' through the process of an election.

Table 8 Ways the principle of representative government protects individuals' rights

Representative government and the protection of rights
Law-makers tend to pass laws that protect the rights valued by the majority of voters. For example, laws preventing discrimination based on gender have been passed because voters want people protected from such discrimination. The <i>Sex Discrimination Act 1984</i> (Cth) is an example of this.
Regular elections allow voters to remove a government that introduces legislation violating the rights of individuals.
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. All Australian citizens who are 18 years and over are eligible to vote, with the exception of people who: • are of unsound mind. • are serving prison sentences of three years or more. • have been convicted of treason and not pardoned. • are not specially registered as 'itinerant voters' and have not lived at an address for one month. • are living overseas long term and with no intention of returning to Australia.

LEGISLATION

Sex Discrimination Act 1984 (Cth)

HYPOTHETICAL SCENARIO

Preventing a power-hungry parliament

Assume members of the House of Representatives face pressure from voters in their electorates to become tough on crime. Imagine, hypothetically, 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 hypothetical 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, as only courts may exercise this judicial power.



Image: Rose Marinelli/Shutterstock.com

Figure 5 Dylan will not be found guilty in the House of Representatives for defrauding Centrelink as it is not within the legislative power of the parliament to judge who has breached the law

LEGAL CASE

Australian Communist Party v Commonwealth (1951) 83 CLR 1

Facts

As concerns around communism rose in the midst of the Cold War, 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, led by prime minister Robert Menzies, had been elected promising to introduce and pass this legislation. Making a law banning the communist party was very popular with a majority of voters.

Legal issue

The Communist Party, 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.

Decision

The High Court upheld this challenge, ruling the legislation invalid. The Court stated its role was not to decide whether this was a good law or a bad law as that is 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.

Continues →

LEGAL CASE

Australian Communist Party v Commonwealth (1951) 83 CLR 1 – Continued**Significance**

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.

Lesson summary

The Australian Constitution has a variety of mechanisms to ensure the protection of human rights, including:

- express rights
- implied rights
- the principle of the separation of powers
- the system of representative government.

These principles are interrelated. For example, the implied right to freedom of political communication allows the principles of representative government to be better achieved as voters have greater knowledge of law-makers and what they intend to do in the future, making voters informed when it comes to elections.

Table 9 Strengths and weaknesses of constitutional protection of rights

Strengths	Weaknesses
• The five express rights are entrenched in the Constitution and can only be removed by a successful referendum. This is a difficult process, making it unlikely these rights will be removed easily. • The High Court has the ability to find implied rights, as reflected in the implied right to political communication. • The express and implied rights are fully enforceable by the High Court. Therefore, if legislation is created that has breached one of these rights and a case is brought to court regarding the breach, the Act can be declared invalid. • None of the protected rights can be overridden by parliament. • The separation of powers is an effective way to protect human rights. A judge's will determine whether legislation breaches the Constitution in a way that is independent and based on the law, not politic. A judge's independence is protected in many ways. • The reliance on representative government to protect human rights allows rights protection to change as society changes. For instance, laws promoting equality for everyone regardless of gender, sexuality, and race were unthinkable at the time the Constitution was written. However, as society's values change, the system of representative government ensures new laws evolve to remove discrimination and protect individuals' rights in such situations. • The principle of representative government includes having regular elections. As a result, the fear of losing power at an election should prevent law-makers from passing laws that violate human rights. This is preferable to having mechanisms for compensating or removing the rights of abusers after the fact.	• There are few express rights in the Australian Constitution that limit the law-making powers of parliament. • The express and implied rights are relatively narrow in their operation. For example, s 80 applies only to Commonwealth indictable offences, yet most criminal laws are made by the states. Additionally, the implied freedom of political communication protects only communication about political issues in Australia, rather than free speech more generally. • A law in breach of an express right operates until it is challenged and declared invalid in the High Court. This will require a party with standing to take legal action, which is both costly and time consuming and therefore, may deter or prevent a case from being brought altogether. • The court cannot award damages to a person affected by a law breaching express or implied rights. • 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. • 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. Fear of losing office may prevent law-makers from passing legislation that is not popular with the majority. • Australia does not have a Bill of Rights, which many argue prevents important rights from being protected. • There is no mechanism preventing parliament from passing laws that are not constitutionally valid in the first place. Therefore, laws can be established that infringe on express rights and will be in force until a successful High Court case occurs declaring the Act invalid and therefore, void.

10B Questions

Check your understanding

Question 1

Parliament can amend the Constitution to include new, enshrined rights and structural protections at any time as long as the majority of members of parliament vote to approve it.

- A. True
- B. False

Question 2

Express rights are:

- A. rights found to exist in the Constitution as a result of High Court interpretation, limiting Parliament's law-making power.
- B. rights explicitly stated in the Constitution limiting Parliament's law-making power.

Question 3

Fill in the blanks with the following terms:

implied right

express right

The protection of freedom of religion is an [], whereas freedom of political communication is an [] preserved by the Constitution.

Question 4

The system of representative government should ensure parliament does not introduce and pass laws that infringe on voters' rights, out of fear of losing office. Therefore, the rights of unpopular minorities in society may not be protected by relying on this mechanism.

- A. True
- B. False

Question 5

Anthony challenged legislation in the High Court that banned certain religious practices that are central to his faith.

The likely outcome of the case is that:

- 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 declared invalid by the High Court when challenged.
- C. the legislation would be declared invalid, as laws breaching an implied right are declared invalid by the High Court when challenged.

Question 6

Assume Dominique challenged legislation in the High Court that had banned him from posting comments about the performance of the current prime minister on Twitter.

The likely outcome of the case is that:

- A. Dominique 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 declared invalid by the High Court when challenged.
- C. the legislation would be declared invalid, as laws breaching an implied right are declared invalid by the High Court when challenged.

Question 7

Fill in the blank with **one** of the following terms:

The separation of powers

Representative government

_____ is the system in which the government is divided into three different branches; the judiciary, the legislative, and the executive.

Question 8

Which of the following are ways in which the Australian Constitution protects human rights in Australia?

(Select all that apply)

- A. Establishes the principle of separation of powers.
- B. Establishes a system of representative government.
- C. Since 2017, gay marriage has been made legally valid.
- D. Contains express rights.
- E. Can be interpreted to include implied rights.
- F. Enforces equal pay across the workforce for women.

Preparing for exams**Standard exam-style****Question 9**

(2 MARKS)

Using **one** example, define the term 'implied right'.

Question 10

(2 MARKS)

A senior constitutional lawyer recently said:

'One weakness of human rights protection through express rights is that those who challenge legislation for breaching an express right cannot be awarded damages by the High Court.'

Describe **one** other limitation of express rights as a means of protecting human rights in Australia.

Question 11

(3 MARKS)

The structural protection of rights in Australia is one of the means by which the Commonwealth Constitution protects rights.

Explain how the structural protections established by the Constitution uphold human rights in Australia.

Question 12

(4 MARKS)

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** limitation of relying on the principle of representative government to protect human rights.

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the protection of human rights by the Australian Constitution.

Statement	Strengths	Limitations
I. In order to change the Constitution and remove any of the five express rights, a successful referendum would need to occur, which is a difficult and lengthy process, preventing these rights from being easily removed.	☐	☐
II. A law breaching an express right can be in operation until it is challenged in the High Court, requiring a party with standing to take legal action, which is a costly and time-consuming process.	☐	☐
III. Members of minorities, such as asylum seekers, are usually ignored by parliament as the system of representative government serves to protect the rights of the majority.	☐	☐
IV. The separation of powers doctrine ensures judges are independent in determining whether legislation is constitutionally valid, allowing the rights set out in the Constitution to be upheld in legislation.	☐	☐

Question 14

(5 MARKS)

To what extent does the Australian Constitution protect human rights in Australia?

Use your answer to question 15 to support your response to question 16.

Question 15

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the protection of express rights through the Australian Constitution.

Statement	Strengths	Limitations
I. Commonwealth and state parliaments cannot pass laws that restrict the movement of goods between states due to the express right to freedom of movement between states. This is beneficial for Australian businesses.	☐	☐
II. Under s 116 of the Constitution, the Commonwealth cannot impose religion on any individual, providing each Australian citizen with the autonomy to choose their own religion.	☐	☐
III. Commonwealth's law-making powers are prevented from creating legislation restricting religion, however, this does not apply to states, therefore it would be constitutionally valid for state parliaments to introduce laws limiting freedom of religious practices.	☐	☐
IV. The High Court has interpreted s 92 of the Constitution to mean that legislation created by states is still constitutionally valid as long as legislation limiting interstate movement serves a different, valid purpose and is non-discriminatory.	☐	☐

Question 16

(6 MARKS)

'The Commonwealth Constitution protects Australians through express rights.'

Evaluate the Constitution's express rights as a protection of Australians. In your answer, identify **two** express rights.

Linking to previous learning

Question 17

(7 MARKS)

Winston Churchill once said: 'The jury system has come to stand for all we mean by English justice. The scrutiny of 12 honest jurors provides defendants and plaintiffs alike a safeguard.'

- Explain **one** role of the jury in a criminal trial. 3 MARKS
- Discuss the express right to trial by jury in the Australian Constitution. 4 MARKS

10C Australia's protection of human rights – statute and common law

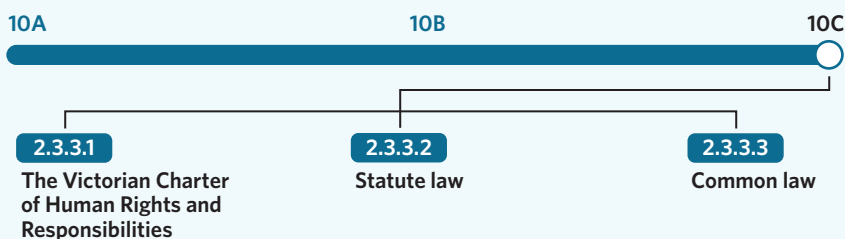


Image: Monkey Business Images/Shutterstock.com

As VCE students, many of you might already have casual jobs. However, your lack of experience, qualifications, or skills may disqualify you from certain positions, but can your gender, sexual orientation, or marital status also play a role in whether you receive employment? Could these characteristics influence the approval of rental accommodation when you move out of your house? What is stopping a university from banning all women from enrolling in their courses?

STUDY DESIGN DOT POINT

- an overview of the ways in which human rights are protected in Australia, such as through the Australian Constitution, the Victorian Charter of Human Rights and Responsibilities, statute law and common law



LESSON LINK

You learnt about the Australian Constitution as a human rights protection in **10B Australia's protection of human rights – the Constitution**.

Lesson introduction

The Australian Constitution is not the only mechanism that ensures human rights are upheld and abusers of human rights incur punishment. Common law and statute law, at both federal and state levels, also protect human rights in Australia. State parliaments, such as the Victorian Parliament, have established mechanisms of ensuring legislation is not passed until each Act's human rights implications have been considered. Despite their flaws, these methods of safeguarding rights have allowed Australian society to uphold human rights to a relatively high international standard.

The Victorian Charter of Human Rights and Responsibilities 2.3.3.1

The *Charter of Human Rights and Responsibilities Act 2006* (Vic), also known as the **Victorian Charter of Human Rights and Responsibilities (VCHRR)**, is a piece of Victorian legislation that aims to protect human rights in Victoria. It requires the Victorian Parliament to review bills and determine their compatibility with the rights set out in the Charter, whilst encouraging debate if the bill is incompatible with human rights.

Table 1 Features of the Victorian Charter of Human Rights and Responsibilities

Feature of the VCHRR	Explanation of the feature
Before a law is passed in Victoria, the Member of Parliament (MP) introducing the bill needs to outline how the proposed law is or is not compatible with the Charter in a Statement of Compatibility .	By mandating MPs to produce a Statement of Compatibility, the Charter discourages parliament from passing legislation that breaches Victorians' human rights. If a proposed law breaches a right in the Charter: - this breach is debated openly in parliament - law-makers consider whether the breach of human rights is justified.

Continues →

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)

KEY TERM

Victorian Charter of Human Rights and Responsibilities (VCHRR)

a piece of Victorian legislation that sets out human rights, freedoms, and the responsibilities of the government and public bodies to protect these.

LEGAL VOCABULARY

Statement of Compatibility

a document that assesses whether a bill being proposed is compatible with the human rights set out in the VCHRR.

Table 1 Continued

Feature of the VCHRR	Explanation of the feature
The VCHRR requires public authorities to act in accordance with the Charter when delivering services on behalf of the government.	As the Victorian Parliament is the supreme law-making body in the state, it can pass new laws that are inconsistent with the Charter. Therefore, there are no grounds for a citizen to attempt to declare an Act invalid on the basis that it defies the rights of the Charter. Even if a law is incompatible with human rights, it can still be passed.
The VCHRR includes 20 fundamental, civil, and political human rights.	Government bodies, such as Victoria Police, schools, and hospitals, must act in accordance with the human rights in the VCHRR. These rights include: - the right to vote - the right to equality - the right to protection from cruel, inhuman, or degrading treatment - the right to freedom of expression. For example, under section 22 of the Charter, if a person is detained, Victorian authorities must ensure the detainee is kept separate from convicted offenders in order to protect the right to be treated humanely and with respect and dignity.

USEFUL TIP

When referring to the Victorian Charter of Human Rights and Responsibilities in your assessment and exam answers, always refer to it by its full name the first time you use it in your response. You may use either the *Charter of Human Rights and Responsibilities Act 2006* (Vic) or the Victorian Charter of Human Rights and Responsibilities. After its first mention, you can refer to it as the 'Charter' or the 'VCHRR' to save yourself time.

REAL WORLD EXAMPLE

Mandatory vaccinations: protecting society or violating human rights?

In October 2021, former Victorian Premier Daniel Andrews announced that all authorised workers, such as paramedics, firefighters, marriage celebrants, faith leaders, and Victoria Police, would be required to have the COVID-19 vaccination to continue working, unless they had a valid exception. This requirement lasted until 24 June 2022 when the mandatory vaccination requirements ended.

There were several sections of the Charter that were contravened by making vaccinations mandatory for the long list of workers. Such sections include:

- s 10(c) 'A person must not be subjected to medical or scientific experimentation or treatment without his or her full, free, and informed consent'. Mandating vaccinations for certain workers violated the fact that their consent had to be 'free' as a small proportion of Australians were outrightly opposed to getting the vaccine, but may have been coerced into receiving it due to the mandate.
- s 13(a) 'A person has the right not to have his or her privacy ... unlawfully or arbitrarily interfered with'. As part of the mandate, workers had to disclose proof of vaccination to their employer, possibly infringing on their right to keep certain information private.
- s 14 'Every person has the right to freedom of thought, conscience, religion and belief'. Some Victorian citizens object to vaccinations on religious grounds as cells derived from elective abortions were used to develop certain COVID-19 vaccines. Therefore, individuals argued it went against their religion to receive the vaccine, but were still required to in order to remain employed.

Despite infringing on certain Charter rights, the order mandating vaccinations to maintain employment was still imposed on these select workers, indicating the non-binding nature of the Charter. The government had to weigh up whether the collective health benefits to society outweighed restricting authorised person's rights under the Charter.

Adapted from 'Human rights implications of mandatory COVID 19 vaccinations in Victoria' (Saunders, 2021)



Image: vilma3000/Shutterstock.com

Figure 1 Authorised workers were required to roll up their sleeves to be eligible to continue working at the end of 2021

USEFUL TIP

Many students misunderstand the 'power' of the Charter. It does not prevent new laws from being passed if they breach or impact upon the human rights set out in the Charter. The Victorian Parliament has the power to pass legislation that breaches or limits the rights set out in the Charter. The VCHRR's 'power' lies in requiring parliament to explicitly debate and consider how new laws might impact Victorians' human rights.

USEFUL TIP

An important key skill in Area of Study 3 of Unit 2 VCE Legal Studies is to 'evaluate the ways in which rights are protected in Australia'. The tables in this lesson showing strengths and limitations in relation to the VCHRR, statute, and common law can help you evaluate rights protection in Australia, but you should also consider strengths and limitations of other ways in which rights are protected in Australia, which you learnt about in **10B Australia's protection of human rights – the Constitution**.

Table 2 The strengths and limitations of the VCHRR

Strengths of the VCHRR	Limitations of the VCHRR
- The Charter ensures human rights issues are considered and debated publicly when proposed legislation is tabled in Victoria. This creates a political risk for law-makers to introduce laws breaching human rights, discouraging MPs from doing so. - The process of requiring a Statement of Compatibility to be produced for all proposed legislation in Victoria ensures complex issues regarding human rights are debated and resolved publicly, by democratically-elected law-makers. - The Charter imposes obligations on public authorities to consider human rights. This constrains abuses of power by Victoria Police, for example. - Unlike the Constitution, which only contains five explicitly-protected rights, the Charter has a greater number of established rights including 20 fundamental rights, therefore explicitly indicating the rights Victorians should expect to be awarded in society.	- The VCHRR does not establish the right for Victorians to bring a case against parliament for creating a law that breaches the rights of the Charter. - As the Charter was only created in 2006, legislation created prior to 2006, may not have been analysed to consider the Charter's human rights. As a Statement of Compatibility was not required when these laws were created, Members of Parliament may not have considered the human rights implications during the law-making process. - The VCHRR applies only to new laws being considered in Victoria. It has no impact on new laws developed in the Commonwealth Parliament. Laws created by the Commonwealth are usually applicable to all Australians and may therefore infringe upon the rights of Victorians. - Although the VCHRR requires Victorian law-makers to explicitly consider whether new laws violate human rights, it does not stop such laws from being created.

Statute law 2.3.3.2

Laws created by the Commonwealth and Victorian Parliament protect human rights by making certain discrimination unlawful, such as discrimination on the basis of gender, religion, age, and sexuality. 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.

Table 3 Features of statute law in relation to human rights protection

Feature of statute law	Example of the feature
Federal and state laws establish the grounds on which it is unlawful to discriminate against someone, such as on the basis of their age, gender, religion, pregnancy, or marital status.	Under s 12 of the <i>Racial Discrimination Act 1975</i> (Cth), it is unlawful to refuse a person residential accommodation on the basis of their race, colour, or national or ethnic origin.
Statutes outline the places where such discrimination is not permitted, such as when a person is applying for a job, applying for a university course, in a shop, or in a restaurant.	Under s 16 of the <i>Equal Opportunity Act 2010</i> (Vic), an employer must not discriminate against a person based on their gender, for example, when 'determining who should be offered employment'.

Continues →

LEGISLATION

Equal Opportunity Act 2010 (Vic)
Racial Discrimination Act 1975 (Cth)
Sex Discrimination Act 1984 (Cth)

LESSON LINK

You learnt about statute law in **1E Sources of law**.

Table 3 Continued

Feature of statute law	Example of the feature
Statutes may establish some exceptions to the general principles against discrimination, setting out circumstances in which discrimination may be permitted.	Under s 38 of the <i>Sex Discrimination Act 1984</i> (Cth), it is lawful for a school to engage in discriminatory practices against a potential employee based on their sexual orientation, gender identity, marital status, or pregnancy if the school adheres to specific teachings about a particular religion or creed. As long as such discrimination is carried out to protect the individual, it is considered lawful. For example, a deeply Christian institution may lawfully opt not to hire a teacher solely due to their sexual orientation if it is believed doing so will protect that teacher.
Statutes set out the remedies available for individuals who have had their rights breached, such as a court-ordered apology or damages.	According to s 46PO(4) of the <i>Human Rights and Equal Opportunity Commission Act 1986</i> (Cth), the court may make orders as it sees fit if discrimination has occurred against an individual. Such orders may include requiring a defendant to pay damages to the plaintiff, requiring a defendant to vary the termination of a contract, or requiring the defendant to re-employ or employ a plaintiff.

LEGISLATION

Human Rights and Equal Opportunity Commission Act 1986 (Cth)

LEGAL CASE

CONTENT WARNING This section explores content that is sensitive in nature, relating to racism.

Bharatiya v Antonio [2022] FCA 428

Facts

The plaintiff and the defendant were neighbours whose relationship soured. The plaintiff alleged that the defendant had used racist language on various occasions, including:

- during a heated conversation in July 2020, the defendant said ‘the black bastard’, which he said was in reference to the plaintiff’s dog. The plaintiff perceived this as an insult towards him.
- in January 2021, the defendant was recorded saying ‘this is what happens when parasites are let into Australia’. He also referred to the plaintiff as a ‘cockroach’.

Legal issue

The plaintiff argued the defendant’s remarks were unlawful under section 18(c) of the *Racial Discrimination Act 1975* (Cth). This section says it is unlawful for a person to say something in public if it is reasonably likely to offend, humiliate, or intimidate another person and if the words were said due to the race, colour, or ethnicity of the person.

One key issue was whether the words said by the defendant were made because of the race, colour, or national or ethnic origin of the plaintiff.

Decision

For the altercation that took place in July 2020, the court held ‘the black bastard’ expression was not directed toward the plaintiff, but rather, his dog.

For the acts in January 2021, the judge held one of the reasons the term ‘cockroach’ was used was because of the Indian ethnicity of the plaintiff. Therefore, the conduct by the defendant was declared to be unlawful under the *Racial Discrimination Act*.

Significance

The judge declined to make an order requiring the defendant to apologise to the plaintiff, believing the apology would be ‘devoid of the sincerity required for an apology’. The judge condemned the unlawful conduct of the defendant.

When deciding on the appropriate damages, the judge stated:

‘Racial insults are hurtful and may be deeply so. It may be readily inferred that they may cause distress. They deprive people of their dignity’.

Therefore, compensatory damages worth \$750 were awarded for the alleged humiliation and distress suffered by the plaintiff from the altercation. This case indicates the ability of statute law in Australia to protect the human right to equality which is contravened by discrimination on the basis of race.

LESSON LINK

You learnt about damages in **9B Types of remedies**.

LEGAL VOCABULARY

Right to silence a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.

Inadmissible evidence evidence that does not abide by the rules of procedure, and is, therefore, prohibited from being presented to the court.

Victorian and Commonwealth legislation also protects the rights of an accused person, victims, or witnesses of a crime. When being questioned by the police, most accused persons are granted the **right to silence**. This right protects accused persons from facing physical force and intimidation by authorities in order to gain answers to questions or gather forensic evidence, such as fingerprints. Failure to follow these statutes and uphold an accused's rights can result in evidence that has been gathered, in this illegal manner, being considered **inadmissible evidence** in a criminal trial. This encourages police to adhere to these laws protecting accused persons.

Table 4 The strengths and limitations of statutory protection of human rights

Strengths	Limitations
- Statutes, such as the <i>Equal Opportunity Act 2010</i> (Vic), allow injured parties to seek a remedy if they have been mistreated on the basis of gender, marital status, ethnicity, and more. This discourages rights breaches and enables those who are wronged to seek damages or an apology. - Politicians are unlikely to amend or remove human rights protections currently in place as doing so could reduce their chance of re-election and may harm their reputation with the public. - Rights protections can change as society's expectations and values evolve. At the time of federation, discrimination on the basis of gender, sexuality, and race was common in Australia. For example, in 2019, Victoria altered legislation that previously had required transgender or gender-diverse Victorians to undergo sex-affirming surgery in order to change the sex recorded on their birth certificate. Now, Victorians are able to self-nominate the sex listed on their birth certificate to be a descriptor of their choice. - Victorian and Commonwealth legislation now provides very widespread protection from discrimination based on characteristics such as age, gender, marital status, sexuality, and race. Therefore, this protects the human right to equality in that all humans should be treated equally, regardless of certain traits they may possess. - Legislation protecting the rights of an accused person ensures evidence obtained by police through violations of an accused person's rights is not valid 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.	- In order to obtain justice in the form of damages or an apology for being a victim of human rights abuse, such as racial discrimination, most legislation sets out that an individual must pursue this claim through the courts. This can be time-consuming and expensive for the parties involved. - Parliament can pass new laws amending or removing human rights that were previously protected in legislation as these rights are not enshrined in the Constitution and can therefore be removed at the discretion of parliament. Therefore, certain human rights protections currently in place could be removed at any time, in theory. - As the views of society have changed, legislation has failed to keep up in some regards. For example, the Australian Law Reform Commission has argued that the laws enabling religious education institutions to discriminate against a student or prospective employee on the basis of their sex or sexual orientation inherently breach the human rights of these individuals. Therefore, the Commission called for reform to ensure religious education institutions cannot discriminate against a student or members of staff due to factors such as marital status, pregnancy, or sexual orientation. - There are still no statutory protections for certain communities in Australia, limiting the ability of the law to protect the human rights of some marginalised communities. For example, there is no legislation preventing refugees in Australia from being indefinitely detained, violating the human right to freedom of movement for refugees in Australia. - The police practices used in the criminal justice system do not provide complete protection of human rights for prisoners or detained individuals. For example, solitary confinement, strip searches, and the use of physical restraints are still all used within the Victorian criminal justice system. - It can often be difficult to prove that a decision was made, or words were said, on the basis of a person's characteristics, such as their gender, race, or sexual orientation. An employer, for example, can argue they did not hire a person because of their lack of skills and experience, when the reality was that person did not get employed due to their race. Therefore, discrimination can still occur even though there are laws protecting it from taking place.

Common law 2.3.3.3

Common law refers to law created by judges when resolving a dispute, in circumstances where there is no applicable law, or the existing law is unclear. This process often involves questions about human rights, which require a judge to:

- give meaning to words in legislation through **statutory interpretation**.
- create principles of law when a new type of dispute arises for which there is no relevant law to apply, in the process of establishing a new **precedent**.

The principles created by the judge in a higher court become rules that future, similar cases taking place in lower courts in the hierarchy must abide by.

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 and the presumption of innocence, have been adopted into legislation. The presumption of innocence, for example, is protected under section 25 *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Common law has established principles regarding how legislation should be interpreted to uphold human rights. In *Coco v The Queen* (1994), the court declared judges should only interpret legislation in a way that breaches human rights if the legislation clearly intended to violate human rights by using unmistakable and unambiguous language. The main role of common law with regard to human rights is that judges give meaning to words in legislation, develop common law, and establish principles that allow human rights to be protected.

HYPOTHETICAL SCENARIO

Breaking bad: How breaking bones to beat the bad breached the law

Section 462A of the *Crimes Act 1958* (Vic) states that when a police officer arrests a suspect, or acts to prevent an indictable offence being committed, the officer can use force. However, they must only use force that is reasonably necessary in order to achieve the objectives of the arrest or prevent the offence from being committed. They cannot use 'disproportionate' force for the relative offence when making a lawful arrest.

Mikasa is about to shoplift from a supermarket. Jake, a police officer, sees this occurring and decides to stop her. He uses force to prevent her from stealing the chicken kiev, breaking her arm in the process of stopping her, by restraining her against the wall.

Mikasa brings the matter to court under the belief that Jake's actions did not adhere to s 462A of the *Crimes Act* as the breaking of her arm was a 'disproportionate' response to her attempting to steal some groceries. A court will need to give meaning to 'disproportionate' to decide whether the *Crimes Act 1958* (Vic) has been breached by Jake. The definition decided by the court as to what amounts to an action being 'disproportionate' will then become a common law precedent that future judges of a lower court will be bound to follow, and judges of higher courts will likely follow.



Image: boyphare/Shutterstock.com

Figure 2 Mikasa brought a case to court after having her arm broken as a police officer attempted to arrest her for stealing groceries

LEGAL VOCABULARY

Statutory interpretation a process whereby the courts give meaning to the words in legislation when applying the legislation to a case.

Precedent a legal principle or decision established by a court in a previous case that is used as a guide or authority in subsequent cases with similar facts or legal issues.

LESSON LINKS

You will learn about the rights of the child in **11A The rights of young people**.

You learnt about common law in **1E Sources of law**.

You learnt about the presumption of innocence in **2B The presumption of innocence**.

You learnt about police powers in **4C Institutional powers and individual rights**.

LEGISLATION

Crimes Act 1958 (Vic)

LEGAL CASE

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to people who have passed or distressing events.

Mabo v Queensland (No. 2) [1992] HCA 23

Facts

Before European settlement in 1788, it was believed that Australia was 'terra nullius', meaning it was legally the 'land of no-one'. This was a long-standing principle in Australia until Eddie Mabo, an Indigenous activist from the Torres Strait Islands, among others, argued the legal assumption that Australia was 'terra nullius' was incorrect as First Nations people had lived on the land for tens of thousands of years. Mabo claimed ownership rights over the land in the Murray Islands, within the Torres Strait.

Issue

The issue was whether First Nations Australians had the 'native title' to the land of Australia.

Decision

In 1992, the High Court held 'terra nullius' was a legal fiction and found that native title could exist if it could be proved that:

- there is a strong connection between the people and the land.
- the Indigenous connection to the land had not been extinguished by a 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 people's 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.

Significance

As a result of the decision, it was formally recognised that Indigenous rights to the land existed at the time the British colonised Australian land.

The ability of the High Court to recognise the land as belonging to Indigenous people when European settlement occurred, thereby removing previous common law principles based on outdated and racist views about Indigenous people, demonstrates the ability of common law to uplift human rights. It should be noted that the High Court was able to stray from the past precedent of the 'terra nullius' assumption because it is the most superior court in the court hierarchy. Lower courts would not be able to stray from precedent to such an extent.

Table 5 The strengths and limitations of common law protection of human rights

Strengths	Limitations
• Courts can give meaning to the words in Federal and State legislation and the Constitution to determine whether particular actions are in breach of human rights. This is beneficial as society changes and new issues and scenarios of potential rights abuses arise. • The courts can recognise individuals' human rights when the parliament has failed to do so. • The courts are guided by the principle that they should only interpret legislation in a way that contravenes human rights if the wording of the legislation is unmistakably intended to breach human rights. Therefore, the courts will generally aim to protect human rights.	• 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. • Bringing a case to the higher courts to determine whether human rights have been breached or to establish a new common law human right is very expensive and time-consuming. • Common law human rights can be abolished by legislation. For example, over many decades, judges have created a right to remain silent when individuals were questioned by police. Whilst 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 the police.

Lesson summary

Table 6 Australia's protection of human rights through statute law and common law

Source of law	Protection of human rights in Australia
Victorian Charter of Human Rights and Responsibilities	- Ensures Victorian Parliament reviews all proposed legislation in consideration of the rights set out in the Charter. - Enforces public authorities to act in accordance with the rights set out in the Charter.
Statute law	- Federal and State parliaments have created legislation protecting certain human rights, such as the right to equality by preventing discrimination. - Laws created allow Australian citizens to seek remedies, such as damages, when their human rights are breached, providing them with justice.
Common law	- The courts intend to interpret legislation in a way that uplifts human rights where possible. - The courts can identify a human right that has not been enshrined in legislation. - Precedent about the interpretation of human rights legislation has been created by the courts to ensure a uniform approach to human rights.

10C Questions

Check your understanding

Question 1

Australian human rights are protected only by statute law.

- A. True
B. False

Question 2

Fill in the blanks with the following terms:

statute law

common law

The human rights protections enshrined in state and federal legislation are examples of rights being protected by

[] . On the other hand, [] aims to protect human rights by giving meaning to statutes and interpreting them in such a way that is compatible with human rights.

Question 3

An example of a federal statute law in Australia that aims to protect human rights is:

- A. the *Racial Discrimination Act 1975* (Cth).
B. the Victorian Charter of Human Rights and Responsibilities.

Question 4

If the Victorian Parliament creates an Act that goes against the human rights set out in the Charter, that Act is invalid.

- A. True
B. False

Question 5

Which of the following statements are correct about the strengths of the Charter?

(Select all that apply)

- A. All pieces of legislation produced in Australia must comply with the Charter, meaning Acts are not produced that violate the human rights set out in the Charter.
- B. The Charter ensures that human rights issues are considered and debated publically in the Victorian Parliament when new laws are attempting to be passed as a Statement of Compatibility with human rights must be produced.
- C. The Charter enforces public authorities to act in a way that is compatible with human rights, for example, police can not use excessive force when carrying out an arrest.
- D. The Charter was created in Victoria but applies to the Commonwealth Parliament too. Therefore, federal laws applying to all Australians must also be debated to ensure their compatibility with human rights before being passed.

Question 6

Which of the following statements are correct about the limitations of the Charter? **(Select all that apply)**

- A. There are only five explicit rights set out in the Charter, therefore the scope of its human rights protections is limited.
- B. The Charter requires law-makers to consider whether new laws violate human rights, but does not prevent laws that do so from being passed.
- C. Individuals who have had their human rights breached by Victorian legislation can claim remedies from the Victorian Parliament. However, these remedies are usually nominal damages that may not account for the emotional damage the breach caused.
- D. The Charter only is applicable to the Victorian Parliament, therefore the Commonwealth Parliament does not have to debate new laws being developed to ensure their compatibility with human rights.

Question 7

A weakness of statute law's ability to protect human rights in Australia is that:

- A. parliament can pass laws amending or removing human rights protections that were previously guaranteed under statute law.
- B. there is no legislation in Victoria or Australia relating to the rights of victims or accused therefore, these individual's rights still remain unprotected under legislation.

Question 8

Human rights in Australia are protected by:

(Select all that apply)

- A. statute law.
- B. common law.
- C. the Australian Constitution.
- D. the Bill of Rights.

Preparing for exams**Standard exam-style****Question 9**

(2 MARKS)

Identify **two** pieces of statute law in Australia that protect human rights.

Question 10

(2 MARKS)

Describe **one** way that common law protects human rights in Australia.

Question 11

(2 MARKS)

Outline **one** role of statute law in protecting the Australian people's human rights.

Question 12

(4 MARKS)

Explain, with an example, **one** limitation of the Victorian Charter of Human Rights and Responsibilities in protecting the human rights of Victorians.

Extended response

Use your answer to question 13 to support your response to question 14.

Question 13

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the Charter to protect human rights in Australia.

Statement	Strengths	Limitations
I. The Charter upholds the human rights of Victorians by ensuring human rights issues are considered and debated publicly when all proposed legislation is considered in Victoria.	☐	☐
II. The Charter only forces parliamentarians to debate bills in accordance with human rights but does not stop laws violating human rights from being created.	☐	☐
III. The Charter protects human rights in Australia as it enforces obligations onto public authorities, ensuring they act compatibly with human rights and consider human rights when making decisions.	☐	☐
IV. The Charter only applies to laws being created in Victoria, but has no impact on laws being developed in the Commonwealth Parliament.	☐	☐
V. The Charter does not establish the right for a Victorian Citizen to bring a case against Victorian Parliament for creating a law that breaches rights set out in the Charter.	☐	☐

Question 14

(6 MARKS)

Discuss the extent to which the Victorian Charter of Human Rights and Responsibilities can protect human rights in Australia.

Use your answer to question 15 to support your response to question 16.

Question 15

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of common law and statute law to protect human rights in Australia.

Statement	Strengths	Limitations
I. Common law in Australia allows the courts to give meaning to the words in Federal and State legislation and the Constitution to determine whether particular actions do or do not breach human rights.	☐	☐
II. Rights protection can evolve alongside the evolution of society's expectations and values as Parliament can create new laws that reflect the desires of Australians to have certain human rights protected.	☐	☐
III. It can be time-consuming and expensive for a court to clarify the words of legislation to determine the scope of human rights protections and whether human rights have been breached.	☐	☐
IV. Common law guides the courts to only interpret legislation in a way that contravenes human rights if the wording of the legislation unmistakably intended to breach human rights.	☐	☐
V. Certain communities still remain unprotected by laws in Australia and Victoria. For example, refugees have very limited human rights protections in Australia, such as the right to freedom of movement.	☐	☐

Question 16

(6 MARKS)

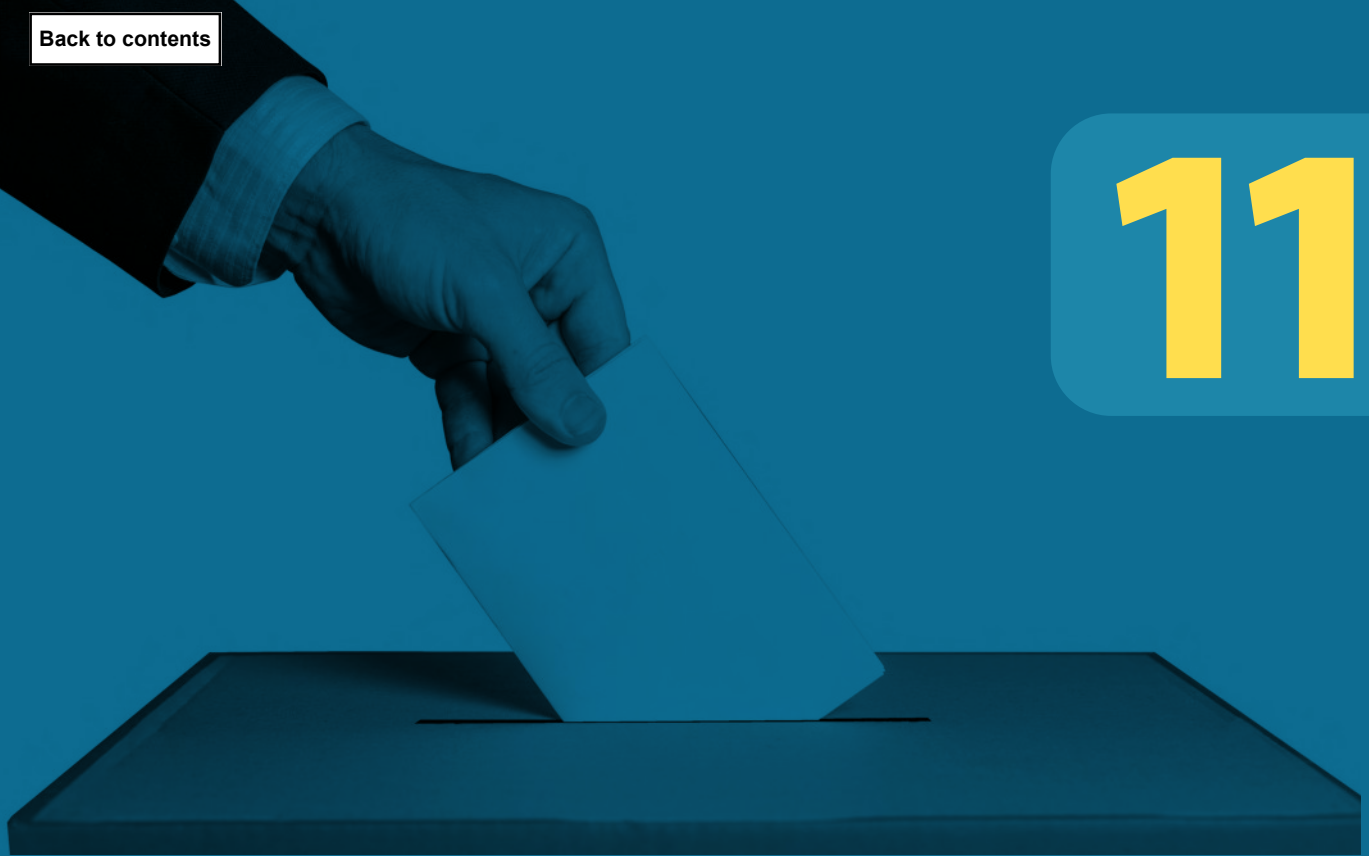
Evaluate the extent to which common law and statute law protect human rights in Australia.

Linking to previous learning**Question 17**

(4 MARKS)

- a. Define the term 'presumption of innocence'. 2 MARKS
- b. Describe the role of common law and statute law in protecting the right to the presumption of innocence. 2 MARKS

11



CHAPTER 11

Human rights issues in Australia

LESSONS

- 11A** The rights of young people
- 11B** The rights of young people
 - Raise The Age campaign
- 11C** The right to vote
- 11D** The right to vote
 - *Roach v Electoral Commissioner*

Image: I'm friday/Shutterstock.com

KEY KNOWLEDGE

- one human rights issue in Australia and in relation to that human rights issue:
 - the nature and development of the human right
 - the laws that apply to the human right in Australia
 - possible conflicting attitudes
 - possible reforms to the protection of the human right in Australia
- one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

11A The rights of young people

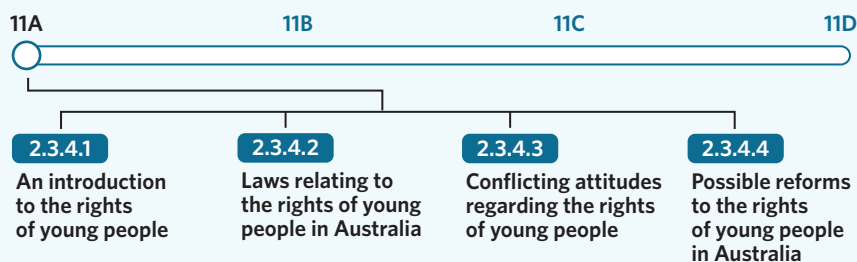


Image: sirtravelalot/Shutterstock.com

Broadly, there has been an international consensus that the right to food, water, and shelter are universal human rights that every person should be afforded. For young people in Australia, like yourselves, education is now also considered a right. Currently, by reading this book and taking VCE Legal Studies Units 1&2, you are exercising your right as a young person to an education.

STUDY DESIGN DOT POINT

- one human rights issue in Australia and in relation to that human rights issue:
 - the nature and development of the human right
 - the laws that apply to the human right in Australia
 - possible conflicting attitudes
 - possible reforms to the protection of the human right in Australia
 - one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.



Lesson introduction

Whilst it may seem obvious for societies, governments, and international organisations to come to an agreement about the human rights everyone is afforded, executing and delivering these rights is easier said than done.

In recent years, young people have had their rights increasingly challenged by modern issues, such as war, natural disasters, and rapidly rising costs of living. Consequently, the gap has grown between the human rights protections provided by legislation and governments and the actual experience of the younger generations. According to Save The Children Australia (2022), one in three children globally are living in an area of high climate risk, meaning that there is a high chance of a natural disaster occurring, whilst also living in poverty. This statistic will continue to increase as climate conditions worsen across the world.

Young people, who are the future leaders of societies across the world, deserve the best possible conditions in their formative years as this can ensure they lead a prosperous future and independent life.

LESSON LINKS

You learnt about individual rights in **4C Institutional powers and individual rights**.

You learnt about human rights in **Chapter 10: Human rights**.

KEY TERMS

Human rights entitlements and liberties that exist for all human beings, irrespective of any personal qualities and characteristics.

Rights of young people rights that build upon baseline human rights to protect people under 18 years of age during their growth into adulthood.

An introduction to the rights of young people 2.3.4.1

Human rights are the entitlements and liberties that are applicable to all human beings no matter their ethnicity, religion, sex, or other identifying features. Therefore, the **rights of young people** are non-discriminatory human rights that are inherent to all children and youth. They act to protect individuals under the age of 18 and provide them with freedom, safety, security, respect, and fairness in every aspect of their life.

The **United Nations Convention on the Rights of the Child (UNCRC)** is the leading **international treaty** that governs the 140 countries that have become a signatory to it, as of 2023. Prior to the UNCRC, the *Geneva Declaration of the Rights of the Child*, which was not a legally binding document, was the first and main document bringing children's rights to an international forum. Since the establishment of the *Geneva Declaration* in 1924, the care and safeguarding of children has been an international priority. This prioritisation is required due to the vulnerability of young people, which often exposes them to mistreatment and exploitation.

The UNCRC of 1989 is a global convention that builds upon the foundations established by the *Geneva Declaration*, whilst outlining additional human rights specific to children and youth that ensure they are raised in a just and healthy environment. A foundational element of the UNCRC is the 'best interests principle' which states that 'in all actions concerning children...the best interests of the child should be a primary consideration'. This principle has been particularly applicable to the development of family law where the interests of the child must be critically considered, especially in the case of divorce or parental separation.

In Victoria, human rights protection is primarily legislated through the *Charter of Human Rights and Responsibilities Act 2006* (Vic). It specifies the rights afforded to all Victorians and how the government, courts and institutions must act in relation to rights. Whilst this Act does not specifically address the rights of young people, the rights of children are mentioned, such as the 'right to protection of families and children' and the 'rights of children in the criminal process'.

LEGAL VOCABULARY

United Nations Convention on the Rights of the Child (UNCRC)

an international treaty, based on the 1924 *Geneva Declaration of the Rights of the Child*, which seeks to specify and prescribe an international standard for the rights of young people.

International treaty an agreement between two or more countries or international organisations, that creates international rights and obligations.

Ratification the formal agreement or undertaking by a country to be bound by the terms of an international treaty, which provides the country time to ensure domestic legislation is consistent with the treaty.

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)

REAL WORLD EXAMPLE

Adopting rights across the world

The *United Nations Convention on the Rights of the Child* (UNCRC) is the 'most widely ratified human rights treaty in history and has helped transform children's lives around the world'. First signed in 1989, this treaty describes 54 articles, each a different right of a young person that the United Nations and the 140 signatories believe to be essential and universal. These 54 articles lay out various conditions and actions that, in practice, should apply to all children, irrespective of race, religion, gender, wealth, or birthplace.

Some of the key signatories, alongside Australia, include the United Kingdom, New Zealand, Canada, Sweden, and India. Whilst the United States is also a signatory nation, they have done little to adopt the principles and articles into their federal and state laws, which results in issues and inconsistencies regarding areas of punishment, adoption, religion, and education.

The United States is an example of the difference between simply being a signatory and ratifying a treaty. Australia became a signatory to the UNCRC soon after its creation in 1989 and then later ratified it in 1990. The process of **ratification** creates a legally binding obligation for a nation to follow and adopt a treaty into domestic law, and therefore demonstrates a commitment and dedication to the principles and values of the treaty, in this case, the rights of young people. Australia's ratification has notably not included the creation of a Bill of Rights or a definitive list of rights of young people.

Adapted from 'United Nations Convention on the Rights of the Child' (United Nations International Children's Emergency Fund, 1989)



Image: Drop of Light Motiwala/Shutterstock.com

Figure 1 With the UNCRC, the United Nations has been successful in creating the frontrunning document of young people's rights

Laws relating to the rights of young people in Australia 2.3.4.2

Australia has a number of laws that specifically relate to protecting and pursuing the rights of young people. As a member of the United Nations, Australia ratified the UNCRC in 1990 and has utilised it to govern human rights law for young people across the nation. For example, Article 28 of the UNCRC recognises the right of all children to an education, which is exercised in Australia as it is mandatory for children aged six to 16 to attend school. This legislation is supported by government schooling options.

Many rights of young people fall under **residual powers**, meaning they are dependent on each state and territory to interpret and adopt UNCRC into their own legislation for rights protections to be enacted. Hence, the rights of a young person from Victoria may be slightly different to those of a young person in Tasmania. There are not many substantial differences across states and territories, but as an example, children in Queensland may commence employment at age 13, compared to 15 in Victoria.

LEGAL VOCABULARY

Residual powers law-making powers that are not granted to the Commonwealth Parliament in the Australian Constitution and therefore belong to the state parliaments.

USEFUL TIP

Unless specifically stated, the exact legislation titles are unlikely to be required when answering assessment questions in Unit 2. However, they are a great tool to enhance the quality of your answer by demonstrating a close understanding of the topic.

Table 1 Examples of Australian and Victorian laws relating to the rights of young people

Right	Law
Right to work	- According to the <i>Child Employment Act 2003</i> (Vic), children in Victoria can only enter the workforce without the employer holding a special permit at the age of 15 years. - The <i>Child Employment Act 2003</i> (Vic) states that, in Victoria, employees aged 15 to 18 years are unable to work more than 3 hours per day or 12 hours per week during schooling periods.
Right to a safe and healthy environment	<i>Worker Screening Act 2020</i> (Vic) legislates the requirement of people over the age of 18 to have a Working With Children's Check (WWCC) in order to volunteer with or be employed in an organisation that involves working with children. - A person in authority within an organisation can be criminally charged under the <i>Crimes Act 1958</i> (Vic) for failing to protect a child from sexual abuse. - Child protective services have the authority to intervene in situations where it is reasonable to believe a child has or is suffering from abuse, violence, or neglect through powers granted to them by the Children's Court of Victoria. - Anyone under the age of 18 is prohibited from buying or consuming alcohol according to the <i>Liquor Control Reform Act 1998</i> (Vic). - Children can learn to drive from 16 years of age in Victoria, according to the <i>Road Safety Act 1986</i> (Vic). - Children and young people are entitled to discrimination-free education from both staff and peers under the <i>Equal Opportunity Act 2010</i> (Vic).
Right to healthcare	- The <i>Public Health and Wellbeing Act 2008</i> (Vic) prevents children from being enrolled in all early childhood education and care without an immunisation history to ensure all children are vaccinated and immunologically protected in places such as daycares and kindergartens. - All children are able to access Australia's healthcare system according to the <i>Health Insurance Act 1973</i> (Cth) and Medicare.

Continues →

Table 1 Continued

Right	Law
Age of criminal responsibility	As of 2023, children aged 10 and over can be arrested, detained, and jailed for Commonwealth and Victorian criminal offences. This is governed by the <i>Crimes Act 1914</i> (Cth) and the <i>Children Youth and Families Act 2005</i> (Vic).
Right to freedom of choice	- According to section 116 of the Constitution all Australian citizens have the freedom of religion, and the United Nations Human Rights Commission has also stated that this right extends to children, who should have the liberty and freedom to practise religion or belief (United Nations, 2015). - The <i>Marriage Act 1961</i> (Cth) prohibits childhood marriages in Australia, with legal marriage occurring at the age of 18 years. - The <i>Change or Suppression (Conversion) Practices Prohibition Act 2021</i> (Vic) protects young Australians from being exposed to unconsenting sexuality and gender change or oppression practices.

LESSON LINKS

You learnt about the age of criminal responsibility in **2C Key concepts of criminal law**.

You will learn more about the age of criminal responsibility in **11B The rights of young people – Raise The Age campaign**.

REAL WORLD EXAMPLE

All muffin, no break

In April 2023, Wage Inspectorate Victoria (WIV) commenced legal action against a Muffin Break franchise after a suspected 111 breaches of the *Child Employment Act 2003* (Vic) at their Southland store in Cheltenham. These breaches accumulated to 360 charges in the Melbourne Magistrates' Court.

The breaches were largely related to the employment of three young people under the age of 15, which employers in Victoria must obtain a permit from WIV to employ. Allegedly, Muffin Break Southland lacked these permits, and allegedly also failed to meet the conditions guaranteed to Victorian young workers in the *Child Employment Act*. These conditions include providing a rest break of 30 minutes for every three hours worked and offering shifts for no longer than three hours during the school term and six hours during the school holidays.

The safety of these workers is also in question as WIV has also accused the store of 'failing to ensure the children are supervised by someone with a Working with Children Clearance'.

Since 2021, the WIV has made 17 other child employment charges in an effort to protect the rights of young workers who often do not have the knowledge and/or means to stand up to their employers and demand the conditions they are entitled to.

Adapted from 'Muffin Break served with 360 criminal charges over alleged child employment breaches' (Wage Inspectorate Victoria, 2023)



Image: marcin jucha/Shutterstock.com

Figure 2 Muffin Break's Southland store in Melbourne was accused of breaching child employment laws 360 times by Wage Inspectorate Victoria

WANT TO KNOW MORE?

Employment is a rite of passage for many young Australians. However, due to differences in state legislation, the work life of a young Western Australian may look entirely different to that of a young Tasmanian.

To find out more about the employment rights of young people, search up 'Youth Law Australia when can I start working?' and click on 'When Can I Start Working?'. Using the Youth Law Australia (2023) website, you can cycle through the different state and territory regulations on key areas, such as working age, timing of shifts and maximum hours. Similarly, the Jobwatch website has a number of fact sheets about employment rights and a phone number to call for legal information about employment.

USEFUL TIP

An important key skill in Area of Study 3 of Unit 2 VCE Legal Studies is to 'discuss possible reforms to the protection of rights in Australia'. These tables showing the arguments for and against contentious issues relating to the rights of young people can assist you in developing a discussion on this topic.

Conflicting attitudes regarding the rights of young people 2.3.4.3

In Australia, various human rights relating to young people are controversial and largely contested in the public sphere. Recently, major debates have been centred around decreasing the voting age and raising the age of criminal responsibility.

Table 2 Arguments for and against some contentious issues relating to the rights of young people

Current youth human right or legislation	Arguments supporting current law	Arguments opposing current law
The age at which Australian citizens are required to vote is 18.	• People under 18 do not have the political understanding to make a responsible choice. • People under 18 who are not politically engaged may be more likely to make an ill-informed vote, due to their relative lack of maturity.	• 16 – 17 year-olds are politically engaged and impacted by political decisions, therefore they should have the right to vote. • A 16 – 17 year-old who is working and paying taxes deserves to be represented in democracy, as they are already engaged in and affected by systems that are determined by the government of the day.
The age of criminal responsibility is currently 10 years of age for Commonwealth crimes.	• The current justice processes involving youth has existed for decades without much reform and, therefore, should be left unchanged. • It is important for victims of crime, regardless of the offender's age, to feel the empowerment that is often elicited when an offender is punished.	• Early charges and imprisonment are proven to have adverse consequences on youth, especially with regard to mental health outcomes and trauma. • The involvement of children, as young as 10, in the criminal justice system, worsens their prospects of a well-supported and satisfactory living standard. • First Nations youth are disproportionately affected by a lower age of criminal responsibility, as they are overrepresented in the criminal justice system.
Certain childhood vaccinations are a prerequisite for early education enrolment.	• Mandatory vaccinations can help achieve herd immunity, which means that all people in the community, including children, have access to a safe and healthy environment. • Victoria and Australia have very high vaccination rates by global standards and, therefore, it is not an unfair imposition that families take on this duty to maintain these rates. • The vaccines that are part of this program are tested and proven to be effective for children and are provided free of charge.	• Mandatory vaccination laws infringe on a child's bodily autonomy. • Mandatory vaccination policies can lead to a situation whereby healthcare providers and staff can be abused or be subject to complaints if they opt not to grant exemptions to families or children. • There should be a greater focus on vaccination education as opposed to mandates that strip families of the ability to make an informed decision.
Freedom of sexuality and gender is provided for in legislation.	• Families owe it to their children to ensure they are raised in an environment where they are not restricted to be someone they are not.	• The current legislation which bans any gender and/or sexuality suppressants is restrictive for medical professionals. • Parents are removed from decision-making processes that affect their own children.

Possible reforms to the rights of young people in Australia 2.3.4.4

Each year, there are a number of reforms that are recommended for implementation into both Australian and Victorian law. The protection of rights or the expansion of these protections is a valid and necessary reason for **law reform** as societies and communities face new challenges and issues in relation to rights and guarantees.

Close attention to the protection of young people's rights, similar to the rights of other vulnerable groups in society, is crucial as there is a limited domain for this portion of society to adequately campaign and protest for themselves.

Often law-makers and politicians believe they are acting in the best interest of young people but remain out of touch with the actual lived experience of young people, which is a major issue in law reform regarding young people. As most politicians are substantially older than this portion of society, the frameworks for youth input are often outdated, underdeveloped, or do not exist at all. Where participation of young people occurs, the consultation can be simply a procedural requirement, rather than inputs being considered meaningfully. Consequently, many governments, councils, and public bodies are actively looking to improve their avenues for advocating and voicing the perspective of young people to better inform and influence positive outcomes for youth in the law and their rights.

KEY TERM

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness.

WANT TO KNOW MORE?

The Australian Youth Affairs Coalition (AYAC) website includes information on their current projects as well as details of upcoming events, services they provide to the community, and options to become a member.

REAL WORLD EXAMPLE

Youth now have an official say

The Australian Youth Affairs Coalition (AYAC) has been a front runner in youth rights advocacy for over two decades, with a variety of committees, advisory groups, a fellowship, and a forum that assist in providing direct channels of feedback to both state and federal governments.

In 2022, the federal government established the Australian Government Youth Steering Committee in conjunction with AYAC. The steering committee, comprising 15 diverse Australians aged between 13-24, works closely with the Minister for Youth and the government on policy affecting youth, as well as the new Youth Engagement Model.

The Youth Engagement Model promises to establish a formalised and accessible process for all young people to contribute to the development and reform of youth policy. Increased channels of feedback and breaking down barriers to youth voice that may have previously existed is crucial if youth rights reform is to be meaningful and beneficial for young Australians.

Adapted from 'Australian Youth Affairs Coalition' (Australian Youth Affairs Coalition, n.d.)



Image used with permission from AYAC

Figure 3 The Australian Youth Affairs Coalition (AYAC) have had a meaningful influence on law reform relating to youth rights

REAL WORLD EXAMPLE

Coal mine crime

Whilst there is no current legislation confirming this viewpoint, climate action and protection is often considered a right of young people as the decisions of governments and businesses today will affect the world that young people will eventually inhabit and lead.

In 2022, the link between rights and climate change was exemplified through a Land Court of Queensland ruling. A group of First Nations-led young people, with the name 'Youth Verdict', challenged the proposal of a new coal mine in the Galilee Basin and successfully blocked the establishment of the 'Waratah coal mine'. The reasons provided by the President of the Land Court of Queensland were that the project would jeopardise a variety of human rights, including 'the rights of children', whilst also working against progress towards climate action.

This was considered a landmark case nationwide as it was the first to formally recognise the relationship between youth rights and climate change.

Adapted from "This case has made legal history": young Australians just won a human rights case against an enormous coal mine' (Bell James, 2022)



Image: Parilov/Shutterstock.com

Figure 4 The Waratah coal mine posed a serious environmental threat not only for the immediate area but Australia as a whole, due to the planned emissions

Table 3 Possible reforms to the rights and privileges of young people in Australia and Victoria

Proposed reform	Explanation	Examples of groups who support the reform
Increasing the age of criminal responsibility from 10 to 14 years of age	This reform, sometimes referred to as the 'Raise the Age' campaign, seeks to reduce the rate of youth incarceration and minimise the contact that young people have with the criminal justice system while they are still developing.	- National Aboriginal and Torres Strait Islander Legal Services - The Greens political party - Victoria Legal Aid - Human Rights Law Centre - Australian Medical Association - Law Council of Australia
Increased funding for the public school system	This reform would support and improve the right to an education for young people in Australia by improving facilities, quality of programs, and accessibility.	- Save Our Schools - Australian Education Union - The Greens political party
Abolishment of junior pay rates	This reform would see junior workers be paid at standard, adult rates, irrespective of their age. This has been said to be fair as young staff often may be required to undertake the same responsibilities and tasks as their adult colleagues.	- Australian Council of Trade Unions - Shop, Distributive and Allied Employees Association
Lowering the voting age from 18 to 16 – 17 years old	This reform, sometimes referred to as 'Make it 16', would recognise that 16 and 17-year-olds are active members of society, and therefore should have a chance to elect representatives who are responsible for elements of their lives, for example, taxation.	- The Greens political party - Australian Labor Party
Lowering the age that young people qualify for probationary licences (Ps) from 18 to 17	This reform seeks to increase the independence of young people to access education and employment, particularly in rural areas, by allowing solo-driving at a younger age.	- Victorian Liberal Party - Law Institute of Victoria

Lesson summary

WANT TO KNOW MORE?

The Youth Central website, managed by the Victorian Government, is an information source for a variety of topics related to life as a young person. You can find anything from study tips, employment advice and opportunities, and the rights of young people.

- The rights of young people are crucial not only in Australia but globally.
- Young people often cannot protect themselves and represent their interests in society, due to developmental limitations and age.
- The most recognised international document regarding the rights of young people is the UNCRC. In Australia, the individual states and territories have adopted aspects of this convention into law.
- Many of the conflicting attitudes regarding the rights of young people are related to the perceived maturity of young people, as well as the ability for them to take responsibility for themselves and their own lives.
- Law reform for the rights of vulnerable groups of society, such as youth, is often difficult as barriers to consultation and feedback exist.
- Recent government initiatives alongside advocacy groups, political parties, and unions are often helpful in representing the needs of young people in relation to rights.

11A Questions

Check your understanding

Question 1

Which of the following is a right of a young person outlined in the *United Nations Convention on the Rights of the Child*?

- A. Education
- B. A mobile phone
- C. Video games
- D. A bicycle

Question 2

There have been calls to lower the driving age in Victoria.

- A. True
- B. False

Question 3

Australia has a Bill of Rights that legislates the rights of young people.

- A. True
- B. False

Question 4

Fill in the blank with **one** of the following terms:

difficulty

no issue

Young people often have when advocating for reform in relation to their rights.

Question 5

If a young person is having difficulty with racial discrimination at their high school, which piece of legislation may apply to their situation?

- A. *Public Health and Wellbeing Act 2008* (Vic)
- B. *Children, Youth and Families Act 2005* (Vic)
- C. *Equal Opportunity Act 2010* (Vic)
- D. *Crimes Act 1914* (Cth)

Question 6

Which of the following are proposed reforms regarding the rights of young people in Australia?

(Select all that apply)

- A. A reduction in the voting age to 16 or 17.
- B. Reform in the age of criminal responsibility, increasing it across Australia from 10 to 14.
- C. A reduction in the legal drinking age to 14 to provide children with greater bodily autonomy.
- D. A reform to raise the age at which a young person is eligible to work in Victoria to 21, so that children focus on education and studying during their youth, as opposed to work.

Question 7

In Australia, children's rights are somewhat protected as the nation is a signatory to the *United Nations Convention on the Rights of the Child*. Therefore, Australia has international obligations to uphold the rights outlined in the Convention.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 8**

(2 MARKS)

Identify **two** rights of a young person in Australia.

Question 9

(2 MARKS)

Outline **one** way in which young people's rights are protected internationally.

Question 10

(3 MARKS)

Explain how **one** right of a young person is protected by Victorian or Commonwealth legislation.

Question 11

(3 MARKS)

Jordan, 12 years of age, has been caught underage drinking at their local park by a police patrol and is now facing potential charges.

- a. Identify **one** right of young people that is likely to be related to Jordan's case. 1 MARK
- b. Describe why this right may exist in relation to young people. 2 MARKS

Question 12

(3 MARKS)

Explain **one** proposed law reform in relation to young people's rights.

Extended response

Use your answer to question 13 to support your response to question 14.

Use the following information to answer questions 13 and 14.

In 2016, the Victorian Government amended the *Public Health and Wellbeing Act 2008* (Vic) to create the 'No Jab, No Play' policy. Since then, children enrolled in Victorian early education must be fully up-to-date with all vaccinations that they are eligible to receive at their age.

The amendment aimed to 'increase immunisation rates for young children' and six months after the policy was introduced, vaccination rates grew from 92.15% to 93.4%.

Source: Better Health Channel, No Jab No Play, 14 July 2022

Question 13

Which of the following statements are arguments in support of mandatory vaccinations for any child enrolled in early education? **(Select all that apply)**

- A. The vaccines enforced by this program are tested and proven to be safe for almost all children and are provided free of charge.
- B. The subjection of children as young as 10 years old to the criminal justice system worsens the chance of a well-supported and satisfactory living standard.
- C. Mandatory vaccination laws infringe on a child's bodily autonomy.
- D. Victoria and Australia have very high vaccination rates by global standards and therefore, it is not an unfair imposition that families take on this duty.
- E. Mandatory vaccinations can help achieve herd immunity, which means that all people in the community, including children, have access to a safe and healthy environment.

Question 14

(5 MARKS)

With reference to **one** young person's right in Australia, discuss the need for mandatory early education vaccinations.

Linking to previous learning**Question 15**

(3 MARKS)

A Minister of the Victorian Parliament introduces a bill, Open Roads Bill 2061 (Vic), which proposes to abolish the current minimum driving age, meaning that children of any age may obtain their licence whenever they may wish to do so.

Explain **one** feature of the Victorian Charter of Human Rights and Responsibilities that would directly affect the progression of this bill.

11B The rights of young people – Raise The Age campaign

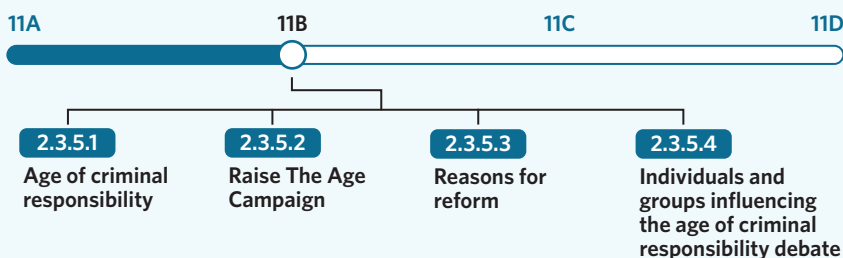


Image: Tinnakorn jorruang/Shutterstock.com

Consider a 10-year-old child who, on a hot day after school, decides to steal ice cream from their local supermarket. Should this child be imprisoned? Would your answer differ if the crime the 10-year-old child had committed was the murder of their younger sibling?

STUDY DESIGN DOT POINT

- one human rights issue in Australia and in relation to that human rights issue:
 - the nature and development of the human right
 - the laws that apply to the human right in Australia
 - possible conflicting attitudes
 - possible reforms to the protection of the human right in Australia
 - one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.



CONTENT WARNING Aboriginal and/or Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to distressing events, such as imprisonment in Don Dale Youth Detention Centre and the Stolen Generations.

CONTENT WARNING This lesson explores content that is sensitive in nature, relating to child abuse and mental health.

Lesson introduction

The age at which children should be held criminally responsible has caused much debate across Australia. This is due to the greater vulnerability and lower reasoning capacity of children compared to adults. As of 2023, across Australia, this age is currently set at 10 years and older, meaning a 10-year-old child can be arrested, sent to court, and imprisoned for a criminal offence.

Since 2020, a group of First Nations organisations alongside various medical, legal, and human rights groups have been advocating for the age of criminal responsibility to be increased from 10 to 14 years of age, through the Raise The Age campaign.

Age of criminal responsibility 2.3.5.1

The **age of criminal responsibility** is the legal age at which a child is thought to comprehend right from wrong and therefore, can be criminally charged since they are capable of understanding their actions were against the law. In Australia, the age of criminal responsibility for Commonwealth offences is 10 years and older. For state and territory-governed offences, each state and territory is responsible for establishing its own age of criminal responsibility. However this age, as of 2023, is the same Australia-wide, except in the Northern Territory where the age is 12 years or older. In Victoria, the age of criminal responsibility is stated under section 344 of the *Children, Youth and Families Act 2005* (Vic), which outlines that:

- a child under the age of 10 years cannot commit a criminal offence.
- a child between the ages of 10 and 14 can be charged with an offence if the prosecution proves they understood their actions were criminal and their behaviour was wrong. If this cannot be established, the child will be released on the grounds they are **doli incapax**.
- a child that is 14 years or older can be charged and imprisoned for their actions.

LEGISLATION

Children, Youth and Families Act 2005 (Vic)

KEY TERM

Age of criminal responsibility the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.

LEGAL VOCABULARY

Doli incapax a Latin term meaning 'incapable of wrong' that deems children incapable of possessing criminal intent, therefore preventing them from being charged with a crime as the mens rea element cannot be satisfied.

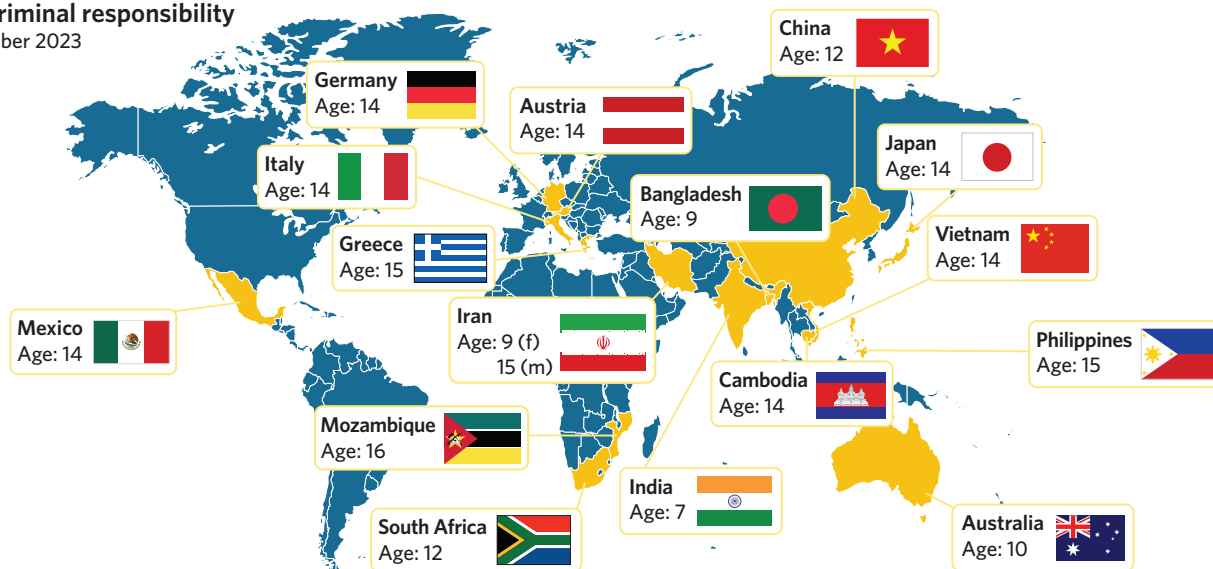
According to Starting Blocks (n.d.), an Australian Government website about childhood development and care, it is the ‘experiences and relationships that... young children have that continuously develop their brains and build the neural circuits that will be the foundation for later development’. Hence, it is crucial for the future growth and behavioural attributes of a child that they experience positive relationships and care in their early life. Imprisonment does not provide an environment that is optimal for the development of a healthy child during these crucial years.

LESSON LINK

You learnt about the age of criminal responsibility in **2C Key concepts of criminal law**.

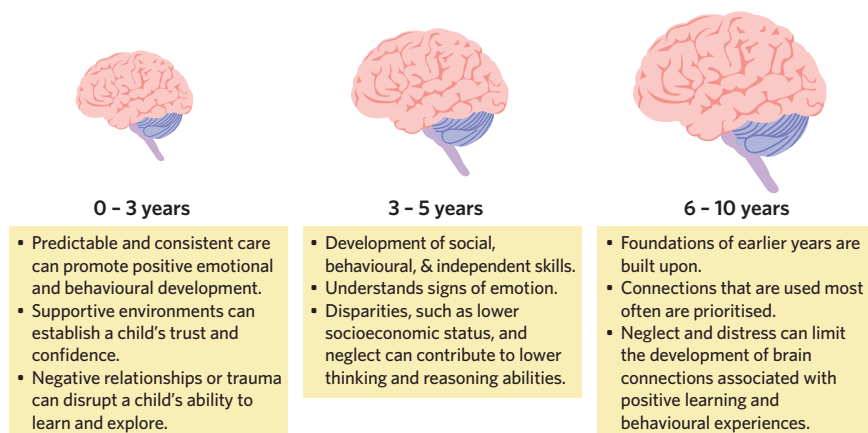
Age of criminal responsibility

As of October 2023



Images (left to right): Andrei Minsk, Magi Bagi, mapsandphotos, Loveshop, Globe Turner, Gil C, Save nature and wildlife, Marco Rosales, Julinzy, charnsitr, Artsem Vysotski, roihun matpor, N.Vector Design/Shutterstock.com

Figure 1 The age of criminal responsibility around the world as of October 2023



Adapted from 'Brain development in children' (Starting Blocks n.d.)

Figure 2 The key hallmarks of childhood development

USEFUL TIP

The age of criminal responsibility in Victoria was set to increase to 12 years or older in 2024, whilst a further increase to 14 years or older was proposed to occur by 2027. Therefore, for the most up-to-date age of criminal responsibility in Victoria, you should consult section 344 of the *Children, Youth and Families Act 2005* (Vic).

HYPOTHETICAL SCENARIO

The case only worsens

At the age of 10, Riley was arrested for stealing from a jewellery store and was held in youth detention for a week as her case was processed. Since then, Riley has constantly been in the youth justice system. She has reoffended several times, claiming she has no other path to lead as she feels there is no help available for her in prison or in the real world. At the age of 15, Riley resents imprisonment and tries to avoid it at all costs, but with her trauma and behavioural issues remaining unaddressed, crime is like an addiction. The conditions Riley has lived in are challenging and inhumane. She has remained isolated for days at a time and has been subject to physical and verbal abuse from both guards and other inmates, whilst living conditions have been inappropriate for the needs of a child. Riley sees no way out and is now facing worsening mental struggles, including depression and anxiety.



Figure 3 Imprisonment can worsen the prospect of a child living a healthy and fulfilling life

Raise The Age campaign 2.3.5.2

KEY TERM

Raise The Age an Australian campaign advocating for the age of criminal responsibility to be increased from 10 to 14 years of age.

LEGAL VOCABULARY

Royal commission the highest form of inquiry, which investigates a particular issue through consultation with experts and the community, then develops a final report of recommendations for law reform which is tabled in parliament.

Youth detention centre a facility used for the detainment and rehabilitation of people under the age of 18 who are under supervision, either before or after sentencing, for a juvenile crime.

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness.

LESSON LINKS

You learnt about rehabilitation in **5A Purposes of sanctions**.

You learnt about the human rights of young people in **11A The rights of young people**.

In July 2016, prior to the establishment of the **Raise The Age** campaign, the Australian Broadcasting Corporation (ABC) aired an episode of its Four Corners program (ABC News, 2016) exposing the torture and abuse experienced by young people imprisoned in the Don Dale Youth Detention Centre in the Northern Territory. Following its release, there was great shock and uproar from the Australian public, which sparked the **Royal Commission** into the Protection and Detention of Children in the Northern Territory. The final report detailed that **youth detention centres** were unfit for the rehabilitation of children and at times denied those imprisoned of their basic human rights (Australian Royal Commission, 2017). It was found that children had been subject to violence, inhumane restraints, and an inadequate education, which were all detrimental to their 'health, wellbeing, and prospects of rehabilitation'. However, despite these findings, little has been done to improve the situation for young people.

Consequently, the Raise The Age Campaign is lobbying for **law reform** in relation to the age of criminal responsibility. The campaign highlights that at the age of 10, children are entering a critical learning and developmental period in their lives where removal from their family and community can detrimentally impact their health and wellbeing. The organisations involved promote rehabilitation by focusing on empowering children to overcome their reasons for engaging in criminal behaviour. This rehabilitation can be community-based and aims to provide young people with the resources required to conquer their challenges. This increase in the age of criminal responsibility has been recommended by the United Nations Committee on the Rights of the Child since 2019 and would adhere to the worldwide median of 14 years.

DEEP DIVE

Raise The Age campaigners

The Raise The Age campaign was founded in 2020 by nine organisations:

- National Aboriginal and Torres Strait Islander Legal Services
- Change the Record
- Human Rights Law Centre
- Law Council of Australia
- Amnesty International Australia
- Australian Medical Association
- Australian Indigenous Doctors' Association
- Public Health Association of Australia
- Royal Australasian College of Physicians

The Raise The Age campaign has now rallied the support of more than 100 additional organisations and together, they have advocated for the age of criminal responsibility to be increased to at least 14 years. By speaking out and developing an alliance for raising the age, the Raise The Age campaign aims to address the injustice that is impacting children, especially First Nations peoples.

Adapted from 'About The Campaign' (Raise the Age, n.d.)

WANT TO KNOW MORE?

Currently in Australia, if a child below the age of 10 years commits an act that is considered a criminal offence when conducted by an older person, they can face various consequences, including being disciplined by a parent, guardian, or teacher, receiving a referral or recommendation to see a counsellor, and/or Child Protective Services receiving notification that the child is being inadequately cared for.

You can find out more about the consequences of child offences by searching 'The Age of Criminal Liability (Vic)' clicking the Go To Court Lawyers webpage (Dahlstrom, n.d.).

There is a large disparity between First Nations childhood imprisonment rates compared to those of non-Indigenous children. Therefore, **community-based rehabilitation** is extremely important for these children so they can receive culturally relevant rehabilitation that can work towards reducing imprisonment rates amongst Aboriginal and Torres Strait Islander peoples.



Figure 4 Advocacy for raising the age of criminal responsibility

LEGAL VOCABULARY

Community-based rehabilitation programs and activities that are centralised within a person's community that aim to provide a supportive environment where behavioural, cognitive, and mental issues can be addressed.

LESSON LINK

You learnt about the challenges faced by Aboriginal and Torres Strait Islander peoples in the criminal justice system in **4F First Nations people and the criminal justice system**.

DEEP DIVE

Detention or discrimination?

The Royal Commission Inquiry into the Protection and Detention of Children in the Northern Territory found that youth detention centres were unfit for the rehabilitation of children and at their worst, physically, verbally, and mentally abused children via restraints, isolation, and violence. It was also identified that children lacked the support needed to avoid future altercations with the youth justice system.

Consequently, the Royal Commission proposed a number of recommendations to the Australian Government to improve child protection and rehabilitation. These recommendations included:

- the establishment of a network of at least 20 Family Support Centres across the Northern Territory as a means of early intervention and the provision of support services and information.
- that detention is only used as a last resort for child crimes where programs and activities have failed to resolve underlying behavioural issues.
- the involvement of First Nations people in decision-making about improvements to youth justice and welfare.

Despite these recommendations being proposed in 2017, the Australian Government has taken minimal action towards addressing the lack of child protection in the justice system.

Adapted from 'Final Report: Royal Commission into the Protection and Detention of Children in the Northern Territory' (Australian Royal Commission, 2017)



Figure 5 The conditions of the Don Dale Youth Detention Centre were unfit for the rehabilitation of children

WANT TO KNOW MORE?

Following the election of the Albanese Government in 2022, the Australian Labor Party pledged to reassess the current age of criminal responsibility.

You can find out more about children's rights and the age of criminal responsibility in Australia by searching 'World Report 2023: Australia' and clicking the link by Human Rights Watch (2023).

REAL WORLD EXAMPLE



Image: EF Stock/Shutterstock.com

Figure 6 Life Without Barriers provides community-based rehabilitation that aims to prevent youth offending

Local support for a changed future

Life Without Barriers is a community-based organisation that aims to address the needs of the community and support those in vulnerable positions. The organisation provides multisystemic therapy (MST) which is a 'family and home-based treatment that strives to decrease youth offending and prevent incarceration'. So far, the program has been assisting young people aged 11 to 18 years with behavioural and antisocial issues, with such therapies showing the 'strongest... evidence of effectiveness in preventing or reducing youth offending'. Such programs have the potential to include younger age brackets and therefore, be implemented Australia-wide as an effective alternative to childhood imprisonment. MST is highly accessible, especially in rural areas of Australia, and can allow children to attend rehabilitation with community facilitators and therapists they feel comfortable and safe with. There is also a greater potential for culturally appropriate resources and support to be provided through these community-based programs that can improve the effectiveness and overall outcomes of rehabilitation.

Adapted from 'Youth Justice' (Life Without Barriers, n.d.)

Reasons for reform 2.3.5.3

The Raise the Age campaign proposes a number of reasons to reform the law in relation to the age of criminal responsibility in Australia. At the forefront of this debate is the greater vulnerability of young children in terms of their social, cultural, and cognitive development, as imprisonment can lead to detrimental harm that ignores childhood trauma and reinforces antisocial behaviours.

Table 1 Reasons for reforming the law in relation to the age of criminal responsibility

Reason for reform	Explanation
Shift in community values	• There is strong evidence to support the notion that childhood imprisonment can cause cognitive, social, and developmental harm. • Society is more willing to achieve reconciliation with First Nations peoples and ensure their rights are protected, especially children's rights. • There has been increased awareness about the importance of childhood development and the idea that their level of understanding is not equivalent to an adult.
Protect society	• Existing laws are not adequately protecting children from the mental repercussions of imprisonment. • Current legislation is denying imprisoned children access to a safe and healthy upbringing. • Preventing childhood imprisonment and fostering community rehabilitation may reduce the likelihood of children becoming repeat criminal offenders.
Improve the legal system	• The principles of justice, fairness, access, and equality, are not being upheld in relation to: – imprisonment and youth detention centres. – children being removed from their families, culture, and community. – addressing childhood trauma and mental or behavioural issues.

Continues →

Table 1 Continued

Reason for reform	Explanation
Improving the legal system	- For example, the principle of equality is limited by childhood detention as offenders typically face some form of disadvantage in society, such as abuse or mental illness. Therefore, addressing these issues with prison fails to recognise a child's disadvantages or provide them with mechanisms to improve their situation and achieve equality. - Furthermore, judging a child by adult standards and punishing them for crimes in the same manner, fails to uphold the principle of fairness. - The Four Corners program on the Don Dale Youth Detention Centre highlighted the need for greater protection of the rights of children. - The Royal Commission Inquiry into the Protection and Detention of Children in the Northern Territory revealed that youth detention centres are unfit for childhood rehabilitation, demonstrating the need for change.

Individuals and groups influencing the age of criminal responsibility debate 2.3.5.4

Across Australia, there are various groups influencing the age of criminal responsibility debate and ultimately, increasing the success of the Raise The Age campaign.

Table 2 Supporters of the Raise The Age campaign

Individual/group	Examples of their claims, comments, and/or involvement
Organisers of the Raise The Age campaign  Image used with permission from raisetheage.org.au	Organisers claim: - the cognitive and developmental implications of childhood imprisonment are detrimental to the healthy upbringing of a child. - imprisonment does not lead to rehabilitation and instead fails to address childhood trauma and behavioural issues that may be impacting criminalised children. - the separation of children from their families and culture, especially of First Nations children, has a historical resemblance to the Stolen Generations and the harmful implications of such separation.
Amnesty International  Image: viewimage/Shutterstock.com	Amnesty International claims: - justice needs to be achieved for First Nations communities by addressing the overrepresentation of young children in prison. Amnesty International advocacy includes: - advocating to raise the age of criminal responsibility in its campaigns since 2018. - delivering a petition with 210,000 Australian signatures to Australian members of parliament in 2022, calling for the Federal Government to align the legal system with basic human rights (Amnesty International, 2022).
Australian population  Image: Rawpixel.com/Shutterstock.com	- A 2021 Essential Research survey of 1092 Australians found that 56% of Australians were in support of raising the age of criminal responsibility, with only 33% opposed and 11% unsure (Dennien, 2021). - These results indicate that most Australians understand the implications of the current age of criminal responsibility and are likely to support this reform.

Continues →

Individual/group	Examples of their claims, comments, and/or involvement
Former Premier of Victoria, Daniel Andrews  Image: Dave Hewison Photography/Shutterstock.com	In 2023, Daniel Andrews commented that: - the age of criminal responsibility should be changed and reforms to Victorian law should be implemented regardless of the stance of other states and territories (Eddie & Ilanbey, 2023). 'Empowering First Nations communities to have much greater control over the child protection of their kids... is very important to me' (9News, 2023). The former premier's advocacy included: - making a promise to work towards a reform that overhauled the current law, with Victoria 'do(ing) its own thing' and 'calling time on national processes that do not deliver' by raising the age of criminal responsibility (9News, 2023).
Federal Member of Parliament, Rebekha Sharkie  Image: FiledIMAGE/Shutterstock.com	Rebekha Sharkie supports: - the recommendations of the UN to increase the age of criminal responsibility to at least 14 years and recognises that 'the UN and peak bodies have been calling for change for some time' (Rebekha Sharkie MP, 2019). Rebekha Sharkie's advocacy includes: - introducing the Crime Legislation Amendment (Age of Criminal Responsibility) Bill 2019 in the House of Representatives in 2019, aiming to raise the age of criminal responsibility from 10 to 14 years of age. - continuing to question the lack of action by the Commonwealth to address childhood protection in the justice system following the Royal Commission into the Protection and Detention of Children, stating that '[Australia] needs to acknowledge the evidence' (Rebekha Sharkie MP, 2019).
The Victorian Greens  Image: Nils Versemann/Shutterstock.com	The Victorian Greens have expressed that: - children should be given care and protection so they can grow, learn, and develop in a supportive environment (The Greens Victoria, 2020). 'If we are committed to listening to First Nations, we must raise the age of criminal responsibility as a matter of urgency' (The Greens Victoria, 2020). - criminalising children institutionalises a cycle of disadvantage and exacerbates racial injustice (The Greens Victoria, 2020). 'Children need to be kept out of the justice system for as long as possible... [as] locking them up at such a young age makes them more likely to reoffend' (The Greens Victoria, 2020). The Victorian Greens' advocacy includes: - introducing a bill into the Victorian Parliament to raise the age in 2022.

Table 3 Opposition to the Raise The Age campaign

Individual/group	Examples of their views and/or involvement
Minority of Australians  Image: Andrii Yalanskyi/Shutterstock.com	A minority of the Australian population argues that: • the number of children currently in custody is relatively insignificant and declining. • victims of crime will not receive justice or empowerment if the age of criminal responsibility is increased.
Continues →	

Table 3 Continued

Individual/group	Examples of their views and/or involvement
Member of the Queensland Legislative Assembly, Shannon Fentiman 	Shannon Fentiman commented that: raising the age of criminal responsibility ‘does not reflect the complexity underlying youth offending and why children as young as 10 years old commit these offences’ and therefore, will not stop children from recommitting these offences.
Former Premier of Western Australia, Mark McGowan 	Mark McGowan commented that: - children should not ‘be able to murder someone or commit a sexual assault with no consequence’ (Collard, 2022). - victims’ rights and justice will not be achieved if the age of criminal responsibility is increased, as children are not held responsible for their behaviours (Collard, 2022). - the current age of criminal responsibility should remain to ‘protect the public and rehabilitate the detainees’ (Collard, 2022).

Table 4 Views and opinions for and against raising the age of criminal responsibility

For	Against
- There are negative developmental impacts of imprisonment and its associated familial and cultural separation. - Imprisonment does not lead to rehabilitation and child trauma remains unaddressed. - The overrepresentation of First Nations peoples in childhood imprisonment needs to be addressed. - The UN has recommended all countries set the age of criminal responsibility to 14 years old. - Children should grow up in a caring, supportive, and safe environment. - Criminalisation of children enhances the cycle of disadvantage and racial injustice. - The younger a child enters the criminal justice system, the more the likelihood of reoffending increases.	- There is an insignificant number of children in prison. - Raising the age will not prevent criminal offences or address a child’s underlying behavioural issues. - Victims do not receive the justice nor empowerment they deserve from imprisoning an offender.

WANT TO KNOW MORE?

A strong argument for raising the age of criminal responsibility in Australia is that the separation of First Nations children from their families and culture has significant resemblances to the Stolen Generations and similar negative consequences, such as intergenerational trauma.

You can find out more about the Stolen Generations and intergenerational trauma by searching ‘The Stolen Generations’ and clicking the link by The Healing Foundation (2023).

Lesson summary

- The Raise The Age campaign advocates for an increase in the age of criminal responsibility in order to improve the protection of young peoples’ rights.
- There are various attitudes across Australia towards raising the age, with the majority of the population supporting the reform.
- Arguments for reform primarily focus on the ability of increasing the age to prevent childhood imprisonment and address the overrepresentation of First Nations children in prison.
- However, some individuals and groups disagree, believing the change does not offer victim support or prevent future crimes.

11B Questions

Check your understanding

Question 1

The Raise The Age campaign is advocating for the age of criminal responsibility in Australia to be increased to protect children from the harmful effects of imprisonment.

- A. True
- B. False

Question 2

Fill in the blank with **one** of the following terms:

10 years of age

14 years of age

The United Nations Committee on the Rights of the Child has recommended the age of criminal responsibility across all countries should be .

Question 3

Some of those against raising the age of criminal responsibility believe that victims' justice will not be upheld if the age of criminal responsibility is increased.

- A. True
- B. False

Question 4

Tick the box to indicate whether each of the following statements are **for** or **against** the beliefs of those in support of Raising The Age.

Statement	For	Against
I. Children as young as 10 are cognitively and developmentally vulnerable to the negative impacts of imprisonment.	☐	☐
II. Imprisonment is the only way to ensure children are held responsible for crimes.	☐	☐
III. Childhood trauma and behavioural issues fail to be addressed through imprisonment as it is not an appropriate form of rehabilitation.	☐	☐
IV. The historical resemblance of removing children from their families and culture demonstrates the implications of separation due to imprisonment.	☐	☐

Question 5

Some reasons for reform associated with the Raise The Age campaign are:

(Select all that apply)

- A. a shift in community values.
- B. the protection of society.
- C. advances in technology.
- D. changes to economic conditions.

Question 6

Which of the following statements are arguments against the Raise The Age campaign?

(Select all that apply)

- A. Childhood development is negatively impacted by imprisonment.
- B. The number of children held in custody is relatively small.
- C. There are measures in place to ensure children are only sent to prison if they are consciously aware of their wrongdoings.

Question 7

The Raise The Age campaigners believe:

- A. children should not be held responsible for criminal behaviour as they are too young to understand the implications of their actions.
- B. children should be rehabilitated in community centres where they can continue to grow up surrounded by family and culture.

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Define the term 'age of criminal responsibility'.

Question 9

(2 MARKS)

Outline the Raise The Age campaign.

Question 10

(2 MARKS)

Identify **two** reasons for reform of the age of criminal responsibility in Australia.

Question 11

(3 MARKS)

Explain the influence of **one** specific individual or group on raising the age of criminal responsibility in Australia.

Question 12

(4 MARKS)

'Everyone in Australia believes the age of criminal responsibility should be raised across the country to 14 years old. All members of the state and territory parliaments are unified on this decision to raise the age.'

Discuss the extent to which you agree with this statement with reference to the individuals and groups influencing the age of criminal responsibility debate.

Question 13

(6 MARKS)

In 2022, more than 60,000 people signed a petition to raise the age of criminal responsibility in the state of New South Wales. In response to this, Cheryl Axelby, a First Nations woman and CEO of Change the Record, an organisation aiming to end violence and discrimination against First Nations people, stated:

'The current institutions aren't working... We just see more intergenerational incarceration in the current institutions ... They just drive our kids and our people further into the system.'

Source: More than 60,000 people sign petition urging NSW to raise the age of criminal responsibility, The Guardian, 11 August 2022 (Sarah Collard)

- a. Outline the role of Cheryl Axelby as an individual influencing the protection of children's rights. 2 MARKS
- b. Propose and justify **two** reasons why the Raise The Age campaign should be implemented in Australia. 4 MARKS

Extended response

Use your answer to question 14 to support your response to question 15.

Question 14

Tick the box to indicate whether each of the following statements are arguments **for** or **against** raising the age of criminal responsibility in Australia.

Statement	For	Against
I. Raising the age will not necessarily prevent children from committing future crimes.	☐	☐
II. Disparities between First Nations and non-Indigenous children can be addressed and improved through raising the age.	☐	☐
III. Children can cognitively and behaviourally develop in a safe and healthy environment, avoiding the potentially damaging impacts of imprisonment.	☐	☐
IV. Justice for victims of crime may not be achieved if children are not imprisoned as they are not held accountable for their actions.	☐	☐

Question 15

(5 MARKS)

Evaluate the proposed law reform to raise the age of criminal responsibility in Australia.

Linking to previous learning

Question 16

(3 MARKS)

Explain how the Raise The Age campaign relates to the rights of young people in Australia.

11C The right to vote

STUDY DESIGN DOT POINT

- one human rights issue in Australia and in relation to that human rights issue:
 - the nature and development of the human right
 - the laws that apply to the human right in Australia
 - possible conflicting attitudes
 - possible reforms to the protection of the human right in Australia
 - one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.

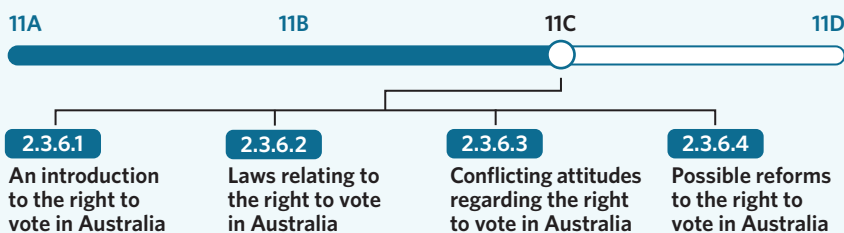


Image: Stock Up/Shutterstock.com

Each year, you may have voted for your school's captains. When casting your vote, you might have considered your own views and selected individuals who most closely aligned with these. The students with a majority of the votes would win, claiming the relevant school captaincy title. Consequently, the actions of these individuals as school leaders should reflect the values of most students at your school.

Lesson introduction

Australia is a representative democracy, whereby citizens have the power to vote for their relevant parliamentary representatives. Parliament makes decisions and creates laws that affect many aspects of Australians' lives. Therefore, the right to vote is a fundamental privilege for the vast majority of individuals across the nation. The right to vote has changed over time and continues to be developed in Australia.

An introduction to the right to vote in Australia 2.3.6.1

The right to vote has developed significantly since British colonisation in 1788 when Captain Arthur Phillip was appointed Governor by the British Government. During the mid to late 1800s, states and territories began to grant individuals the right to vote, including male residents over the age of 21. However, significant changes to voting rights occurred in the aftermath of Australia's **Federation** in 1901. The first federal election took place on 29 and 30 March 1901, allowing individuals to elect representatives to the Commonwealth Parliament. However, First Nations peoples were not granted the right to vote in federal elections until the *Commonwealth Electoral Act 1918* (Cth) was amended in 1962.

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to people who have passed, inappropriate language, or distressing events.

LEGAL VOCABULARY

Federation the process of uniting states into a cohesive group under centralised authority.

LEGISLATION

Commonwealth Electoral Act 1918 (Cth)

DEEP DIVE



Image: paintings/Shutterstock.com

Figure 1 Aboriginal and Torres Strait Islander peoples were granted equal voting rights to other Australians in 1984

The right to vote for First Nations peoples

Prior to federation in 1901, the states and territories imposed different restrictions on voting rights for First Nations peoples. For example, in the 1850s, Aboriginal men over the age of 21 had the same voting rights as other males in Victoria, New South Wales, and South Australia. Alternatively, laws were created to specifically prohibit Aboriginal and Torres Strait Islander peoples from voting in Queensland in 1885, Western Australia in 1893, and the Northern Territory in 1922.

In 1962, the Australian Parliament passed a law permitting Aboriginal and Torres Strait Islander peoples to vote in federal elections. However, this law gave them the option of enrolling to vote, which was unlike the mandatory voting that was required for all other Australians. It was not until 1984 that equal voting rights were granted to First Nations peoples, making it mandatory to vote in federal elections. Shortly after 1962, Western Australia, the Northern Territory, and Queensland granted Aboriginal and Torres Strait Islander peoples the right to vote in state/territory elections.

Adapted from 'Indigenous Australians' right to vote' (National Museum Australia, 2023)

WANT TO KNOW MORE?

Although First Nations peoples were granted the right to vote in federal elections in 1962, they were not formally recognised as members of the Australian population until 1967. The 1967 Referendum stands as a monumental moment in Australian history whereby the Constitution was reformed to abolish the section which had excluded Aboriginal peoples from being counted in the census data, whilst also amending a section of the Constitution to allow the Commonwealth to make laws related to Aboriginal and Torres Strait Islander peoples. You can find out more about the 1967 Referendum by searching 'The 1967 Referendum' and clicking the Australian Institute of Aboriginal and Torres Strait Islander Studies (2021) webpage.

Furthermore, the right to vote is an internationally recognised human right and is set out in many international treaties and declarations supported by Australia. For example, the *Universal Declaration of Human Rights (UDHR)*, established in 1948, acknowledges the right to vote in Article 21 by recognising that all people have the right to 'take part in the government' of their country. Although the UDHR is non-binding, it has largely influenced Australia's voting system.

Australia is also a signatory to, and has ratified, a number of international treaties that protect the right to vote, meaning it should uphold the rights outlined in these treaties. For example:

- in 1975, Australia ratified the *International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD)*. In particular, Article 5(c) ensures the right to 'participate in elections to vote and to stand for election on the basis of universal and equal **suffrage**', meaning that all people should be able to vote, and nominate themselves in an election.
- in 1980, Australia ratified the *International Covenant on Civil and Political Rights (ICCPR)*. In particular, Article 25(a) protects the right to 'take part in the conduct of public affairs', which involves voting to decide public issues through a **referendum** or other electoral processes, such as electing members to represent them in parliament.

LEGAL VOCABULARY

Suffrage the right to vote in public and political elections.

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

LESSON LINK

You learnt about international treaties and the *Universal Declaration of Human Rights (UDHR)* in **10A An introduction to human rights**.

Table 1 Events that contributed to the development of the right to vote in Australia

Year	Event	Contribution to the development of the right to vote
1842/1843	British Parliament passed the <i>New South Wales Constitution Act 1842</i> (UK)	Members of the Legislative Council were required to be elected for the first time. The first election was held in 1843, whereby the only people allowed to vote were men who either: - owned land worth 200 pounds or more - rented a dwelling for 20 pounds or more a year.
1851 – 1854	Eureka Stockade	Gold miners protested about their political rights, including advocating for their right to vote. After their demands were ignored, a rebellion broke out, resulting in the death of many soldiers and minors, which is referred to as the Eureka Stockade. Following the rebellion, the miners' demands were met, including their right to vote.
1856	Male suffrage and 'The Secret Ballot'	South Australia was the first colony to extend its right to vote to male residents 21 years or older. The remaining colonies followed soon after. Additionally, an independent electoral body was established to ensure elections ran fairly as, prior to this, people voted publicly. The change to the law allowing electors to vote in private is referred to as the 'secret ballot'.
1894	Women's suffrage	South Australia became the first electorate in the world to grant equal political rights to both men and women. The remaining colonies followed soon after.
1901	Federation	The Australian Constitution was created, establishing a federal parliament to govern Australia. It set out that the people would have to elect members of the House of Representatives and the Senate, but gave no detail as to how this process would work or who was eligible to vote.
1918	The <i>Commonwealth Electoral Act 1918</i> (Cth) was passed	The Commonwealth Parliament passed the <i>Commonwealth Electoral Act 1918</i> (Cth) to consolidate and amend the law in relation to parliamentary elections.
1924	Compulsory voting	The <i>Commonwealth Electoral Act 1918</i> (Cth) was amended to make voting mandatory in a successful attempt to increase the number of people voting in elections.
1962	First Nations peoples were granted the right to vote	The Commonwealth Parliament passed a law permitting Aboriginal and Torres Strait Islander peoples to enrol to vote in federal elections, although voting was not compulsory.
1973	The voting age was lowered to 18	The <i>Commonwealth Electoral Act 1918</i> (Cth) was amended to reduce the minimum voting age to 18 years old. This was in response to young people believing the fact they could pay taxes, drive cars, and serve their country during times of conflict, meant they were also entitled to have a say in the composition of the parliament.
1975	Australia ratified the <i>International Covenant on the Elimination of All Forms of Racial Discrimination</i> (ICERD)	Article 5(c) promotes equal political rights for all, including the right to vote, free from racial discrimination. Therefore, by ratifying this convention, Australia indicated to the international community its intention to uphold this convention.
1980	Australia ratified the <i>International Covenant on Civil and Political Rights</i> (ICCPR)	Article 25 grants every citizen the right and opportunity to vote in periodic elections, without unreasonable restrictions, whilst also promoting equal suffrage, elections to be held by secret ballot, and access to services to vote. By ratifying this convention, it entitles the Commonwealth Parliament to make laws that allow the convention's implementation in domestic law.
1984	Australia granted equal voting rights to Aboriginal and Torres Strait Islander peoples	Voting was declared mandatory for all First Nations peoples, providing them with equal voting rights to other Australians.

Laws relating to the right to vote in Australia 2.3.6.2

WANT TO KNOW MORE?

Each of the three levels of government in Australia has the power to make laws about different things. For example, the Commonwealth Parliament can make laws in relation to currency, whereas the state and territory parliaments and local councils cannot.

You can find out more about the three levels of government by searching 'Three levels of government: governing Australia' and clicking the Parliamentary Education Office' (2022) webpage.

In Australia, the right to vote is not protected under a single statute. Instead, it is protected under both statute law and common law, including from the High Court's interpretations of the Australian Constitution. There are three levels of government in Australia: the Commonwealth Parliament, state and territory parliaments, and local councils. Australian citizens elect representative members for each of these levels, having a say in those who get to make decisions on citizen's behalf. Therefore, whilst the right to vote in federal elections is mainly protected by the *Commonwealth Electoral Act 1918* (Cth), states and territories each have their own legislation protecting voting rights in state and territory elections.

Additionally, although the right to vote is not explicitly stated in the Australian Constitution, it does contain certain protections that have been interpreted to exist by the High Court. Therefore, the right to vote is protected under common law as a result of certain High Court decisions.

Table 2 How the right to vote is protected in Australia

Protection	Explanation	Examples of principles established
Statute law	The right to vote in Commonwealth elections is governed by the <i>Commonwealth Electoral Act 1918</i> (Cth). This statute establishes the key principles involved in voting in Commonwealth elections, such as outlining who is eligible to vote, and who is not.	Under the Act, it is compulsory for all eligible citizens over the age of 18 to vote in federal elections. However, certain individuals are prohibited from voting. For example, a person is not eligible to vote if they: - are of unsound mind and, as a result, are incapable of understanding the nature and significance of enrolment and voting. - have been convicted of treason or treachery and have not been pardoned. - are the holder of a temporary visa or an unlawful non-citizen, defined under the <i>Migration Act 1958</i> (Cth). - are under the age of 18. - are serving a prison sentence of three years or more.
The Australian Constitution	Sections 7 and 24 of the Australian Constitution require members of the Commonwealth Parliament to be 'directly chosen by the people'.	Section 7 of the Australian Constitution requires members of the Senate to be 'directly chosen by the people', whilst section 24 maintains this requirement for the House of Representatives. This upholds the principle of representative government , allowing the people to elect members of parliament to best represent their views. Therefore, whilst the right to vote is not expressly protected in the Constitution, the High Court has interpreted the Constitution as requiring a substantial majority of Australian citizens to choose representatives, protecting the right to vote for a majority of citizens.

Continues →

LEGISLATION

Migration Act 1958 (Cth)

CONSTITUTION

Section 7

Section 24

LEGAL VOCABULARY

Representative government a system in which members of parliament are elected by the people of a community or nation to best represent the needs and views of those people.

Table 2 Continued

Protection	Explanation	Examples of principles established
The Australian Constitution	Sections 7 and 28 of the Australian Constitution require regular elections for the Senate and House of Representatives, respectively.	Section 7 requires members of the Senate to be chosen every 6 years, whilst section 28 requires members of the House of Representatives to be re-elected every three years. Regular elections are required to achieve representative government, allowing citizens to vote the government of the day out of office in the next election if they do not create laws that represent elector's views and values.
	Section 41 of the Australian Constitution outlines the rights of state electors.	Section 41 of the Australian Constitution establishes that individuals who have the right to vote in state elections also have the right to vote in federal elections. This protects the right to vote to some extent.
Common law	<i>Roach v Electoral Commissioner</i> (2007) 233 CLR 162 involved Roach challenging the validity of Commonwealth legislation that banned all prisoners from voting in Commonwealth elections.	The High Court declared the law banning all prisoners from voting invalid because it undermined the principle of representative government, therefore breaching sections 7 and 24 of the Australian Constitution. The High Court confirmed the right to vote should still be available for prisoners serving a sentence of less than three years.
	<i>Rowe v Electoral Commissioner</i> [2010] 243 CLR 1 involved Rowe challenging the validity of Commonwealth legislation that reduced the number of days available for individuals to enrol to vote after the calling of a federal election, which had been changed from seven to three days. Individuals who did not enrol during this three-day period were not eligible to vote.	The High Court declared the relevant provisions of the legislation invalid as they breached sections 7 and 24 of the Australian Constitution. This is because a significant proportion of individuals enrolled, re-enrolled, or updated their enrolment during the previous seven-day period. For example, in the 2004 federal election, the number of people enrolling or altering their enrolment amounted to approximately 423,000 people (Human Rights Law Centre, 2010). Therefore, reducing the number of days to enrol decreased the number of eligible voters.

CONSTITUTION

Section 28

LEGAL VOCABULARY

Government of the day the political party or coalition with a majority in the lower house.

CONSTITUTION

Section 41

LESSON LINKS

You learnt about the principle of representative government in **10B Australia's protection of human rights – the Constitution**.

You will learn about *Roach v Electoral Commissioner* in **11D The right to vote – Roach v Electoral Commissioner**.

DEEP DIVE
Victoria voting laws

Each state and territory has its own legislation that protects the right to vote. For example, in Victoria, the *Constitution Act 1975* (Vic) establishes who is eligible, or ineligible, to vote in electing members of Victoria's Legislative Assembly and Legislative Council.

Section 48 of the *Constitution Act 1975* (Vic) establishes those who are not entitled to vote in Victoria's state elections. The list of ineligible voters includes:

- a person convicted of treason under the law of Victoria or treason or treachery under the law of the Commonwealth.
- a person serving a sentence of five years imprisonment or more for a criminal offence under Victorian or Commonwealth law.
- a person who is of unsound mind, rendering them incapable of understanding the nature and significance of voting.
- a person who is the holder of a temporary entry permit or a prohibited immigrant, defined under the *Migration Act 1958* (Cth).

LEGISLATION
Constitution Act 1975 (Vic)

DEEP DIVE

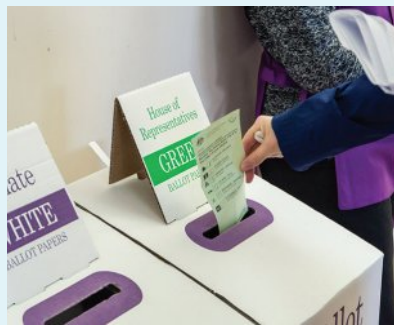


Image: Nils Verseemann/Shutterstock.com

Figure 2 Voters are required to select candidates for both the House of Representatives and the Senate

How do you vote?

Enrolment and voting is compulsory in Australia, meaning eligible individuals who do not do so receive a fine. In order to cast a vote in a federal election, individuals usually attend a polling place, which may be a school or community centre. An election official will then ask for the voter's name, address, and if they have already voted in the election. If the voter has not, they are provided with two ballot papers, a green one and a white one, which they fill out by indicating their vote. The green paper is for the House of Representatives, whilst the white one is for the Senate.

Individuals who are eligible to vote but are unable to on election day, due to valid reasons, may cast their vote beforehand. In the 2022 federal election, early voting was available at a number of polling booths, allowing all eligible voters to cast their vote early before the official election day. Postal voting is also available whereby individuals can send their vote by mail if they are unable to attend election day due to being out of the country, for example.

Adapted from 'How to vote at a polling place Easy to read guide' (Australian Electoral Commission, n.d.)

Conflicting attitudes regarding the right to vote in Australia 2.3.6.3

USEFUL TIP

An important key skill in Area of Study 3 of Unit 2 VCE Legal Studies is to 'discuss possible reforms to the protection of rights in Australia'. These tables showing the arguments for and against contentious issues relating to the right to vote can assist you in developing a discussion on this topic.

In Australia, various aspects of the right to vote are controversial and largely contested in the public sphere. For example, major debates have been centred around decreasing the voting age and removing compulsory voting.

WANT TO KNOW MORE?

If you are currently 16 years or older, you are eligible to enrol to vote. Even if a person is 18 years or older and a valid citizen, they cannot vote unless their name is on the electoral roll.

You can find out more about the processes involved in enrolling and voting by searching 'A guide to enrolling and voting' and clicking the Australian Electoral Commission webpage (n.d.).

Table 3 Arguments for and against contentious issues relating to the right to vote in Australia for federal elections

	For	Against
The age at which Australian citizens are required to vote is 18	- People under 18 years old do not have the political understanding to make a responsible choice. - People under 18 years old who are not politically engaged may be more likely to make an ill-informed vote, due to their relative lack of maturity.	16 to 17-year-olds are politically engaged and impacted by political decisions, meaning they should have the right to vote. 16 to 17-year-olds who are working and paying taxes deserve to have their views and values represented in parliament as they are already engaged in, and affected by, systems that are determined by the government of the day.
Prisoners serving a sentence of three years or more are not eligible to vote	- People who commit an offence that is serious enough to be punishable by a sentence of three years or more should also forfeit their right to vote. - People who are serving a sentence of less than three years have committed less serious offences than those who have imprisonment terms of three years or more. Therefore, they may be more capable of integrating back into the community and should accordingly have their voting rights upheld.	- Banning certain prisoners from voting alienates and disengages these individuals from mainstream society, reducing their sense of civic responsibility. - Banning prisoners serving a sentence of three years or more from voting is disproportionately discriminatory against First Nations peoples, as they represent a significant proportion of the prison population.

Continues →

Table 3 Continued

	For	Against
Prisoners serving a sentence of three years or more are not eligible to vote	- When prisoners serving a sentence of less than three years are released into society during a government's term, they still have their say on the government of the day. - Prisoners serving a prison term of three years or more will not live in the Australian society that the government is overseeing, as they will be in prison during this time. - It safeguards the integrity of the electoral system by excluding individuals in full-time detention from voting, considering these individuals may have limited capacity to engage in political activities in prison, where news sources and information are not always readily available or reliable.	Some argue this restriction breaches s 7 and 24 of the Constitution, which states that representatives must be 'directly chosen by the people'. This implies that representatives should be chosen by a substantive majority of the population. Therefore, it could be argued that by removing prisoners with a sentence of three years or more from this decision, the substantive majority is not achieved. However, the High Court in <i>Roach v Electoral Commissioner</i> (2007) 233 CLR 162 declared that removing this group from voting did still allow a substantial majority of the Australian population to participate in voting, considering many prisoners are not serving a sentence greater than three years.
It is compulsory for all eligible voters over the age of 18 to vote	- Compulsory voting ensures a large proportion of individuals in Australia participate in elections. Since the introduction of mandatory voting in 1924, over 90% of those registered have voted in each federal election (Parliamentary Education Office, 2023) - Voting is not only a right, but a duty that citizens must undertake, like jury duty or paying taxes. - Compulsory voting ensures parliament reflects the views and values of the majority of the Australian people as elected representatives have won a majority of the population's votes. - Individuals are more likely to engage with politics if they are required to vote, increasing the population's political education and awareness.	- Individuals who are not interested in politics may cast a random or ill-informed vote, diminishing the quality of votes and jeopardising the integrity of the voting system. - Individuals who do not support any of the candidates are still forced to vote for candidates that do not necessarily represent their views. - Citizens should choose whether they want to vote, rather than being forced to do so.
To cast their vote, individuals must do so on ballot paper at a polling place	- Voting in person at a polling place, rather than online, is beneficial for individuals who are not technologically proficient, including members of the older population. - Voting in person at a polling place ensures individuals cast their vote in an environment free from coercion. - Paper processes are more reliable and secure than technological systems, which could malfunction or be the subject of a major data breach. - Paper processes are more verifiable than electronic voting systems because ballot papers can be recounted, whilst an online system would be unlikely to produce any 'meaningful evidence of the correctness of any of the votes' (The Parliament of the Commonwealth of Australia, 2014).	- Voting in person on the ballot paper is outdated and society should shift to introduce electronic voting, particularly due to advancements in technology and cybersecurity. - The paper voting system is insecure as it relies on the integrity and competence of people involved in the movement and storage of ballots, who may make mistakes when manually counting votes. - Electronic voting may be more accessible to certain individuals, including those living in rural locations, as it would enable Australians to cast their vote online rather than travelling to a polling place. - Currently, voters who are blind or visually impaired have the option of voting via the assisted telephoning system. Many do not use this system as their vote is no longer anonymous and there is no way to ensure the vote has been lodged correctly. Online voting systems may provide more alternatives for these individuals to vote.

REAL WORLD EXAMPLE



Image: Nils Versemann/Shutterstock.com

Figure 3 Some voting centres ran out of printed ballot papers during the Victorian election in 2022

Paper ballots posing problems

In the 2022 Victorian State election, a number of voting centres ran out of printed ballot papers, resulting in one polling place resorting to casting handwritten ballots. According to the Victorian Electoral Commission (VEC), this issue occurred as people voted outside of their allocated district. The VEC later issued a statement, assuring voters that no one missed out on casting their vote because of this issue.

At affected polling places, voters were provided with blank ballots where the candidates' names had been handwritten on the paper. The VEC believed this was 'an acceptable approach in this situation'. However, some voters complained that the makeshift ballots did not include the names of the parties each candidate belonged to, making it difficult for some people to know which party they were voting for.

Adapted from 'VEC turns to handwritten votes as some booths run out of printed ballots' (Ilanbey et al., 2022)

Possible reforms to the right to vote in Australia 2.3.6.4

KEY TERM

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness.

Each year, there are a number of **law reforms** related to voting rights that are recommended for both Australian and Victorian laws to address. Some of these reforms include expanding the eligibility criteria to allow certain groups of people the right to vote, lowering the voting age, and allowing all prisoners to vote. Other reforms focus on improving the processes and systems involved in the election process, such as introducing electronic voting.

Table 4 Possible reforms to the right to vote in Australia for federal elections

Proposed reform	Explanation	Examples of groups that endorse the proposed reform
Lower the voting age	There have been ongoing debates in Australia about lowering the voting age from 18 to 16 or 17 years old. In 2018, the Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018 (Cth) was introduced in the Commonwealth Parliament. The Bill sought to lower the voting age to allow 16 to 17-year-olds to vote in federal elections, proposing that voting would not be compulsory for this age group. However, this Bill was unsuccessful.	• Make it 16 • Children and Young People with Disability Australia • Young Women Speak Out • Human Rights Law Centre • Australian Youth Climate Coalition
Allow all prisoners to vote	Several organisations have criticised the current Commonwealth laws that ban prisoners serving a sentence of three years or more from voting in Commonwealth elections. Instead, some believe that all prisoners, no matter the length of their sentence, should have a say in who comprises parliament.	• Australian Human Rights Commission • Human Rights Law Centre • Australian Greens Political Party
Introduce electronic voting	Whilst current voting systems in Australia involve the use of ballot papers and manually counting votes, there have been calls to introduce electronic voting. This would involve the use of technological devices and online systems to cast a ballot and support the electoral process. The Australian Electoral Commission (AEC) recommended that amendments be made to the <i>Commonwealth Electoral Act 1918</i> (Cth) to account for an electronically-assisted counting process. This would allow the AEC to trial the scanning and electronic counting of the House of Representatives' ballot papers at the next federal election. Currently, ballot papers are counted manually, a process that is both 'time-consuming and prone to errors' (AEC, 2016).	• Australian Electoral Commission • Vision Australia • Blind Voting Australia • Australia Post

Continues →

Table 4 Continued

Proposed reform	Explanation	Examples of groups that endorse the proposed reform
Make voting voluntary	Australia's longstanding mandatory voting system has been criticised, with calls for the nation to make voting voluntary. This was endorsed in the Joint Standing Committee on Electoral Matters' report on the 2019 federal election. It has been said that Australia is 'out of step with the world' as the majority of other democratic countries across the globe adopt voluntary voting systems, including in the United States (Parliament of Australia, 2020).	The Voter Choice Project

DEEP DIVE

An attempt at going digital

In the 2007 federal election, remote, electronic-assisted voting was trialled for blind people or people with a visual impairment, as well as members of the Australian Defence Force who were posted overseas. These trials allowed individuals to cast a secret and independent vote via remote electronic voting systems. Currently, blind or low-vision voters have the option of voting via the assisted telephoning system, although, many do not use this system because the vote is not anonymous.

However, in its report in response to these trials, the Joint Standing Committee on Electoral Matters (JSCEM) recommended the discontinuation of electronically-assisted voting for these two groups. This was due to the high costs involved in the delivery of this alternative, with the trials alone costing over \$4 million (Parliament of Australia, 2009). Additionally, there were concerns in relation to the low participation experienced during the trials.

Adapted from 'The right to vote is not enjoyed equally by all Australians' (Australian Human Rights Commission, 2010)

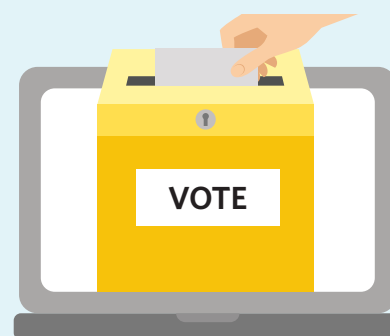


Figure 4 Electronic voting trials were conducted for blind people or people with a visual impairment, as well as members of the Australian Defence Force

REAL WORLD EXAMPLE

Make it 16

The Make it 16 Campaign is a youth-led campaign advocating for the voting age to be lowered from 18 to 16 years old in Australia. As the government makes decisions that significantly impact the lives of young people, the campaign 'demand[s] a voice, and a vote' for 16 to 17-year-olds. In particular, the campaign highlights that:

- by 16, young people can engage in society in many ways, including through serving in the army, driving, paying income tax, and working full time. Therefore, they should have the right to political influence.
- young people will be affected by national and global crises in the future, such as climate change, and deserve to have a say on issues that will impact their adult lives.

Furthermore, other countries have lowered their voting age to 16, including Austria, Scotland, and Argentina. In November 2022, New Zealand's Supreme Court ruled that the voting age of 18 was discriminatory against young people, encouraging the government to lower the voting age. As of August 2023, a bill that would allow 16 and 17-year-olds to vote and stand for candidates in local elections passed its first reading in New Zealand's Parliament, therefore, the voting age is still at 18 as of this time.

Adapted from 'Why 16' (Make it 16, n.d.) and 'New Zealand: bill to allow under 18s to vote in local elections passes first hurdle' (Graham McLay, 2023)



Image: Ms Jane Campbell/Shutterstock.com

Figure 5 Young people across the globe have called for the voting age to be lowered to allow 16 and 17-year-olds to vote

Lesson summary

- The right to vote is a fundamental right of the Australian people.
- The right to vote is protected under:
 - statute law
 - the Australian Constitution
 - common law.
- There are still some contentious issues regarding the right to vote in federal elections as the current rules surrounding voting in federal elections establish:
 - the age at which Australian citizens are required to vote is 18.
 - prisoners serving a sentence of three years or more are ineligible to vote.
 - it is compulsory for all eligible voters over the age of 18 to vote.
 - to cast their vote, individuals must do so on ballot paper at a polling place.
- Possible reforms on the right to vote in Australia include:
 - lowering the voting age
 - allowing all prisoners to vote
 - introducing electronic voting
 - making voting voluntary.

11C Questions

Check your understanding

Question 1

All Australian citizens are granted the right to vote in federal elections.

- A. True
- B. False

Question 2

Which of the following statements are correct about events that contributed to the development of the right to vote in Australia? **(Select all that apply)**

- A. Male suffrage and 'The Secret Ballot' in 1856.
- B. The voting age was lowered to 16 in 1973.
- C. Federation in 1901.
- D. Australia's ratification of the *International Covenant on the Elimination of All Forms of Racial Discrimination* in 1975.

Question 3

Fill in the blank with **one** of the following terms:

Sections 7 and 24

Sections 24 and 41

Sections 7 and 28

[] of the Australian Constitution require regular elections for the Senate and House of Representatives, respectively.

Question 4

The right to vote in federal elections is mainly governed by the *Commonwealth Electoral Act 1918* (Cth), whilst each state and territory has its own legislation protecting the right to vote for state or territory elections.

- A. True
- B. False

Question 5

An argument against Australia's mandatory voting system is that:

- A. individuals who do not support any of the candidates are still forced to vote for candidates that do not necessarily represent their views.
- B. it ensures a large proportion of individuals in Australia participate and have their say in elections.

Question 6

Which of the following are proposed reforms regarding the right to vote in Australia?

(Select all that apply)

- A. Introduce electronic voting.
- B. Allow all prisoners to vote.
- C. Allow all citizens to vote, such as those who are of unsound mind.
- D. Lower the voting age to 16.
- E. Ban all those accused of a crime from voting.

Question 7

Even if the Commonwealth Parliament sought to implement reforms related to the right to vote, it cannot because this right is explicitly stated in the Constitution.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Identify **two** ways the Australian Constitution protects the right to vote in federal elections.

Question 9

(3 MARKS)

Explain **one** proposed law reform in relation to the right to vote.

Question 10

(4 MARKS)

Outline **two** events that contributed to the development of the right to vote in Australia.

Question 11

(4 MARKS)

Rohaam just turned 18 and has been told he officially has the right to vote in the upcoming federal election. However, he does not understand how his voting rights are protected under Australian law and has not yet enrolled to vote.

Advise Rohaam of **two** ways his right to vote in federal elections is protected in Australia.

Extended response

Use your answer to question 12 to support your response to question 13.

Question 12

Tick the box to indicate whether each of the following statements are arguments **for** or **against** switching to electronic voting in Australia.

Statement	For	Against
I. Currently, blind voters or those with a visual impairment have the option of voting via the assisted telephoning system, but many do not as the vote is not anonymous and there is no way to ensure the vote has been lodged correctly.	☐	☐
II. Trials of remote, electronic-assisted voting for blind voters or those with a visual impairment were unsuccessful when conducted in the 2007 federal election.	☐	☐
III. The current paper voting system is insecure as it relies on the integrity and competence of groups of people who are involved in the movement and storage of ballots, who may make mistakes when manually counting votes.	☐	☐
IV. Paper processes are more verifiable than electronic voting systems as ballot papers can be recounted, whilst an online system would be unlikely to produce any evidence of the correctness of any of the votes.	☐	☐

Question 13

(5 MARKS)

Evaluate the conflicting attitudes regarding switching to electronic voting in Australia.

Linking to previous learning

Question 14

(3 MARKS)

Explain the significance of the *Universal Declaration of Human Rights (UDHR)* in relation to the right to vote.

11D The right to vote – *Roach v Electoral Commissioner*

STUDY DESIGN DOT POINT

- one human rights issue in Australia and in relation to that human rights issue:
 - the nature and development of the human right
 - the laws that apply to the human right in Australia
 - possible conflicting attitudes
 - possible reforms to the protection of the human right in Australia
 - one case study in relation to the human rights issue, in which an individual or group has influenced the protection of the right.



Image: Alexandru Nika/Shutterstock.com

Did you know that in Austria, Brazil, and Nicaragua, citizens can vote at the age of 16? Saudi Arabia only granted women the right to vote in 2015. Bolivia has a policy of compulsory voting and if a citizen does not vote, they will receive a salary freeze.

In Australia, whilst most individuals are granted the right to vote when they turn 18, our voting laws still exclude particular Australian citizens, including prisoners.



Lesson introduction

The right to vote is a fundamental right granted to Australian citizens to ensure parliament is elected by the people to, consequently, make laws on their behalf. Therefore, a majority of Australian citizens over the age of 18 holding the right to vote underpins democratic processes in Australia and protects the principle of representative government. However, in 2006, the Commonwealth Parliament sought to ban all prisoners from voting in federal elections. Questions arose as to whether this ban infringed upon the fundamental rights granted to the Australian people. In line with this opinion, Vickie Roach, a Yuin woman who was serving a prison sentence at the time, challenged the law's validity in the High Court of Australia on various grounds.

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this lesson may be culturally sensitive. Examples of this include references to distressing events, such as the Stolen Generations.

Roach v Electoral Commissioner [2007] 2.3.7.1

Background information

The right to vote in Commonwealth elections for individuals serving a term of imprisonment has changed over time.

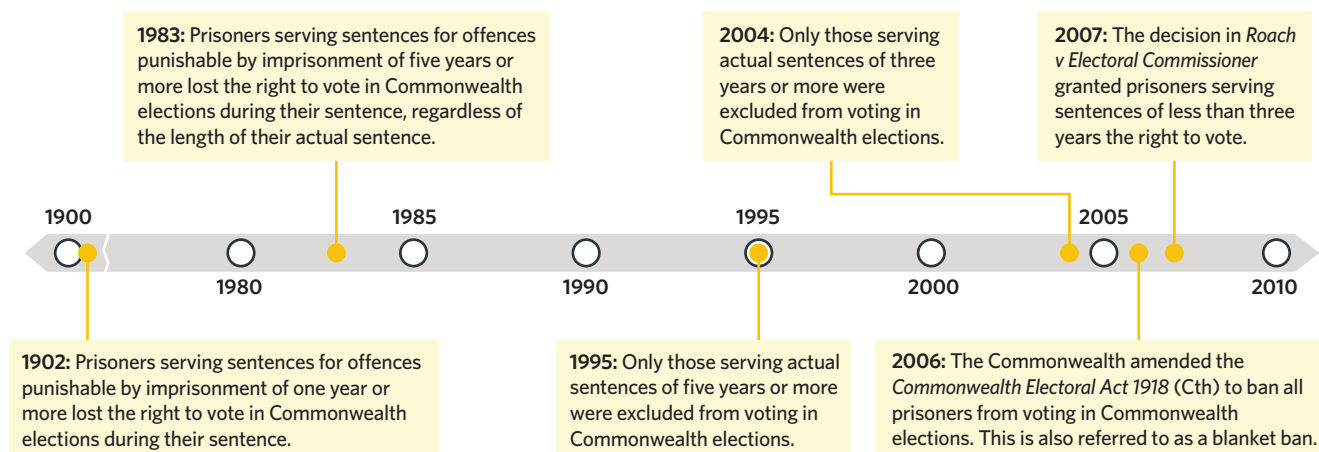


Figure 1 History of the right to vote for prisoners in Australia

LEGISLATION

Commonwealth Electoral Act 1918 (Cth)

Facts

When the *Commonwealth Electoral Act 1918* (Cth) was amended in 2006, Vickie Roach was serving a six-year prison term for five offences. Removed from her Aboriginal mother when she was two years old due to government policies of the time, Roach is a member of what is now referred to as the Stolen Generations. The Stolen Generations were the Aboriginal and Torres Strait Islander children who were removed from their families by governments, churches, and welfare bodies, and raised in institutions or in white foster families. Roach began running away from her foster family at nine years old. Throughout her life, she was regularly in and out of jail after resorting to a life of drugs and petty crime.

WANT TO KNOW MORE?

Members of the Stolen Generations were 3.3 times as likely to have been incarcerated from 2014–2018 when compared to First Nations people who had not been separated (Australian Institute of Health and Welfare, 2018). The separation of First Nations children from their families and culture has had devastating consequences on the incarceration rates of First Nations peoples.

You can find out more about the relationship between the Stolen Generations and the higher incarceration rates of First Nations peoples by searching 'Disadvantage for the Stolen Generations and their descendants' and clicking the link by The Healing Foundation (2018).

LESSON LINK

You learnt about First Nations peoples and the criminal justice system in **4F First Nations people and the criminal justice system**.

Disqualified from voting due to her status as a prisoner at the time, Roach decided to challenge the constitutional validity of the Commonwealth's 2006 ban on voting in elections for all prisoners. Roach believed the legislative amendment silenced Aboriginal and Torres Strait Islander peoples, as they accounted for 25% of the prison population, but only around 2.5% of the total Australian population at the time the law was passed (Queensland Parliament, 2008).

DEEP DIVE



Image: PIXEL2020/Shutterstock.com

Figure 2 Pope Francis granted women the right to vote at synods in 2023

Voting rights in Vatican City

Vatican City is the smallest country in the world, covering just 100 acres of land with a population of 519 people as of September 2023. It is governed as an absolute monarchy with the Pope as its leader, and is known for being the headquarters of the Roman Catholic Church. In April 2023, Pope Francis granted women the right to vote. The new rules allow five religious sisters the ability to vote at the synod, which is a papal advisory body. Prior to this, women were only allowed to attend the gathering to watch men vote. As the Roman Catholic Church has been dominated by males for centuries, this was a monumental and significant shift in women's rights.

Adapted from 'Pope Francis gives women historic right to vote at meeting' (Armstrong, 2023)

Legal issues

In *Roach v Electoral Commissioner* [2007] 233 CLR 162, the High Court had to determine whether the law was constitutionally invalid. Roach argued the law was invalid on the grounds that it:

- breached ss 7 and 24 of the Australian Constitution, which state that Australia's representatives must be 'directly chosen by the people'.
- was made beyond the law-making powers of the Commonwealth Parliament.
- was inconsistent with the implied right to freedom of political communication.
- undermined the principle of **representative government**, as it disregarded the fact that prisoners who have committed a minor breach of the law have a greater ability to participate in electoral processes due to having a shorter sentence.

CONSTITUTION

Section 7

Section 24

LEGAL VOCABULARY

Representative government a system in which members of parliament are elected by the people of a community or nation to best represent the needs and views of those people.

Decision

The High Court held that a complete ban on all prisoners from voting was unconstitutional as it was inconsistent with the protection of the representative government principle interpreted through ss 7 and 24 of the Constitution. The government must be chosen by a substantial majority of the population and therefore, the right to vote could only be removed for a significant reason.

However, the High Court rejected part of Roach's argument, deciding the Constitution does not protect the right to vote for all adults. Serving a long-term prison sentence was considered a 'significant reason', as these prisoners are removed from participating in society for an extended period, which therefore, is an appropriate basis to remove the right to vote. However, the Court stated that removing the right to vote for all prisoners, even those on **remand**, was excessive. A law removing the power to vote was needed to distinguish between those who seriously violate the law and serve long prison sentences, from the majority of prisoners who have committed less serious offences, or are on remand, and are only in prison for a short time of less than three years.

Furthermore, the Court found that if a person goes to prison, they are still a member of the community and should still take an interest in how society is governed, so removing the ability to vote can only be done in serious cases. The Court concluded the 2006 amendment to the *Commonwealth Electoral Act 1918* (Cth) was invalid. However, the previous law banning voting for those serving a prison term of three years or longer was held to be acceptable and the legislation is still applicable today.

Significance

As a result of the decision, Roach did not regain the right to vote as she was serving a prison sentence with a term longer than three years. However, prisoners serving shorter prison terms of less than three years, and those on remand, had their ability to vote reinstated. Approximately 10,000 prisoners regained their right to vote in the 2007 Commonwealth election (Activist Rights, 2022).

Today, the Commonwealth retains the ability to pass laws about who may vote. However, this decision is significant as the Court's interpretation of ss 7 and 24 in this case had the effect of restricting the Commonwealth's ability to pass laws regarding who may vote.

LESSON LINKS

You learnt about sections 7 and 24 of the Australian Constitution in **11C The right to vote**.

You learnt about the implied right to freedom of political communication in **10B Australia's protection of human rights – the Constitution**.

LEGAL VOCABULARY

Remand the legal status of an accused when they are held in custody awaiting trial.

USEFUL TIP

Whilst *Roach v Electoral Commissioner* may be a complicated case, it is important that you become familiar with it for Unit 4. During this unit, you will learn about how the High Court protects the principle of representative government in the Australian Constitution.

Reasons for reform 2.3.7.2

The Roach case was pivotal in protecting the right to vote for a substantial number of individuals serving a sentence of imprisonment. By declaring the law that banned all prisoners from voting invalid, the principle of representative government was upheld, and the legislative power of parliament was restricted in relation to voting rights.

Table 1 Reasons for reforming the law in relation to the right to vote

Reason for reform	Explanation
Protect First Nations' rights	According to the Australian Bureau of Statistics (2023), as of June 2022, First Nations peoples account for 32% of all prisoners. Additionally, Aboriginal and Torres Strait Islander peoples generally receive shorter terms of imprisonment than non-Indigenous people. For example, the average sentence length for First Nations peoples was two years, compared to three and a half years for non-Indigenous people (Australian Bureau of Statistics, 2018).

Continues →

Table 1 Continued

Reason for reform	Explanation
Protect First Nations' rights	Therefore, the law to ban all prisoners from voting resulted in a large proportion of First Nations peoples losing their right to vote. Many individuals, including Roach, argued that this law was silencing the political voices of Aboriginal and Torres Strait Islander peoples. Thus, by invalidating this law and ensuring prisoners with sentences of less than three years with the right to vote, this essential right was partially safeguarded for First Nations individuals who were adversely affected by the 2006 legislation.
Enhance the principle of representative government	As of 30 June 2007, the average sentence length for all prisoners was three years. Therefore, the amendment of the <i>Commonwealth Electoral Act 1918</i> (Cth) in 2006 removed the right to vote for a large proportion of prisoners who were able to vote prior to the blanket ban. High Court Justices Gummow, Kirby, and Crennan argued that the phrase 'chosen by the people' admits a requirement that all adults should be able to vote unless there is a substantial reason for their disenfranchisement. Therefore, to maintain the principle of representative government, banning the right to vote must be reasonably appropriate and proportionate to the offender's actions and consequences. The majority of judges stated that the blanket ban took away the right to vote without considering 'the nature of the offence committed, the length of the term of imprisonment imposed, or the personal circumstances of the offender'. Therefore, by declaring the blanket ban invalid, the principle of representative government was upheld.
Prevent an arbitrary exercise of power by parliament	Prior to the bill being passed in 2006, the Australian Human Rights Commission argued that banning all prisoners from voting would breach Article 25 of the International Covenant on Civil and Political Rights (ICCPR), an international treaty Australia is a signatory to. This is because the bill was 'disproportionate to any legitimate aim and arbitrary in its application' (Queensland Parliament, 2008). After the law was invalidated by the Roach case in 2007, the majority of judges declared that it was made beyond the law-making powers of Parliament.

LEGAL VOCABULARY

Disenfranchisement a situation whereby a person is deprived of the right to vote.

Arbitrary the unrestrained and autocratic use of power.

LESSON LINK

You learnt about the presumption of innocence in **2B The presumption of innocence**.

DEEP DIVE

Figure 3 The voting rights of prisoners differ between countries

Can prisoners vote in other countries?

Penal Reform International (PRI) is an international non-governmental organisation that works on penal and criminal justice reform across the globe. In a study conducted in 2015, PRI analysed the voting rights of individuals, who had been detained, in 66 different jurisdictions. The study revealed that each country imposes different restrictions and/or conditions on the voting rights of incarcerated individuals.

- In approximately 45% of the jurisdictions, a conviction of imprisonment automatically results in the individual losing their right to vote. This applies in countries such as Kyrgyzstan, Lebanon, and New Zealand.
- In some countries, such as India, individuals awaiting trial are not allowed to vote.
- Some countries impose limitations associated with the nature of the election. For instance, in the Czech Republic and Latvia, individuals in incarceration might not possess the right to vote in local elections due to the argument that they are 'uninfluenced by local matters'.
- In Kuwait, the right to vote is dependent on the severity of the sentence rather than its length.

Adapted from 'The right of prisoners to vote: a global overview' (Penal Reform International, 2016)

Individuals and groups influencing the right to vote 2.3.7.3

Across Australia in 2006, there were various individuals and groups who had differing views as to whether the law banning all prisoners from voting should have remained, or been declared invalid.

Table 2 Opposers of banning all prisoners from voting

Individual/group	Examples of their claims, comments, and/or involvement
Vickie Roach	As an individual with standing , Vickie Roach invested her own money to challenge the validity of the law banning all prisoners from voting in Commonwealth elections. By taking the matter to the High Court of Australia, she was able to have the law declared invalid. This issue was of particular importance to Vickie, as a Yuin woman, considering the disproportionate effects a blanket ban would have had on the voting rights of First Nations peoples.
Human Rights Law Resource Centre (HRLRC)	The HRLRC provided Vicki Roach with the top Queen's Counsel, free of charge, which are senior barristers whose skills have been formally recognised by the Supreme Court and the legal profession after a number of years of work. By providing her with these resources, Roach could afford to take the matter to the High Court. The director of the HRLRC at the time believed that 'only [a] rational and legitimate basis upon which the franchise [to vote] can be limited under the Constitution is on the basis of the person's capacity' (Nicol, 2022).
The Justice Action Group (JAC)	During the Roach case, the JAC, a community-based organisation composed of criminal justice and prison reform activists, started a campaign advocating for prisoners' voting rights. In relation to the blanket ban, JAC contended: - removing a prisoner's right to vote allowed politicians to 'officially ignore prisons and prisoners'. - denying prisoners the right to vote would likely lead to higher levels of alienation and disengagement from mainstream society, as well as a reduced sense of civic responsibility.
Australian Human Rights Commission (AHRC)	In its March 2006 submission to the Senate Finance and Public Administration Committee regarding the proposed blanket ban, the AHRC raised the following concerns regarding the change to prisoner's voting rights: - The Bill does not explain the purpose of the proposed ban. - The Bill is likely to be discriminatory in its application to First Nations peoples, people with mental illness, and people with intellectual disabilities. - There is no distinction between prisoners based on the type of offence that led to imprisonment or the length of the sentence imposed.

LEGAL VOCABULARY

Standing the requirement that, in order to bring a case to court, an individual or group must be affected by, or have a special interest in, the issues involved in the case.

Table 3 Supporters of banning all prisoners from voting

Individual/group	Examples of their claims, comments, and/or involvement
The Commonwealth	In <i>Roach v Electoral Commissioner</i> , the Commonwealth stipulated its reasons for the blanket ban, including to: • maintain civic responsibility • support respect and compliance with the law • safeguard the integrity of the electoral system, by excluding individuals in full-time detention from voting considering they may have a limited capacity to engage in political communication and matters.
Justices Hayne and Heydon	In the <i>Roach</i> case, Justices Hayne and Heydon disagreed with the majority, stating they believed the blanket ban was valid. Although Heydon believed restricting the voting rights of prisoners with the blanket ban would be 'highly undesirable', he affirmed that this did not mean 'it [was] unconstitutional'.
Michael Johnson MP	Michael Johnson, a Queensland Member of Parliament (MP) at the time, claimed that individuals who commit offences against society that warrant a prison term must forfeit their right to vote. He argued that if a person committed a crime and gave up their freedom, they should also not have the same voting rights as other law-abiding citizens. This view was also shared by other MPs, such as Michael Keenan.

LEGAL VOCABULARY**Member of Parliament (MP)**

an elected, political representative of people who live in a certain area, such as a district or state.

Table 4 Views and opinions for and against banning all prisoners from voting

For	Against
• People who commit an offence that is serious enough to be punishable by imprisonment should also forfeit their right to vote. • It deters other individuals within the community from committing similar offences as they would also lose their ability to vote. • It maintains civic responsibility, the patriotic and ethical duty of citizens to take an active role in society. • It safeguards the integrity of the electoral system by excluding individuals in full-time detention from voting. This is because these individuals may have a limited capacity to engage in political communication and matters when inside prison where news sources and information is not always readily and reliably accessible.	• It breaches ss 7 and 24 of the Constitution, which state that parliamentary representatives must be 'directly chosen by the people'. This implies that representatives should be chosen by a substantive majority of the population. Thus, by removing all prisoners from this decision, the substantive majority is not achieved. • It was made beyond the law-making powers of parliament. • It is inconsistent with the implied right to freedom of political communication. • It does not consider the type of offence that led to imprisonment or the length of the sentence imposed. • Prisoners serving a sentence of less than three years should be granted the right to vote in federal elections. This is because when they are released into society during a government's term, they should have their say on the government of the time. • It is discriminatory against First Nations peoples who represent a significant proportion of the prison population. • It is likely the blanket ban would lead to higher levels of alienation and disengagement of First Nations peoples from mainstream society, or a reduced sense of civic responsibility.

Lesson summary

- The case of *Roach v Electoral Commissioner* protected the right to vote by invalidating parliament's law banning all prisoners from voting in Commonwealth elections.
- The High Court held that a complete ban on all prisoners from voting was unconstitutional, and restored the right to vote for prisoners serving a sentence of less than three years.

- Reasons for the High Court's invalidation of the blanket ban included:
 - protecting First Nations rights
 - enhancing the principle of representative government
 - preventing an arbitrary exercise of power by parliament.
- However, supporters of the blanket ban argued all prisoners should forfeit their right to vote as a consequence of committing a crime warranting a term of imprisonment.

11D Questions

Check your understanding

Question 1

Roach v Electoral Commissioner is a High Court case that protected the right to vote for all prisoners.

- A. True
- B. False

Question 2

Which of the following are arguments Vickie Roach raised in the High Court to invalidate the law banning all prisoners from voting? **(Select all that apply)**

- A. The ban breached ss 7 and 24 of the Australian Constitution, which states that parliamentary representatives must be 'directly chosen by the people'.
- B. The ban breached s 20 of the Australian Constitution.
- C. The law was made beyond the law-making powers of parliament.
- D. The law was inconsistent with the implied rights to freedom of political communication.
- E. The law was inconsistent with other countries across the globe.

Question 3

Fill in the blank with **one** of the following terms:

The majority in the High Court [] with Roach's argument that the Constitution protects the right for all adults serving any term of imprisonment to vote.

Question 4

Some reasons for reform associated with *Roach v Electoral Commissioner* are:

(Select all that apply)

- A. protecting First Nations rights.
- B. enhancing the principle of representative government.
- C. preventing an arbitrary exercise of power by parliament.
- D. punishing prisoners for their crimes.

Question 5

Vickie Roach was successful in convincing the High Court that the law banning all prisoners from voting was invalid.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 6

(2 MARKS)

Identify **two** reasons for reforming the law in relation to the right to vote for prisoners.

Question 7

(3 MARKS)

Describe the influence of **one** specific individual or group on protecting the right to vote in *Roach v Electoral Commissioner*.

Question 8

(3 MARKS)

Explain how *Roach v Electoral Commissioner* protected First Nations rights.

Question 9

(3 MARKS)

Roach v Electoral Commissioner restored the right to vote for approximately 10,000 prisoners in Australia.

Justify how *Roach v Electoral Commissioner* upheld the principle of representative government.

Extended response

Use your answer to question 10 to support your response to question 11.

Question 10

Tick the box to indicate whether each of the following statements are arguments **for** or **against** banning the right to vote for all prisoners.

Statement	For	Against
I. The law is discriminatory against First Nations peoples who represent a significant proportion of the prison population.	☐	☐
II. Banning all prisoners from voting in Commonwealth elections deters other individuals within the community from committing similar offences as they would also lose their ability to vote.	☐	☐
III. People who commit an offence that is serious enough to be punishable by imprisonment and denied their freedom should forfeit their right to vote.	☐	☐
IV. Prisoners serving a sentence of less than three years should be granted the right to vote in federal elections. This is because when they are released into society during a government's term, they should have their say on the government of the time.	☐	☐

Question 11

(5 MARKS)

Evaluate the decision to ban the right to vote for all prisoners in 2006, with reference to the views and opinions related to the Commonwealth's decision.

Linking to previous learning

Question 12

(4 MARKS)

'*Roach v Electoral Commissioner* contributed to the development of the right to vote in Australia.'

Do you agree with this statement? Justify your response.

ANSWERS

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Image: chrupka/Shutterstock.com

1A Social cohesion and the rights of individuals

Check your understanding

- B. False. **Explanation:** The rights of individuals can be protected and upheld not only by the legal system, but also by the existence of laws, and the adherence of individuals to social norms and standards.
- Through **the legal system**, parliaments establish legislation, whilst the courts ensure laws are enforced in a just manner. The **law** can influence the actions and values of **individuals**.
- A. **Explanation:** Social cohesion refers to the presence of strong relationships and bonds that unite society and encourage cooperation, alongside an absence of war and conflict.
- A; B; D. **Explanation:** In order to maintain social cohesion and protect rights, individuals are expected to enact lawful behaviour, obey moral values and guidelines, respect the rights of others, and bring matters to the courts to instigate social change.
- The role of the law is to **discourage** dangerous behaviours, such as armed robbery and assault, whilst it aims to **encourage** positive behaviours, such as workplace safety and paying taxes.
- B. False. **Explanation:** To successfully promote social cohesion, the legal system should be transparent and, therefore, open and honest about its proceedings and purpose.
- D. **Explanation:** When individuals, laws, and the legal system do not align, individuals are unlikely to act in a united and bonded manner. This may consequently limit the achievement of social cohesion and result in a lack of rights protection for individuals.

Preparing for exams

Standard exam-style

- [The role of the legal system in achieving social cohesion and rights protection is to maintain order, whilst promoting societal norms through the creation and enforcement of laws.¹]

☒ ☐ I have identified the role of the legal system in achieving social cohesion and rights protection.¹

- [Individuals are responsible for enacting lawful behaviour, obeying moral values and guidelines, and respecting the rights of others.¹] [By doing so, individuals can ensure all people live in a safe environment where their rights and needs are respected and protected from harm by others, ultimately achieving social cohesion and rights protection.²]

☒ ☐ I have provided one role of individuals in achieving social cohesion and rights protection.¹

☒ ☐ I have provided information about my chosen role of individuals in achieving social cohesion and rights protection.²

- [The legal system is composed of various institutions, rules, procedures, and people, that each aim to maintain social cohesion and order, whilst promoting societal norms, by creating and enforcing laws.¹] [The role of laws is to protect the rights of individuals and promote community safety.²] [Therefore, the legal system acts to establish laws through parliament and ensure they are enforced and upheld through courts. This allows laws to achieve social cohesion and rights protection.³]

☒ ☐ I have provided information about the legal system.¹

☒ ☐ I have provided information about the role of laws.²

☒ ☐ I have provided information about the relationship between the legal system and the role of laws in achieving social cohesion and rights protection.³

☒ ☐ I have used connecting words, such as 'Therefore'.

- [The role of individuals in this scenario is to abide by, and follow, the conditions that are outlined in the new law.¹] [Alternatively, the role of the legal system is to establish and enforce the new law mandating community service and therefore, ensure the rights of future individuals are protected through the preservation of the environment.²] [One key difference between the role of individuals and the legal system in this scenario is that the legal system creates and enforces the law that aims to establish social cohesion and rights protection, whereas individuals are the people who need to obey the established law and ensure these goals are achieved.³]

☒ ☐ I have provided information about the role of individuals in this scenario.¹

☒ ☐ I have provided information about the role of the legal system in this scenario.²

☒ ☐ I have provided one key difference between the role of individuals and the role of the legal system in this scenario to achieve social cohesion and rights protection.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'Alternatively' and 'whereas', when distinguishing.

- [One role of the legal system in achieving social cohesion and rights protection in this scenario is the establishment of law enforcement, such as the police.¹] [The role of the police officer would be to enforce the law by identifying and arresting the person who robbed the family-owned jewellery store to prevent future disruptions to social cohesion.²] [Furthermore, the legal system can also achieve social cohesion and protect individual rights through the court process and the role of the judge.³] [The role of the judge in this scenario is to ensure the rights of the jewellery store owner and the accused are upheld and protected through the delivery of a fair and just verdict.⁴]

☒ ☐ I have provided one role of the legal system in achieving social cohesion and rights protection.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen role of the legal system.²

☒ ☐ I have provided a second role of the legal system in achieving social cohesion and rights protection.³

- ☒ ☐ I have provided an example from the scenario and linked it to my chosen role of the legal system.⁴
- ☒ ☐ I have used signposting in my response, such as 'One role'.
- ☒ ☐ I have used connecting words, such as 'Furthermore'.

Extended response

13. True: I; II; V
False: III; IV

14. [I agree with this statement because individuals, laws, and the legal system all rely on each other to achieve social cohesion and protect individual rights. If one of these elements is not present, the remaining two cannot function effectively.¹]

[Firstly, the role of individuals in achieving social cohesion and rights protection is to enact lawful behaviour, obey moral values and guidelines, and prevent harm to others.²] [However, to achieve their role, individuals must be governed by laws that encourage and discourage certain behaviours, which must first be established, and then ultimately enforced, by legal systems.³]

[Additionally, the role of laws is to protect the rights of individuals and promote community safety.⁴] [To achieve social cohesion and rights protection these laws must be created by parliament, based on the needs of the people, and enforced by the courts when any issues arise. Thus, without individuals adhering to these laws, which are created and enforced by the legal system, the achievement of social cohesion and rights protection would not be possible.⁵]

[Overall, without individuals, laws, or the legal system, social cohesion and rights protection would fail to be established and achieved.⁶]

- ☒ ☐ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹
- ☒ ☐ I have provided one role of individuals in achieving social cohesion and rights protection.²
- ☒ ☐ I have provided information about how this role of individuals relies on laws and the legal system.³
- ☒ ☐ I have provided one role of laws in achieving social cohesion and rights protection.⁴
- ☒ ☐ I have provided information about how this role of laws relies on individuals and the legal system.⁵
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Overall'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Additionally'.

1B The principles of justice

Check your understanding

- B. **Explanation:** Parties being able to participate in the justice system with adequate knowledge relates more to the principle of access, whilst guaranteed uniform treatment of individuals relates to none of the principles of justice as if uniform policies would create disparity of disadvantage, they should not be introduced.
- B. **Explanation:** Imposing similar sanctions for similar offences ensures offenders are treated in an equal manner. The opportunity for accused persons to be informed about the charges against them and the information provided by various services relate more to the principle of access.
- D. **Explanation:** Community legal centres provide free legal advice to those who need it, upholding access.
- The principle of **equality** aims to ensure uniform treatment of all individuals in the civil justice system, with the exception of instances where it may lead to disadvantage.
- The principle of **fairness** ensures that all people can participate in the justice system and its processes should be impartial and open.
- A. True. **Explanation:** Justice can be evaluated through the three principles of justice and aims to allow all people to interact and use the legal system effectively.

Preparing for exams

Standard exam-style

- [Jason has been denied access as he is unaware of the low-cost legal support available to him.¹] [Community legal centres (CLCs) can provide free initial legal advice, and could assist Jason with his unlawful termination issue.²] [Access to the legal system has been denied as Jason is unaware of the existence of CLCs and the help they can provide him and, therefore, he may not receive the compensation he is entitled to.³]
- ☒ ☐ I have identified one way Jason has been denied access.¹
 - ☒ ☐ I have provided information about my chosen way access has not been achieved.²
 - ☒ ☐ I have provided an example from the scenario and linked it to my chosen way access has not been achieved.³
- [The Children's Court upholds equality as children should not be held to the same standard as the average adult.¹] [The Children's Court aims to address the disadvantage children have, such as not having higher-order thinking skills or being fully developed.²] [Thus, it would not be equal if Josh's case was heard in the Magistrates' Court, instead of the Children's Court, and was subject to the adult sentencing standards, due to his age.³]
- ☒ ☐ I have identified one way the Children's Court upholds equality.¹
 - ☒ ☐ I have provided information about my chosen way the Children's Court upholds the principle of equality.²
 - ☒ ☐ I have provided an example from the scenario and linked it to my chosen way the Children's Court upholds the principle of equality.³

Extended response

9. Fairness: I; III
Access: II; IV
10. [Fairness and access in Deborah's case will be achieved to a moderate extent.¹]

[One way fairness would be achieved in Deborah's case is that she is able to present her side of the story in court if she chooses to as an accused.²][Another way fairness would be achieved is that Deborah's case would be heard by an impartial judge.³][However, fairness would be undermined by the fact that she suffers from anxiety and is apprehensive about the trial. She would likely be unable to present her case to the same quality as the opposing lawyer representing the prosecution.⁴]

[One way access is achieved in Deborah's case is that she has received advice from a community legal centre which would help her access information about her legal rights.⁵][Although, Deborah is not eligible for Victoria Legal Aid and will have to represent herself in court.⁶][Furthermore, she cannot afford legal representation, and she may not be able to present her case in the best possible light.⁷]

[Overall, fairness and access have not been fully achieved in Deborah's case.⁸]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have provided one way fairness is achieved in Deborah's case.²

✓ ✗ I have provided a second way fairness is achieved in Deborah's case.³

✓ ✗ I have provided one way fairness is not achieved in Deborah's case.⁴

✓ ✗ I have provided one way access is achieved in Deborah's case.⁵

✓ ✗ I have provided a second way access is achieved in Deborah's case.⁶

✓ ✗ I have provided one way access is not achieved in Deborah's case.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One way' and 'Another way'.

✓ ✗ I have used connecting words, such as 'However' and 'Although'.

Linking to previous learning

11. [When people do not have access to the law and legal information, this can affect social cohesion, as individuals may not abide by the law.¹][Where the law is too complex to understand or not accessible to the average person, it is more likely that people will break the law, hindering harmony in society.²]

✓ ✗ I have provided one way access affects social cohesion.¹

✓ ✗ I have provided information about my chosen way access affects social cohesion.²

1C Characteristics of an effective law

Check your understanding

- B. False. **Explanation:** An effective law should satisfy most of the characteristics that make a law effective. When a law does not include most or all of these characteristics, its effectiveness may be compromised.
- B. **Explanation:** For a law to reflect society's values, it must uphold what the majority of society accepts and believes in, rather than only reflecting the opinions of the law-makers.
- When a law is **stable**, it does not frequently change. This can enhance the law's ability to be **known** in society.
- A. **Explanation:** When a new law or changes to an existing law are implemented, the government may invest in advertising campaigns to inform the general public about legislative changes and therefore, make the law known.
- A; C. **Explanation:** When a law is enforceable, it is possible to monitor whether people abide by it, meaning consequences can be provided to those who do not. Highly enforceable laws, such as speed limits, often come with hefty fines when disobeyed by members of the general public. However, laws that are less enforceable, like jaywalking, are often disobeyed.
- B. **Explanation:** When communicating a law to society, the government and law-makers will often simplify the terms and complexities associated with the legislation to ensure the general public clearly understands what is required of them.
- A. True. **Explanation:** When implementing new legislation, the characteristics of an effective law should be considered and may act to guide law-makers on how to establish a law that will be well received in society.

Preparing for exams

Standard exam-style

8. [One characteristic of an effective law is that it should be enforceable.¹][Another characteristic of an effective law is that it should be known in society.²]

✓ ✗ I have provided one characteristic of an effective law.¹

✓ ✗ I have provided a second characteristic of an effective law.²

✓ ✗ I have used signposting in my response, such as 'One characteristic' and 'another characteristic'.

9. [A law that reflects society's values upholds what the majority of society accepts and believes in.¹][When implementing new or changed legislation, a government should consider the views and opinions of the general public to ensure it aligns the law with current societal beliefs.²]

✓ ✗ I have defined 'reflects society's values' as a characteristic of an effective law.¹

✓ ✗ I have provided an example of how a law can reflect society's values.²

10. [A law is clear and understood when individuals can comprehend the requirements of the law and are able to abide by it.¹] [When implementing this new legislation, Dan and Murphy can ensure the conditions of the law, such as remaining at or below a blood alcohol reading of 0.05, are communicated in a simple and uncomplicated manner.²] [By doing so, Dan and Murphy can increase the likelihood of people accepting and implementing the new law as there is clarity about its requirements and how to remain compliant, thus increasing its effectiveness.³]

✓ ✗ I have defined 'clear and understood' as a characteristic of an effective law.¹

✓ ✗ I have provided an example of how Dan and Murphy can ensure their new law is clear and understood.²

✓ ✗ I have provided a reason why a clear and understood law can be effectively implemented by Dan and Murphy in society.³

11. [For a law to be known, people must be aware of the law and any changes to it, whilst adequate time should be provided to become familiar with the new law.¹] [When implementing the reformed law, Zen could implement an advertising campaign that communicates these updates to the people of Dayerville, thus ensuring the reformed legislation is known.²] [On the other hand, a stable law is one that should not change so frequently that it is difficult to keep up with.³] [To ensure the reformed trespassing law is stable, Zen can implement the reformed law and make minimal future updates, as this ensures it remains consistent, consequently, improving Dayerville society's ability to know and understand the law.⁴]

✓ ✗ I have defined 'is known' as a characteristic of an effective law.¹

✓ ✗ I have provided an example of how Zen can ensure the reformed law is known.²

✓ ✗ I have defined 'is stable' as a characteristic of an effective law.³

✓ ✗ I have provided an example of how Zen can ensure the reformed law is stable.⁴

✓ ✗ I have used connecting words, such as 'On the other hand'.

Extended response

12. Strengths: II; III
Limitations: I; IV

13. [The implementation of the new legislative ban will be somewhat effective in Sustainia as, whilst the law reflects society's values and is known, clear, and understood, its enforceability and stability are limited.¹]

[One strength of Sustainia's new law is that it reflects society's values as the survey that was held to gauge the city's stance received affirmative votes, indicating the Sustainian society is in support of this

plastic ban.²] [Moreover, another strength of the plastic ban is that it is likely to be known, clear, and understood in Sustainia as Greta has invested in a social media advertising campaign to communicate the ban to the city in a simple and uncomplicated manner.³]

[However, a limitation of Sustainia's plastic ban is that it is difficult to monitor compliance with the ban as it would require comprehensive surveillance of all businesses, workplaces, and homes, which is not highly practical.⁴] [Furthermore, another limitation of Sustainia's new legislation is that Greta is planning to implement a number of changes in the future to improve the enforceability of the law, however, this will compromise its stability in the Sustainian society.⁵]

[Overall, Greta's new law will be effective to a moderate degree in Sustainia.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one strength of Sustainia's new plastic ban with reference to the characteristics of an effective law.²

✓ ✗ I have provided a second strength of Sustainia's new plastic ban with reference to the characteristics of an effective law.³

✓ ✗ I have provided one limitation of Sustainia's new plastic ban with reference to the characteristics of an effective law.⁴

✓ ✗ I have provided a second limitation of Sustainia's new plastic ban with reference to the characteristics of an effective law.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One strength' and 'another strength'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'However'.

Linking to previous learning

14. [Equality is the principle that all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage.¹] [One characteristic of an effective law is that a law should be enforceable, which means it is possible to monitor whether people abide by the law, allowing consequences to be provided to those who do not.²] [Laws are enforced on all people in the same way and apply to everyone no matter who they are, therefore achieving the principle of equality.³]

✓ ✗ I have defined equality.¹

✓ ✗ I have identified and defined one characteristic of an effective law.²

✓ ✗ I have provided an example of how equality relates to my chosen characteristic of an effective law.³

✓ ✗ I have used signposting in my response, such as 'One characteristic'.

1D Parliament and the courts in law-making

Check your understanding

- B. False. **Explanation:** Parliament and the courts have a close relationship in law-making, for example, parliament can override common law through abrogation.
- C. **Explanation:** Any new, proposed law must pass through both houses of parliament before it can become an official law.
- In Victoria, the courts are arranged in a **hierarchy**. In each court, a **judge** may have to create **common law**.
- B. False. **Explanation:** Even though parliament is the supreme law-making body, they are still bound by the Constitution, which imposes some restriction on their law-making powers.
- True: III; IV
False: I; II
- C. **Explanation:** Obiter dictum refers to the judge's comments made in passing to provide context to a legal decision.
- B. **Explanation:** Judge Indi, in this case, will have to undertake statutory interpretation to determine a new common law principle based on the existing statute to resolve the case before them.

Preparing for exams

Standard exam-style

- [One feature of the relationship between the parliament and courts in law-making is codification.¹]
 I have identified one feature of the relationship between the parliament and courts in law-making.¹
 I have used signposting in my response, such as 'One feature'.
- [The role of the courts is to determine cases and disputes between parties.¹] [This is undertaken by expert personnel, such as judges and magistrates, who interpret the law and apply the principles to the case before them.²]
 I have identified the main role of the courts.¹
 I have provided information about this role.²
- [Statutory interpretation is the process of the courts giving meaning to the words in legislation while resolving a case.¹] [When judges or magistrates undertake this process, they give a specific meaning to the words of the statute and seek to uphold the intentions of parliament.²] [One reason the courts may need to interpret statutes is when the meaning of certain words contained in the statute has changed over time.³]
 I have defined the term 'statutory interpretation'.¹
 I have provided information about statutory interpretation.²
 I have provided one reason why the courts may need to interpret statutes.³

I have used signposting in my response, such as 'One reason'.

- [The codification of common law is the process of parliament confirming common law precedent by enacting legislation to give effect to the legal principles.¹] [Alternatively, the abrogation of common law is the process of parliament overruling common law by creating a statute contrary to a decision of the courts.²]
 [While codification of common law demonstrates a positive affirmation of the principles established in court, on the other hand, abrogation is a negative response to a common law principle that ultimately ends with it being abolished.³]
 I have defined codification of common law.¹
 I have defined abrogation of common law.²
 I have provided one difference between codification and abrogation of common law.³
 I have used comparison words, such as 'Alternatively' and 'on the other hand', when distinguishing.
- [Cooper is an elected, political representative of people who live in the inner-north of Melbourne. As MPs are regularly elected, they have a duty to serve their community to avoid the prospect of not being re-selected at the next election.¹] [As local residents have requested a new law that requires all roads to pass a safety test, Cooper should promote this law in parliament.²] [As parliament is also the supreme law-making body, it has a duty to create laws that promote social cohesion and harmony.³] [Therefore, Cooper, would consider and take action on the new road safety law to promote safety and social cohesion in his community.⁴]
 I have provided one role of Cooper as a Member of Parliament.¹
 I have provided an example from the scenario and linked it to my chosen role.²
 I have provided a second role of Cooper as a Member of Parliament.³
 I have provided an example from the scenario and linked it to my chosen role.⁴
 I have used connecting words, such as 'Therefore'.

Extended response

- Abrogation: II
Statutory interpretation: III
Judicial influence: I
- [The parliament and courts have a strong relationship in law-making as they rely on each other to ensure laws promote and maintain social cohesion and harmony in society.¹]
 [One feature of the relationship between the parliament and the courts in this scenario is abrogation, which is the process of parliament overruling common law by creating a statute contrary to a decision of the courts and therefore ruling the common law invalid.²] [In this case, parliament was unhappy with the common law created by the Supreme Court and chose to abrogate the principle.³]

[Another feature of the relationship between the parliament and the courts is statutory interpretation, which is the process of the courts giving meaning to the words in legislation while resolving a case, especially in cases where the statute may be in broad terms.⁴]

[In this case, the Supreme Court was required to interpret the statute to apply it to the case before it, creating a new principle of law as a result.⁵]

[While not directly involved in the scenario, if the parliament chooses to act in an opposite fashion to abrogation, they may codify a common law principle.⁶][Codification is the process where parliament demonstrates their approval of common law and decides to introduce it into statute law. This allows the principle to be enshrined in legislation.⁷]



I have provided an introduction to my response.¹



I have identified one feature of the relationship between the parliament and the courts.²



I have provided information about how my chosen feature is relevant to the scenario.³



I have identified a second feature of the relationship between the parliament and the courts.⁴



I have provided information about how my chosen feature is relevant to the scenario.⁵



I have identified a third feature of the relationship between the parliament and the courts.⁶



I have provided information about my chosen feature.⁷



I have used paragraphs to organise my response.



I have used signposting in my response, such as 'One feature' and 'Another feature'.

Linking to previous learning

15. [As parliament is the supreme law-making body, MPs are able to create statute laws where they see fit. They may also choose to amend or abolish laws in line with community values and changing attitudes.¹][This can promote social cohesion as parliament has direct control over laws and their effect on society. They actively seek to promote harmony through their supreme law-making powers.²][Parliament may also monitor the effect of common law on social cohesion by abrogating and codifying court-made principles where necessary.³]



I have provided information about parliament's law-making powers.¹



I have provided information about the relationship between parliament's law-making and social cohesion.²



I have provided information about how parliament may assist in the achievement of social cohesion.³

1E Sources of law

Check your understanding

- A; B. **Explanation:** Different types of law include common law, which is made by the courts, and statute law, which is made by parliament.
- The doctrine of precedent requires judges in **lower** courts to follow the reasons for the decisions given by **superior** courts in the same court hierarchy when deciding on cases with similar facts.
- True: I; II; IV
False: III
- B. False. **Explanation:** A court's interpretation of words and phrases in legislation forms a precedent, a principle of law that can be applied in similar cases in future.
- B. **Explanation:** Before a bill becomes a law, it undergoes three separate readings in both the lower and upper houses of parliament, rather than four.
- B. False. **Explanation:** Delegated legislation refers to law that is not made directly by an Act of Parliament but under the authority of an Act of Parliament.
- Law made by parliament is referred to as **statute law**, whereas law made by the courts is referred to as **common law**.

Preparing for exams

Standard exam-style

- [One source of law is common law, which is law created by the courts.¹][A second source of law is statute law, which is law created by parliament.²]
- ☒ ☐ I have identified common law as a source of law.¹
- ☒ ☐ I have identified statute law as a source of law.²
- ☒ ☐ I have used signposting in my response, such as 'One source of law' and 'A second source of law'.
- [Statute law refers to the body of law that comprises laws made by parliament, also known as legislation.¹][To be legislated, a bill must pass through the house the bill was introduced in, with the majority of members approving the bill. It must then be reviewed, scrutinised, and approved by the second house, before receiving royal assent by a King's representative.²]
- ☒ ☐ I have defined the term 'statute law'.¹
- ☒ ☐ I have provided information about statute law.²
- [Common law refers to the principles of law created by the courts to resolve a case or dispute and have since been followed in future cases of a similar nature.¹][On the other hand, statute law refers to laws made by parliament, also known as legislation.²][One key difference between common law and statute law is that common law can only be developed to resolve a case before the courts, whereas statute law may be developed by parliament at any time.³]
- ☒ ☐ I have provided information about common law.¹
- ☒ ☐ I have provided information about statute law.²

✓ ✗ I have provided a key difference between common law and statute law.³

✓ ✗ I have used signposting in my response, such as 'One key difference'.

✓ ✗ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

11. a. [The doctrine of precedent is a rule in which judges must follow the reasons for decisions given by superior courts in the same court hierarchy when deciding a case before them with similar facts.¹] [By applying this principle, the courts can ensure cases with similar facts are decided in a similar manner to former cases, therefore enabling the achievement of a consistent, predictable, and just legal system.²]

✓ ✗ I have defined the term 'doctrine of precedent'.¹

✓ ✗ I have provided information about the doctrine of precedent.²

- b. [Statutory interpretation is a process whereby the courts give meaning to the words in legislation when applying the legislation to a case.¹] [A court may be required to clarify the meaning of the legislation to better apply it to the particular case before it. This may be necessary in cases where the relevant legislation is drafted in broad terms.²] [A court's interpretation of words and phrases in legislation forms a precedent, a principle of common law that can be applied in similar cases in the future.³] [In Kiki's case, interpreting the meaning of 'a baton or similar weapon' will enable the court to determine whether Kiki's walking stick is a 'prohibited weapon' under s 5 of the *Public Places Regulation Act 2022* (Vic). This determination will likely create a principle of common law to be applied in future cases.⁴]

✓ ✗ I have defined the term 'statutory interpretation'.¹

✓ ✗ I have provided information about the role of statutory interpretation.²

✓ ✗ I have provided information about the role of statutory interpretation in shaping common law.³

✓ ✗ I have provided an example from the scenario and linked it to the statutory interpretation and common law.⁴

✓ ✗ I have referred directly to relevant legislation in my response.

Extended response

12. A; D.

13. [Whilst common law and statute law are developed in vastly different ways, both sources of law establish foundational elements of the legal system.¹]

[Common law refers to the body of law that is derived from judicial reasoning and decisions in past cases.²] [It is developed through the process of statutory interpretation when resolving a court case.³]

[By interpreting and providing meaning to statutes in relation to the case before them, the courts are establishing legal principles. These legal principles must then be followed by judges in lower courts in similar cases where the same matter is being determined.⁴]

[Alternatively, statute law refers to the body of law that comprises laws made by parliament, also known as legislation.⁵] [When establishing legislation, a member of parliament will introduce a bill. To be legislated, this bill must pass through the house it was introduced in after undergoing three readings and approval by majority of its members.⁶] [It must be then reviewed, scrutinised, and approved by the alternate house, before receiving royal assent from the King's representative. After this process, it will become a law that must be followed in society.⁷]

[Overall, common law can only be developed by the courts in cases that are brought before them, whilst statute law can be developed by parliament at any time when a bill passes through the relevant process to become an Act.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have defined common law.²

✓ ✗ I have identified that common law is developed through statutory interpretation.³

✓ ✗ I have provided information about statutory interpretation.⁴

✓ ✗ I have defined statute law.⁵

✓ ✗ I have provided information about the development of statute law through the legislative process.⁶

✓ ✗ I have provided further information about the development of statute law through the legislative process.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Alternatively' and 'Overall'.

Linking to previous learning

14. [The statement that parliament cannot override common law is incorrect as parliament may choose to abrogate a legal principle developed by a court.¹] [Abrogation of a legal principle by parliament renders the law invalid. This is achieved by passing legislation that overrides this common law.²] [In this situation, the common law is superseded by the legislation passed by parliament, as this is the supreme law-making body.³]

✓ ✗ I have provided a reason why the statement is incorrect.¹

✓ ✗ I have provided information about the abrogation of common law.²

✓ ✗ I have provided information about how parliament can override common law through abrogation.³

1F The Victorian court hierarchy

Check your understanding

1. A. True. **Explanation:** The Victorian court hierarchy is the arrangement of courts in order of formality and superiority.
2. The lowest ranked court in the Victorian court hierarchy is the **Magistrates' Court**, whilst the highest ranked court is the **High Court of Australia**.
3. B; C. **Explanation:** The County Court and the Supreme Court – Trial Division can both hear civil claims of any amount. Such claims may relate to defamation, workplace injury, or class actions.
4. A. **Explanation:** Specialisation refers to a judge's ability to develop expertise in a particular area of law as a result of the court hierarchy.
5. The benefit of separating minor and more serious offences is associated with **administrative convenience**, whereas the process of a dissatisfied party pursuing a review of the court's previous decision on their case in a higher court is **an appeal**.
6. B. False. **Explanation:** The doctrine of precedent refers to the process of judges following the reasons for decisions given by superior courts in the same court hierarchy, when deciding on cases before them with similar facts.
7. A; C. **Explanation:** The high cost of appeals limits access to the Victorian justice system, and therefore hinders the achievement of the principles of justice. Furthermore, the limited accessibility of court decisions also limits access to justice.
8. A. **Explanation:** Specialisation, administrative convenience, appeals, and the doctrine of precedent are the four reasons for the Victorian court hierarchy.

Preparing for exams

Standard exam-style

9. [The Victorian court hierarchy is the arrangement of Victorian courts in order of superiority based on their authority in hearing legal matters.¹] [The courts within the Victorian court hierarchy, from least to most superior, are the Magistrates' Court, County Court, Supreme Court – Trial Division, Supreme Court – Court of Appeal, and the High Court of Australia.²]

☒ ☐ I have provided information about the Victorian court hierarchy.¹

☒ ☐ I have listed the courts of the Victorian court hierarchy.²

10. [One court in the Victorian court hierarchy is the County Court, which has both original and appellate jurisdiction.¹] [The County Court's original jurisdiction enables it to hear trials for most indictable offences and civil claims of any amount, but usually these are greater than \$100,000.²] [The Court's appellate jurisdiction enables it to hear criminal appeals from the Magistrates' Court.³]

☒ ☐ I have provided one court from the Victorian court hierarchy.¹

☒ ☐ I have provided information about the original jurisdiction of my chosen court.²

☒ ☐ I have provided information about the appellate jurisdiction of my chosen court.³

☒ ☐ I have used signposting in my response, such as 'One court'.

11. [One reason for the Victorian court hierarchy is specialisation, which refers to a court's ability to develop expertise in a particular area of law as a result of the court hierarchy.¹] [For example, Victorian courts that are lower in the hierarchy, such as the Magistrates' Court, have judges specialised in dealing with high volumes of minor criminal and civil offences, therefore enabling consistent and efficient outcomes to various cases.²]

[Another reason for the Victorian court hierarchy is appeals, which refers to the legal process that a dissatisfied party may pursue to have the court's decision reviewed by a higher court.³] [The existence of the Victorian court hierarchy enables parties who have had their cases heard in a lower court to have wrong or unjust decisions corrected by a superior court.⁴]

☒ ☐ I have provided one reason for the Victorian court hierarchy.¹

☒ ☐ I have provided information about my chosen reason for the Victorian court hierarchy.²

☒ ☐ I have provided a second reason for the Victorian court hierarchy.³

☒ ☐ I have provided information about my chosen reason for the Victorian court hierarchy.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One reason' and 'Another reason'.

Extended response

12. A; B

13. [I agree with this statement to a minor extent because whilst the Victorian court hierarchy exists to uphold the doctrine of precedent, it also enables specialisation, administrative convenience, and appeals.¹]

[The Victorian court hierarchy ensures the doctrine of precedent is upheld as judges in lower courts must follow the reasoning behind decisions made in more superior courts regarding similar cases.²]

[For example, if similar cases are heard in both the County Court and Supreme Court – Trial Division, the County Court judge would need to ensure its decision is consistent with that of the Supreme Court – Trial Division's decision.³]

[However, the Victorian court hierarchy also serves to enable specialisation, which allows courts to develop expertise in a particular area of law, thus facilitating a more efficient, timely, and consistent justice system.⁴]

[Moreover, administrative convenience refers to the systematic benefit derived from legal matters being distributed amongst the courts according to their complexity and severity, which is ultimately enabled by the Victorian court hierarchy. For example, lower courts, such as the Magistrates' Court, resolve large numbers of minor offences and disputes.⁵]

[Finally, the existence of the Victorian court hierarchy enables parties who have had their cases heard in a lower court to have wrong or unjust decisions corrected by a superior court, through appeals.⁶]

[Overall, while the Victorian court hierarchy serves to uphold the doctrine of precedent, it also facilitates various other purposes as well.⁷]

☒	☐	I have provided an introduction to state the extent to which I agree or disagree with the statement. ¹
☒	☐	I have provided one way the Victorian hierarchy upholds the doctrine of precedent. ²
☒	☐	I have provided information about my chosen way the Victorian hierarchy upholds the doctrine of precedent. ³
☒	☐	I have provided one reason why the Victorian court hierarchy exists, apart from the doctrine of precedent. ⁴
☒	☐	I have provided a second reason why the Victorian court hierarchy exists, apart from the doctrine of precedent. ⁵
☒	☐	I have provided a third reason why the Victorian court hierarchy exists, apart from the doctrine of precedent. ⁶
☒	☐	I have provided a conclusion to my response that links back to the question. ⁷
☒	☐	I have used paragraphs to organise my response.
☒	☐	I have used signposting in my response, such as 'Finally' and 'Overall'.
☒	☐	I have used connecting words, such as 'However' and 'Moreover'.

Linking to previous learning

14. [One way in which the Victorian court hierarchy protects the rights of individuals is by enabling parties to appeal the outcome of their case.¹] [If a party has valid grounds and believes the outcome handed down is unjust and does not uphold their rights, they have the opportunity to file an appeal as a result of the Victorian court hierarchy. Therefore, this ensures that any unfair outcomes are rectified and the rights of parties in a criminal or civil matter are upheld and protected.²]

☒	☐	I have provided one way the Victorian court hierarchy protects the rights of individuals. ¹
☒	☐	I have provided information about my chosen way the Victorian court hierarchy protects the rights of individuals. ²
☒	☐	I have used signposting in my response, such as 'One way'.
☒	☐	I have used connecting words, such as 'Therefore'.

1G Criminal and civil law

Check your understanding

1. A. **Explanation:** There are two types of law in the legal system, which are criminal and civil law.

2. D. **Explanation:** In a criminal case, the party pursuing the case is the prosecution and the alleged offender is known as the accused. The plaintiff and the defendant are the respective parties in civil law.
3. In civil law, the plaintiff must prove the defendant is liable **on the balance of probabilities**, whereas the standard of proof in criminal law requires the prosecution to prove the accused is guilty **beyond reasonable doubt**.
4. Criminal law: II; V
Civil law: I; III; IV
5. B. False. **Explanation:** Criminal and civil law are interrelated and may both apply to a situation. Therefore, an offender can be found guilty and sanctioned under criminal law, whilst also being found liable and forced to pay damages under civil law.
6. A; D. **Explanation:** Assault, murder, culpable driving, and manslaughter all fall under criminal law. Furthermore, the balance of probabilities is the standard of proof in a civil dispute not a criminal case. In criminal law, the prosecution needs to prove the accused is guilty beyond reasonable doubt.

Preparing for exams

Standard exam-style

7. [Criminal law is an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.¹] [One feature of criminal law is that the parties are the prosecution, the party bringing the case to court, and the accused, who allegedly committed the crime.²] [Another feature of criminal law is that the standard of proof requires the prosecution to prove the accused is guilty beyond reasonable doubt.³]

☒	☐	I have provided the definition of 'criminal law'. ¹
☒	☐	I have provided one feature of criminal law. ²
☒	☐	I have provided a second feature of criminal law. ³
☒	☐	I have used signposting in my response, such as 'One feature' and 'Another feature'.

8. [One feature of civil law is that the parties are the plaintiff, who brings the claim to court, and the defendant, who allegedly inflicted the plaintiff's suffering or loss.¹] [A second feature of civil law is that the standard of proof requires the plaintiff to prove the defendant is liable on the balance of probabilities.²] [Moreover, a third feature of civil law is that, if the defendant is found liable for the loss or suffering of the plaintiff, the judge will award the plaintiff a remedy that seeks to return them to their original position.³]

☒	☐	I have provided one feature of civil law. ¹
☒	☐	I have provided a second feature of civil law. ²
☒	☐	I have provided a third feature of civil law. ³
☒	☐	I have used signposting in my response, such as 'One feature' and 'A second feature'.
☒	☐	I have used connecting words, such as 'Moreover'.

9. [Criminal law is an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.¹] [Alternatively, civil law is an area of law that defines the rights and responsibilities of individuals, government entities, and organisations, and provides a legal framework for when these parties interact with each other.²] [One key difference between criminal and civil law is that if an accused is found guilty in a criminal case, they will be sanctioned, whereas, if a defendant is found liable in a civil case, they will be required to compensate the plaintiff through remedies.³]

☒ ☐ I have defined criminal law.¹

☒ ☐ I have defined civil law.²

☒ ☐ I have provided one key difference between criminal and civil law.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'Alternatively' and 'whereas', when distinguishing.

10. [The type of law that is relevant to Polly's case is civil law, as Polly would be making a claim to protect her rights as a worker.¹] [If Polly were to make a civil claim she would be bringing the case to court as the plaintiff, as she is claiming the unsafe work environment and machinery caused her suffering, whilst her workplace would be the defendant.²] [As the plaintiff, Polly would have the burden of proof, meaning she must prove her workplace is liable for her injuries and inability to work.³] [Additionally, the standard of proof in a civil case would require Polly to prove that her workplace is liable on the balance of probabilities, meaning it is more probable than not that the conditions of the workplace caused Polly's injuries and led to her inability to work.⁴]

☒ ☐ I have identified the type of law relevant to Polly's case.¹

☒ ☐ I have provided one feature of civil law relevant to Polly's case.²

☒ ☐ I have provided a second feature of civil law relevant to Polly's case.³

☒ ☐ I have provided a third feature of civil law relevant to Polly's case.⁴

☒ ☐ I have used connecting words, such as 'Additionally'.

Extended response

11. A; C; D

12. [There are three errors Danny has made that he would need to be advised on. These errors relate to the burden of proof, the parties in the case, and the outcome of the case.¹]

[One error in the scenario is that Danny believes he has the burden of proof as an accused.²] [In criminal law, the burden of proof is on the prosecution, meaning they have the responsibility of proving the facts of the case and must do so as they are pursuing the case against Danny.³]

[A second error Danny has made is that the Office of Public Prosecutions is the plaintiff.⁴] [The parties in a criminal case are the prosecution and the accused. Therefore, as Danny committed the crime, the Office of Public Prosecutions is the prosecution in this case.⁵]

[A third error Danny has made is that he would have to pay remedies to the court if he is found guilty.⁶] [If Danny were found guilty of his crimes he would be sanctioned, likely with a prison sentence considering the severity of his offence.⁷]

[Ultimately, Danny should be advised about the errors he has made in order to ensure he is educated about his case and aware of the likely consequences of his criminal activity.⁸]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one error in the scenario.²

☒ ☐ I have provided a correction for the first error in the scenario.³

☒ ☐ I have provided a second error in the scenario.⁴

☒ ☐ I have provided a correction for the second error in the scenario.⁵

☒ ☐ I have provided a third error in the scenario.⁶

☒ ☐ I have provided a correction for the third error in the scenario.⁷

☒ ☐ I have provided a conclusion to my response that links back to the question.⁸

☒ ☐ I have used signposting in my response, such as 'One error' and 'A second error'.

☒ ☐ I have used connecting words, such as 'Ultimately'.

Linking to previous learning

13. [Criminal law is an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct.¹] [On the other hand, civil law is an area of law that defines the rights and responsibilities of individuals, government entities, and organisations, and provides a legal framework for when these parties interact with each other.²] [Therefore, criminal and civil law ultimately aim to protect broader society from disruptions to social cohesion by providing consequences to behaviours that disturb civility and cause harm to others, therefore, protecting rights.³]

☒ ☐ I have defined criminal law.¹

☒ ☐ I have defined civil law.²

☒ ☐ I have provided an example of how criminal and civil law can contribute to the protection of rights and social cohesion.³

☒ ☐ I have used connecting words, such as 'On the other hand' and 'Therefore'.

2A The purposes of criminal law

Check your understanding

1. B. **Explanation:** Protection of society, protecting justice and the rule of law, and setting minimum standards of behaviour are all purposes of criminal law.
2. A. **Explanation:** If an offender, or general society, is discouraged from committing a crime, deterrence is primarily the purpose of criminal law that has been achieved.
3. B. **Explanation:** In this scenario, Jamie and Liam have been deterred from committing cybercrimes due to the significant prison sentence they incurred as a result of their offence.
4. A; B; C. **Explanation:** An accused person is considered innocent in criminal law until the prosecution is able to prove they are guilty.
5. When statute and common law establish expectations that society should follow and determine the punishments a person will incur if they do not follow these expectations, the purpose of criminal law that is being achieved is to **set minimum standards of behaviour**.
6. B. False. **Explanation:** The purposes of criminal law are not being achieved in this scenario. For example, the protection of society has not been achieved as Xavier has killed people without any consequences.
7. B. False. **Explanation:** There is no broad purpose of criminal law that aims to eliminate crime. It is acknowledged that crime will likely always exist, therefore, the purposes of criminal law relate to protecting society and aiming to deter people from committing crime to reduce, but likely not eliminate, crime rates.

Preparing for exams

Standard exam-style

8. [Protection of society is a purpose of criminal law that aims to reduce danger and chaos in society and prevent individuals from experiencing harm.¹] [By creating criminal laws, people who commit crimes can be removed from society, ensuring they are no longer threatening the community and establishing greater feelings of safety amongst members of society.²]
☒ ☐ I have defined 'protection of society' as a purpose of criminal law.¹
☒ ☐ I have provided information about the 'protection of society'.²
9. [Deterrence of crime is a purpose of criminal law that aims to discourage an offender, or other individuals, from reoffending or committing similar crimes through the imposition of a criminal sanction.¹] [On the other hand, setting minimum standards of behaviour is a purpose of criminal law that involves establishing expectations that intend to regulate how each person in society should act and establish the punishments they will receive if they do not act in a certain way.²] [One key difference between these two purposes is that while deterrence is focussed on imposing sanctions with the intent of ensuring offenders, or other members of society, do not commit crimes out of fear of punishment, minimum standards are set so that everyone is aware, and can understand, how they should behave in society.³]

☒ ☐ I have defined 'deterrence of crime' as a purpose of criminal law.¹

☒ ☐ I have defined 'minimum standards of behaviour' as a purpose of criminal law.²

☒ ☐ I have provided one key difference between 'deterrence of crime' and 'minimum standards of behaviour' as purposes of criminal law.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'On the other hand', when distinguishing.

10. [One way criminal law is able to protect justice and the rule of law is that most criminal hearings and judgments are accessible to the public.¹] [The public nature of criminal trials ensures the presentation of facts is open and available to all members of the community. This provides transparency and accountability for the legal decisions made in the court system.²] [Another way the rule of law can be achieved by criminal law is through the presumption of innocence as this guarantees an accused person does not have to prove their innocence, but rather, the prosecution has this burden to prove the accused is guilty beyond reasonable doubt.³]

☒ ☐ I have provided one way criminal law is able to protect justice and the rule of law.¹

☒ ☐ I have provided information about my chosen way criminal law is able to protect justice and the rule of law.²

☒ ☐ I have provided a second way criminal law is able to protect justice and the rule of law.³

☒ ☐ I have used signposting in my response, such as 'One way' and 'Another way'.

11. [One purpose of criminal law that is being achieved as a result of the new smoking laws is 'to set the minimum standards of behaviour'.¹] [Using criminal law to discourage smoking in particular places enshrines these standards into legislation by punishing offenders who violate these behavioural expectations.²] [The law would also likely prescribe a punishment that offenders would face if they are caught smoking outside of restaurants or cafes, therefore setting minimum sentences in the case that a person does not abide by the standards established by the law.³]

☒ ☐ I have identified one purpose of criminal law that is achieved by the smoking regulations.¹

☒ ☐ I have provided information about my chosen purpose of criminal law.²

☒ ☐ I have provided examples from the scenario and linked them to my chosen purpose of criminal law.³

☒ ☐ I have used signposting in my response, such as 'One purpose'.

Extended response

12. Achieved: I; II; III
Not achieved: IV

13. [In this scenario, some but not all purposes of criminal law have been achieved, due to the fact that Cam has not been deterred from stalking Mitchell, despite being sentenced for his criminal behaviour.¹

[One purpose of criminal law that has been achieved is the protection of society, which refers to a purpose of criminal law that aims to ensure society avoids danger and chaos by preventing individuals from experiencing harm.²] [As Cam has been imprisoned for seven years, and therefore removed from society, he can no longer stalk and cause psychological harm to Mitchell, providing safety to both Mitchell and any other people that Cam could potentially stalk.³

[Another purpose of criminal law that has been achieved is justice for Mitchell, which is the idea that a person who received the burden of another's actions should receive a fair outcome, such as their offender being reasonably punished.⁴] [Since Cam has been imprisoned for seven years, he has been punished fairly, therefore providing a degree of justice to Mitchell as Cam faced the consequences for his actions.⁵

[However, one purpose of criminal law that has been achieved to a lesser extent is deterrence, which is the purpose of criminal law that aims to discourage an offender, or other individuals, from reoffending or committing similar crimes through the imposition of a criminal sanction.⁶] [When released from prison, Cam intends to continue stalking Mitchell until he falls in love with him. Therefore, he has not been deterred from committing the crime of stalking.⁷] [Despite Cam not being deterred, the harsh punishment he received for stalking Mitchell may cause broader society to be discouraged from committing a similar crime, fearing the punishment they may face if they do so. Therefore, deterrence is still likely to be partially achieved.⁸

[Overall, although deterrence is not completely achieved in this criminal scenario, other purposes of criminal law have been successfully upheld.⁹

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have identified one purpose of criminal law that has been achieved in the scenario.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen purpose of criminal law.³

✓ ✗ I have identified a second purpose of criminal law that has been achieved in the scenario.⁴

✓ ✗ I have provided an example from the scenario and linked it to my chosen purpose of criminal law.⁵

✓ ✗ I have identified one purpose of criminal law that has not been achieved in the scenario.⁶

✓ ✗ I have provided an example from the scenario and linked it to my chosen purpose of criminal law.⁷

✓ ✗ I have provided information about my chosen purpose of criminal law.⁸

✓ ✗ I have provided a conclusion to my response that links back to the question.⁹

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

✓ ✗ I have used connecting words, such as 'However' and 'Despite'.

Linking to previous learning

14. a. [Casey has committed the criminal offence of culpable driving, which is regulated by criminal law.¹

✓ ✗ I have identified that Casey's actions would be regulated by criminal law.¹

- b. [One purpose of criminal law that has been achieved in Casey's case is the protection of society.¹] [Casey has been sentenced to 15 years imprisonment, therefore removing them from society for this period of time. By not being in society for 15 years, Casey will be unable to commit such an offence again, protecting society from their reckless behaviour.²

[Another purpose of criminal law that has been achieved in Casey's case is that justice has been provided and the rule of law has been upheld.³] [Their case was heard in front of an impartial judge and jury. This upholds the rule of law as it means that Casey was convicted of culpable driving as a result of a fair and impartial trial, instead of due to Casey's personal characteristics or biases held by jurors.⁴

✓ ✗ I have identified one purpose of criminal law that has been achieved in Casey's case.¹

✓ ✗ I have provided an example from the scenario and linked it to my chosen purpose of criminal law.²

✓ ✗ I have identified a second purpose of criminal law that has been achieved in Casey's case.³

✓ ✗ I have provided an example from the scenario and linked it to my chosen purpose of criminal law.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

2B The presumption of innocence

Check your understanding

- C. **Explanation:** The presumption of innocence may contribute to a fair trial and the right to silence, but it refers to the right to be considered innocent until proven guilty.
- The presumption of innocence refers to the right for all **accused persons** to be presumed not guilty until it is proven otherwise, beyond reasonable doubt.
- C. **Explanation:** The police must inform the accused person of their rights before questioning them, upholding the presumption of innocence as it may prevent an accused from unintentionally incriminating themselves.
- A. **Explanation:** By not revealing prior convictions to a jury, the innocence of an accused is protected.
- A. True. **Explanation:** Section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) outlines both the presumption of innocence and the right to silence.

Preparing for exams

Standard exam-style

6. [The presumption of innocence refers to right for all accused persons to be presumed innocent until it is proven otherwise beyond reasonable doubt.¹] [This guarantee is afforded to all accused persons, regardless of their personal situation or the circumstances of the case, therefore, upholding the principle of equality before the law.²]

✓ ✗ I have provided the definition of the 'presumption of innocence'.¹

✓ ✗ I have provided information about the presumption of innocence.²

7. a. [One reason the presumption of innocence should be upheld during police questioning is to ensure accused people do not feel pressured by police to confess, or unintentionally provide incriminating evidence against themselves.¹] [Police need to ensure the presumption of the individual's innocence is still respected and there is no abuse of power that could potentially lead to a miscarriage of justice.²]

✓ ✗ I have identified one reason why the presumption of innocence should be upheld during police questioning.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have used signposting in my response, such as 'One reason'.

- b. [One way the presumption of innocence may have assisted Jasmine is that she was able to remain silent to protect her innocence.¹] [The right to silence is an aspect of the presumption of innocence that can assist an accused person and help them avoid incriminating themselves.²]

✓ ✗ I have identified one way the presumption of innocence may have assisted Jasmine.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have used signposting in my response, such as 'One way'.

8. [One element of criminal trial proceedings that upholds the presumption of innocence is the right to apply for bail and, if granted, await the trial in the community.¹] [This right can only be refused if the accused poses a serious risk of not appearing in court, interfering with witnesses, or endangering society.²] [The presumption of innocence requires there to be no punishment before a person is found guilty of a crime. This right to apply for bail ensures, in most cases, that individuals merely suspected of a crime are not punished prior to their trial.³]

✓ ✗ I have identified one element of criminal trial proceedings that upholds the presumption of innocence.¹

✓ ✗ I have provided information about my chosen element.²

✓ ✗ I have provided further information about my chosen element.³

✓ ✗ I have used signposting in my response, such as 'One element'.

9. [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]

[The second error in the scenario is that the judge spoke about Jorge's prior convictions during the 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 in the scenario is that Jorge had to prove his innocence.⁵] [The burden of proof in criminal trials rests with the prosecution and police, and they are required to prove Jorge's guilt. Jorge does not need to prove he is innocent.⁶]

✓ ✗ I have identified the first error in the scenario.¹

✓ ✗ I have provided the correct procedure for the first error in the scenario.²

✓ ✗ I have identified the second error in the scenario.³

✓ ✗ I have provided the correct procedure for the second error in the scenario.⁴

✓ ✗ I have identified the third error in the scenario.⁵

✓ ✗ I have provided the correct procedure for the third error in the scenario.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One error' and 'The second error'.

Extended response

10. A; C

11. [The presumption of innocence was not upheld effectively in Kai's situation, since there were two instances in which her right to be presumed innocent was breached.¹]

[A person suspected of committing an offence does not usually need to answer police questions, other than providing their name and address, as they must be presumed innocent until proven otherwise, giving them the right to silence.²] [The police failed to inform Kai of her right to silence as she was asked to provide details of the evening and where she was during the fight, without knowing she had a right to silence, thus breaching the presumption of innocence.³]

[Furthermore, police officers can only collect forensic evidence, such as fingerprints or a blood sample, from a person when they reasonably suspect the person has committed a serious offence, but they must inform the suspect of the offence they are believed to have committed.⁴] [Kai was not informed of the offence she was believed to have committed, nor was she informed that the fingerprints and blood sample may be used as evidence in court.⁵]

[However, there was no breach of the presumption of innocence in relation to the actual arrest of Kai.⁶] [Each person has the right to not be wrongfully arrested, therefore, the police must have adequate evidence and reason for suspicion before arresting a suspect.⁷]

[The police had reasonable grounds to arrest Kai as they believed

she had instigated a fight. The police had seen footage of the fight and believed Kai was the woman in the footage, meaning they had adequate evidence to arrest her.⁸]

[The presumption of innocence, while somewhat upheld in Kai's case, was not fully upheld due to actions of the police in failing to inform her of her right to remain silent and of the offence she was believed to have committed. Therefore, Kai has been treated unfairly and has not had full access to justice.⁹]

- ✓ ✗ I have provided an introduction to summarise my answer to the question.¹

- ✓ ✗ I have provided one way the presumption of innocence was breached in the scenario.²

- ✓ ✗ I have provided an example from the scenario and linked it to the first way the presumption of innocence was breached.³

- ✓ ✗ I have provided a second way the presumption of innocence was breached in the scenario.⁴

- ✓ ✗ I have provided an example from the scenario and linked it to the second way the presumption of innocence was breached.⁵

- ✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.⁶

- ✓ ✗ I have provided one way the presumption of innocence was upheld in the scenario.⁷

- ✓ ✗ I have provided an example from the scenario and linked it to the way the presumption of innocence was upheld.⁸

- ✓ ✗ I have provided a conclusion to my response that summarises the discussion and links back to the question.⁹

- ✓ ✗ I have used paragraphs to organise my response.

- ✓ ✗ I have used connecting words, such as 'Furthermore' and 'However'.

Linking to previous learning

12. [The presumption of innocence upholds the principle of equality as it ensures an accused person is not discriminated against.¹]
[The right to have prior convictions withheld from the jury allows accused people to be portrayed in a neutral light, with the aim to remove any prejudices held by the jurors.²]
- ✓ ✗ I have provided one way the presumption of innocence upholds the principle of equality.¹

 - ✓ ✗ I have provided information about my chosen way.²

2C Key concepts of criminal law

Check your understanding

1. B. False. **Explanation:** In order for justice to be effectively achieved, the various foundational components of the criminal justice system must work together.
2. The two key elements of a crime are actus reus and mens rea. Actus reus refers to a guilty **act**, whilst mens rea refers to a guilty **mind**. Generally, both of these elements need to be satisfied to find an accused guilty.
3. C. **Explanation:** For strict liability offences, only the actus reus element of a crime needs to be proven for an accused to be found guilty.
4. True: I; II
False: III; IV
5. A; C. **Explanation:** The accused does not have the responsibility of proving the facts of the case against them as the prosecution is the party initiating the proceedings, and therefore has the burden of proof. Additionally, there are situations, such as if the accused raises the defence of self-defence, where the burden of proof may be reversed.
6. B; D. **Explanation:** Murder and theft are not classified as strict liability offences as these crimes require both the mens rea and actus reus to be proven in order to find an accused guilty.
7. C. **Explanation:** The standard of proof in criminal cases is beyond reasonable doubt, meaning that based on the evidence, there can be no reasonable or logical doubt that the accused is guilty.
8. B; D; E. **Explanation:** The burden of proof is on the prosecution in criminal cases as this concept refers to who bears the responsibility of proving the facts of the case. Alternatively, the standard of proof is beyond reasonable doubt in criminal law and applies to all cases, not only to strict liability offences.

Preparing for exams

Standard exam-style

9. [One element of a crime is actus reus.¹][The second element of a crime is mens rea.²]

 - ✓ ✗ I have identified actus reus as an element of a crime.¹

 - ✓ ✗ I have identified mens rea as an element of a crime.²

 - ✓ ✗ I have used signposting in my response, such as 'One element' and 'The second element'.

10. [The age of criminal responsibility refers to the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.¹]
[If a child is considered doli incapax, they cannot be charged with a crime as they are considered 'incapable of wrong' and the mens rea element of a crime cannot be established.²]

 - ✓ ✗ I have defined the term 'age of criminal responsibility'.¹

 - ✓ ✗ I have provided information about the age of criminal responsibility.²

11. [One reason for strict liability crimes is to protect society.¹] [Even if an offender does not intend to cause harm, these acts can still be dangerous and threaten the safety of the community.²] [For example, running a red light is considered a strict liability crime.³] [Therefore, though an offender may not have intended to break the law and commit a crime, this sort of activity must be discouraged to protect the community from the potential harm that could occur if drivers do not abide by the road laws.⁴]

☒ ☐ I have identified one reason for strict liability crimes.¹

☒ ☐ I have provided information about my chosen reason.²

☒ ☐ I have provided an example of a strict liability crime.³

☒ ☐ I have provided information about my chosen example.⁴

☒ ☐ I have used signposting in my response, such as 'One reason'.

12. [Mens rea translates to a 'guilty mind' and forms the mental element of a crime.¹] [On the other hand, actus reus translates to a 'guilty act' and forms the physical element of a crime.²] [One key difference is that mens rea requires an offender to have an awareness of their criminal behaviour and its potential consequences, whereas, it must be proven that the offender physically undertook an action that constitutes a crime in order for actus reus to be satisfied.³]

☒ ☐ I have provided information about mens rea as an element of a crime.¹

☒ ☐ I have provided information about actus reus as an element of a crime.²

☒ ☐ I have provided one key difference between mens rea and actus reus.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when comparing.

13. [No, McQueen is not correct.¹] [Speeding is considered a strict liability crime, meaning an individual can be found guilty of this offence without mens rea needing to be proven.²] [Even though McQueen may not have intended to break the law, their physical act of speeding in itself is enough to find them guilty and have them punished accordingly.³]

☒ ☐ I have identified that McQueen is not correct.¹

☒ ☐ I have provided information about strict liability crimes.²

☒ ☐ I have provided an example from the scenario and linked it to the concept of strict liability crimes.³

[In this case, the prosecution has the burden of proof as they are pursuing the case against Sunitha.²] [This means the prosecution has the responsibility of proving the facts of the case and the charge of theft against Sunitha. They will do this by presenting facts and evidence, such as the CCTV footage, to prove that Sunitha is guilty of stealing from the store.³]

[Moreover, the standard of proof in a criminal case is beyond reasonable doubt.⁴] [In order to find Sunitha guilty, the prosecution must prove there is no reasonable or logical doubt that Sunitha is guilty of stealing cosmetics. This could be established through the CCTV footage and the employee's witness testimony recounting how Sunitha deliberately asked them to check the stock room before proceeding to steal the products.⁵]

[Therefore, the prosecution must satisfy the criminal standard of proof, beyond reasonable doubt, in order to prove Sunitha is guilty.⁶]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one aspect of the burden of proof.²

☒ ☐ I have provided an example from the scenario and linked it to the burden of proof.³

☒ ☐ I have provided one aspect of the standard of proof.⁴

☒ ☐ I have provided an example from the scenario and linked it to the standard of proof.⁵

☒ ☐ I have provided a conclusion to summarise my response.⁶

☒ ☐ I have linked my answer to the scenario where appropriate.

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used connecting words, such as 'Moreover' and 'Therefore'.

Linking to previous learning

16. [The presumption of innocence is upheld by the burden of proof.¹] [As the burden of proof rests with the prosecution and refers to the responsibility of proving the facts of the case, the accused's presumed innocence is maintained as they are not required to prove the charges against them or their innocence.²]

☒ ☐ I have identified the relationship between the burden of proof and the presumption of innocence.¹

☒ ☐ I have provided information about the relationship between the burden of proof and the presumption of innocence.²

Extended response

14. True: II; III; IV
False: I

15. [If Sunitha's case goes to court, the burden and standard of proof would be fundamental in determining her guilt.¹]

2D Types of crime

Check your understanding

- A. True. **Explanation:** Crimes can be broadly categorised based on the different characteristics of each offence.
- D. **Explanation:** Arson is categorised as a crime against property, as it involves deliberately setting fire to property to damage it.
- A; C; D. **Explanation:** Culpable driving is not an example of a crime against property. It is a crime against the person as it involves the death of another individual.
- Crimes that are motivated by prejudice towards a specific minority group are called **hate crimes**. On the other hand, crimes that operate in a corporate environment with the goal of financial gain are called **white-collar crimes**.
- Crimes against the person: I; III
Crimes against property: II; IV
- Organised crime: I; II
Cybercrime: III; IV
- B. False. **Explanation:** Crimes against property can be criminal offences as well as civil breaches.

Preparing for exams

Standard exam-style

- [Samantha committed a cybercrime.¹][As she created a hacking software that targeted computers and sought to steal personal data, Samantha's offence can be classified as a cybercrime as this type of crime is defined as a criminal offence directed at computers and where the use of computers and ICT technologies are key components of an offence.²]
☒ ☐ I have identified the crime Samantha type of crime committed as a cybercrime.¹
☒ ☐ I have provided information about cybercrimes.²
☒ ☐ I have used connecting words, such as 'Hence'.
- [Crimes against the person are criminal offences where a person is harmed or harm is threatened.¹][For instance, assault is a crime against the person since it involves the use of force to harm an individual.²][Another example of a crime against the person is attempted murder, since it involves the threat of causing fatal harm to the victim.³]
☒ ☐ I have provided the definition of the term 'crimes against the person'.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 signposting in my response, such as 'Another example'.
- [Crimes against property are criminal offences that involve using force or deception to obtain, damage, or destroy property.¹]

[Generally, crimes against property involve the acquisition of money, personal property, or land.²][For example, burglary is a crime against property as it involves trespassing in order to steal.³]

- ☒ ☐ I have defined the term 'crimes against property'.¹
- ☒ ☐ I have provided information about crimes against property.²
- ☒ ☐ I have provided an example of a crime against property.³
- ☒ ☐ I have used connecting words, such as 'Generally'.
- [Louis' crime could be categorised as a hate crime.¹][This is demonstrated through the homophobic slurs Louis was heard yelling, as hate crimes involve acts motivated by sexual orientation.²][Additionally, his act of breaking the service station window was motivated by his hatred and prejudice against the queer community, hence classifying this offence as a hate crime.³]
☒ ☐ I have identified the type of crime Louis could have been convicted of.¹
☒ ☐ I have provided one reason why Louis' offence can be categorised as a hate crime.²
☒ ☐ I have provided a second reason why Louis' offence can be categorised as a hate crime.³

- [Organised crime is a type of criminal activity that is generally carried out in a systematic and premeditated manner by an organised group. It can operate in a similar way, or under the guise of a legitimate business and involve criminal syndicates, gangs, or crime families.¹][One example of organised crime is drug trafficking.²][On the other hand, white-collar crimes are non-violent crimes that are generally financially motivated.³][One example of a white-collar crime is embezzlement.⁴][One key difference between organised crimes and white-collar crimes is that organised crimes tend to involve a large network of individuals, whereas white-collar crimes can be conducted by a sole individual.⁵]
☒ ☐ I have provided information about organised crime.¹
☒ ☐ I have provided an example of an organised crime.²
☒ ☐ I have provided information about white-collar crime.³
☒ ☐ I have provided an example of a white-collar crime.⁴
☒ ☐ I have provided one key difference between organised crimes and white-collar crimes.⁵
☒ ☐ I have used signposting in my response, such as 'One example' and 'One key difference'.
☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

Extended response

- A; C; D; E
- [This statement is incorrect. Whilst there are similarities between crimes against property and crimes against the person, there remain distinct differences between the categories of offences.¹]

[One similarity is that both crimes against the person and crimes against property may involve a victim.²] [Both of these offences can result in victims suffering in some way due to the offender's actions.] [For example, kidnapping is a crime against the person, which causes suffering to a victim by depriving them of their personal freedom. Similarly, theft is a crime against property that causes suffering to a victim by depriving them of financial or other resources.³]

[However, one difference between these types of crime is the type of harm caused.⁴] [For crimes against the person, like assault, the harm is physically, emotionally, or mentally suffered by the victim. Comparatively, a victim of a crime against property may not be physically injured but their property could be harmed.⁵]

[Therefore, whilst there are similarities between crimes against the person and crimes against property, they remain separate categories of crimes that can have differing impacts on victims.⁶]

✓ ✗ I have stated that the statement is incorrect and provided a summary of my response.¹

✓ ✗ I have provided one similarity between crimes against the person and crimes against property.²

✓ ✗ I have provided information about my chosen similarity.³

✓ ✗ I have provided one difference between crimes against the person and crimes against property.⁴

✓ ✗ I have provided information about my chosen difference.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have used signposting in my response, such as 'One similarity' and 'one difference'.

✓ ✗ I have used connecting words, such as 'Therefore'.

✓ ✗ I have used comparison words, such as 'However' and 'Comparatively', when comparing.

Linking to previous learning

15. [Samarth could be found guilty of burglary, which is a crime against the person.¹] [One purpose of criminalising burglary is to protect people's property and personal safety.²] [This promotes a sense of security to individuals, such as Brielle, who have the right to enjoy their property and privacy without the threat of others illegally entering and stealing from them.³] [Another purpose of criminalising behaviour, like burglary, is to use the threat of punishment as a deterrent to others and stop other individuals from committing similar crimes.⁴] [The severity of the punishment for crimes against the person is intended to dissuade individuals like Samarth from trespassing and stealing the property of others.⁵]

✓ ✗ I have identified that Samarth could be found guilty of burglary.¹

✓ ✗ I have provided one purpose of criminalising burglary.²

✓ ✗ I have provided information about my chosen purpose and linked it to the scenario.³

✓ ✗ I have provided a second purpose of criminalising burglary.⁴

✓ ✗ I have provided information about my chosen purpose and linked it to the scenario.⁵

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

2E Summary offences and indictable offences

Check your understanding

- B. **Explanation:** Summary and indictable offences are the two main categories of criminal offences in the justice system.
- Indictable offences are heard in the **County or Supreme Court**, whilst summary offences are heard in the **Magistrates' Court**.
- Summary: I; IV
Indictable: II; III; V
- B. False. **Explanation:** Indictable offences heard summarily are considered less serious than indictable offences, but are more severe than summary offences.
- B; C. **Explanation:** For an indictable offence to be heard summarily the offence must not be punishable by a maximum term exceeding 10 years of imprisonment, the court must agree and determine it is appropriate, and the accused must consent to having their offence(s) heard summarily.
- In Victoria, most indictable offences are included in the **Crimes Act 1958 (Vic)**, whilst indictable offences heard summarily are established in the **Criminal Procedure Act 2009 (Vic)**. Alternatively, the **Summary Offences Act 1966 (Vic)** sets out summary offences in Victoria.
- B. False. **Explanation:** Summary offences, indictable offences, and indictable offences heard summarily are heard and determined within the criminal justice system.

Preparing for exams

Standard exam-style

8. [One category of criminal offences is summary offences, which are minor criminal offences usually heard in the Magistrates' Court.¹] [Additionally, another category of offences is indictable offences, which are criminal offences that are serious in nature and generally heard by a judge and a jury in the County or Supreme Court.²]

✓ ✗ I have identified one category of offences in the criminal justice system.¹

✓ ✗ I have identified a second category of offences in the criminal justice system.²

✓ ✗ I have used signposting in my response, such as 'One category' and 'another category'.

✓ ✗ I have used connecting words, such as 'Additionally'.

9. [Indictable offences heard summarily are a subset of indictable offences that can be heard in the Magistrates' Court in a similar manner to a summary offence. Only eligible offences can be heard summarily.¹] [For an indictable offence to be heard summarily, the offence must not be punishable by a term exceeding 10 years of imprisonment, the court must agree and determine it is appropriate, and the accused must consent to have their offence(s) heard summarily.²]

☒ ☐ I have defined the term 'indictable offences heard summarily'.¹

☒ ☐ I have provided information about indictable offences heard summarily.²

10. [Summary offences are minor criminal offences usually resolved in the Magistrates' Court.¹] [Alternatively, indictable offences are criminal offences that are serious in nature and generally heard by a judge and a jury in the County or Supreme Court.²] [One key difference between summary and indictable offences is that summary offences are established in the *Summary Offences Act 1966* (Vic), whereas, indictable offences are set out in the *Crimes Act 1958* (Vic).³]

☒ ☐ I have provided information about summary offences.¹

☒ ☐ I have provided information about indictable offences.²

☒ ☐ I have provided one key difference between summary and indictable offences.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'Alternatively' and 'whereas', when distinguishing.

11. [Elsa was caught drink-driving, which is considered a summary offence.¹] [One feature of summary offences is that they are less severe and are, consequently, heard in the Magistrates' Court where a fine or small term of imprisonment would be issued as the sanction to Elsa if she were found guilty.²] [Another feature of summary offences is that they are mostly established in the *Summary Offences Act 1966* (Vic) and include driving offences, like driving whilst under the influence of alcohol in the case of Elsa.³] [Finally, a third feature of summary offences is that there is no option to trial by jury, meaning the magistrate will determine the guilt of Elsa if her case is taken to court.⁴]

☒ ☐ I have identified the type of offence Elsa has committed.¹

☒ ☐ I have provided one feature of summary offences.²

☒ ☐ I have provided a second feature of summary offences.³

☒ ☐ I have provided a third feature of summary offences.⁴

☒ ☐ I have linked my answer to the scenario where appropriate.

☒ ☐ I have used connecting words, such as 'Finally'.

☒ ☐ I have used signposting in my response, such as 'One feature' and 'Another feature'.

Magistrates' Court.²] [The maximum imprisonment sentence that can be imposed by a magistrate for one indictable offence is two years, and five years for two or more offences. Therefore, if an accused is found guilty in the Magistrates' Court there are less severe maximum sentences that can be handed down, compared to higher courts which can impose longer imprisonment sentences.³]

[Furthermore, hearings in the Magistrates' Court are more cost and time efficient.⁴] [As the Magistrates' Court specialises in hearing a high number of less serious offences, cases are heard more frequently and delays to having a case resolved may be minimised. This can reduce the cost of legal representation for the accused and allow the case to be determined in a more timely manner, compared to if it were to be heard as an indictable offence in a higher court where there are greater delays.⁵]

[However, a trial by jury is not available for indictable offences heard summarily. If an accused wishes to have a jury trial they cannot have their offence heard summarily as the Magistrates' Court does not conduct jury trials.⁶] [Therefore, some accused persons may not consent to have the matter determined summarily, although this may increase the cost and time associated with the case.⁷]

[Overall, it is more beneficial in terms of sanctions, time, and costs, to have an indictable offence tried summarily rather than as an indictable offence in a higher court.⁸]

☒ ☐ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹

☒ ☐ I have provided one reason why I agree or disagree with the statement.²

☒ ☐ I have provided information to support my chosen reason.³

☒ ☐ I have provided a second reason why I agree or disagree with the statement.⁴

☒ ☐ I have provided information to support my chosen reason.⁵

☒ ☐ I have provided a third reason why I agree or disagree with the statement.⁶

☒ ☐ I have provided information to support my chosen reason.⁷

☒ ☐ I have provided a conclusion to my response that links back to the question.⁸

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Overall'.

☒ ☐ I have used connecting words, such as 'Therefore' and 'Furthermore'.

Extended response

12. B; C

13. [I agree with this statement to a moderate extent. Whilst the Magistrates' Court does not facilitate jury trials, if the accused has their indictable offence tried summarily, they would face a less severe sanction.¹]

[Firstly, it can be beneficial for the accused to have their offence heard summarily as less severe sanctions are handed down in the

Linking to previous learning

14. [The type of crime Joshua committed is a crime against property.¹] [Additionally, the type of offence Joshua committed is a summary offence.²]

☒ ☐ I have identified the type of crime Joshua has committed.¹

☒ ☐ I have identified the type of offence Joshua has committed.²

☒ ☐ I have used connecting words, such as 'Additionally'.

2F Possible participants in a crime

Check your understanding

1. A person who is involved, either directly or indirectly, with the commission of an offence, is a **principal offender**. However, a person who was less involved but had knowledge of an individual committing an indictable offence is considered an **accessory**.
2. B. False. **Explanation:** There can be multiple accessories and multiple principal offenders to a crime.
3. B. **Explanation:** Jasmine is still the principal offender even though she was not at the crime scene, as she planned and instigated the offence.
4. A. **Explanation:** Commissioning someone to commit a criminal offence indicates that the person who did so has the mens rea of the offence and thus, may be found to be the principal offender.
5. B. False, **Explanation:** An accessory to a crime can be found guilty of an offence even where the principal offender is found not guilty.

Preparing for exams

Standard exam-style

6. [An accessory is any person who knows or believes that a person is guilty of a serious indictable offence and acts to prevent the arrest, prosecution, or punishment of that person.¹] [Even where the principal offender is found not guilty of a crime, an accessory to a crime can be still be found guilty of an offence.²]

☒ ☐ I have defined the term 'accessory'.¹

☒ ☐ I have provided information about an accessory as a possible participant in a crime.²

7. [One way an individual can be an accessory to a crime is if they lie to the police about a principal offender's whereabouts at the time of an offence.¹] [A second way an individual can be an accessory to a crime is if they hide a principal offender from the police or other investigators.²]

☒ ☐ I have identified one way an individual can be an accessory to a crime.¹

☒ ☐ I have identified a second way an individual can be an accessory to a crime.²

☒ ☐ I have used signposting in my response, such as 'One way' and 'A second way'.

8. [Principal offenders are those considered to be immediately linked to the crime.¹] [On the other hand, an accessory is any person who knows or believes a person is guilty of a serious indictable offence and acts to prevent the arrest, prosecution, or punishment of that person.²] [One key difference between principal offenders and accessories is that principal offenders can be sentenced to the maximum penalty, whereas, accessories have altered sentencing guidelines that are less severe.³]

☒ ☐ I have provided information about principal offenders.¹

☒ ☐ I have provided information about accessories.²

☒ ☐ I have provided one key difference between principal offenders and accessories.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

9. [Sally can be sentenced to the maximum penalty for the bank robbery because she was the principal offender, which is the individual who actually commits the offence and/or is directly linked to the enactment of the crime.¹] [The principal offender does not have to physically carry out the crime in order to be found guilty.²] [As Sally planned the crime, it is likely the actus reus and mens rea elements could be proven beyond reasonable doubt. Consequently, Sally could be found guilty of and sentenced to the maximum penalty for the bank robbery crime.³]

☒ ☐ I have identified why Sally can be sentenced to the maximum penalty in this case.¹

☒ ☐ I have provided one reason why Sally can be sentenced to the maximum penalty in this case.²

☒ ☐ I have provided information about my chosen reason why Sally can be sentenced to the maximum penalty in this case.³

10. [The first error in the scenario is that Lucia's trial did not proceed due to Jael being found not guilty.¹] [An accessory's trial is able to proceed regardless of the outcome of the principal offender's trial, meaning Lucia's trial would still proceed even though Jael was acquitted.²]

[The second error in the scenario is that Eisha 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 Eisha would be tried as a principal offender as opposed to an accessory.⁴]

☒ ☐ I have provided one error in the scenario.¹

☒ ☐ I have provided the correct procedure for the first error in the scenario.²

☒ ☐ I have provided a second error in the scenario.³

☒ ☐ I have provided the correct procedure for the second error in the scenario.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'The first error' and 'The second error'.

Extended response

11. D

12. [In this scenario, Jenny, Harold, and Robert are participants in the crime of stealing the car and would each be considered principal offenders, despite their differing involvement.¹]

[A principal offender is the individual who actually commits the offence and/or is directly linked to the enactment of the crime.²]

[Jenny would be considered a principal offender in this case as she devised the plan associated with executing the crime and, thus, she likely had both mens rea and actus reus.³][Whilst she was not present at the crime scene on the day of the offence, she was still involved in its execution and instigated the actions of Robert and Harold via earpiece.⁴]

[Moreover, Harold would also be considered a principal offender as he also wanted the money for the Bali trip and directly committed the crime.⁵][Through Harold's acting, Robert was able to steal the car, therefore, directly assisting and enabling the execution of the crime.⁶]

[Finally, Robert would also be considered a principal offender as he was responsible for carrying out the actus reus component of the offence by stealing the motor vehicle.⁷][Robert was the individual who drove the motor vehicle and therefore, directly stole it from the dealership, committing the offence.⁸]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have defined the term 'principal offender'.²

☒ ☐ I have identified Jenny as a principal offender in this scenario.³

☒ ☐ I have provided information about Jenny as a principal offender.⁴

☒ ☐ I have identified Harold as a principal offender in this scenario.⁵

☒ ☐ I have provided information about Harold as a principal offender.⁶

☒ ☐ I have identified Robert as a principal offender in this scenario.⁷

☒ ☐ I have provided information about Robert as a principal offender.⁸

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'Finally'.

☒ ☐ I have used connecting words, such as 'Moreover'.

Linking to previous learning

13. a. [Aaron is the principal offender in this case as he committed the offence himself.¹]

☒ ☐ I have provided an example from the scenario and linked it to the principal offender.¹

- b. [Aaron has committed a summary offence.¹][This is because it is a minor offence that will likely result in a fine.²]

☒ ☐ I have identified that Aaron would be charged with a summary offence.¹

☒ ☐ I have provided information about summary offences.²

3A Murder – elements

Check your understanding

- B; C; D. **Explanation:** Self-defence is a defence to murder, not an element of the crime.
- B. False. **Explanation:** The actus reus in a murder case refers to the nature of the physical components of the murder itself, rather than the mental state of the accused.
- A. True. **Explanation:** The substantial and operating cause test is able to discern whether the accused's actions were the cause of the murder, even if intervening events also occurred that ultimately led to the victim's death.
- B. **Explanation:** Unborn children are an exception under the death element.
- If the accused wants to kill or cause grievous bodily harm, this is **an intentional** murder. On the other hand, if an accused engages in activities in which it would be reasonably foreseeable that death or grievous bodily harm could amount from their actions, this is **a reckless** murder.
- A. **Explanation:** As Rhiley was unconscious, the push was not voluntary and, therefore, the element of 'a voluntary act' is unlikely to be satisfied.
- A. **Explanation:** Murder and manslaughter carry different maximum penalties to reflect the different severity of the offences.
- A. True. **Explanation:** The elements of murder are the components of the crime that must be satisfied in order to find an accused person guilty.

Preparing for exams

Standard exam-style

- [Murder is the action of intentionally or recklessly causing the death of a human.¹][For an accused to be found guilty of murder, the actus reus and mens rea elements of the offence must be proven by the prosecution.²]
☒ ☐ I have provided a definition of the term 'murder'.¹
☒ ☐ I have provided information about murder as a criminal offence.²
- [One element of murder is death.¹][In order for this element to be satisfied, it must be proven that the victim is in fact dead. Murder law does not apply to unborn children, animals, or objects.²]
☒ ☐ I have identified one element of murder.¹
☒ ☐ I have provided information about my chosen element.²
☒ ☐ I have used signposting in my response, such as 'One element'.
- [Causation is the element of murder that requires the victim's death to have a causal connection to the act or omission of the accused.¹][The test used by the courts is the 'substantial and operating cause' test, which requires the accused's actions to be the primary cause of the victim's death.²][However, in cases where there are intervening

events, that could have also lead to the death of the victim, the courts will view the facts of the case to decide whether the actions of the accused were the substantial and operating cause despite the intervening acts that may have contributed to the victim's death.³]

- ☒ ☐ I have defined the actus reus element of causation.¹
- ☒ ☐ I have provided information about the 'substantial and operating cause' test.²
- ☒ ☐ I have provided further information about the 'substantial and operating cause' test.³
- ☒ ☐ I have used connecting words, such as 'However'.
- [Intentional murder is a murder in which the accused acted with a conscious desire to, or foresight that their actions almost certainly would, kill or cause grievous bodily harm to the victim.¹][Reckless murder occurs when the accused is acting with such disregard for human life that it could be reasonably foreseen their actions would likely cause death or grievous bodily harm to another.²][One key difference between reckless murder and intentional murder is that an offender convicted of intentional murder typically has a conscious desire to kill, whereas a person convicted of reckless murder may not have this same desire to kill.³]
☒ ☐ I have provided information about intentional murder.¹
☒ ☐ I have provided information about reckless murder.²
☒ ☐ I have provided one key difference between intentional and reckless murder.³
☒ ☐ I have used signposting in my response, such as 'One key difference'.
☒ ☐ I have used comparison words, such as 'whereas', when distinguishing.

Extended response

13. B

- [Although the prosecution may be able to prove beyond reasonable doubt certain elements of murder in its case against Daichi, some elements may be difficult for it to establish, thus likely resulting in Daichi not being found guilty of the offence.¹]

[One element that will be satisfied in Daichi's case is the element of death.²][It is confirmed that Rick passed away and he is a born human, not an animal or object.³]

[However, one element that is unlikely to be satisfied in Daichi's case is the voluntary act.⁴][As Daichi was in the process of tripping over, due to losing consciousness, when he pushed Rick, the actus reus that led to Rick's death was not voluntarily committed by Daichi's conscious mind.⁵]

[Another element that is unlikely to be established is Daichi's mens rea.⁶][When the death of Rick occurred, Daichi was not acting recklessly and he did not intend to cause Rick any harm. Walking on a trail is not a reckless act and it is reasonable to assume that a slip may occur on uneven terrain, especially when one has lost consciousness.⁷]

[Ultimately, although Rick did die, and this was partially at the hands of Daichi, since Daichi's actions were not committed voluntarily or with recklessness or intent, he would likely not be found guilty of murder.⁸]



I have provided an introduction to my response.¹



I have identified one element of murder that is likely to be satisfied in Daichi's case.²



I have provided information about why my chosen element is likely to be satisfied.³



I have identified one element of murder that is unlikely to be satisfied in Daichi's case.⁴



I have provided information about why my chosen element is unlikely to be satisfied.⁵



I have identified a second element that is unlikely to be satisfied in Daichi's case.⁶



I have provided information about why my chosen element is unlikely to be satisfied.⁷



I have provided a conclusion to my response that links back to the question.⁸



I have used signposting in my response such as 'One element' and 'Another element'.



I have used connecting words, such as 'However' and 'Ultimately'.

Linking to previous learning

15. [The principle of fairness refers to the idea that the justice system should be impartial and open for all participants.¹] [In the instance of murder, fairness is upheld for the accused, as a number of specific elements must be satisfied in order for them to be found guilty.²] [It is not enough for the accused to have simply caused the death of the victim, they must have also satisfied the mens rea element and have voluntarily completed the act that caused death.³]



I have provided information about the principle of fairness.¹



I have identified one way in which the principle of fairness is upheld by the elements of murder.²



I have provided information about my chosen way the principle of fairness is upheld.³

3B Murder – defences and sanctions

Check your understanding

1. **C. Explanation:** Involuntary violence is not a defence to murder.
2. **Duress** is a defence that can be raised if the criminal behaviour in question was induced by threat, violence, or coercion from a third party and against the accused's better judgement.

3. **A. Explanation:** In order for self-defence to be made out for murder, the accused must believe there was a threat to their life or a threat of really serious injury, not merely a threat to their safety.
4. **Duress:** II; IV
Sudden or extraordinary emergency: I; III
5. **B. Explanation:** The murder of custodial officers and on-duty emergency workers can result in a standard sentence of 30 years imprisonment as opposed to the usual standard of 25 years.
6. **B. False. Explanation:** In Australia, there is no death penalty. The maximum sentence for murder is life imprisonment.

Preparing for exams

Standard exam-style

7. [The maximum penalty for murder is life imprisonment.¹]



I have identified the maximum penalty for murder.¹

8. [One defence to murder is self-defence, which is the legal recognition that a person may lawfully cause the death of another person in order to prevent unlawful harm, being death or really serious injury, against themselves or another.¹] [For murder cases, the unlawful harm the accused is protecting themselves against must equate to really serious injury or death in order for self-defence to be successful.²]



I have identified one defence to murder.¹



I have provided information about my chosen defence.²



I have used signposting in my response, such as 'One defence'.

9. [Duress is a defence that can be raised when criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party.¹] [Apollo would not be able to raise this defence as, in murder cases, the threatened violence must be the infliction of death or really serious injury.²] [Apollo's boss threatening to fire him would not equate to inflicting death or really serious injury, thus the court would likely reject duress as a possible defence.³]



I have defined 'duress' as a defence to murder.¹



I have identified one reason why Apollo would not be able to raise the defence of duress.²



I have provided information about my chosen reason.³

10. [Sudden or extraordinary emergency is a defence that can be raised where criminal activity occurred under circumstances involving a real risk of death or serious injury.¹] [By contrast, self-defence is the legal recognition that a person may lawfully cause the death of another person in order to prevent unlawful harm, being death or really serious injury, against themselves or another.²] [One key difference between these defences is that self-defence involves the risk of death being inflicted by another person, whereas, in sudden or extraordinary emergency, it is the circumstances that pose a threat to the life of the accused.³]

- ✓ ✗ I have provided information about sudden or extraordinary emergency.¹
- ✓ ✗ I have provided information about self-defence.²
- ✓ ✗ I have provided one key difference between sudden or extraordinary emergency and self-defence as defences for murder.³
- ✓ ✗ I have used signposting in my response, such as 'One key difference'.
- ✓ ✗ I have used comparison words, such as 'By contrast' and 'whereas', when distinguishing.

Extended response

11. C; D
12. [One defence Jessica may try to raise is the defence of self-defence, which is the legal recognition that a person may lawfully cause the death of another person in order to prevent unlawful harm, being death or really serious injury, against themselves or another.¹] [However, Jessica would likely be unsuccessful in raising self-defence as Watson was merely joking when he said he would throw her overboard.²] [It was not a reasonable response to the circumstances and was disproportionate to the perceived threat.³] [Another defence Jessica may attempt to raise is sudden or extraordinary emergency, which is a defence that can be raised where the criminal activity occurred under circumstances involving a real risk of death or serious injury.⁴] [Jessica would likely be unsuccessful in raising the defence of sudden or extraordinary emergency as it was not a reasonable response to the situation.⁵] [There were other reasonable responses, such as fishing or redirecting the boat to reach land sooner, that she could have enacted instead.⁶] [Overall, both self-defence and duress would likely fail in Jessica's case, as her response was not reasonable in the circumstances.⁷]

- ✓ ✗ I have identified one defence to murder that Jessica could raise.¹
- ✓ ✗ I have provided information about the likely success of Jessica in raising my chosen defence.²
- ✓ ✗ I have provided further information about the likely success of Jessica in raising my chosen defence.³
- ✓ ✗ I have identified a second defence to murder that Jessica could raise.⁴
- ✓ ✗ I have provided information about the likely success of Jessica in raising my chosen defence.⁵
- ✓ ✗ I have provided further information about the likely success of Jessica in raising my chosen defence.⁶
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁷
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One defence' and 'Another defence'.
- ✓ ✗ I have used connecting words, such as 'However'.

Linking to previous learning

13. [The first error is that Savanna would be charged with murder.¹] [Savana killed a bird, and one of the elements of murder is that the voluntary act must cause the death of a born human, not an object or animal.²] [The second error is that Savana could raise the defence of duress.³] [Duress requires the threat made to equate to really serious injury or death. The threat from her boyfriend that he was going to break up with her cannot be likened to threatening to kill.⁴]
- ✓ ✗ I have identified the first error in the scenario.¹
- ✓ ✗ I have provided a correction to the first error in the scenario.²
- ✓ ✗ I have identified the second error in the scenario.³
- ✓ ✗ I have provided a correction to the second error in the scenario.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'The first error' and 'The second error'.

3C Murder – trends and impact

Check your understanding

- A. True. **Explanation:** The maximum penalty for murder in both NSW and Victoria is life imprisonment. In NSW, this is established in the *Crimes Act 1900* (NSW).
- D. **Explanation:** From 2018 to 2022, there were 144 murder convictions in NSW according to the NSW Bureau of Crime Statistics and Research.
- There were **more** murder convictions in NSW from 2018 to 2022 compared to Victoria from 2017 to 2022.
- B. False. **Explanation:** All offenders convicted of murder received a custodial sentence in NSW between 2018 and 2022.
- C. **Explanation:** According to the Sentencing Advisory Council, 91.8% of murder cases resulted in imprisonment during this time.
- A; B; D; E. **Explanation:** Secondary victimisation is not an impact of murder on both the community and the accused as, although a victim's community may experience this, the accused will not. This is because secondary victimisation refers to instances where a victim of crime suffers further harm not as a direct result of the crime but through negative experiences of the criminal justice system.
- A. **Explanation:** Those close to a murder victim, such as family and friends, are likely to experience reduced mental health outcomes as a psychological impact following the crime, such as PTSD.
- Murder cases impact **hospitals** as victims may require urgent medical treatment prior to their death. Furthermore, murder cases impact **the courts** and impose a cost on society as offenders must be tried and imprisoned.

9. A. True. **Explanation:** As murder results in the death of a member of a community, the impact is significant and complex, affecting a variety of parties.

Preparing for exams

Standard exam-style

10. [One sentencing statistic for murder in Victoria is that between 2017 to 2022, 97 people in Victoria were sentenced to murder according to the Sentencing Advisory Council.¹] [Another sentencing trend is that, of these 97 offenders, 91.8% of offenders received a term of imprisonment for their offence.²]

☒ ☐ I have provided one sentencing statistic or trend for murder in Victoria.¹

☒ ☐ I have provided a second sentencing statistic or trend for murder in Victoria.²

☒ ☐ I have used signposting in my response, such as 'One sentencing statistic' and 'Another sentencing trend'.

11. [One similarity between murder sentencing trends in Victoria and New South Wales is that the majority of offenders received a prison sentence.¹] [In Victoria, 91.8% of offenders were sentenced to imprisonment for murder between 2017 to 2022, whilst in NSW, 100% of offenders were sentenced to imprisonment from 2018 to 2022.²] [Another similarity between the sentencing trends in these states is that, in both states, a majority of people convicted of murder are men.³] [More than 90% of murder offences were committed by men in both states, with 90.7% in Victoria and 92% in NSW.⁴]

☒ ☐ I have provided one similarity between sentencing trends for murder in Victoria and New South Wales.¹

☒ ☐ I have provided information about my chosen similarity.²

☒ ☐ I have provided a second similarity between sentencing trends for murder in Victoria and New South Wales.³

☒ ☐ I have provided information about my chosen similarity.⁴

☒ ☐ I have used signposting in my response, such as 'One similarity' and 'Another similarity'.

12. [One impact of murder on individuals, such as the victim's family, is the psychological effects of someone close to them passing away.¹] [The murder of an individual close to someone has been shown to have a number of detrimental effects on their mental health, including causing or triggering post-traumatic stress disorder (PTSD) and depression.²]
- [Another individual impacted by murder is the accused. One impact of murder on the offender is the psychological effects they may endure.³] [The offender may experience regret, guilt, and remorse for taking the life of another person.⁴]

☒ ☐ I have identified one impact of murder on individuals.¹

☒ ☐ I have provided information about my chosen impact on individuals.²

☒ ☐ I have identified a second impact of murder on individuals.³

☒ ☐ I have provided information about my chosen impact on individuals.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another individual'.

13. [One impact of murder on the community of Mount Icelot is that the high number of murders may affect the extent to which people feel safe in the community and free to move in public spaces.¹] [Individuals within the Mount Icelot area may have a weaker attachment to, and sense of, community.²]

[Another impact on the Mount Icelot community is that murders impose a cost on society through an increased workload on law enforcement institutions, such as the police, that are funded by tax-payers.³] [This may further decrease Mount Icelot's sense of community.⁴]

☒ ☐ I have identified one impact of murder on society in relation to Mount Icelots.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen impact.²

☒ ☐ I have identified a second impact of murder on society in relation to Mount Icelots.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen impact.⁴

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

Extended response

14. A; C; D

15. [There may be significant impacts of murder on society and individuals, which can be both immediate and long-term.¹]

[One impact of murder on society is the effect it can have on the police force.²] [When there is a murder in a specific community there may be pressure on police, including Anjelica's father, to work longer hours to ensure community protection.³]

[Additionally, another impact of murder on society is the cost burden that it can impose. For example, murder cases increase the workload of hospitals and law enforcement institutions, which are often funded by tax-payer money.⁴]

[On the other hand, one impact of murder on individuals is the effect of such a crime on the victim's family and their relationships.⁵]

[Research has shown significant detrimental effects of murder on the maintenance of stable family relationships as the associated high stress of the situation may cause strain and potentially weaken ties, closeness, and devotion between friends, family members, or partners.⁶] [Furthermore, another impact on individuals is that they may also suffer psychological effects following a murder, such as increased feelings of fear and restrictions surrounding freedom of movement. This is demonstrated by Anjelica's reluctance to visit her hometown.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have identified one impact of murder on society.²
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen impact.³
- ✓ ✗ I have provided a second impact of murder on society.⁴
- ✓ ✗ I have identified one impact of murder on individuals.⁵
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen impact.⁶
- ✓ ✗ I have provided a second impact of murder on individuals.⁷
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One impact' and 'another impact'.
- ✓ ✗ I have used connecting words, such as 'Additionally' and 'On the other hand'.

Linking to previous learning

16. a. [One element of murder that the prosecution would need to prove beyond reasonable doubt is that Dusty's death was a result of Lance's voluntary act.¹] [The conduct must have been directed by the accused's conscious and voluntary decision and, since Lance was conscious and aware of what he was doing, this element would likely be satisfied.²]
- [Another element of murder that the prosecution would need to prove is that Dusty actually died.³] [The voluntary act must cause the death of another person, not an object or animal. This would not be contentious as Lance died as a result of Dusty's actions.⁴]
- ✓ ✗ I have identified one element of murder that the prosecution would need to prove.¹
 - ✓ ✗ I have provided an example from the scenario and linked it to my chosen element of murder.²
 - ✓ ✗ I have identified a second element of murder that the prosecution would need to prove.³
 - ✓ ✗ I have provided an example from the scenario and linked it to my chosen element of murder.⁴
 - ✓ ✗ I have used paragraphs to organise my response.
 - ✓ ✗ I have used signposting in my response, such as 'One element' and 'Another element'.
- b. [One impact of the murder on Lance, as the accused, is that he may experience regret, guilt, and remorse for murdering another person.¹] [Moreover, another impact is that there is a risk that Lance may develop mental health issues, such as depression or post-traumatic stress disorder (PTSD).²] [Finally, a third impact is that the process of defending himself in court and the uncertainty of not knowing what the outcome will be, could cause immense anxiety and stress for Lance.³]

- ✓ ✗ I have provided one impact of murder on Lance.¹
- ✓ ✗ I have provided a second impact of murder on Lance.²
- ✓ ✗ I have provided a third impact of murder on Lance.³
- ✓ ✗ I have used signposting in my response, such as 'One impact' and 'another impact'.
- ✓ ✗ I have used connecting words, such as 'Moreover'.

3D Assault - elements

Check your understanding

- B. False. **Explanation:** Assault may involve one person threatening to apply force to the body of another person. For example, threats to kill is an assault under s 20 of the *Crimes Act 1958* (Vic) or under common law apprehension assault.
- D. **Explanation:** An assault does not involve the death of a particular victim. Therefore, the victim's death is not an element the prosecution must prove beyond reasonable doubt for an assault offence.
- According to s 15 of the *Crimes Act 1958* (Vic), **an injury** means physical injury or harm to mental health.
- B. False. **Explanation:** It is not enough to prove the accused intended to do the act that caused the serious injury, rather, the accused must have intended to cause injury or serious injury.
- If an accused **recklessly** caused injury, they foresaw that their actions would probably cause injury or serious injury to the victim and decided to perform the act anyway. Alternatively, if an accused **negligently** caused injury, their conduct was a great falling short of the standard of care that a reasonable person would exercise, and there was a high risk that injury or serious injury would result from their conduct.
- A. **Explanation:** The 'substantial and operating cause' test requires the accused's act, or omission, to substantially or significantly contribute to the injury or serious injury suffered by the victim.
- A. True. **Explanation:** For the prosecution to prove an offender is guilty of assault beyond reasonable doubt, they must sufficiently prove to a judge and/or jury that the offender committed all elements of the offence.

Preparing for exams

Standard exam-style

- [One element of assault is that the victim suffered an injury or serious injury.¹] [According to s 15 of the *Crimes Act 1958* (Vic), an 'injury' means physical injury or harm to mental health. Alternatively, a 'serious injury' is an injury that either endangers life or is substantial and protracted.²]
- ✓ ✗ I have identified one element of assault.¹
- ✓ ✗ I have provided information about my chosen element.²
- ✓ ✗ I have used signposting in my response, such as 'One element'.

9. [One element of assault that may be difficult for Bronte to make out is the mens rea requirement that Alba must have either intentionally, recklessly, or negligently caused Bronte's injuries, being a broken nose.¹] [Considering it was part of the planned routine for Alba to pirouette at this point in the dance, the mens rea of intention or recklessness is unlikely to be made out. There is no way that Alba intended to kick Bronte in the face, or that she could have reasonably foreseen that her pirouette would cause Bronte's injuries as Bronte came on stage at the wrong time.²] [Furthermore, the mens rea element of negligence is unlikely to be made out either as Alba performing a pirouette on stage and 'accidentally' hitting Bronte, due to Bronte's mistake, is not a gross falling short of the standard of care she owes to Bronte.³]

✓ ✗ I have identified and described one element of assault that is unlikely to be made out in Alba's case.¹

✓ ✗ I have provided information about my chosen element.²

✓ ✗ I have provided further information about my chosen element.³

✓ ✗ I have used signposting in my response, such as 'One element'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

10. [One element of causing serious injury intentionally is that Joseph must have caused the victim's injury, being the broken jaw.¹] [Causation requires there to be a connection between Joseph's act or omission and the serious injury suffered by the victim. An objective test is used whereby the actions of Joseph must have been a 'substantial and operating cause' of the victim's broken jaw, without an intervening event.²] [Furthermore, a second element is that Joseph must have intended to cause the serious injury.³] [The prosecution must prove beyond reasonable doubt that Joseph intended to cause serious injury. It is not enough to prove that Joseph intended to perform the act of punching the supermarket worker, which caused her the serious injury.⁴]

✓ ✗ I have identified one element of causing serious injury intentionally.¹

✓ ✗ I have provided information about my chosen element.²

✓ ✗ I have identified a second element of causing serious injury intentionally.³

✓ ✗ I have provided information about my chosen element.⁴

✓ ✗ I have used signposting in my response, such as 'One element' and 'a second element'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

physical injury.²] [In Paige's case, Eden suffered a physical injury of a broken leg and broken ribs as a result of the incident.³]

[A second element that must be proven is that the accused caused the victim's injury. To determine whether there is a connection between the accused's actions and the victim's injury, an objective test is used, whereby the actions of the accused must have been a 'substantial and operating cause' of the victim's injury without an intervening event.⁴]

[Paige's action of pushing Eden is a substantial and operating cause of his broken leg and broken ribs as the push was a reason for him stumbling and falling down the nearby stairs.⁵]

[A third element is the accused intended to cause injury.⁶] [As Paige only meant to give Eden a nudge and did not think he would stumble backwards and fall down the stairs, she acted recklessly in causing Eden's injuries. Therefore, intention would not be made out as, although she may have intended to cause the action of pushing Eden, she clearly did not intend to cause the injury itself of him falling down the stairs.⁷]

[Ultimately, Paige would not be found guilty of intentionally causing injury as she did not commit the action of pushing Eden down the stairs intentionally, but rather, was reckless in doing so.⁸]

✓ ✗ I have provided an introduction to state the extent to which I agree or disagree, and a brief reason for my answer.¹

✓ ✗ I have identified the first element of causing injury intentionally.²

✓ ✗ I have provided an example from the scenario and linked it to the first element of causing injury intentionally.³

✓ ✗ I have identified the second element of causing injury intentionally.⁴

✓ ✗ I have provided an example from the scenario and linked it to the second element of causing injury intentionally.⁵

✓ ✗ I have identified the third element of causing injury intentionally.⁶

✓ ✗ I have provided an example from the scenario and linked it to the third element of causing injury intentionally.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'The first element' and 'A second element'.

✓ ✗ I have used connecting words, such as 'Therefore' and 'Ultimately'.

Extended response

11. A; C; D

12. [I do not agree with the statement as Paige would not be found guilty of causing injury intentionally since the mens rea element of intention would not be made out.¹]

[The first element that must be proven to be found guilty of causing injury intentionally or recklessly is that the victim suffered an injury. According to s 15 of the *Crimes Act 1958* (Vic), an injury can mean

Linking to previous learning

13. [The first error is that Diana believes she cannot be found guilty of assault as she merely threatened to stab Charles, but did not actually do so.¹] [Assault may involve a threat of force to the body of another person without the actual use of force being enacted.²]

[The second error is that Diana is required to prove her innocence by presenting evidence that demonstrates she is not guilty.³] [The presumption of innocence is the right for all accused persons, such as Diana, to be presumed not guilty until it is proven otherwise, beyond reasonable doubt, by the prosecution who has the burden of proof.⁴]

- ✓ ✗ I have identified the first error in the scenario.¹
- ✓ ✗ I have provided the correct procedure for the first error in the scenario.²
- ✓ ✗ I have identified the second error in the scenario.³
- ✓ ✗ I have provided the correct procedure for the second error in the scenario.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'The first error' and 'The second error'.

3E Assault – defences and sanctions

Check your understanding

- B; D. **Explanation:** Actus reus is the physical actions of the crime, whilst unlawful excuse is not a defence to assault.
- A. **Explanation:** Self-defence requires the accused to have believed their conduct was necessary, which is a subjective assessment, and for their response to be reasonable in all of the circumstances. Their response must not be disproportionate to the threat or harm inflicted upon them.
- The defence of **duress** may be raised where an accused engaged in criminal behaviour due to threat, violence, or coercion from a third party, whereas **self-defence** is an applicable defence where the accused reasonably believed they needed to use force to prevent harm against themselves or another person.
- A; C; D. **Explanation:** When an accused commits assault to defend themselves, or another, from harm, the defence they would raise is self-defence. On the other hand, the defence of duress requires the accused to act to prevent or avoid threatened harm.
- A. **Explanation:** If a victim is in public, they consent to force being applied across the ordinary course of daily life. However, being pushed onto a road would not constitute an ordinary activity in the course of daily life and therefore, would not fall under the defence of 'consent'.
- A. True. **Explanation:** Each form of assault has imprisonment as the harshest sentence a guilty person may receive. Depending on the severity of the type of assault, the length of this maximum prison sentence can differ.
- A; C; F; G. **Explanation:** Injunctions and damages are both remedies that may apply in civil cases, whilst the threat to harm is neither a defence nor a sanction for assault.

Preparing for exams

Standard exam-style

- [The maximum penalty Jai could receive for causing serious injury intentionally is 20 years imprisonment.¹] [However, such a penalty is applied in the most extreme circumstances, therefore, Jai may not receive this sentence and could receive a community correction order or a decreased prison sentence.²]

- ✓ ✗ I have identified the maximum penalty Jai could receive for causing serious injury intentionally.¹
- ✓ ✗ I have provided information about the maximum penalty.²
- ✓ ✗ I have used connecting words, such as 'However'.

- [The defence that Joseph has raised is duress.¹] [Duress is a defence that can be raised whereby criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party.²] [Considering the motorcycle club leader threatened to harm Joseph's wife unless he committed the assault, duress would likely be satisfied as Joseph believed assaulting the victim was necessary in order to prevent the threatened harm.³]

- ✓ ✗ I have identified duress as the defence that Joseph has raised.¹
- ✓ ✗ I have defined duress as a defence to assault.²
- ✓ ✗ I have provided an example from the scenario and linked it to duress as a defence.³

- [Self-defence refers to 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.¹] [For self-defence to be made out, the accused must have believed the conduct was necessary for self-defence. Considering Nikkita's property was being stolen, this would likely constitute conduct where self-defence is necessary as she had to protect herself and her possessions.²] [Furthermore, the accused's conduct must be a reasonable response to the circumstances. It is likely Nikkita's actions were reasonable as she punched and kicked the man to try and get away from him, not causing him excessive harm but rather, producing a reasonable response to being attacked.³]

- ✓ ✗ I have defined self-defence as a defence to assault.¹
- ✓ ✗ I have identified one element of self-defence and linked it to the scenario.²
- ✓ ✗ I have identified a second element of self-defence and linked it to the scenario.³
- ✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

- True: I; III
False: II; IV
- [One defence to assault that Narelle could raise is consent.¹] [Narelle would likely be able to successfully raise the defence of consent as the injuries sustained by Farlap occurred during a medical procedure.²] [Considering Narelle had Farlap consent to having open-heart surgery, he consented to incur injuries that are a requirement of this surgery, and therefore, would be unable to successfully establish that Narelle assaulted him.³]

[One sanction for assault that Narelle may be prescribed is a prison sentence.⁴] [If Narelle is found guilty of causing injury intentionally, the maximum penalty she could receive would be 10 years imprisonment.⁵] [However, considering she was not acting with malice, she would be unlikely to receive the harshest penalty available. Instead, she could receive a community correction order, fine, or short-term prison sentence.⁶]

- ✓ ✕ I have identified one defence to assault that Narelle could raise.¹
- ✓ ✕ I have provided information about my chosen defence.²
- ✓ ✕ I have provided an example from the scenario and linked it to my chosen defence.³
- ✓ ✕ I have identified one sanction for assault that Narelle could face if she is found guilty.⁴
- ✓ ✕ I have provided information about my chosen sanction.⁵
- ✓ ✕ I have provided an example from the scenario and linked it to my chosen defence.⁶
- ✓ ✕ I have used signposting in my response, such as 'One defence' and 'One sanction'.
- ✓ ✕ I have used connecting words, such as 'However'.

Linking to previous learning

13. [One error in the scenario is that the prosecution must prove the offence of assault against Julia on the balance of probabilities.¹]
[The prosecution must prove that Julia is guilty of assault by satisfying all of the elements beyond reasonable doubt, not on the balance of probabilities as this is the standard of proof for civil law.²]
[Another error is that the maximum sentence Julia could receive for causing injury recklessly is 20 years.³][The maximum sanction that Julia could possibly face for causing injury recklessly would be five years in prison, not 20 years imprisonment.⁴]
[A third error is that Julia does not have any defences that she could raise.⁵][Julia could raise the defence of consent as the tackle occurred during a rugby game where players consent to injuries that may occur over the course of the game.⁶]
- ✓ ✕ I have identified the first error in the scenario.¹
 - ✓ ✕ I have provided the correct legal information for the first error in the scenario.²
 - ✓ ✕ I have identified the second error in the scenario.³
 - ✓ ✕ I have provided the correct legal information for the second error in the scenario.⁴
 - ✓ ✕ I have identified the third error in the scenario.⁵
 - ✓ ✕ I have provided the correct legal information for the third error in the scenario.⁶
 - ✓ ✕ I have used paragraphs to organise my response.
 - ✓ ✕ I have used signposting in my response, such as 'One error' and 'Another error'.

3F Assault - trends and impact

Check your understanding

- B. False. **Explanation:** The *Crimes Act 1958* (Cth) does not exist. In NSW, criminal offences and their maximum penalties are set out in the *Crimes Act 1900* (NSW), whereas the *Crimes Act 1958* (Vic) regulates Victorian criminal offences. Therefore, the maximum penalties for various assault offences differ between the two states.
- A. **Explanation:** From 2018 to 2023, approximately 700 assault incidents occurred in Victoria per 100,000 according to the Crime Statistics Agency.
- In **Victoria**, the proportion of offenders sentenced to prison for causing serious injury intentionally from 2016 to 2021 was 85.5%. Comparatively, in **New South Wales** the percentage of offenders that committed serious assault resulting in injury and are sentenced to a term of imprisonment from 2018 to 2022 was 32.5%.
- A. True. **Explanation:** For offenders who have committed serious assaults resulting in injury in New South Wales between 2018 to 2022, 37.2% of offenders received a supervised community order whilst 32.5% received a term of imprisonment, making the community order the most common sanction.
- C. **Explanation:** According to the Australian Bureau of Statistics, 4% of assault cases involved the use of a weapon in 2021 in NSW.
- A; B; D; E. **Explanation:** Demographical is not an impact of assault on individuals, however, a victim may experience physical, psychological, economical, and social impacts after experiencing such an offence.
- A. **Explanation:** Enduring the physical pain associated with bruising after an assault would be an example of a physical impact that this offence may have on a victim.
- Assault may cause **economic** impacts as higher numbers of assault in a given area can impact the extent to which people feel safe in such locations, potentially reducing house prices or affecting local businesses in an area with high rates of assault. This offence may also cause **health** impacts on those in the community who witnessed an assault, and may cause anxiety or post-traumatic stress disorder, affecting their mental health.
- B. False. **Explanation:** Although assault does not result in death, unlike culpable driving and murder, it still has a number of serious impacts on the individuals involved and society more broadly.

Preparing for exams

Standard exam-style

- [One sentencing statistic for assault in Victoria is that between 2016 and 2021, 124 people in Victoria were sentenced to causing serious injury intentionally according to the Sentencing Advisory Council.¹]
[Another sentencing trend is that, of these 124 people, 85.5% of offenders received a term of imprisonment for their offence.²]
- ✓ ✕ I have identified one sentencing statistic or trend for assault in Victoria.¹
- ✓ ✕ I have identified a second sentencing statistic or trend for assault in Victoria.²
- ✓ ✕ I have used signposting in my response, such as 'One sentencing statistic' and 'Another sentencing trend'.

11. [One similarity between assault sentencing trends in Victoria and New South Wales is that the incidence rate per 100,000 for assault offences is quite similar. In Victoria, there were 697.9 incidents of assault per 100,000 in 2021, whilst during this same period in NSW, there were 790 victims of assault per 100,000 in NSW.¹] [Another similarity between the sentencing trends in these states is that both make use of community corrections orders as a type of sanction used to punish offenders who have committed assault, though this sanction is used to different degrees in each of the states.²] [However, one difference between NSW and Victoria is that whilst 85.5% of offenders received a term of imprisonment for causing serious injury intentionally between 2016 and 2021 in Victoria, just 32.5% of offenders who committed serious assault resulting in injury between 2018 and 2022 received a prison sentence in NSW.³]

☒ ☐ I have provided one similarity between sentencing trends for assault in Victoria and New South Wales.¹

☒ ☐ I have provided a second similarity between sentencing trends for assault in Victoria and New South Wales.²

☒ ☐ I have provided one difference between sentencing trends for assault in Victoria and New South Wales.³

☒ ☐ I have used signposting in my response, such as 'One similarity' and 'One difference'.

☒ ☐ I have used comparison words, such as 'whilst' and 'However', when comparing.

12. [One impact of assault on the victim of the crime is the physical impact of enduring an injury as a result of the assault occurring.¹] [Sustaining physical injuries may cause a victim to experience economic, social, and psychological consequences.²] [Another individual impacted by assault is the offender. One impact of assault on the offender is the psychological impacts they may endure.³] [The offender may experience regret, guilt, and remorse for injuring another person.⁴]

☒ ☐ I have identified one impact of assault on the victim.¹

☒ ☐ I have provided information about my chosen impact on the victim.²

☒ ☐ I have identified one impact of assault on the accused.³

☒ ☐ I have provided information about my chosen impact on the accused.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another individual'.

13. [One impact of assault on the community of SunnySide is that the higher numbers of assaults in SunnySide may impact the extent to which people feel safe in the community and free to move in public spaces.¹] [People may begin to avoid the community of SunnySide as they fear being subject to, or a witness of, an assault, possibly causing house prices in SunnySide to decline, which can negatively impact the local community.²]

[Another impact on the community of SunnySide is that the high proportions of assault may cause the area to develop a negative reputation.³] [This may cause businesses in the area to lose customers and the sense of community may be reduced.⁴]

☒ ☐ I have identified one impact of assault on society.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen impact.²

☒ ☐ I have identified a second impact of assault on society.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen impact.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

Extended response

14. A; D

15. [There may be significant impacts of assault on society and individuals, which can be both immediate and long-term.¹]

[One impact of assault on society is economic.²] [Considering the government increased police presence to 700 officers during protests in an attempt to prevent assault, the police's workload may have increased significantly, therefore causing tax-payer money to be directed towards funding this.³] [Additionally, another impact on police is that they were victims of the assault. Nine police officers were sent to hospital after protesters threw items at them, physically impacting these individuals, which may cause the physical and mental health of police to decline as a result.⁴]

[Another impact of assault on society is on the community.⁵] [People may fear visiting the city due to the risk of encountering a violent protest where they may be assaulted, possibly causing economic decline for businesses in the city.⁶] [The community may also have witnessed the assaults that occurred in the protests, as they happened in the public space of Melbourne's CBD. Therefore, they may now developed post-traumatic stress disorder (PTSD) as a result of what they witnessed, impacting society's overall health.⁷]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have identified one impact of assault on society and individuals.²

☒ ☐ I have provided one example from the scenario and linked it to my chosen impact.³

☒ ☐ I have provided a second example from the scenario and linked it to my chosen impact.⁴

☒ ☐ I have identified a second impact of assault on society and individuals.⁵

☒ ☐ I have provided one example from the scenario and linked it to my chosen impact.⁶

☒ ☐ I have provided a second example from the scenario and linked it to my chosen impact.⁷

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

☒ ☐ I have used connecting words, such as 'Additionally'.

Linking to previous learning

16. a. [One sentencing trend in Victoria relating to causing serious injury intentionally is that 85.5% of offenders received a term of imprisonment as their sanction for this offence.¹]

☒ ☐ I have provided one sentencing trend in Victoria relating to causing serious injury intentionally.¹

☒ ☐ I have used signposting in my response, such as 'One sentencing trend'.

- b. [One element of assault that the prosecution will need to prove beyond reasonable doubt is that Lucia suffered a serious injury, as the police have charged Nadia with causing serious injury intentionally.¹][Considering Lucia suffered a concussion and then a week-long coma, this element will likely be made out as a coma indicates that the injury endangered Lucia's life and was thus 'serious'.²]

[The second element of assault that the prosecution will need to prove is that Nadia had the requisite mens rea of intention when committing the offence.³][Intention requires that Nadia not only intended to do the act which caused the injury but rather, intended to cause the serious injury. Since Nadia hit Lucia in the head, it is likely intention would be made out as this is a purposeful act.⁴]

☒ ☐ I have identified one element of assault that the prosecution will need to prove.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen element of assault.²

☒ ☐ I have identified a second element of assault that the prosecution will need to prove.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen element of assault.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One element' and 'The second element'.

3G Culpable driving - elements

Check your understanding

- B. False. **Explanation:** Both actus reus and mens rea must be proven beyond reasonable doubt for an offence of culpable driving causing death to be made out.
- A; B; C. **Explanation:** Recklessness and negligence are both aspects of the mens rea for the offence of culpable driving causing death but have no relevance to the physical actions, also known as actus reus, required for the offence.
- B. **Explanation:** Since a bike is not motorised, it would not constitute a 'motor vehicle', which is required for the offence of culpable driving causing death to be made out.
- A. **Explanation:** The accused's actions do not need to be the sole reason for the victim's death. For example, the victim may have contributed to their own death by acting carelessly and crossing a road without looking. As long as the accused's actions are the 'substantial and operating cause' of the victim's death, causation will be satisfied.

- For the mens rea of culpable driving causing death to be satisfied, the accused's actions must have been enacted **either** negligently **or** recklessly.
- A; B; D. **Explanation:** The accused does not need to be under the influence of any drugs or alcohol to still satisfy the mens rea of being 'reckless' when driving.
- A. **Explanation:** For negligence to be made out, the accused must have 'failed unjustifiably and to a gross degree' to meet the standard of care that a reasonable person would take under the circumstances. The accused's actions will not be considered negligent if they were merely an accident.
- B. False. **Explanation:** The burden of proof is not on the accused, meaning they do not have to prove they did not commit the offence of culpable driving causing death. Rather, the burden is on the prosecution to prove the accused did so beyond reasonable doubt.

Preparing for exams

Standard exam-style

9. [One element of culpable driving causing death is causation, which is that the accused's actions are the substantial and operating cause of the victim's death.¹][Another element of culpable driving causing death is that the accused was driving a motor vehicle, which may be a car or a motorbike.²]

☒ ☐ I have identified one element of culpable driving causing death.¹

☒ ☐ I have identified a second element of culpable driving causing death.²

☒ ☐ I have used signposting in my response, such as 'One element' and 'Another element'.

10. [One element of culpable driving causing death is mens rea which requires an accused to have killed another person when driving either negligently, recklessly, or under the influence of drugs or alcohol to such an extent that they are incapable of controlling their actions.¹][For example, the mens rea element of negligence requires the accused to not just make an error or a mistake, but rather they must fail to uphold the standard of care that a reasonable person would take unjustifiably and to a gross degree in all the circumstances.²]

☒ ☐ I have identified one element of culpable driving causing death.¹

☒ ☐ I have provided information about my chosen element of culpable driving causing death.²

☒ ☐ I have used signposting in my response, such as 'One element'.

11. [One element of the actus reus for culpable driving causing death is that the accused must have been driving a motor vehicle. The term 'motor vehicle' encompasses motorbikes, jetskis, trucks, cars, and other motorised vehicles.¹][Another element is that the person must have caused the death of the victim. This element of causation requires the accused to be the substantial and operating cause of the victim's death, even if other factors contributed to their death.²][A third element of actus reus for culpable driving causing death is that the accused caused another person to die. Death is defined under the *Human Tissue Act 1982* (Vic).³]

✓ ✗ I have identified one element of the actus reus element of culpable driving causing death.¹

✓ ✗ I have identified a second element of the actus reus element of culpable driving causing death.²

✓ ✗ I have identified a third element of the actus reus element of culpable driving causing death.³

✓ ✗ I have used signposting in my response, such as 'One element' and 'Another element'.

12. [The first element of the actus reus for culpable driving causing death is that the person is driving.¹] [Considering Rion was 'riding his motorbike' he was clearly in control of the vehicle, including its acceleration and braking, therefore fulfilling the requirement that he was driving.²] [A second element of the actus reus for culpable driving causing death is that the vehicle being driven is a motor vehicle.³] [A motorbike is considered a 'motor vehicle' under the *Crimes Act 1958* (Vic), hence this element of actus reus is satisfied.⁴] [Thirdly, the element of causation would be satisfied. Although Ryan called out to Rion, which may have contributed to his death, the prosecution could still prove that Rion was the 'substantial and operating' cause of Ryan's death, thus fulfilling causation.⁵] [Finally, another element of actus reus is that the victim died. Ryan passed away two days after being hit by Rion due to his injuries, therefore the requirement of death to establish culpable driving causing death is satisfied.⁶]

[The offence of culpable driving causing death also requires the mens rea to be proven. The prosecution would likely argue that Rion acted negligently in driving his motorbike, therefore satisfying the mens rea requirement.⁷] [For negligence to be proven, it must be satisfied beyond reasonable doubt that Rion's actions were grossly and unjustifiably below the standard of care a reasonable person would take in the circumstances. This is likely to be proven considering Rion was both on FaceTime with Ronan and stopped abruptly due to the road rage incident.⁸]

✓ ✗ I have identified the first element of the actus reus for culpable driving causing death.¹

✓ ✗ I have provided an example from the scenario and linked it to the first element of the actus reus for culpable driving causing death.²

✓ ✗ I have identified the second element of the actus reus for culpable driving causing death.³

✓ ✗ I have provided an example from the scenario and linked it to the second element of the actus reus for culpable driving causing death.⁴

✓ ✗ I have identified the third element of the actus reus for culpable driving causing death.⁵

✓ ✗ I have identified the fourth element of the actus reus for culpable driving causing death.⁶

✓ ✗ I have identified the mens rea requirement for culpable driving causing death.⁷

✓ ✗ I have provided an example from the scenario and linked it to one mens rea requirement for culpable driving causing death.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'The first element' and 'another aspect'.

Extended response

13. True: I; II; III
False: IV

14. [Although Sanjit did injure the toddler while driving on the road, both the actus reus and mens rea elements of culpable driving causing death are unable to be proven by the prosecution in this case, therefore preventing Sanjit from being found guilty of culpable driving causing death.¹]

[Firstly, Sanjit was driving his motorised wheelchair, which is not considered a 'motor vehicle', a requirement of the actus reus for culpable driving causing death, due to its slow nature.²] [Secondly, actus reus requires that Sanjit's actions were the substantial and operating cause of the injury sustained by the victim. It is likely the prosecution would be unable to prove causation beyond reasonable doubt as Sanjit was driving very slowly and had no real opportunity to avoid the toddler considering she ran onto the road. Therefore, his actions would likely be insufficient to amount to causing the toddler's injuries.³] [Thirdly, as the toddler only sustained injuries and did not die, Sanjit cannot be found guilty of culpable driving causing death. For the offence to be made out, death must have occurred, which it did not in this case.⁴]

[Since the actus reus for culpable driving causing death has not been made out, Sanjit could not be found guilty of the offence even if mens rea was satisfied. However, the fact that Sanjit lacked the requisite mens rea required for culpable driving causing death only further proves that the prosecution would be unable to establish his guilt for this offence.⁵] [Sanjit was driving very slowly and was 'focus[ed] on the roads'. There is no evidence indicating he was on drugs or had consumed alcohol. Therefore, he was not reckless, negligent, or under the influence.⁶]

[Overall, the prosecution is unlikely to be successful in proving Sanjit's guilt as neither the actus reus nor mens rea requirement for culpable driving causing death were satisfied by Sanjit.⁷]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one reason why Sanjit's actions do not satisfy the actus reus requirement for culpable driving causing death.²

✓ ✗ I have provided a second reason why Sanjit's actions do not satisfy the actus reus requirement for culpable driving causing death.³

✓ ✗ I have provided a third reason why Sanjit's actions do not satisfy the actus reus requirement for culpable driving causing death.⁴

✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.⁵

✓ ✗ I have stated one reason why Sanjit's actions do not satisfy the mens requirement for culpable driving causing death.⁶

✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

✓ ✗ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

✓ ✗ I have used connecting words, such as 'However' and 'Therefore'.

Linking to previous learning

15. [The standard of proof in a criminal case, like culpable driving causing death, is beyond reasonable doubt.¹][This means the prosecution must prove all the elements of culpable driving causing death to the judge and/or jury, being actus reus and mens rea, to the point where there is not a doubt in their mind that the accused committed the offence.²]

✓ ✗ I have identified 'beyond reasonable doubt' as the standard of proof required to establish the offence of culpable driving causing death.¹

✓ ✗ I have provided information about the standard of proof.²

3H Culpable driving - defences and sanctions

Check your understanding

- B; C; D. **Explanation:** Although self-defence is a defence for several criminal offences in Victoria, such as assault and murder, it is not a defence for culpable driving causing death.
- A. **Explanation:** Duress requires an accused to have committed the offence of culpable driving causing death as this was a reasonable way to avoid threatened harm, which they believe would have occurred if they did not commit the offence.
- B. False. **Explanation:** Although whether the situation an accused is faced with constituted an 'emergency' is a question of fact with no specific definition, it is likely that running late for work would not be considered an 'emergency', as this could have been avoided and would not be considered dire circumstance.
- A. **Explanation:** Since Dean claimed he had no recollection of driving the motorbike, he was likely sleepwalking. Therefore, he can rely on the defence of automatism to argue against the offence of culpable driving causing death as he did not have a conscious mind.
- If an accused is unable to successfully raise any defences and is found guilty of culpable driving causing death, they are likely to be **sanctioned with** a prison sentence.
- C. **Explanation:** The maximum fine that can be imposed for culpable driving causing death is over \$400,000 as of 2023, whilst the maximum prison sentence is 20 years.
- B. False. **Explanation:** The defence of automatism, duress, or sudden and extraordinary emergency, when raised successfully, will result in the accused being acquitted of any crime. If an accused challenges an element of culpable driving causing death however, such as mens rea, they may still be charged with an offence, for example, dangerous driving causing death, as only the requisite mens rea has not been established.

Preparing for exams

Standard exam-style

8. [The maximum penalties Lucy could receive for culpable driving include a fine, imprisonment, or both in conjunction with each other. The maximum term of imprisonment is 20 years.¹][The maximum fine she could receive for this offence is worth 2,400 penalty units, which currently amounts to \$400,000.²]

✓ ✗ I have identified one maximum penalty Lucy could receive for culpable driving causing death.¹

✓ ✗ I have identified a second maximum penalty Lucy could receive for culpable driving causing death.²

9. [Sudden or extraordinary emergency is a defence to culpable driving causing death where an accused pleads that their actions were a reasonable response to an emergency they reasonably believed to exist, and their conduct was the only reasonable way to deal with the emergency.¹][Whether a set of circumstances constitutes an emergency is a question of fact determined by the courts.²]

✓ ✗ I have defined the defence of sudden or extraordinary emergency.¹

✓ ✗ I have provided information about the defence of sudden or extraordinary emergency.²

10. [Automatism is a defence Sarthak could raise as he was sleepwalking and therefore, in an involuntary state of mind, when he committed the offence.¹][Sleepwalking is an example of automatism, meaning Sarthak did not hit Siena due to conscious actions or behaviours.²][If Sarthak or his lawyers are able to successfully provide evidence that he was sleepwalking at the time of the offence, he will be acquitted of his crime and not convicted of culpable driving causing death.³]

✓ ✗ I have identified automatism as a defence Sarthak could raise.¹

✓ ✗ I have provided information about automatism as a defence Sarthak could raise.²

✓ ✗ I have provided further information about automatism as a defence Sarthak could raise.³

Extended response

11. True: II; III
False: I; IV
12. [One defence Alaya may raise against the culpable driving causing death offence is the defence of sudden or extraordinary emergency.¹][Alaya may argue that she needed to arrive at the hospital on time to immunise the children, which constituted an 'emergency' as the reasonable person would recognise that unimmunised children could be disastrous. However, this defence may fail as late immunisations is unlikely to be a sufficient 'emergency'.²][Furthermore, the reasonable person in Alaya's circumstances is unlikely to believe speeding 30 km/h over the speed limit was reasonable, as a more reasonable response would have involved informing the children to arrive at 10:30 am instead or asking another nurse at the hospital to administer the immunisations.³][The defences of duress and automatism would not be applicable here as there is no evidence to suggest Alaya was being coerced or threatened into speeding, or that she was acting under an involuntary state of mind.⁴]

[One sanction Alaya may face if the defence is unsuccessful and she is found guilty of culpable driving causing death is imprisonment.⁵]
[The maximum prison sentence for culpable driving causing death in Victoria is 20 years in prison, however, this is usually for the most extreme cases of culpable driving causing death where the offender shows limited remorse.⁶][Trends in Victoria suggest the standard prison sentence for culpable driving causing death is eight years in prison. This sentence is typically applied to culpable driving causing death offences that are in a middle range of seriousness. Therefore, if found guilty, Alaya would likely receive a prison sentence of around eight years.⁷]

✓ ✗ I have identified one defence Alaya may raise.¹

✓ ✗ I have provided information about my chosen defence.²

✓ ✗ I have provided an example from the scenario and linked them to my chosen defence.³

✓ ✗ I have provided further information about my chosen defence.⁴

✓ ✗ I have identified one sanction Alaya may face if found guilty.⁵

✓ ✗ I have provided information about my chosen sanction.⁶

✓ ✗ I have provided further information about my chosen sanction.⁷

✓ ✗ I have used signposting in my response, such as 'One defence' and 'One sanction'.

✓ ✗ I have used connecting words, such as 'Furthermore' and 'Therefore'.

✓ ✗ I have stated whether I believe Emmett would likely be found guilty of culpable driving causing death.¹

✓ ✗ I have identified one element of culpable driving causing death.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen element of culpable driving causing death.³

✓ ✗ I have provided information about whether Emmett would satisfy my chosen element of culpable driving causing death.⁴

✓ ✗ I have identified a second element of culpable driving causing death.⁵

✓ ✗ I have provided an example from the scenario and linked it to my chosen element of culpable driving causing death.⁶

✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'The final element'.

✓ ✗ I have used connecting words, such as 'Therefore' and 'However'.

- b. [An appropriate sanction for Emmett, if he is found guilty of culpable driving causing death, would be imprisonment.¹]
[Considering Emmett is extremely remorseful, he would likely receive a middle-of-the-range prison sentence which, according to the Sentencing Advisory Council, is around eight years in prison.²][Over recent years in Victoria, every person charged with culpable driving causing death has received some form of prison sentence, therefore, it would be appropriate for Emmett to receive the same.³]

✓ ✗ I have identified an appropriate sanction for Emmett.¹

✓ ✗ I have provided information about my chosen sanction.²

✓ ✗ I have provided one reason why this sanction is appropriate for Emmett.³

Linking to previous learning

13. B; C

14. a. [Emett is likely to be found guilty of culpable driving causing death as the prosecution would likely be able to prove, beyond reasonable doubt, that Emmett caused the victim's death and was negligent in doing so.¹]

[Considering the elements that the accused was driving a motor vehicle, and that the victim died, have both been made out, the next element the prosecution would need to prove is that Emmett's driving caused the death of the cyclist.²][Emmett may argue that the cyclist was not wearing a helmet, which may have contributed to his death. Therefore, it is possible that if the cyclist was wearing a helmet, they would have survived.³]

[However, the chain of causation is unlikely to be broken by the cyclist's lack of a helmet, as Emmett's actions, of veering into the cyclist, are still considered the 'substantial and operating cause' of the cyclist's death.⁴]

[The final element the prosecution must prove is that Emmett fulfils the mens rea requirement of the culpable driving causing death offence.⁵][The prosecution would likely be successful in arguing that Emmett was negligent in driving without adjusting his mirrors and turning his headlights on late at night, and with the knowledge that he was extremely fatigued.⁶]

[Overall, all elements of culpable driving causing death would likely be satisfied beyond reasonable doubt and Emmett would therefore, be found guilty of the offence.⁷]

31 Culpable driving - trends and impact

Check your understanding

- B. False. **Explanation:** One element of culpable driving causing death is that the accused caused the death of the victim, not just injury to the victim. Therefore, the sanction an offender receives for culpable driving causing death is typically imprisonment, due to the offence's severity.
- B. False. **Explanation:** From 2015 to 2020, 98.5% of individuals found guilty of culpable driving causing death in Victoria received an immediate custodial sentence.

3. B; C; D. **Explanation:** There is no offence referred to as 'culpable driving causing death' in NSW. Rather, a person who is driving a vehicle and kills someone may be charged with dangerous driving causing death or manslaughter.
4. In New South Wales, the majority of offenders charged with culpable driving causing death are **men**.
5. A. **Explanation:** Due to the likelihood of a culpable driving causing death offender receiving a prison sentence, financial disadvantages will likely be a consequence of their behaviour as there is limited opportunity to earn money in prison. Anxiety and the stress of going to court may also impact an offender as they may fear what punishment they could face.
6. A. **Explanation:** Culpable driving causing death may occur on busy roads, surrounded by other cars and pedestrians who observe the event unfold and could develop trauma and anxiety as a result.
7. B. False. **Explanation:** Every Australian jurisdiction has its own criminal laws, for example, NSW and Victoria both have different offences relating to driving causing death, and thus different sanctions for offenders who commit these crimes.

Preparing for exams

Standard exam-style

8. [One sentencing trend in New South Wales for culpable driving causing death is that 41.4% of people charged with dangerous driving causing death receive a prison sentence.¹]
- ✓ ✗ I have identified one sentencing trend in one Australian jurisdiction other than Victoria.¹
- ✓ ✗ I have used signposting in my response, such as 'One sentencing trend'.
9. [One trend related to culpable driving causing death in Victoria is that 98.5% of individuals found guilty of culpable driving causing death received an immediate custodial sentence between the period of 2015 to 2020.¹][A custodial sentence is a prison sentence, meaning most people convicted of this offence received a period of imprisonment as their punishment, as opposed to a fine or a community corrections order.²][Another trend in Victoria is that, over the past eight years, the number of driving causing death offences being reported and recorded each year has remained relatively consistent.³][For example, according to the Crime Statistics Agency, in 2016, there were 81 reports of dangerous driving causing death, whilst this statistic was at 85 by 2022, showing a consistent pattern.⁴]
- ✓ ✗ I have identified one trend related to culpable driving causing death in Victoria.¹
- ✓ ✗ I have provided information about my chosen trend.²
- ✓ ✗ I have identified a second trend related to culpable driving causing death in Victoria.³
- ✓ ✗ I have provided information about my chosen trend.⁴
- ✓ ✗ I have used signposting in my response, such as 'One trend' and 'Another trend'.

10. [One impact of culpable driving causing death on the family and friends of a victim of a crime is the financial burden the death of the victim imposes on them due to bereavement costs.¹][Expenses, such as paying for a funeral and taking time off work to plan this event or to grieve, will likely be incurred by the family of a victim.²][A second impact of culpable driving causing death on the family and friends of a victim is the panic and anxiety that a friend or family's death may cause.³][Especially since the victim's death occurred on the roads, the victim's family may develop post-traumatic stress disorder (PTSD) and fear the roads as a result of the victim's death.⁴]

✓ ✗ I have identified one impact of culpable driving causing death on the family and friends of the victim.¹

✓ ✗ I have provided information about my chosen impact.²

✓ ✗ I have identified a second impact of culpable driving causing death on the family and friends of the victim.³

✓ ✗ I have provided information about my chosen impact.⁴

✓ ✗ I have used signposting in my response, such as 'One impact' and 'A second impact'.

11. [As the offender of the crime, Hyun-Ae will still face many negative impacts from committing the offence. Firstly, Hyun-Ae will be in prison for the next eight years, negatively impacting her financial position.¹][When in prison, there are few opportunities to earn money and, considering she has just graduated, Hyun-Ae is likely to have limited savings to rely on, so when she does leave prison she may face financial strife.²][Secondly, Hyun-Ae may experience several psychological consequences as a result of her actions.³][Hyun-Ae expressed how 'truly sorry' she was for committing the crime, indicating her feelings of great remorse and regret for her actions, which she will now have to live with for the rest of her life.⁴]

✓ ✗ I have identified one impact of culpable driving causing death on Hyun-Ae.¹

✓ ✗ I have provided examples from the scenario and linked them to my chosen impact of culpable driving causing death.²

✓ ✗ I have identified a second impact of culpable driving causing death on Hyun-Ae.³

✓ ✗ I have provided examples from the scenario and linked them to my chosen impact of culpable driving causing death.⁴

✓ ✗ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

Extended response

12. A; C; D
13. [The first impact that the broader community will likely face due to Leon's crime is that several witnesses to the crime may develop post-traumatic stress disorder (PTSD) or anxiety as a result.¹][As the crime occurred during peak hour, when there were several local eyewitnesses, there may now be a number of people in society who now may fear the roads after seeing Leon's erratic driving.²]

[Another impact is on the victim's family. They will be impacted both financially and emotionally by Cora's death.³] [Cora was a mother and a surgeon who accounted for around 70% of her household's income, therefore, in her absence, the family may struggle financially. On top of this, the family will also have to endure the emotional pain and distress that accompanies a loved one abruptly passing away.⁴]

[A third impact is on Leon, who has been sentenced to 10 years in prison after being found guilty of culpable driving causing death.⁵]

[Imprisonment can have detrimental impacts on Leon's personal relationships and social life as it is difficult to socialise with the outside world when in prison.⁶]

[Ultimately, society and individuals involved in the crime are significantly impacted by culpable driving causing death, making it an extremely severe offence.⁷]

✓ ✕ I have identified one impact of Leon's crime on society.¹

✓ ✕ I have provided an example from the scenario and linked it to my chosen impact of culpable driving causing death on society.²

✓ ✕ I have identified one impact of Leon's crime on the victim's family and friends.³

✓ ✕ I have provided an example from the scenario and linked it to my chosen impact of culpable driving causing death on a victim's family and friends.⁴

✓ ✕ I have identified one impact of Leon's crime on Leon.⁵

✓ ✕ I have provided an example from the scenario and linked it to my chosen impact of culpable driving causing death on an offender.⁶

✓ ✕ I have provided a conclusion to my response that links back to the question.⁷

✓ ✕ I have used paragraphs to organise my response.

✓ ✕ I have used signposting in my response, such as 'The first impact' and 'Another impact'.

✓ ✕ I have used connecting words, such as 'Ultimately'.

✓ ✕ I have identified one similarity between the sentencing trends for culpable driving causing death and murder.¹

✓ ✕ I have provided information about my chosen similarity.²

✓ ✕ I have identified one key difference between the sentencing trends for culpable driving causing death and murder.³

✓ ✕ I have used signposting in my response, such as 'One similarity' and 'A difference'.

✓ ✕ I have used comparison words, such as 'Similarly' and 'however', when comparing.

Linking to previous learning

14. [One similarity between the sentencing trends for culpable driving causing death and murder is that both involve the offender facing a harsh sentence, due to the severe nature of these crimes.¹]
[For murder, from 2017-2022, 91.8% of murder offenders received an immediate custodial sentence. Similarly, during a similar five-year period from 2015-2020, 98.5% of offenders who were charged with culpable driving causing death received a prison sentence.²]
[A difference between the two offences, however, is that while 66 people were sentenced for culpable driving causing death between the five-year period of 2015 and 2020, 97 people were sentenced for a murder conviction in a similar, five-year period from July 2017 to 2022. This emphasises that murder is a more common offence than culpable driving causing death in Victoria.³]

4A The principles of justice in the criminal justice system

Check your understanding

1. B. **Explanation:** Fairness, equality, and access are the three principles of justice.
2. B. **Explanation:** The accused is presumed innocent until proven guilty beyond reasonable doubt. This aspect of the criminal justice system promotes fairness.
3. A. **Explanation:** For fairness to be promoted, the criminal justice system should ensure its procedures are unbiased and just, not basing decisions regarding an accused's guilt on their individual characteristics but rather on their actions.
4. The principle of **equality** is upheld when all people are able to engage with the justice system without disparity or disadvantage.
5. B. **Explanation:** Providing translators only to non-English speaking accused persons when required aims to promote equal footing between the parties, enabling all people involved in a criminal case to understand court processes and procedures.
6. A. True. **Explanation:** By having access to legal information, people can understand their legal rights, thus upholding the principle of access.
7. A; B; D. **Explanation:** The accused can access a translator if they require one, however, the cost of a translator is the responsibility of the courts, not the accused. This can ensure financial difficulties do not prevent an accused from understanding court proceedings.
8. A. True. **Explanation:** All the principles of justice are inherently linked and overlap. When one principle is achieved, it is likely another is simultaneously achieved to some extent.

Preparing for exams

Standard exam-style

9. [The principle of fairness is the principle that all people can participate in the justice system and its processes should be impartial and open.¹] [As the law is highly complex, all accused persons have the right to legal representation to better understand court processes and procedures.²]
☒ ☐ I have defined the term 'fairness'.¹
☒ ☐ I have provided information about the principle of fairness.²
10. [The principle of access is the principle that all people should be able to engage with the justice system and its processes on an informed basis.¹] [One way this principle is applied in the criminal justice system is through the minimisation of delays, as this can reduce stress and anxiety for victims and their families, witnesses, and accused persons awaiting trial.²] [As delays can impact the reliability of evidence, due to lost or forgotten facts, minimising delays ensures access to a just resolution of the case.³]
☒ ☐ I have identified and defined the principle of access.¹
☒ ☐ I have provided an example of access in the Victorian criminal justice system.²

☒ ☐ I have provided information about access in the Victorian criminal justice system.³

☒ ☐ I have used signposting in my response, such as 'One way'.

11. [One principle of justice that has been achieved in Campbell's case is fairness.¹] [The unbiased jurors found Campbell's offender guilty of the crime, supporting the achievement of fairness as the jurors provided a just outcome, basing their guilty verdict on the facts and evidence presented, as opposed to the offender's personal characteristics or any personal biases.²]

[Another principle of justice that has been achieved in Campbell's case is access.³] [Campbell's case was heard just one month after he initially sustained the injuries. The minimal time delay between the incident and the provision of a just resolution to the case allowed Campbell to access justice in a timely manner.⁴]

☒ ☐ I have identified one principle of justice that has been achieved in Campbell's case.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen principle of justice.²

☒ ☐ I have identified a second principle of justice that has been achieved in Campbell's case.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen principle of justice.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One principle' and 'Another principle'.

12. [I agree with this statement to a minimal extent as equality aims to ensure equal outcomes rather than 'exactly the same' treatment.¹]

[The principle of equality addresses the disadvantages faced by some groups and aims to ensure a just result is achieved despite these inequalities.²] [Therefore, additional resources may be provided to those who are disadvantaged, including having translators for culturally and linguistically diverse persons, or children having their case heard in an alternative court, such as the Children's Court.³] [Hence, this demonstrates the same treatment of all accused persons can create disparity or disadvantage in some circumstances. Therefore, adequate measures should be implemented to allow all people to engage with the criminal justice system without such inequalities and this may mean that different processes will apply to different people.⁴]

☒ ☐ I have provided an introduction to summarise the extent to which I agree or disagree with the statement.¹

☒ ☐ I have provided information about the principle of equality.²

☒ ☐ I have provided an example of the principle of equality in the Victorian criminal justice system.³

☒ ☐ I have provided further information about the principle of equality.⁴

☒ ☐ I have used connecting words, such as 'Therefore' and 'Hence'.

Extended response

13. Achieved: II; IV
Not achieved: I; III

14. [I agree with this statement to a moderate extent as the principles of justice are only achieved to a certain extent and are limited in some circumstances.¹]

[Delays to Theo's trial are causing him to feel stressed and anxious. Delays may impact the reliability of evidence, due to lost or forgotten facts. Therefore, minimising delays ensures access to a fair resolution of the case. Hence, access to justice and a fair outcome is not achieved in this aspect of Theo's case.²]

[Furthermore, Theo has not been sufficiently informed about the proceedings, hindering the achievement of access.³]

[However, through Victoria Legal Aid (VLA), Theo will be able to gain legal support for minimal, or no, expense. This promotes equality as despite Theo's low socioeconomic status, he can still be represented in court in the best possible light.⁴][Furthermore, the VLA lawyer will represent Theo at trial, upholding the principle of access as everyone is entitled to legal representation in a criminal trial.⁵]

[Therefore, despite legal aid being available to Theo, the delays and potential issues with evidence limit the extent to which the principles of justice can be achieved.⁶]

✓ ✗ I have provided an introduction to summarise the extent to which I agree or disagree with the statement.¹

✓ ✗ I have provided one way the principle of access is not achieved.²

✓ ✗ I have provided a second way the principle of access is not achieved.³

✓ ✗ I have provided one way the principle of equality is achieved.⁴

✓ ✗ I have provided one way the principle of access is achieved.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have linked my answer to the scenario where appropriate.

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Therefore' and 'Hence'.

Linking to previous learning

15. [The burden of proof is the responsibility of a party to prove the facts of a case and in a criminal trial this lies with the prosecution.¹][It is not the responsibility of the accused to prove their own innocence, as this would be unfair and undermines the presumption of innocence and their right to be presumed innocent until proven guilty beyond reasonable doubt.²][Thus, the burden of proof in a criminal trial upholds fairness as the accused person is afforded the presumption of innocence and their trial is determined by an independent and unbiased judge and jury.³]

✓ ✗ I have identified the burden of proof in a criminal trial.¹

✓ ✗ I have provided information about how the burden of proof upholds fairness.²

✓ ✗ I have provided further information about how the burden of proof upholds fairness.³

✓ ✗ I have used connecting words, such as 'Thus'.

4B Institutions that enforce criminal law

Check your understanding

- B. False. **Explanation:** Delegated bodies are given authority by parliament to make and enforce criminal laws within their specific area.
- A; D; E. **Explanation:** The police are tasked with investigating and prosecuting people who have broken the law, as well as attempting to prevent crime before it occurs. They can only act as the prosecutor for summary offences heard in the Magistrates' Court.
- B. False. **Explanation:** Victoria Police can only prosecute summary offences. The Office of Public Prosecution (OPP) prosecutes indictable offences.
- Australian Federal Police: I; II
Victoria Police: III; IV
- Delegated bodies are specialised government agencies that have been given authority from **parliament** to make and enforce laws within their area.
- A; E. **Explanation:** WorkSafe Victoria and the Australian Taxation Office are bodies that have been delegated authority by the government to enforce laws related to workplace safety compliance and tax obligations.
- Strengths: I; III
Limitations: II; IV

Preparing for exams

Standard exam-style

8. [One institution that enforces criminal law is the Australian Taxation Office.¹][Another institution that enforces criminal law is Victoria Police.²]

✓ ✗ I have identified one institution that enforces criminal law.¹

✓ ✗ I have identified a second institution that enforces criminal law.²

✓ ✗ I have used signposting in my response, such as 'One institution' and 'Another institution'.

9. [One role of the police in enforcing criminal law is to prosecute parties who have broken the law.¹][This involves charging them with a crime and commencing legal proceedings against them in the Magistrates' Court. Therefore, the police are responsible for both gathering and presenting the evidence relevant to the case.²]

- ☒ ☐ I have identified one role of the police in enforcing criminal law.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have used signposting in my response, such as 'One role'.
- ☒ ☐ I have used connecting words, such as 'Therefore'.

10. [One similarity between the role of the police and delegated bodies is that they both have the authority to prosecute individuals who have broken the law.¹] [Another similarity between the role of the police and delegated bodies is that they are both tasked with investigating instances of people breaking the law.²] [However, a difference between the role of the police and delegated bodies is that delegated bodies have a narrower scope of powers to investigate and prosecute cases, whereas the police are afforded a broader range of powers to investigate and prosecute cases under their authority.³] [A second difference is that the police deal with more serious matters than delegated bodies, especially the Australian Federal Police (AFP), including drug trafficking.⁴]

- ☒ ☐ I have provided one similarity between the role of the police and delegated bodies in enforcing criminal law.¹
- ☒ ☐ I have provided a second similarity between the role of the police and delegated bodies in enforcing criminal law.²
- ☒ ☐ I have provided one difference between the role of the police and delegated bodies in enforcing criminal law.³
- ☒ ☐ I have provided a second difference between the role of the police and delegated bodies in enforcing criminal law.⁴
- ☒ ☐ I have used signposting in my response, such as 'One similarity' and 'Another similarity'.
- ☒ ☐ I have used comparison words, 'However' and 'whereas', when comparing.

Extended response

11. A

12. [Delegated bodies can positively impact the achievement of access to the criminal justice system to a great extent.¹]

[Delegated bodies are able to enhance the principle of access by spreading the workload of law enforcement amongst different bodies.²] [By delegating the authority to handle particular areas of law to specialised bodies, institutions overall may experience fewer backlogs and increase community access to resources and justice.³]

[However, delegated bodies rely on government funding, which can impact the accessibility of resources.⁴] [A government that prioritises the enforcement of particular areas of criminal law above others may decrease the funding of certain delegated bodies, resulting in the under-resourcing of such bodies. With fewer resources, community access to these delegated bodies will be limited.⁵]

[On balance, delegated bodies, through their ability to spread the workload of the criminal justice system and roles in enforcing criminal law, are able to improve access to the justice system.⁶]

- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have provided one way delegated bodies promote the achievement of access.²
- ☒ ☐ I have provided information about my chosen way.³
- ☒ ☐ I have provided one way delegated bodies limit the achievement of access.⁴
- ☒ ☐ I have provided information about my chosen way.⁵
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used connecting words, such as 'However' and 'Therefore'.

Linking to previous learning

13. a. [An accessory is any person who knows or believes that a person is guilty of a serious indictable offence and acts to prevent the arrest, prosecution, or punishment of that person.¹] [On the other hand, a principal offender is the individual who actually commits the offence and/or is directly linked to the enactment of the crime.²] [In this case, Charlie is the accessory, and Alex is the principal offender.³]

- ☒ ☐ I have defined the term 'accessory'.¹
- ☒ ☐ I have defined the term 'principal offender'.²
- ☒ ☐ I have identified the accessory and principal offender in this scenario.³
- ☒ ☐ I have used connecting words, such as 'On the other hand'.

- b. [The role of the police in this situation is to investigate and prosecute Alex and Charlie.¹] [The police must collect evidence that proves Alex and Charlie committed the offences. For example, this could include recovering the bank notes stolen or any CCTV footage of Alex robbing the bank and driving off with Charlie.²] [Moreover, given robbery is an indictable offence, the police must collate the evidence and hand it to the Office of Public Prosecution (OPP) to prosecute Alex and prove Charlie's involvement in the crime.³]

- ☒ ☐ I have identified one role of the police in this scenario.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have provided further information about my chosen role.³
- ☒ ☐ I have used connecting words, such as 'Moreover'.

4C Institutional powers and individual rights

Check your understanding

1. A. True. **Explanation:** A balance between institutional powers and individual rights allows society to operate in a peaceful and fair manner where all individuals are safe and protected by the law.
2. B. **Explanation:** The police can only stop and search individuals in some circumstances, including where they have reasonable grounds to suspect the person is carrying drugs, weapons, or stolen property.
3. A; C; D. **Explanation:** The power to arrest a suspect rests with the police, not the courts. Additionally, the court cannot force an individual to answer questions if they have exercised their right to silence.
4. A. **Explanation:** Whilst the police can use force in some situations, such as when restraining a violent offender who may injure others, the force used must be proportionate to the threat posed.
5. Individual rights when dealing with the police: II; III
Individual rights during court proceedings: I; IV
6. B. False. **Explanation:** A court cannot draw any inferences from the fact an accused has chosen to remain silent by refusing to answer questions by the police or choosing not to give evidence in court.
7. Strengths: II; III; IV
Limitations: I; V

Preparing for exams

Standard exam-style

8. [One police power is the power to obtain a person's name and address.¹] [A second police power is the power to arrest a suspect on reasonable grounds.²]

☒ ☐ I have identified one police power.¹

☒ ☐ I have identified a second police power.²

☒ ☐ I have used signposting in my response, such as 'One police power' and 'A second police power'.

9. [One right individuals have during court proceedings is the right to legal representation.¹] [Due to the complex nature of the criminal justice system, an accused has the right to obtain legal representation, enabling them to properly understand and participate in the proceedings.²] [Where an accused is charged with a serious criminal offence and is unrepresented, the trial judge should adjourn the trial, providing the accused with the opportunity to seek legal representation.³]

☒ ☐ I have identified one right individuals have during court proceedings.¹

☒ ☐ I have provided information about my chosen right.²

☒ ☐ I have provided further information about my chosen right.³

☒ ☐ I have used signposting in my response, such as 'One right'.

10. [One police power is the right to question the alleged offender who is in custody.¹] [One corresponding individual right is the right to silence, which means an accused person does not have to answer any of the police's questions, other than providing their name and address.²] [This individual right balances the police power of the right to question an offender, as individuals can remain silent, consequently avoiding police intimidation and the potential of answering questions that result in self-incrimination.³]

☒ ☐ I have identified one police power.¹

☒ ☐ I have identified one corresponding individual right.²

☒ ☐ I have provided one reason why my chosen individual right balances my chosen police power.³

☒ ☐ I have used signposting in my response, such as 'One police power' and 'One corresponding individual right'.

11. [Individual rights and institutional powers are balanced in a way that enables justice to be carried out without infringing on the rights of individuals. One power the police have is the right to question Felix in custody to obtain evidence that can be used during the criminal proceeding.¹] [To balance this, Felix has the right to remain silent, meaning he does not have to answer any questions, other than providing his name and address. This ensures Felix is not pressured into answering the police's questions, consequently helping avoid self-incrimination.²]

[A second power the police have is the power to arrest a suspect with a warrant, which has occurred in Felix's case.³] [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 provides Felix with the best opportunity to prepare for any legal proceedings that may follow his arrest.⁴]

☒ ☐ I have identified one police power.¹

☒ ☐ I have identified a corresponding individual right.²

☒ ☐ I have identified a second police power.³

☒ ☐ I have identified a corresponding individual right.⁴

☒ ☐ I have linked my answer to the scenario where appropriate.

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have signposted my response, such as 'One power' and 'A second power'.

Extended response

12. Strengths: II; III; IV
Limitations: I

13. [A balance between institutional powers and individual rights is essential in ensuring the achievement of the principles of fairness and access. This balance enables society to operate peacefully and fairly, where all individuals feel safe and protected by the law.¹]

[In this scenario, the police officer exercised his power to use force by putting his hand on Poppy's shoulder to prevent her from escaping arrest.²] [Exercising this power upholds the principle of access as it ensured Poppy did not escape without being held accountable for her actions, providing access to justice for the jewellery store owners as victims of the attempted crime.³]

[An individual right that balances this is that the police cannot use excessive force, meaning the force must be proportionate to the threat posed.⁴] [This right upholds the principle of fairness as it prevents police officers from abusing their power and using force that is not proportionate to the threat.⁵]

[Furthermore, an individual right Poppy has during court proceedings is the right to legal representation.⁶] [This right upholds the principle of fairness by ensuring an accused understands their legal rights and the court processes and procedures. Due to the complexities of the legal system, properly understanding aspects of the legal system promotes a just and fair trial.⁷] [However, not all individuals, such as Poppy, can afford to hire legal representation. This limits the achievement of access and fairness as a lack of legal representation may lead to an unjust case outcome if the accused cannot present evidence in the best possible light, preventing access to justice.⁸]

[Overall, a balance between institutional powers and individual rights is essential in achieving the principles of fairness and access to prevent an abuse of power by institutions, whilst also ensuring justice is administered. However, not all individual rights are realistically available to all people, limiting access to justice.⁹]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have identified one police power relevant to the scenario.²

✓ ✗ I have provided an example of how my chosen police power upholds the principle of access.³

✓ ✗ I have linked my chosen police power to a corresponding individual right relevant to the scenario.⁴

✓ ✗ I have provided an example of how my chosen individual right upholds the principle of fairness.⁵

✓ ✗ I have identified a second individual right relevant to the scenario.⁶

✓ ✗ I have provided an example of how my chosen individual right upholds the principle of fairness.⁷

✓ ✗ I have provided an example of how my chosen individual right limits the principle of access.⁸

✓ ✗ I have provided a conclusion to my response that links back to the question.⁹

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'An individual right' and 'Overall'.

✓ ✗ I have used connecting words, such as 'Furthermore' and 'However'.

Linking to previous learning

14. [Social cohesion refers to the presence of strong relationships and bonds that unite society and encourage cooperation, alongside an absence of war and conflict.¹] [In order to ensure institutions, such as the police, cooperate alongside individuals, there must be a balance between institutional powers and individual rights.²] [Consequently, this balance avoids abuses of power by these institutions, whilst also ensuring justice is served. Subsequently, society can become increasingly unified, achieving social cohesion.³]

✓ ✗ I have defined social cohesion.¹

✓ ✗ I have provided information about the need for a balance between institutional powers and individual rights in achieving social cohesion.²

✓ ✗ I have provided further information about the need for a balance between institutional powers and individual rights in achieving social cohesion.³

✓ ✗ I have used connecting words, such as 'Consequently' and 'Subsequently'.

4D Criminal jurisdictions of Victorian courts

Check your understanding

- B. False. **Explanation:** Not all courts in the Victorian court hierarchy have both original and appellate jurisdiction. For example, the Magistrates' Court only has original jurisdiction.
- As the **highest-ranked** court in the Victorian court hierarchy, the High Court mostly exercises its **appellate** jurisdiction.
- C. **Explanation:** The Supreme Court of Victoria consists of the Trial Division, which has both original and appellate jurisdiction, and a Court of Appeal, which only has appellate jurisdiction.
- B; D. **Explanation:** In the criminal justice system, the two main roles of the Victorian courts are to determine the overall verdict of the case and ensure, if found guilty, an accused is appropriately sentenced.
- True: II; IV
False: I; III
- A; C. **Explanation:** In criminal cases, the prosecution is usually representing the government or the Crown. Therefore, they are not impacted by the costs associated with legal representation or an appeal. Hence, only the accused is burdened with personally financing a lawyer or an appeal process when wanting to challenge an unjust verdict.
- A. True. **Explanation:** The Victorian court hierarchy is arranged based on jurisdiction. In the criminal justice system, this ensures the prosecution and accused have their case determined in a timely and just manner.

Preparing for exams

Standard exam-style

8. [One court in the Victorian court hierarchy is the County Court. The original criminal jurisdiction of the County Court enables it to hear most indictable offences, including culpable driving and armed robbery, except for extremely serious cases, such as murder.¹] [Moreover, the appellate criminal jurisdiction of the County Court provides it with the power to hear criminal appeals from the Magistrates' Court when an accused is appealing their sentence on a question of fact or a party is appealing the sanction imposed.²]
- ☒ ☐ I have provided information about the original criminal jurisdiction of one court in the Victorian court hierarchy.¹
- ☒ ☐ I have provided information about the appellate criminal jurisdiction of the same court in the Victorian court hierarchy.²
- ☒ ☐ I have used signposting in my response, such as 'One court'.
- ☒ ☐ I have used connecting words, such as 'Moreover'.
9. [One role of the Victorian court hierarchy in the criminal justice system is to provide access to a trial by jury.¹] [In criminal cases, a trial by jury is usually afforded when an accused has been charged with an indictable offence and has pleaded not guilty. By accessing a trial by jury, the parties have their case heard by members of the community who can each provide a unique perspective when determining the guilt of the accused.²]
- ☒ ☐ I have provided one role of the Victorian court hierarchy.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have used signposting in my response, such as 'One role'.
10. [One role of the Victorian courts that enables the achievement of access in the criminal justice system is that they provide parties with judges and magistrates who have specialised knowledge and expertise.¹] [As a result of their original and appellate jurisdictions, the courts have developed expertise in hearing certain types of criminal cases. For example, justices in the Supreme Court are knowledgeable in laws relating to murder as they conduct trials for such offences on a relatively frequent basis.²] [Therefore, the jurisdiction and role of the courts in the criminal justice system enhances access to justice by allowing criminal cases to be resolved in an efficient and consistent manner, as a result of the specialised knowledge of judges and magistrates.³]
- ☒ ☐ I have identified one role of the Victorian courts that enables the achievement of access in the criminal justice system.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have provided information about how my chosen role enables the achievement of access.³
- ☒ ☐ I have used signposting in my response, such as 'One role'.
- ☒ ☐ I have used connecting words, such as 'As a result' and 'Therefore'.

11. [Niall's appeal would be heard in the Supreme Court – Court of Appeal.¹] [The Supreme Court – Court of Appeal has no original jurisdiction and thus cannot hear cases for the first time.²] [However, it does have appellate jurisdiction and can hear appeals from the County Court and the Supreme Court – Trial Division.³]

- ☒ ☐ I have identified the court Niall's appeal would be heard in.¹
- ☒ ☐ I have provided information about the original jurisdiction of the Supreme Court – Court of Appeal.²
- ☒ ☐ I have provided information about the appellate jurisdiction of the Supreme Court – Court of Appeal.³
- ☒ ☐ I have used connecting words, such as 'However'.

Extended response

12. Strengths: I; III; VI
Limitations: II; IV; V
13. [The criminal jurisdiction of the Victorian courts enables the achievement of various principles of justice, however, it is limited in its ability to support an accused, such as Liam.¹]
- [One way the criminal jurisdiction of the Victorian courts enables the achievement of fairness is through the specialised knowledge that judges develop through the hierarchy, which increases the likelihood that a just and fair outcome is delivered.²] [However, the Victorian courts' criminal jurisdiction is limited in its ability to uphold fairness as the delays in the prosecution's appeal to the Supreme Court – Court of Appeal may have caused Liam to become increasingly stressed and overwhelmed, potentially affecting his ability to confidently present evidence. Thus, this may limit the achievement of fairness for Liam as his case may not be presented in the best light for a just outcome.³]
- [Additionally, the criminal jurisdiction of the Victorian courts can uphold the achievement of equality as both the prosecution and Liam have the right to appeal the outcome of the case with valid grounds, regardless of characteristics such as race, sex, or gender.⁴]
- [Although, one way the Victorian courts are limited in their ability to achieve equality is that despite having the right to appeal, not all parties can financially afford this. Liam has maintained his innocence, yet he is unable to afford to appeal the Court of Appeal's decision, thus limiting his access to equality, and therefore, justice.⁵]
- [Finally, one way the criminal jurisdiction of the Victorian courts can achieve the principle of access is that the unbiased and independent nature of the Supreme Court Justices enabled Liam's case to be resolved in a consistent and competent manner.⁶] [Alternatively, the achievement of access is limited by the criminal jurisdiction of the Victorian courts as Liam may have been unable to afford legal representation for the prosecution's appeal in the Supreme Court. Consequently, his perspective may not have been represented in the best light, potentially leading to his guilty verdict.⁷]
- [Overall, while the criminal jurisdiction of the Victorian courts upholds the principles of justice, it can deny Liam, as the accused, of a just outcome in some instances.⁸]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts enables the achievement of fairness.²
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts limits the achievement of fairness.³
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts enables the achievement of equality.⁴
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts limits the achievement of equality.⁵
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts enables the achievement of access.⁶
- ✓ ✗ I have provided one way the criminal jurisdiction of the Victorian courts limits the achievement of access.⁷
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁸
- ✓ ✗ I have linked my answer to the scenario where appropriate.
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One way' and 'Finally'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Additionally'.

Linking to previous learning

14. [Murder is the action of intentionally or recklessly causing the death of a human.¹] [As murder is the most serious offence in the Victorian criminal justice system, Simon's case would most likely be initially heard in the Supreme Court – Trial Division.²] [The Trial Division of Victoria's Supreme Court has original jurisdiction that provides it with the power to hear all indictable offences. However, this court usually only hears the most serious Victorian crimes, including murder in Simon's case.³]

- ✓ ✗ I have provided a definition of one of the crimes in the scenario.¹
- ✓ ✗ I have identified the appropriate court for my chosen crime.²
- ✓ ✗ I have provided information about the appropriate court for my chosen crime.³

Note: Culpable driving causing death would likely be heard in the County Court of Victoria.

4E The jury in a criminal trial

Check your understanding

- A. True. **Explanation:** Juries determine the criminal culpability of an accused and make a group decision as to whether they are guilty or not based on evidence presented in the trial.
- A jury is composed of **12** members who will assist in determining the guilt of persons accused of **indictable** offences.

- C. **Explanation:** Disqualification, ineligibility, and being excused, are all reasons why a Victorian citizen may be unable to serve on a jury in Victoria. This may be due to various factors, such as their personal characteristics or relationship with the criminal justice system.
- A. True. **Explanation:** As all accused parties who plead 'not guilty' have identical access to a jury, this promotes equality as these parties always have the opportunity to utilise a jury to determine their guilt, regardless of their personal characteristics.
- D. **Explanation:** While the jury is responsible for determining the guilt of the accused, it is the sole discretion of the judge to make decisions regarding sentencing if they are found guilty.
- B. False. **Explanation:** As the vast majority of criminal trials conducted are for summary offences or indictable offences heard summarily, the use of a jury is quite limited and few cases actually require a jury.
- D. **Explanation:** Juries assist in improving the delivery of justice across all three principles of justice.

Preparing for exams

Standard exam-style

8. [A jury is a group of randomly selected people who are required to deliver a verdict in a trial based on the evidence presented to them in court.¹] [One role of the jury in a criminal trial is to remain objective.²]

- ✓ ✗ I have provided a definition of the term 'jury'.¹
- ✓ ✗ I have identified one role of the jury in a criminal trial.²
- ✓ ✗ I have used signposting in my response, such as 'One role'.

9. [A jury is usually composed of 12 members of the community who are randomly selected. To be selected, jurors must be at least 18 years old and enrolled to vote in Victoria.¹] [While the verdict determined by a jury will always originate from 12 jurors, up to 15 jurors may be empanelled to account for juror withdrawal.²] [One reason a juror may be unable to serve is if they are disqualified. Juror disqualification is often due to having a negative past relationship with the criminal justice system, potentially impacting their ability to remain impartial.³]

- ✓ ✗ I have provided information about the composition of a jury in a criminal trial.¹
- ✓ ✗ I have provided further information about the composition of a jury in a criminal trial.²
- ✓ ✗ I have provided one reason why a person may be unable to serve on a jury in Victoria.³
- ✓ ✗ I have used signposting in my response, such as 'One reason'.

10. [One role of the jury in a criminal trial is to deliver a verdict.¹] [This involves the jury listening to and comprehending the evidence presented at trial and then deciding whether the accused is guilty.²] [Another role of the jury in a criminal trial is to appoint a foreperson.³] [The foreperson, selected by the jury themselves, will communicate on behalf of the jury as a spokesperson on matters, such as questions of law and the delivery of the final verdict.⁴]

- ✓ ✕ I have identified one role of the jury in a criminal trial.¹
- ✓ ✕ I have provided information about my chosen role.²
- ✓ ✕ I have identified a second role of the jury in a criminal trial.³
- ✓ ✕ I have provided information about my chosen role.⁴
- ✓ ✕ I have used signposting in my response, such as 'One role' and 'Another role'.

11. [One role of the jury in relation to Angelica's case is to listen to evidence.¹] [The jury must listen to all evidence presented at trial to ensure the verdict is based on relevant information and facts of the case.²] [Considering both Maya and her young cousin are presenting evidence at the trial, the jurors must recall information to ensure their final determination of culpability is informed and educated. For example, the jury will need to consider Maya's cousin's account of the events and testimony as to whether she witnessed Maya assault Angelica or not.³]

- ✓ ✕ I have identified one role of the jury in relation to Angelica's case.¹
- ✓ ✕ I have provided information about my chosen role.²
- ✓ ✕ I have provided an example from the scenario and linked it to my chosen role.³
- ✓ ✕ I have used signposting in my response, such as 'One role'.

Extended response

12. Strengths: I; IV
Limitations: II; III
13. [The principle of fairness is upheld by a criminal jury trial to a moderate extent. While jury trials allow an impartial, cross-section of the community to judge the culpability of the accused there are certain aspects of a jury that limit its ability to promote fairness.¹]
[One way in which the use of a jury in a criminal trial can achieve the principle of fairness is through their composition. Juries are randomly selected from the community and cannot have any connection to the victim, the accused, or witnesses. This promotes fairness as the accused may feel their case has been decided by their equals, who are objective and can produce a just outcome.²] [However, a limitation of criminal trials by jury is that juries do not need to provide reasons for their decisions and, therefore, there is no certainty they have applied the law to the facts correctly. Consequently, this limits the consistent and accurate provision of justice across criminal cases.³]
[Another way in which a criminal trial by jury can uphold the principle of fairness is that a cross-section of the community is used as the decision maker, meaning the accused is more likely to feel as though their case has been decided by their equals. This may encourage an accused to believe the justice system has upheld fairness in their trial.⁴] [Although, the use of juries in a criminal trial may create delays, as time is taken to empanel the jury, explain court procedures and jurors' roles, explain the evidence, and allow the jury to reach a decision.⁵]
[Therefore, in many respects, a criminal trial by jury can uphold fairness and, in turn, the delivery of justice. However, juries can also have complications and their use may contribute to delays or unfair outcomes.⁶]

- ✓ ✕ I have provided an introduction to my response.
- ✓ ✕ I have provided one way a criminal trial by jury promotes the achievement of fairness.²
- ✓ ✕ I have provided one way a criminal trial by jury limits the achievement of fairness.³
- ✓ ✕ I have provided a second way a criminal trial by jury promotes the achievement of fairness.⁴
- ✓ ✕ I have provided a second way a criminal trial by jury limits the achievement of fairness.⁵
- ✓ ✕ I have provided a conclusion to my response that links back to the question.⁶
- ✓ ✕ I have used paragraphs to organise my response.
- ✓ ✕ I have used signposting in my response, such as 'One way' and 'a limitation'.
- ✓ ✕ I have used connecting words, such as 'However' and 'Although'.

Linking to previous learning

14. [I agree with this statement to a moderate extent. However, there are some errors in this statement.¹] [Murder is an indictable offence, meaning trials for murder are heard in the Supreme Court and consequently, able to be heard and determined by a judge and jury.²]
[However, these trials will not 'always' be heard by a jury. In order for a jury to be empanelled and utilised in a criminal case, the accused must plead 'not guilty', and this is not always the case.³]
- ✓ ✕ I have stated the extent to which I agree with the statement, and provided a brief reason for my answer.¹
- ✓ ✕ I have provided one reason why the statement is correct.²
- ✓ ✕ I have provided one reason why the statement is incorrect.³
- ✓ ✕ I have used connecting words, such as 'However'.

4F First Nations people and the criminal justice system

Check your understanding

1. B. False. **Explanation:** Even after the Royal Commission into Aboriginal Deaths in Custody's final report was released in 1991, the experiences of First Nations peoples in the criminal justice system have still been fraught with difficulties.
2. A; C; D. **Explanation:** Intergenerational child removals may act as barriers preventing Indigenous Australians from reporting criminal acts perpetrated against them, particularly family violence, due to mistrust in the criminal justice system.

3. Due to **socioeconomic disadvantages** that may be experienced by Aboriginal and Torres Strait Islander peoples as a result of disproportionately high unemployment rates, First Nations peoples may experience difficulties in affording legal representation, limiting their access to justice. Another difficulty Aboriginal and Torres Strait Islander peoples may experience is **geographical barriers**, which can also impede access to justice as there are often low numbers of legal practitioners in rural areas.
4. A. **Explanation:** The Koori Engagement and Consultation (KEC) Framework is an action initiated by the Court Services Victoria Strategic Plan, which was developed to increase cultural safety practices, including the implementation of a 'comprehensive cultural awareness program' across Court Services Victoria.
5. A; B. **Explanation:** The 2018 Australian Law Reform Commission's 'Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples' report contained 35 recommendations designed to reduce the disproportionate incarceration rates of First Nations peoples, indicating difficulties do exist for Aboriginal and Torres Strait Islander peoples in the criminal justice system.
6. Fairness is **limited** for First Nations peoples in the criminal justice system. First Nations witnesses, victims, and accused persons may face difficulties when presenting evidence due to differing body language and cultural practices of certain Aboriginal and Torres Strait Islander communities compared to Western practices. However, this principle of justice is still somewhat **upheld** due to the presumption of innocence and the high standard of proof required for a criminal conviction, which each aim to protect those who face difficulties when presenting evidence or a defence.
7. A. True. **Explanation:** First Nations peoples may be less capable of presenting evidence as victims or accused persons in the courtrooms due to language barriers and different cultural and body language practices compared to the Western foundations the criminal justice system is built upon.
8. A. **Explanation:** The geographical barriers to accessing justice that some First Nations peoples may experience, due to living in remote or rural areas, is an example of a limitation of the criminal justice system in achieving access for First Nations peoples.
9. B. False. **Explanation:** Certain mechanisms of the criminal justice system, such as the existence of, and funding provided to, the Victorian Aboriginal Legal Service, aim to uphold the principles of justice for First Nations peoples interacting with the criminal justice system.

Preparing for exams

Standard exam-style

10. [One difficulty faced by First Nations peoples in the criminal justice system is that Aboriginal and Torres Strait Islander peoples are over-represented in the criminal justice system and within prison systems around Australia.¹] [Another difficulty is intergenerational traumas from past events in Australia's history that may act as barriers to reporting criminal acts.²]
- ✓ ✗ I have provided one difficulty faced by First Nations peoples in the criminal justice system.¹
- ✓ ✗ I have provided a second difficulty faced by First Nations peoples in the criminal justice system.²
- ✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'Another difficulty'.
11. [One difficulty faced by First Nations peoples in the criminal justice system that limits the principle of fairness is socioeconomic disadvantage, which may lead to negative interactions with the criminal justice system as an accused person.¹] [Due to disproportionately high levels of unemployment among Aboriginal and Torres Strait Islander peoples, First Nations accused peoples may struggle to afford legal representation.²] [Therefore, this limits their chances of having their case represented well in court, potentially resulting in an unfair case outcome. Even if they are able to access legal aid, the quality of the legal representation can impact the presentation of the case and the likelihood of a just outcome.³]
- ✓ ✗ I have provided one difficulty faced by First Nations peoples in the criminal justice system.¹
- ✓ ✗ I have provided information about my chosen difficulty.²
- ✓ ✗ I have provided information about how my chosen difficulty limits the achievement of fairness.
- ✓ ✗ I have used signposting in my response, such as 'One difficulty'.
- ✓ ✗ I have used connecting words, such as 'Therefore'.
12. [One difficulty that may be experienced by First Nations peoples in the criminal justice system is geographical barriers, as many Aboriginal and Torres Strait Islander peoples live in rural or remote areas in Australia, therefore limiting their ability to access legal services or the courts.¹] [However, one way the Victorian criminal justice system seeks to address this difficulty is through the introduction of the Victorian Aboriginal Legal Service (VALS), which is funded by the government through the National Legal Assistance Partnership (NLAP).²] [VALS's criminal lawyers travel to regions throughout Victoria to ensure services, such as helping Aboriginal peoples find legal help and advice, are provided in both rural and metropolitan areas of Victoria.³]
- ✓ ✗ I have provided one difficulty faced by First Nations peoples in the criminal justice system.¹
- ✓ ✗ I have provided one process, procedure, or institution in place in the criminal justice system to address this difficulty.²
- ✓ ✗ I have provided information about my chosen process, procedure, or institution.³
- ✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'one way'.
- ✓ ✗ I have used connecting words, such as 'However'.
13. [I do not agree with the statement, as although there are still many difficulties faced by First Nations peoples in the criminal justice system that remain unaddressed, there are mechanisms in place that seek to rectify these negative experiences.¹]

[One way the criminal justice system seeks to rectify the negative experiences endured by First Nations peoples is through the Koori Court, a specialised division of the Magistrates' Court, County Court, and Children's Court, that conducts culturally-relevant sentencing practices for Aboriginal offenders.²] [Furthermore, another way the difficulties faced by First Nations peoples is addressed is through the Koori Engagement and Consultation (KEC) framework that was developed to increase the cultural awareness of staff across Court Services Victoria.³] [Finally, a third way the Victorian criminal justice system seeks to rectify negative experiences of First Nations peoples is through conducting inquiries into the treatment of First Nations peoples within the criminal justice system, such as the Australian Law Reform Commission's 'Pathways to Justice - Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples'.⁴]

✓ ✗ I have stated the extent to which I agree or disagree, and a brief reason for my answer.¹

✓ ✗ I have provided one way the criminal justice system in Australia attempts to rectify the difficulties experienced by First Nations peoples.²

✓ ✗ I have provided a second way the criminal justice system in Australia attempts to rectify the difficulties experienced by First Nations peoples.³

✓ ✗ I have provided a third way the criminal justice system in Australia attempts to rectify the difficulties experienced by First Nations peoples.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One way' and 'another way'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

14. Strengths: II; IV; V
Limitations: I; III; VI

15. [The criminal justice system can achieve the principles of justice in Killara's case to a moderate extent. Although Killara has experienced, and is likely to continue experiencing, several difficulties as an Aboriginal person accused of a crime in Victoria, there are systems in place that seek to mitigate these difficulties and facilitate the achievement of the principles of justice.¹]

[Firstly, one difficulty Killara may experience is socioeconomic disadvantage as she is currently employed.²] [As an accused person, she may be unable to afford quality legal representation due to her current financial status. This may lead to an unfair outcome as the prosecution may be able to present the case in a more convincing manner than Killara, whether she is self-representing or accessing low-quality representation.³] [However, judges in the County Court and the Supreme Court have the power to order Victoria Legal Aid (VLA) to provide a lawyer to those who cannot afford legal representation, ensuring they receive some representation. This promotes fairness by providing Killara with additional resources that can promote the achievement of an open and just trial.⁴]

[Another difficulty faced by Killara is that as she lives in a rural area of Victoria, she may experience geographical barriers that limit her access to justice.⁵] [For example, she may find it difficult to access the courts and other legal facilities as an accused person given her location in a remote region, limiting the achievement of access.⁶]

[However, the Victorian Aboriginal Legal Service (VALS) has criminal lawyers that travel across Victoria, to both rural and metropolitan areas, therefore ensuring Aboriginal peoples living in remote areas of Victoria can still access justice.⁷]

[Finally, the principle of equality was limited by the criminal justice system through Killara's interactions with the police officer who was suspicious of her due to her race.⁸] [This limits the principle of equality as it demonstrates how inherent biases are institutionalised in aspects of the criminal justice system, disproportionately impacting First Nations peoples. This also contributes to the higher rates of incarceration among First Nations peoples compared to the rest of the Australian population.⁹] [To rectify this, in June 2022, the Koori Engagement Consultation (KEC) framework was finalised, aiming to provide culturally relevant training to staff of Court Services Victoria. This may remove biases possessed by certain authorities in the criminal justice system.¹⁰]

[Overall, the criminal justice system can achieve the principles of justice to a moderate extent in relation to Killara's case as an accused, however, more needs to be done to ensure the difficulties First Nations peoples experience in the criminal justice system are mitigated or completely avoided.¹¹]

✓ ✗ I have provided an introduction to my response to summarise my answer to the question.¹

✓ ✗ I have provided one way the principle of fairness is limited for Killara.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen way the principle of fairness is limited.³

✓ ✗ I have provided one way the principle of fairness is upheld for Killara.⁴

✓ ✗ I have provided one way the principle of access is limited for Killara.⁵

✓ ✗ I have provided an example from the scenario and linked it to my chosen way the principle of access is limited.⁶

✓ ✗ I have provided one way the principle of access is upheld for Killara.⁷

✓ ✗ I have provided one way the principle of equality is limited for Killara.⁸

✓ ✗ I have provided an example from the scenario and linked it to my chosen way the principle of equality is limited.⁹

✓ ✗ I have provided one way the principle of equality is upheld for Killara.¹⁰

✓ ✗ I have provided a conclusion to my response that links back to the question.¹¹

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Firstly, one difficulty' and 'Another difficulty'.

✓ ✗ I have used connecting words, such as 'Although' and 'However'.

Linking to previous learning

16. [The presumption of innocence upholds fairness for First Nations peoples in the criminal justice system as it can protect those who have difficulty presenting their evidence or defence, as they do not need to prove their innocence.¹] [Due to the different cultural practices and body language customs of some Aboriginal and Torres Strait Islander peoples, First Nations accused persons may struggle to present their evidence in a credible manner, as the Western system may discredit their testimonies due to these different traditions.²] [However, if a First Nations accused person does not want to provide evidence, fearing this result, they are not mandated to, as the presumption of innocence ensures accused persons are presumed innocent until proven otherwise by the prosecution.³]

✓ ✗ I have provided one reason why the presumption of innocence upholds the principle of fairness for First Nations peoples in the criminal justice system.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided further information about my chosen reason.³

✓ ✗ I have used connecting words, such as 'However'.

4G Difficulties faced by some groups in the criminal justice system

Check your understanding

- B. False. **Explanation:** Not everyone is treated equally in Australia's criminal justice system due to difficulties certain groups may face, such as people with disabilities being considered unreliable witnesses.
- A; C; D. **Explanation:** Children are more likely to be victims of violent crimes due to their physical vulnerability.
- A. **Explanation:** According to the *Children, Youth and Families Act 2005* (Vic), when sentencing a child, special consideration must be given to the fact that the person being sentenced is a minor. A custodial sentence should be a last resort for offenders between the ages of 10 to 18.
- The principles of justice may be **limited** for culturally and linguistically diverse people in the criminal justice system as accused persons from different cultural backgrounds may have limited English communication skills, possibly impacting their ability to give evidence or self-represent. On the other hand, the principles of justice may be **upheld** for this same group as the Victoria Legal Aid (VLA) website can be translated into a number of different languages.
- A. True. **Explanation:** According to the Human Rights Law Centre, in Victoria, it has been recorded that over half of the prison population has reported a mental health condition.
- A; B; C. **Explanation:** Delays in the criminal justice system, which may be due to court backlogs or under-resourcing, can compound pre-existing mental health issues of offenders as they may have to wait for extended periods before hearing whether they have been found guilty, heightening anxiety.

- A; B. **Explanation:** Victims of a violent crime are likely to experience mental health struggles following the attack, as a result of the event itself and the court process afterwards. For example, post-traumatic stress disorder is a common mental health condition experienced by victims of violent crimes.
- A. **Explanation:** It is known in Australia that there is a lack of staff, such as general practitioners and psychologists, in prisons. This prevents many prisoners from being able to access the mental health services they require.
- Strengths: II; IV
Limitations: I; III

Preparing for exams

Standard exam-style

10. [One difficulty faced by culturally and linguistically diverse people in the criminal justice system is the difficulty associated with giving evidence in court as a witness.¹] [Another difficulty is that they may have trouble accessing legal resources in Australia, therefore hindering their understanding of their legal rights and obligations.²]

✓ ✗ I have identified one difficulty faced by culturally and linguistically diverse people in the criminal justice system.¹

✓ ✗ I have identified a second difficulty faced by culturally and linguistically diverse people in the criminal justice system.²

✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'Another difficulty'.

11. [As the age of criminal responsibility in Victoria is increasing to 12 years, one difficulty Billy may face in the criminal justice system is the ability to achieve justice as a young person interacting with the criminal justice system.¹] [As a 13-year-old boy, Billy may be held criminally responsible for his actions despite being of such a young age. Although Billy's lack of mental maturity limited his awareness of the danger and injuries the washing powder could cause, he may still receive a severe punishment, despite his lack of moral culpability for the crime committed.²] [It has been argued that the age of criminal responsibility being lower than 14 years creates difficulties for children accused of a crime as it leads underprivileged youth to be criminalised and incarcerated early in life, increasing their chances of a continued life of crime.³]

✓ ✗ I have identified one difficulty Billy may face in the criminal justice system.¹

✓ ✗ I have provided an example from the scenario and linked it to my chosen difficulty.²

✓ ✗ I have provided information about my chosen difficulty.³

✓ ✗ I have used signposting in my response, such as 'one difficulty'.

✓ ✗ I have used connecting words, such as 'Although'.

12. [One difficulty faced by people with disabilities in the criminal justice system is communication difficulties.¹] [People with an intellectual disability may communicate in different ways, such as through hand signals, pictures, and other social tools. For an accused, this may make it difficult for them to present evidence in court or their words or actions may be misinterpreted.²]

[Another difficulty that may be faced by people with a disability in relation to the criminal justice system is that victims may encounter physical barriers to escaping violent crimes.³] [People with a disability are twice as likely to be victims of violent and domestic-violence related crimes often due to their physical vulnerability, which may make them an 'easier target' for perpetrators.⁴]

- ✓ ✗ I have identified one difficulty faced by people with disabilities in the criminal justice system.¹
- ✓ ✗ I have provided information about my chosen difficulty.²
- ✓ ✗ I have identified a second difficulty faced by people with disabilities in the criminal justice system.³
- ✓ ✗ I have provided information about my chosen difficulty.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'Another difficulty'.

13. [One difficulty Dhruv may face in the criminal justice system is that he may find it difficult to present evidence in court due to being culturally and linguistically diverse.¹] [Dhruv has struggled to communicate well as he can speak minimal English. Therefore, as an accused, he may find it difficult to give evidence at trial, especially if he is self-representing.²] [This may result in the court misunderstanding the circumstances relating to his offence, given the reliance on oral evidence in Victorian courts, causing incorrect and unfair outcomes in which Dhruv is sentenced to a harsher sentence than he deserves.³]

[Furthermore, a second difficulty Dhruv may face in the criminal justice system is that his mental health issues, including anxiety and depression, may worsen.⁴] [Dhruv is being tried for his alleged crime in one year's time. These delays when waiting for a case to be tried can heighten anxiety for an accused person, as Dhruv will be left wondering for a year whether he will be found guilty and, if so, what punishment he will receive.⁵] [If Dhruv is found guilty and sentenced to prison, his mental health issues are likely to worsen as studies show there is a lack of mental health facilities and programs in prison that can address mental health struggles.⁶]

- ✓ ✗ I have identified one difficulty Dhruv may face in the criminal justice system.¹
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen difficulty.²
- ✓ ✗ I have provided information about my chosen difficulty.³
- ✓ ✗ I have identified a second difficulty Dhruv may face in the criminal justice system.⁴
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen difficulty.⁵
- ✓ ✗ I have provided information about my chosen difficulty.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'a second difficulty'.
- ✓ ✗ I have connecting words, such as 'Therefore' and 'Furthermore'.

Extended response

14. Strengths: II; III
Limitations: I; IV; V

15. [As a result of Latisha having both an intellectual disability and mental illness, she is likely to encounter difficulties in the criminal justice system as a person accused of culpable driving. However, certain processes and procedures of the Victorian criminal justice system may somewhat ensure the principles of justice are achieved in Latisha's case.¹]

[Firstly, the principle of equality can be achieved in Latisha's case as, in Victoria, an accused person can raise the defence of mental impairment for criminal behaviour.²] [This ensures Latisha can avoid being found criminally responsible for the actions that were a product of her mental illness, not her conscious mind. Therefore, equality is promoted as her mental illness may not disadvantage her or cause her to be found guilty in the criminal justice system.³]

[Although, the principle of fairness is limited in this case as accused criminals in the past have faked possessing a mental illness or being of an 'unsound mind' in an attempt to lessen a punishment or entirely avoid being found criminally responsible for their actions.⁴] [This has stigmatised mental health and may cause the judge or jury to believe Latisha is lying about hallucinating at the time of the alleged crime, resulting in an unfair outcome.⁵] [Furthermore, the principle of fairness may be further limited as Latisha, due to her intellectual disability, may be unable to communicate sufficiently to a judge or jury to provide evidence about the incident.⁶] [Therefore, her defence of mental impairment may be less believable as she may not present any evidence to prove herself.⁷]

[Another way the principle of equality may be upheld in relation to Latisha's case is that general practitioners and qualified mental health nurses are available at all prisons.⁸] [Therefore, if Latisha is sentenced to prison for culpable driving, her schizophrenia can still be treated, ensuring prison is not especially difficult for her due to her mental illness, therefore promoting equality.⁹] [However, the principle of access is limited as recent studies highlighted that the ACT was the only Australian jurisdiction that satisfied the minimum requirements for mental health care in prisons.¹⁰] [Therefore, Latisha may not gain access to adequate care for her mental health issues if sentenced to prison.¹¹]

[Overall, although the defence of mental impairment and the presence of mental health doctors in prisons are both features of the criminal justice system that support the achievement of the principles of justice, due to Latisha's mental illness and disability, she is likely to still face difficulties in the Victorian criminal justice system.¹²]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one way the criminal justice system promotes the achievement of the principle of equality in Latisha's case.²
- ✓ ✗ I have provided information about my chosen way.³
- ✓ ✗ I have provided one way the criminal justice system limits the achievement of the principle of fairness in Latisha's case.⁴
- ✓ ✗ I have provided information about my chosen way.⁵
- ✓ ✗ I have provided a second way the criminal justice system limits the achievement of the principle of fairness in Latisha's case.⁶

-
- ☒ ☐ I have provided information about my chosen way.⁷
-
- ☒ ☐ I have provided a second way the criminal justice system promotes the achievement of the principle of equality in Latisha's case.⁸
-
- ☒ ☐ I have provided information about my chosen way.⁹
-
- ☒ ☐ I have provided one way the criminal justice system limits the achievement of the principle of access in Latisha's case.¹⁰
-
- ☒ ☐ I have provided information about my chosen way.¹¹
-
- ☒ ☐ I have provided a conclusion to my response that links back to the question.¹²
-
- ☒ ☐ I have used paragraphs to organise my response.
-
- ☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Another way'.
-
- ☒ ☐ I have used connecting words, such as 'However' and 'Although'.
-

Linking to previous learning

16. a. [One individual right Leon has when dealing with the police is the right to silence.¹] [This right ensures that, when an accused is arrested, they do not have to answer any questions, other than providing their name and address.²]

-
- ☒ ☐ I have identified one individual right Leon has in the scenario when dealing with the police.¹
-
- ☒ ☐ I have provided information about my chosen right.²
-
- ☒ ☐ I have used signposting in my response, such as 'One individual right'.
-

- b. [As a person with an intellectual disability, the right to silence allows Leon to not be forced into speaking to the police or the court.¹] [Considering Leon's disability makes it difficult for him to process information, he may falsely represent himself when being questioned by the police. Therefore, this right to silence ensures he does not do so, which can prevent him from providing misleading or incriminating evidence against himself.²]

-
- ☒ ☐ I have identified one reason why the right to silence aims to counter difficulties faced by Leon in the criminal justice system.¹
-
- ☒ ☐ I have provided information about my chosen reason.²
-
- ☒ ☐ I have used connecting words, such as 'Therefore'.
-

5A Purposes of sanctions

Check your understanding

- A. True. **Explanation:** The five purposes of sanctions set out in the *Sentencing Act 1991* (Vic) are punishment, deterrence, denunciation, protection, and rehabilitation.
- A. **Explanation:** The purpose of protection involves removing the offender from society, such as through the imposition of a prison term, as this means the offender cannot commit further crimes in the community, protecting their safety.
- When the offender themselves is discouraged from committing offences of the same or similar nature through the provision of a sanction, this is known as **specific deterrence**. On the other hand, **general deterrence** occurs when individuals other than the offender, are discouraged from committing offences of the same or similar nature to avoid receiving the same sanction as convicted offenders.
- B; C; D. **Explanation:** Rehabilitation can occur in many environments and through a range of different programs that are not exclusive to prison treatment programs.
- C. **Explanation:** Judge Susannah's sentencing statement reprimanded Jeremiah for his crimes as she stated that his actions were 'absolutely deplorable', hence demonstrating the court's disapproval of his offence, achieving denunciation.
- B; C. **Explanation:** Punishment does not seek to encourage victims or their families to take matters into their own hands and enact revenge. Rather, a court may impose a harsher sanction to adequately punish the offender for their actions so that the victim and their family feel justice has been served without needing to do anything themselves.
- B. False. **Explanation:** As each type of sanction achieves different purposes to a varying degree, a court may impose a particular sanction to achieve a particular purpose.

Preparing for exams

Standard exam-style

- [One purpose of sanctions is rehabilitation.¹]
☒ ☐ I have identified one purpose of sanctions.¹

☒ ☐ I have used signposting in my response, such as 'One purpose'.

- [Punishment is a purpose of sanctions that is used to ensure an offender is adequately penalised and held accountable for their crimes and its impact on their victims and society as a whole.¹] [A court aiming to punish an offender will impose a more severe sanction, for example, a larger fine or longer term of imprisonment.²]
☒ ☐ I have defined 'punishment' as a purpose of sanctions.¹

☒ ☐ I have provided information about punishment as a purpose of sanctions.²

- [Protection is a purpose of sanctions that has been demonstrated through Mark's imprisonment sentence.¹] [Protection can be achieved by sanctions that remove offenders from society, such as imprisonment, to ensure they do not pose a risk to the safety and welfare of their victims or society as a whole.²] [By imprisoning Mark for 20 years, the wider community and victims can be assured that he does not have access to public spaces where he could commit further harm and other violent crimes.³]
☒ ☐ I have provided one purpose of sanctions that has been achieved in Mark's case.¹

☒ ☐ I have provided information about my chosen purpose.²

☒ ☐ I have provided an example from the scenario and linked it to my chosen purpose.³

- [Denunciation is a purpose of sanctions whereby a court aims to publicly condemn an offender's criminal behaviour.¹] [Through the judge's statement, the court formalises its disapproval of the offender's actions to highlight how the offender has violated the moral and ethical standards of society.²] [Whilst denunciation condemns an offender's actions, it does not necessarily provide a practical solution to addressing the offender's criminal behaviour, unlike some other purposes of sanctions.³]
☒ ☐ I have defined denunciation as a purpose of sanctions.¹

☒ ☐ I have provided information about denunciation.²

☒ ☐ I have provided further information about denunciation.³

- [No, I do not agree with this statement.¹] [Whilst rehabilitation may not be achieved to the same extent by all sanctions, it should still be considered when sanctioning an offender as a means of breaking the cycle of offending.²] [For example, there are certain sanctions, such as community correction orders, that prioritise the rehabilitation of offenders and are successful in addressing the underlying causes of offending.³] [It is important to consider rehabilitation when sanctioning an offender as the rate of recidivism may be reduced if the causes of an offender's criminal activity are appropriately addressed and they are able to leave a life of crime.⁴]
☒ ☐ I have stated that I disagree with the statement.¹

☒ ☐ I have provided one reason why rehabilitation should be considered during sentencing.²

☒ ☐ I have provided an example and linked it to rehabilitation as a purpose of sanctions.³

☒ ☐ I have provided a second reason why rehabilitation should be considered during sentencing.⁴

Extended response

- Strengths: I; III; IV
Weaknesses: II; V
- [Dwight's sanction of imprisonment can achieve the purposes of sanctions to a considerable extent. However, there are limitations to the extent that rehabilitation and general deterrence, as purposes of sanctions, have been achieved.¹]

[Firstly, punishment is achieved by Dwight's imprisonment sentence. As Dwight has been sentenced to five years imprisonment, he is being held accountable for the crimes he has committed and Jim can feel that retribution has been achieved without feeling the need to take matters into his own hands.²] [Moreover, another purpose that has been achieved is protection. Jim and the broader community can be assured that they are protected from Dwight and the possibility of him committing other identity theft crimes as he is in prison.³] [Additionally, denunciation has been achieved through Judge Scott's sentencing statement. By condemning Dwight for his 'reckless' and 'selfish' actions that were 'a grave breach of privacy that caused unnecessary distress to the victim', Judge Scott is expressing the court's disapproval of Dwight's offence and highlighting that his actions have breached society's moral and ethical codes of behaviour.⁴]

[However, rehabilitation as a purpose of sanctions may not be achieved. As there is no indication that there is a persistent underlying cause for offending, or that the sentencing specifically addresses rehabilitation, Dwight could re-offend upon release.⁵] [Furthermore, whilst specific deterrence may be achieved if Dwight is discouraged from reoffending upon his release to avoid receiving a similar sanction, the success of general deterrence is dependent on whether the wider community is aware of the possible sanctions for identity theft.⁶]

[Thus, most of the purposes of sanctions are achieved in Dwight's case to varying degrees, however, there are restrictions to the achievement of rehabilitation and deterrence.⁷]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have provided information about one purpose of sanctions that has been achieved by Dwight's sentence.²

✓ ✗ I have provided information about a second purpose of sanctions that has been achieved by Dwight's sentence.³

✓ ✗ I have provided information about a third purpose of sanctions that has been achieved by Dwight's sentence.⁴

✓ ✗ I have provided information about one purpose of sanctions that has not been achieved in Dwight's sentence.⁵

✓ ✗ I have provided information about a second purpose of sanctions that has not been achieved in Dwight's sentence.⁶

✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Firstly' and 'another purpose'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'Additionally'.

Linking to previous learning

15. [One purpose of sanctions that can be achieved by imprisonment as a sanction for murder is protection.¹] [Given that the offender has unlawfully taken the life of another human, they must be removed from society to protect the safety and welfare of the whole community.²] [Another purpose of sanctions that can be achieved through imprisonment is punishment.³] [As imprisonment is the removal of an offender from society, their liberty is being stripped

to hold them accountable for their crime, whilst also ensuring retribution is sought on behalf of the victim and society as a whole.⁴]

✓ ✗ I have identified one purpose of sanctions that can be achieved by imprisonment as a sanction for murder.¹

✓ ✗ I have provided information about my chosen purpose and linked it to the offence of murder.²

✓ ✗ I have identified a second purpose of sanctions that can be achieved by imprisonment as a sanction for murder.³

✓ ✗ I have provided information about my chosen purpose and linked it to the offence of murder.⁴

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

Note: The offence of and sanctions for culpable driving can also be used to demonstrate the purposes of sanctions.

5B Types of sanctions

Check your understanding

- B. False. **Explanation:** There are various types of sanctions that can achieve different purposes more effectively than others.
- A; B; D. **Explanation:** The offender's social status is irrelevant when determining the value of a fine.
- B. **Explanation:** Two years is the maximum length of a CCO for one offence, whilst the maximum is five years for two offences.
- C. **Explanation:** Imprisonment deprives an offender of their liberty, which CCOs and fines do not achieve to the same extent.
- Fines: I
CCOs: III
Imprisonment: II

Preparing for exams

Standard exam-style

6. [As a consequence of stalking, Zac may have been imprisoned.¹] [Imprisonment involves the removal of an offender from society for a certain period of time, and is a custodial sentence.²]

✓ ✗ I have identified one sanction that may have been imposed on Zac.¹

✓ ✗ I have provided information about my chosen sanction.²

7. [One condition a court may attach to a CCO is for an offender to complete up to 600 hours of community service work.¹] [Another condition a court may attach to a CCO is to abide by a stated curfew.²] [Thirdly, a court may mandate an individual to not enter, remain within, or consume alcohol in a licensed premises.³]

✓ ✗ I have identified one condition a court may attach to a CCO.¹

✓ ✗ I have identified a second condition a court may attach to a CCO.²

✓ ✗ I have identified a third condition a court may attach to a CCO.³

✓ ✗ I have used signposting in my response, such as 'One condition' and 'Another condition.'

8. [One purpose imprisonment could serve in this instance is punishment.¹] [When imprisoned, the offender is placed in a harsh environment, where their liberty and movement is restricted. The offender will usually lose their employment, and therefore any income, while in prison.²] [In this instance, by depriving Filip of his liberty, he will be punished for the crimes he has committed against his neighbour, Rushil.³]

✓ ✗ I have identified one purpose of imprisonment.¹

✓ ✗ I have provided information about how imprisonment can achieve my chosen purpose.²

✓ ✗ I have provided an example from the scenario and linked it to how imprisonment can achieve my chosen purpose.³

✓ ✗ I have used signposting in my response, such as 'One purpose'.

9. [I agree with this statement to a moderate extent as the ability of fines to punish an offender depends on the financial circumstances of the offender.¹]

[Fines require an offender to make a monetary payment to the state. In the case of wealthy offenders, the court can ensure the fine is appropriate for the offender's financial circumstances and will adequately penalise an offender.²] [However, the legislated maximum penalty for a particular offence may not be enough to proportionately punish a wealthy offender.³]

[Overall, fines generally can punish most people, however will fail to punish wealthy offenders in many cases.⁴]

✓ ✗ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹

✓ ✗ I have provided one strength of a fine in its ability to punish an offender.²

✓ ✗ I have provided one limitation of a fine in its ability to punish an offender.³

✓ ✗ I have provided a conclusion to my response that links back to the question.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Overall'.

✓ ✗ I have used connecting words, such as 'However'.

[Firstly, CCOs can achieve rehabilitation through the implementation of various conditions.²] [A CCO can include treatment for mental health issues and drug or alcohol addiction that have caused criminal offending, potentially reducing the risk of reoffending. That is, a CCO can be custom-tailored to suit the specific needs of the offender, thus effectively achieving rehabilitation.³] [However, rehabilitation is contingent on the offender's willingness to participate and hence will not always be successful.⁴]

[Secondly, CCOs can achieve general deterrence.⁵] [Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans, and other conditions of a CCO, members of the community may be discouraged from committing a similar offence to avoid receiving similar CCO conditions. Therefore, general deterrence may be achieved.⁶] [Although, a CCO is not as severe as imprisonment. Therefore, the wider community may not consider a CCO to be a severe or harsh punishment. Hence, in this regard, CCOs may fail to achieve general deterrence.⁷]

[On balance, CCOs can achieve rehabilitation and deterrence to a large extent, through the implementation of specific conditions and the inconvenience imposed on offenders when completing a CCO.⁸]

✓ ✗ I have provided an introduction to summarise the extent to which I agree or disagree with the statement, and why.¹

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.²

✓ ✗ I have provided one strength of CCOs in achieving rehabilitation.³

✓ ✗ I have provided one limitation of CCOs in achieving rehabilitation.⁴

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁵

✓ ✗ I have provided one strength of CCOs in achieving deterrence.⁶

✓ ✗ I have provided one limitation of CCOs in achieving deterrence.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

✓ ✗ I have used connecting words, such as 'However' and 'Although'.

Linking to previous learning

12. a. [Gjordan would have his case heard in the Supreme Court of Victoria - Trial division.¹] [This is because murder is an offence that only the Supreme Court has the authority to preside over as it is a very serious indictable offence.²]

✓ ✗ I have identified the court where Gjordan would have his case heard.¹

✓ ✗ I have provided one reason why Gjordan's case would be heard in this court.²

Extended response

10. Rehabilitation: I; III
Deterrence: II; IV

11. [Community correction orders (CCOs) can achieve rehabilitation and deterrence to a large extent, due to the flexible conditions they provide.¹]

- b. [An appropriate sanction for Gjordan would be imprisonment.¹
[As murder is an extremely serious offence, imprisonment must be handed down in the courts, and is therefore, an appropriate sanction.²]

✓ ✗ I have identified one sanction that is appropriate for Gjordan.¹

✓ ✗ I have provided information about my chosen sanction.²

5C Factors considered in sentencing

Check your understanding

- B. False. **Explanation:** A judge must consider aggravating factors, mitigating factors, a guilty plea, and victim impact statements (VIS) when sentencing an offender as they can each impact the overall severity of the offence and the sentence imposed.
- A; C; D. **Explanation:** Whilst an offender showing remorse for their conduct can act as a mitigating factor, an offender demonstrating no remorse cannot act as an aggravating factor.
- Whilst aggravating factors tend to **increase** the severity of an offence, mitigating factors usually **decrease** the offender's culpability and, consequently, the harshness of their sentence.
- B. **Explanation:** When an offender pleads guilty, they are fully admitting that they committed the offence and a judge considers this to be a mitigating factor, likely decreasing the severity of the sentence.
- A. **Explanation:** If a victim impact statement (VIS) indicates the offender's conduct had a significant, negative impact on the victim, this can act to increase the offender's sentence. However, if a VIS indicates a victim's forgiveness towards an offender, this may act to decrease the offender's sentence.
- B. **Explanation:** A judge will utilise aggravating factors, mitigating factors, a guilty plea, and victim impact statements to guide their decision and ensure they impose a consistent and fair sentence.

Preparing for exams

Standard exam-style

7. [Aggravating factors are aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.¹][One aggravating factor that a judge may consider in sentencing is whether the offence involved the use of a weapon.²]

✓ ✗ I have provided a definition of 'aggravating factors'.¹

✓ ✗ I have identified one aggravating factor that a judge may consider in sentencing.²

✓ ✗ I have used signposting in my response, such as 'One aggravating factor'.

8. [A victim impact statement (VIS) is a written or verbal statement made to the court about the effect of an offence upon the victim.¹
[A VIS can act to increase or decrease the severity of an offence and inform a judge's decision. For example, if a VIS indicates that an offence greatly impacted a victim, the severity of the sanction imposed may increase.²]

✓ ✗ I have defined 'victim impact statement' as a factor considered in sentencing.¹

✓ ✗ I have provided information about victim impact statements as a factor considered in sentencing.²

9. [Aggravating factors are aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.¹][On the other hand, mitigating factors are aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.²][One key difference between aggravating and mitigating factors is that aggravating factors act to increase an offender's culpability and, consequently, the severity of their sentence. Alternatively, mitigating factors can decrease an offender's culpability and the harshness of the sentence imposed.³]

✓ ✗ I have defined aggravating factors as a factor considered in sentencing.¹

✓ ✗ I have defined mitigating factors as a factor considered in sentencing.²

✓ ✗ I have provided one key difference between aggravating and mitigating factors as factors considered in sentencing.³

✓ ✗ I have used signposting in my response, such as 'One key difference'.

✓ ✗ I have used comparison words, such as 'On the other hand' and 'Alternatively'.

10. [One factor Judge Judd would consider when sentencing the offender is a guilty plea, which is a full admission of guilt by an accused person of an offence for which they have been charged.¹
[As the offender has pleaded guilty, Judge Judd will consider this a mitigating factor when imposing the sanction for the charges of arson and attempted murder, consequently this can decrease the severity of the sentence.²]

[Another factor Judge Judd would consider is mitigating factors, which are aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.³]
[The offender was known to have a difficult upbringing, which can act as a mitigating factor that decreases the offender's culpability and, ultimately, may cause Judge Judd to impose a less severe sanction, such as a shorter term of imprisonment.⁴]

✓ ✗ I have provided one factor Judge Judd would consider when sentencing the offender.¹

✓ ✗ I have provided information about my chosen factor.²

✓ ✗ I have provided a second factor Judge Judd would consider when sentencing the offender.³

✓ ✗ I have provided information about my chosen factor.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I used signposting in my response, such as 'One factor' and 'Another factor'.

11. [I agree with this statement to a minimal extent as, whilst mitigating factors can act to decrease the severity of a sentence, so can a guilty plea and a victim impact statement.¹]

[Mitigating factors are aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence. Such factors include showing genuine remorse or cooperating with police during their investigations.²]

[However, a guilty plea, which is a full admission of guilt by an accused person of an offence for which they have been charged, can also act to decrease the severity of an offender's sentence as the judge considers this a mitigating factor.³]

[Moreover, a victim impact statement (VIS) is a written or verbal statement made to the court about the effect of an offence on the victim. If a victim demonstrates forgiveness towards an offender through a VIS, a less severe sanction could be imposed.⁴]

✓ ✗ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹

✓ ✗ I have provided information about how mitigating factors can act to decrease the severity of an offender's sentence.²

✓ ✗ I have provided information about how a guilty plea can act to decrease the severity of an offender's sentence.³

✓ ✗ I have provided information about how a victim impact statement can act to decrease the severity of an offender's sentence.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'However' and 'Moreover'.

Extended response

12. Aggravating factors: I; IV
Victim impact statements: II; III

13. [When sentencing Kristoff, the judge would need to consider various factors that can act to either increase or decrease the severity of his sentence. By doing so, the judge can ensure a just outcome is provided to both Kristoff and Sven.¹]

[One factor the judge would consider when sentencing Kristoff is aggravating factors, which are aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.²][As Kristoff had prior convictions of assault and his attack was premeditated upon Sven, these would both act as aggravating factors.³][Therefore, as aggravating factors have been identified in Kristoff's case, they would act to increase his culpability and, consequently, may increase the severity of his sentence.⁴]

[Additionally, another factor the judge may consider when sentencing Kristoff is the victim impact statement (VIS) submitted by Sven, which is a written or verbal statement made to the court about the effect of an offence upon the victim.⁵][A VIS can act to either increase or decrease the severity of an offender's conduct, like Kristoff's assault, depending on the overall significance of the offence upon the victim and their family, such as Sven and his family.⁶][As Sven submitted a VIS that demonstrated his forgiveness towards Kristoff, this would most likely act to decrease the severity and harshness of the sentence imposed by the judge.⁷]

[Thus, the judge would consider both aggravating factors and Sven's VIS when sentencing Kristoff.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have identified and defined one factor that would be considered when sentencing Kristoff.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen factor.³

✓ ✗ I have provided information about how my chosen factor can impact Kristoff's sentence.⁴

✓ ✗ I have identified and defined a second factor that would be considered when sentencing Kristoff.⁵

✓ ✗ I have provided an example from the scenario and linked it to my chosen factor.⁶

✓ ✗ I have provided information about how my chosen factor can impact Kristoff's sentence.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One factor' and 'another factor'.

✓ ✗ I have used connecting words, such as 'Therefore' and 'Additionally'.

Linking to previous learning

14. [One factor that would be considered when sentencing Emily is aggravating factors, which are aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.¹][As Emily has been convicted of drunk driving on three separate occasions, these past convictions would act as an aggravating factor when she is sentenced for driving without a licence. Hence, the severity of her sentence may increase as a result.²]

[An appropriate sanction that may be imposed is a term of imprisonment.³][This would be an appropriate sanction as Emily has proven that she is a potential danger to the community by continuously driving under the influence and when not permitted to do so. Therefore, she should be from the community removed for a period of time while she rehabilitates.⁴]

✓ ✗ I have identified one factor that would be considered in sentencing Emily.¹

✓ ✗ I have provided an example from the scenario and linked it to my chosen factor.²

✓ ✗ I have identified one appropriate sanction for Emily.³

✓ ✗ I have provided an example from the scenario and linked it to my chosen sanction.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One factor'.

5D Alternative approaches to sentencing

Check your understanding

- B. False. **Explanation:** If an offender is of Aboriginal or Torres Strait Islander descent, they may be sentenced in the Koori Courts which are a division of the Magistrates' Court. If an offender commits a drug-related offence, they may be sentenced in the Drug Court.
- B; C; D. **Explanation:** Although diversion programs are typically offered to first-time offenders, a lack of prior convictions is only one factor that will be considered to determine if an offender is eligible to complete a diversion program. However, past convictions do not always disqualify an offender from completing this program.
- A. **Explanation:** The Victorian Drug Court is able to provide an alternative means of sentencing through Drug Treatment Orders (DTOs), whereby an offender's sentence is suspended while they complete drug or alcohol treatment and rehabilitation.
- B. False. **Explanation:** The Koori Court only has a role in sentencing First Nation's offenders, but no role in determining the guilt of these offenders as they must first plead guilty to be referred to the Koori Court.
- A; B; D. **Explanation:** If an accused has committed a sexual offence, they will not be eligible for sentencing in the Koori Court.
- If an offender completes a **Drug Treatment Order (DTO)**, they will not have to serve a **custodial sentence**, which is a maximum term of imprisonment of two years that is suspended while an offender engages in, and fulfils the conditions of, their treatment plan.
- B. False. **Explanation:** In order to receive a sentence by the Drug Court or Koori Court, and to be offered a diversion program, an offender must meet certain prerequisites. These alternative sentence options are not available to all criminals.

Preparing for exams

Standard exam-style

- [One of the requirements an offender must meet to have their sentence given by the Drug Court is that they have pleaded guilty to a criminal offence.¹] [Another requirement is that the offender is facing a term of imprisonment of no more than two years.²]
☒ ☐ I have identified one requirement an offender must meet to have their sentence prescribed by the Drug Court of Victoria.¹
☒ ☐ I have identified a second requirement an offender must meet to have their sentence prescribed by the Drug Court of Victoria.²
☒ ☐ I have used signposting in my response, such as 'One of the requirements' and 'Another requirement'.
- [The role of the Koori Courts is to sentence Aboriginal and Torres Strait Islander peoples using culturally-relevant sentencing techniques.¹] [There is a Koori Court division of the Children's Court, the Magistrates' Court, and the County Court, therefore these sentencing practices can be used for a variety of criminal offences, with aims of reducing recidivism to lower the incarceration rate of First Nations peoples in Victoria.²]

☒ ☐ I have identified the role of the Koori Courts.¹
☒ ☐ I have provided information about the Koori Courts.²

- [One feature of diversion programs is that they allow offenders to not have their crimes on their criminal record, so long as the offender fulfils the eligibility criteria.¹] [These criteria include factors such as the offence being a summary offence or an indictable offence tried summarily, the offender acknowledging and taking responsibility for their offences, and there being sufficient evidence to gain a conviction if the matter proceeds to trial.²] [By allowing an offender who meets such criteria to not have the offence appear on their criminal record, diversion programs benefit an offender's future. This can reduce recidivism rates, as offenders are likely to have an easier time accessing employment, insurance, and participating in society.³]

☒ ☐ I have identified one feature of diversion programs.¹
☒ ☐ I have provided information about my chosen feature.²
☒ ☐ I have provided further information about my chosen feature.³
☒ ☐ I have used signposting in my response, such as 'One feature'.

- [One benefit of diversion programs is that they prevent the offender from having the crime they committed on their criminal record.¹] [For many offenders who complete diversion programs, the crime they have committed is their first offence and is relatively minor.²] [For the teenage criminals in Illegalville, their theft may be a one-time offence committed during a period of teenage rebellion. Therefore, it is beneficial for them to not have their theft offences on their criminal record as this may hinder job prospects, university enrolments, and adulthood opportunities.³]

[A second benefit of diversion programs is that the offender must engage in conditions aimed at reducing their likelihood of reoffending.⁴] [These conditions may include performing volunteer work in the community, donating money or time to charity, or attending rehabilitative services, such as alcohol treatment.⁵] [This can be beneficial for Illegalville as it has a problem with petty criminals and a need to minimise criminal activity in the community. The young offenders could be made to actively give back to the community as a part of their program.⁶]

☒ ☐ I have identified one benefit of diversion programs.¹
☒ ☐ I have provided information about my chosen benefit.²
☒ ☐ I have provided an example from the scenario and linked it to diversion programs.³
☒ ☐ I have identified a second benefit of diversion programs.⁴
☒ ☐ I have provided information about my chosen benefit.⁵
☒ ☐ I have provided an example from the scenario and linked it to diversion programs.⁶
☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One benefit' and 'A second benefit'.

☒ ☐ I have used connecting words, such as 'Therefore'.

12. a. [Jerry would not be eligible for a Drug Treatment Order (DTO).¹]
[The first reason why Jerry would not be eligible for a DTO is that he has not pleaded 'guilty' to the offence.²][The second reason is that Jerry was on parole at the time of his arrest.³]

☒ ☐ 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 signposting in my response, such as 'The first reason' and 'The second reason'.

- b. [One benefit of a Drug Treatment Order (DTO) for Tom is that it can enable him to address underlying drug or alcohol dependencies that may have contributed to his offending.¹][This could be directly beneficial for Tom, who recently developed a drug dependency that resulted in him being charged with his first drug-related offence.²]

[Another benefit of a DTO is that, while completing the treatment program, Tom will have a suspended sentence, in which he will remain in the community while dealing with the underlying reasons for his offending.³][This could be directly beneficial for Tom as it will allow him to be surrounded by his family and support networks during his treatment for his drug dependence. As a young adolescent, this community support may be helpful for Tom.⁴]

☒ ☐ I have identified one benefit of a DTO.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen benefit.²

☒ ☐ I have identified a second benefit of a DTO.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen benefit.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One benefit' and 'Another benefit'.

Extended response

13. Strengths: I; III
Limitations: II; IV

14. [The Koori Courts, in some regards, have been an effective means of reflecting First Nations culture in the criminal justice system and reducing recidivism rates for Aboriginal and Torres Strait Islander offenders. However, they are still not an absolute fix for the flaws the justice system has regarding First Nations peoples in Australia.¹]

[One strength of the Koori Courts is that they provide a more informal atmosphere compared to other courts. This allows for greater participation by the offender and First Nations Elders and Respected Persons in the court process, promoting access to the justice system.²][Another strength is that the offender is able to talk about their past and provide reasons for their offending.³][The discussion will involve the offender considering what they can do

to prevent further offending and how their community can help to facilitate this. This has proven very effective at reducing reoffending in the Koori Court divisions of the Magistrates' Court and the County Court.⁴][A third strength of the Koori Court is that the offender is able to sit with a family member or support person during the discussions. This can provide them with a greater sense of comfort.⁵]

[Although the rates of recidivism are shown to decline due to the use of the Koori Court, the incarceration rates for First Nations persons are still very disproportionate to non-indigenous Australians, indicating the fundamental flaws in the Victorian criminal justice system that the Koori Courts fails to address.⁶][Another limitation of the Koori Courts is that they require offenders to have pleaded guilty in order to be sentenced.⁷][Therefore, accused persons may feel pressured into pleading guilty, even if they are not, so they can be referred to the Koori Courts and not risk being sentenced in the Magistrates' or County Court.⁸][A third limitation is that Elders and Respected Community Persons may be unaware of the court's existence, preventing their participation in this process.⁹]

[Overall, the Koori Courts have been shown to act as a more culturally-relevant mechanism of sentencing Aboriginal and Torres Strait Islander persons and is valuable in the Victorian criminal justice system.¹⁰]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have identified one strength of the Koori Courts in Victoria.²

☒ ☐ I have identified a second strength of the Koori Courts in Victoria.³

☒ ☐ I have identified a third strength of the Koori Courts in Victoria.⁴

☒ ☐ I have provided information about my chosen strength.⁵

☒ ☐ I have identified one limitation of the Koori Courts in Victoria.⁶

☒ ☐ I have identified a second limitation of the Koori Courts in Victoria.⁷

☒ ☐ I have provided information about my chosen limitation.⁸

☒ ☐ I have identified a third limitation of the Koori Courts in Victoria.⁹

☒ ☐ I have provided a conclusion to my response that links back to the question.¹⁰

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One strength' and 'Another strength'.

☒ ☐ I have used connecting words, such as 'Although' and 'Therefore'.

Linking to previous learning

15. [Rehabilitation is a purpose of sanctions that aims to break the cycle of criminal behaviour by sentencing an offender in a manner that addresses the underlying causes of criminal behaviour.¹] [The Drug Court of Victoria prioritises rehabilitation as it often sentences offenders to a Drug Treatment Order (DTO).²] [This requires an offender to receive treatment for any substance abuse problems that may be contributing to their criminal behaviour, therefore addressing the root cause of their offending and rehabilitating them. This can reduce their likelihood of reoffending.³]

✓ ✗ I have defined 'rehabilitation' as a purpose of sanctions.¹

✓ ✗ I have provided one way the Drug Court of Victoria helps achieve rehabilitation.²

✓ ✗ I have provided information about my chosen way the Drug Court of Victoria helps achieve rehabilitation.³

5E Sentencing in the Northern Territory

Check your understanding

- B. False. **Explanation:** Each state and territory is able to create its own criminal laws. In Victoria, criminal behaviour is regulated by Acts including the *Crimes Act 1958* (Vic) and the *Summary Offences Act 1966* (Vic), whilst the *Criminal Code Act 1983* (NT) regulates offences in the NT.
- The Northern Territory (NT) has the **highest** imprisonment rate of any state or territory in Australia, with 1,026.6 prisoners per 100,000 adults as of June 2022 (Sentencing Advisory Council, 2023).
- A; C. **Explanation:** Home detention is a sentence that an offender may receive whereby the offender remains within specified premises while completing specified conditions. Damages are not a type of sentence, but rather a remedy that may be awarded where a civil breach occurred.
- B. **Explanation:** A community work order requires an offender to complete certain conditions, such as community service, not breaking the law, and presenting themselves to an officer.
- B. False. **Explanation:** Suspended sentences are custodial prison sentences that are not put into immediate effect. If serving a suspended sentence, an offender will remain in the community, working and fulfilling their responsibilities, while their prison sentence is suspended.
- Northern Territory: II; III
Victoria: I; IV
- 15% of offenders guilty of domestic violence received a custodial sentence in **Victoria**, whereas 73% of all offenders guilty of this offence in **the Northern Territory** received a custodial sentence in the 2021–22 period (Australian Bureau of Statistics, 2023).
- B. False. **Explanation:** Both Victoria and the Northern Territory still have mandatory sentencing, whereby a period of detention must be imposed for serious offences, such as murder.
- A; B; C. **Explanation:** The maximum sentence for murder in Victoria and the Northern Territory is life imprisonment. However, Victorian courts are not obliged to sentence offenders guilty of murder to life imprisonment, whereas Northern Territory Courts are.

Preparing for exams

Standard exam-style

10. [One approach to sentencing in the Northern Territory (NT) that is different to Victoria is the use of suspended sentences.¹] [Another different approach in the NT is the mandatory minimum sentence of life imprisonment for offenders guilty of murder.²]

✓ ✗ I have identified one approach to sentencing in the Northern Territory.¹

✓ ✗ I have identified a second approach to sentencing in the Northern Territory.²

✓ ✗ I have used signposting in my response, such as 'One approach' and 'Another different approach'.

11. [One sentencing approach used in the Northern Territory (NT) is that judges may give sentences for indefinite terms of imprisonment.¹] [The Supreme Court in the NT can sentence an offender convicted of a violent offence to an indefinite term of imprisonment. Indefinite imprisonment can be applied where the offence is severe and certain characteristics of the offender, such as age and health, make it an appropriate sanction.²] [The court must also impose a nominal sentence when handing out an indefinite term of imprisonment. This ensures the prisoner's progress is consistently reviewed so an end date can be prescribed to their sentence if needed.³]

[Another sentencing approach used in the NT is mandatory sentencing for certain types of offences.⁴] [The mandatory minimum sentence of imprisonment that a judge must sentence an offender to for certain crimes varies.⁵] [For example, for the offence of murder, the mandatory minimum sentence is life imprisonment, whilst for common assault, where no aggravating factors apply and it is the offender's first time offending, an imprisonment sentence must be imposed. This sentence can be as short a term of imprisonment as the judge sees fit.⁶]

✓ ✗ I have provided one sentencing approach used in the Northern Territory.¹

✓ ✗ I have provided information about my chosen approach.²

✓ ✗ I have provided further information about my chosen approach.³

✓ ✗ I have provided a second sentencing approach used in the Northern Territory.⁴

✓ ✗ I have provided information about my chosen approach.⁵

✓ ✗ I have provided further information about my chosen approach.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One sentencing approach' and 'Another sentencing approach'.

Extended response

12. Similarities: I; II
Differences: III; IV

13. [Considering the Northern Territory (NT) and Victoria are both able to establish their own sentencing practices, each state/territory would sentence Eddie differently, using varying approaches. However, aspects of Eddie's sentencing experience in both jurisdictions would still be similar.¹]

[One similarity is that in the NT, Eddie may be sentenced in the Youth Justice Court for his offence considering he is below the age of 18. Similarly, the Children's Court could hear Eddie's case in Victoria, both being specialised courts for young accused persons engaging with the criminal justice system.²][Secondly, another similarity between the sentencing approaches of Victoria and the NT is that Eddie may be sentenced to a period of detention in a youth detention centre as both jurisdictions have these facilities.³]

[However, there would also be differences between Eddie's sentencing in these jurisdictions. One difference would be that in Victoria, there is a Koori Court division of the Children's Court. Therefore, young, Aboriginal offenders who plead guilty can have their sentence determined by this specialised, culturally-relevant sentencing court. On the other hand, in the NT, community courts can only sentence offenders who have been approved by the Local Court to partake in such community court processes. Therefore, there are no community court sentencing options for young offenders in the NT.⁴][Additionally, another difference is that Eddie is more likely to be sentenced to a custodial sentence for the domestic violence offence in the NT compared to Victoria, as statistics suggest Victoria uses custodial sentences less frequently than the NT for domestic violence offences.⁵]

- ☒ ☐ I have provided an introduction to summarise my answer to the question.¹
- ☒ ☐ I have provided one similarity between the sentencing experience of Eddie in Victoria and the Northern Territory.²
- ☒ ☐ I have provided a second similarity between the sentencing experience of Eddie in Victoria and the Northern Territory.³
- ☒ ☐ I have provided one difference between the sentencing experience of Eddie in Victoria compared to the Northern Territory.⁴
- ☒ ☐ I have provided a second difference between the sentencing experience of Eddie in Victoria compared to the Northern Territory.⁵
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One similarity' and 'another similarity'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Additionally'.
- ☒ ☐ I have used comparison words, such as 'Similarly' and 'On the other hand', when comparing.

apologies to the victim's friends and family.²][One key difference between Victoria and the NT in sentencing Jerry is that whilst Victorian judges are able to consider mitigating circumstances and not automatically sentence Jerry to life imprisonment, judges must enforce this extreme sentence in the Northern Territory for murder.³]

- ☒ ☐ I have provided information about the sentence Jerry will receive in the Northern Territory.¹
- ☒ ☐ I have provided information about the sentence Jerry would likely receive in Victoria with reference to factors considered in sentencing.²
- ☒ ☐ I have provided one key difference between the sentence Jerry will likely receive in the Northern Territory compared to Victoria.³
- ☒ ☐ I have used signposting in my response, such as 'One key difference'.
- ☒ ☐ I have used comparison words, such as 'On the other hand', when distinguishing.

15. a. [The type of sanction Margot will receive if found guilty of assaulting a frontline worker is a three-month minimum sentence, considering this is her first offence.¹][The judge may decide that aggravating factors apply and therefore, the sentence should be greater than three months. However, regardless of how many mitigating circumstances apply, Margot cannot receive less than a three-month prison sentence.²]

- ☒ ☐ I have identified the type of sanction Margot will receive if found guilty.¹
- ☒ ☐ I have provided information about the type of sanction.²

- b. [There are several aggravating factors relevant to Margot's case. Firstly, she performed the assault in front of several children.¹][Secondly, this attack was premeditated as she planned to attend the protest because she knew her high school bully was also going to be there.²][Finally, another aggravating factor is that Margot used a knife in the attack. The use of a weapon in an attack indicates that the offence should be more harshly punished.³]

- ☒ ☐ I have provided an example from the scenario and linked it to one aggravating factor.¹
- ☒ ☐ I have provided an example from the scenario and linked it to a second aggravating factor.²
- ☒ ☐ I have provided an example from the scenario and linked it to a third aggravating factor.³
- ☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

Linking to previous learning

14. [Considering Jerry was found guilty of murder, the sentence he will receive in the Northern Territory (NT) will be life imprisonment, as this is the mandatory minimum sentence for murder in this jurisdiction.¹][On the other hand, in Victoria, Jerry may receive a sentence of around 25 years in prison, the standard sentence, instead of life imprisonment considering several mitigating factors apply in the present case, such as Jerry showing remorse and writing

6A Purposes and types of civil law

Check your understanding

- B. False. **Explanation:** The primary purpose of civil law is to restore the plaintiff to the position they were in before they suffered a loss.
- C. **Explanation:** Family law is able to resolve disputes regarding issues that may arise after a divorce when a family or marriage is breaking down.
- One of the primary purposes of civil law is to **restore the plaintiff to their original position**. Thus, the legal framework is then able to **protect the rights of individuals** in a broad sense.
- A. **Explanation:** Consumer protection law aids consumers in situations where they may be manipulated by retailers or large corporations, and/or sold defective products.
- B. **Explanation:** Whilst a defendant may be embarrassed if they are found liable for a civil wrong, this is not a purpose that civil law sets out to achieve.
- A. True. **Explanation:** By restoring a plaintiff to their original position, the primary purpose of civil law is achieved, therefore, the justice system has been a success for the plaintiff.

Preparing for exams

Standard exam-style

- [One purpose of civil law is to provide compensation for losses suffered by the aggrieved party.¹] [This is usually in the form of a remedy, such as a defendant paying a sum of money to the plaintiff.²]

☒ ☐ I have identified one purpose of civil law.¹

☒ ☐ I have provided information about my chosen purpose.²

☒ ☐ I have used signposting in my response, such as 'One purpose'.

- [One type of civil law is wills and probate law.¹] [The laws comprising this type of law serve to provide guidelines and legislate upon the creation and then subsequent enactment of wills.²] [This type of civil law is linked to the purpose of protection of rights. The law serves to protect the rights of those who have will entitlements, whilst also protecting the rights of individuals who leave their assets to certain people, and expect that these people are the recipients upon their death.³]

☒ ☐ I have identified one type of civil law.¹

☒ ☐ I have provided information about my chosen type of civil law.²

☒ ☐ I have linked my chosen type of civil law to one purpose of civil law.³

☒ ☐ I have used signposting in my response, such as 'One type'.

- [One type of civil law is consumer protection law.¹] [This deals with the protection of consumers from issues such as faults, warranties, and unfair pricing, when purchasing goods and services in a commercial setting.²] [Another type of civil law is defamation law.³] [Defamation law seeks to protect parties against false claims made about them and any damage to their reputation that may be incurred.⁴]

☒ ☐ I have identified one type of civil law.¹

☒ ☐ I have provided information about my chosen type of civil law.²

☒ ☐ I have identified a second type of civil law.³

☒ ☐ I have provided information about my chosen type of civil law.⁴

☒ ☐ I have used signposting in my response, such as 'One type' and 'Another type'.

Extended response

- C; D

- [Whilst the presence of different types of civil law enables some purposes of such law to be achieved in this scenario, it is clear not all purposes have been upheld.¹]

[One type of civil law relevant in this scenario is defamation law, which relates to falsehoods and lies released about an individual. In this case, Aayush has been defamed by his co-worker and is suffering as a result.²] [One purpose of civil law is to restore the plaintiff to their original position.³] [This purpose may be achieved by defamation law as Hunter may have to provide Aayush with monetary compensation to account for any emotional or financial loss incurred as a result of the false claims.⁴] [However, another purpose of civil law is to establish acceptable behaviour, which may have not been achieved in this scenario.⁵] [As Hunter still believes it is acceptable to lie about Aayush, it is clear current defamation law may have failed in achieving this purpose.⁶]

[Another type of civil law relevant to Aayush is workplace law, which sets national conditions for employment and a base level of rights for employees. After he was defamed, Aayush was subjected to unfair work practices regarding his pay and leave entitlements.⁷] [One of the purposes of civil law is to protect the rights of individuals.⁸] [Aayush, under workplace law, may be able to bring a claim against his workplace for paying him unfairly and not abiding by legislation regarding pay and leave entitlements. By doing so, Aayush can ensure his workplace provides him with the correct conditions and pay moving forward so that his right to earn an adequate wage is protected.⁹]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have identified one type of civil law relevant to the scenario.²

☒ ☐ I have identified one purpose of civil law that has been achieved in the scenario.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen purpose of civil law.⁴

☒ ☐ I have identified one purpose of civil law that has not been achieved in the scenario.⁵

- ☒ ☐ I have provided an example from the scenario and linked it to my chosen purpose of civil law.⁶
- ☒ ☐ I have identified a second type of civil law relevant to the scenario.⁷
- ☒ ☐ I have identified a second purpose of civil law that has been achieved in the scenario.⁸
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen purpose of civil law.⁹
- ☒ ☐ I have used signposting in my response, such as 'One type' and 'One purpose'.
- ☒ ☐ I have used connecting words, such as 'However'.

Linking to previous learning

12. [The primary purpose of civil law is to restore the plaintiff to the position they were in before they suffered loss at the hands of the defendant. This usually involves the award of a remedy to the plaintiff.¹] [The primary purpose of criminal law is to protect society from general harm. This usually involves punishing those who disrupt social order and cohesion with a sanction.²] [One key difference between the two types of law is that civil law aims to compensate the plaintiff rather than punish the defendant. On the other hand, criminal law intends to punish or penalise an offender for their wrongdoing.³]
- ☒ ☐ I have identified the main purpose of civil law.¹
 - ☒ ☐ I have identified the main purpose of criminal law.²
 - ☒ ☐ I have provided one key difference between the purpose of civil law and the purpose of criminal law.³
 - ☒ ☐ I have used signposting in my response, such as 'One key difference'.
 - ☒ ☐ I have used comparison words, such as 'On the other hand', when distinguishing.

6B Key concepts of civil law

Check your understanding

1. A. True. **Explanation:** The six central concepts of civil law are breach, causation, loss, limitation of actions, burden of proof, and standard of proof.
2. D. **Explanation:** The limitation periods for the various types of civil law are contained in the *Limitation of Actions Act 1958* (Vic) and can therefore be altered at any time by the Victorian Parliament.
3. A. **Explanation:** Elektra's illness is a loss that she is suffering as a result of Asha's negligence.
4. B. False. **Explanation:** The plaintiff holds the burden of proof in a civil case as they must prove and argue the defendant's liability.
5. A. **Explanation:** The balance of probabilities is the civil law standard of proof that requires the plaintiff to prove the defendant is likely liable.

6. C. **Explanation:** A breach in civil law is the disobeying of legal obligations owed to another party or the public.
7. The concept in civil law that requires the defendant's act to be a necessary cause of the plaintiff's loss and, 'but for' the defendant's actions, the loss would not have occurred, is referred to as **causation**.
8. Before a person can be found liable under civil law, the plaintiff in a civil dispute will usually have to prove that the defendant's actions were a breach that caused them to suffer a **loss**. The plaintiff must ensure they initiate a claim within the **limitation period**. They will have the onus of proving their claim, as the plaintiff carries the **burden of proof** in a civil trial.

Preparing for exams

Standard exam-style

9. [The standard of proof in a civil case is on the 'balance of probabilities'.¹] [This standard requires that the defendant is most likely liable for the loss suffered by the plaintiff and the plaintiff's version of events is most likely correct.²]

 - ☒ ☐ I have identified the 'balance of probabilities' as the standard of proof in a civil dispute.¹
 - ☒ ☐ I have provided information about the 'balance of probabilities'.²

10. [Civil causation refers to the direct relationship between the defendant's actions and the harm or injury suffered by the plaintiff.¹] [A civil breach refers to an act or omission that is a failure to meet a civil legal obligation.²] [One key difference between these civil concepts is that breach refers to the specific action that violates civil law, whereas causation is how this action created a loss for the plaintiff.³]

 - ☒ ☐ I have provided information about causation as an element of civil law.¹
 - ☒ ☐ I have provided information about a breach as an element of civil law.²
 - ☒ ☐ I have provided one key difference between breach and causation as elements of civil law.³
 - ☒ ☐ I have used signposting in my response, such as 'One key difference'.
 - ☒ ☐ I have used comparison words, such as 'whereas', when distinguishing.

11. [The limitation of actions refers to the restriction on the legal time frame in which a plaintiff is able to initiate their civil claim.¹] [Limitation periods differ across the different types of civil law and are contained in the *Limitation of Actions Act 1958* (Vic).²] [For example, the limitation period for personal injury negligence cases is three years.³]

 - ☒ ☐ I have provided a definition of the limitation of actions.¹
 - ☒ ☐ I have provided information about the limitation of actions.²
 - ☒ ☐ I have identified one example of a limitation period for a civil wrong.³

12. [In civil law cases, the person initiating the legal action, the plaintiff, has the burden of proof and must prove the defendant caused them to suffer a loss.¹] [In May and June's case, the burden of proof will lie with May, as she initiated the proceedings and is, therefore, the plaintiff.²] [In this case, May has likely suffered from a loss of earnings as a result of losing her job.³]

✓ ✗ I have provided information on the burden of proof in civil cases.¹

✓ ✗ I have provided an example from the scenario and linked it to the burden of proof.²

✓ ✗ I have provided an example of one type of loss that May could have suffered.³

Extended response

13. True: I; III; IV; VI
False: II; V

14. a. [The burden of proof lies with Skylar as she is the plaintiff.¹] [The standard of proof will be on the balance of probabilities.²]

✓ ✗ I have identified Skylar as holding the burden of proof.¹

✓ ✗ I have identified the standard of proof as on the 'balance of probabilities'.²

- b. [Skylar's dispute with Aryan is in relation to a broken contract and therefore, relates to contract law.¹] [Under the *Limitation of Actions Act 1958* (Vic), Skylar will have six years to initiate proceedings as it is a contract law dispute.²]

✓ ✗ I have identified the type of civil law dispute in the scenario.¹

✓ ✗ I have provided information about the relevant limitation of actions period for this type of civil dispute.²

✓ ✗ I have referred directly to relevant legislation in my response.

- c. [Aryan has broken the conditions of his contract with Skylar and has, therefore, breached civil law.¹] [The element of breach requires the defendant to have failed to meet a civil legal obligation and in this case, Aryan has breached a contractual obligation.²]

[Alternatively, the element of causation requires a direct relationship between Aryan's actions and the harm or injury suffered by Skylar.³] [As Aryan has intentionally broken his legal obligation causing Skylar to suffer a loss of earnings, causation would likely be satisfied.⁴]

[Finally, in order to instigate civil proceedings, Skylar must have suffered at least one form of loss.⁵] [Skylar, as a result of Aryan's actions, suffered three types of loss. She has experienced a loss of earnings, damage to her property, and mental injury.⁶]

✓ ✗ I have outlined the element of breach in relation to the scenario.¹

✓ ✗ I have provided an example from the scenario and linked it to how breach would be satisfied.²

✓ ✗ I have outlined the element of causation in relation to the scenario.³

✓ ✗ I have provided an example from the scenario and linked it to how causation would be satisfied.⁴

✓ ✗ I have outlined the element of loss in relation to the scenario.⁵

✓ ✗ I have provided an example from the scenario and linked it to how loss would be satisfied.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Finally'.

✓ ✗ I have used connecting words, such as 'Alternatively'.

Linking to previous learning

15. [The burden of proof in a criminal case lies with the prosecution, who must then present evidence to find an accused guilty.¹] [Alternatively, the burden of proof in a civil case lies with the plaintiff, who initiates civil action against the defendant and therefore, must prove the defendant is liable for their loss.²] [The burden of proof in both criminal cases and civil disputes lies with the party who instigates the action. However, one key difference is that the prosecution is the party that holds this responsibility in criminal law, whilst the plaintiff is the party that has this burden in civil law.³]

✓ ✗ I have identified the burden of proof in criminal law.¹

✓ ✗ I have identified the burden of proof in civil law.²

✓ ✗ I have provided one similarity and key difference between the burden of proof in civil and criminal law.³

✓ ✗ I have used signposting in my response, such as 'one key difference'.

✓ ✗ I have used comparison words, such as 'Alternatively' and 'However', when comparing.

6C Plaintiffs and defendants

Check your understanding

- D. **Explanation:** In a civil claim, the plaintiff is the party that initiates a civil claim against another person in court, whilst the defendant is the party being sued for the alleged breach of civil law.
- A. **Explanation:** The plaintiff is responsible for proving the defendant's liability as they initiated the claim, meaning they have the burden of proof. To be successful in the dispute, the plaintiff must prove this liability on the balance of probabilities.
- The party that has allegedly caused the loss of the **plaintiff** is the **defendant**.
- B. **Explanation:** A class action occurs when individuals come together to bring one claim against the defendant as their losses involve the same or similar circumstances and legal implications.

5. A. True. **Explanation:** Defendants can be indirectly responsible for a plaintiff's loss or suffering. When a defendant is found liable in a civil dispute, despite not directly causing the plaintiff's loss, this is known as vicarious liability.
6. B. False. **Explanation:** In a civil dispute, the plaintiff can be the aggrieved party, who directly suffered the harm, or an individual who was indirectly impacted by the aggrieved party's loss, such as family members or insurers.
7. If a plaintiff is successful in their claim against a defendant, they will usually receive some sort of compensation in the form of a **remedy**.

Preparing for exams

Standard exam-style

8. [One possible party to a civil dispute is a plaintiff, which is the party that initiates a civil claim against another person in court.¹] [The plaintiff is the person who has suffered a loss as a result of another party's actions and is, therefore, seeking compensation to return them to their original position before the conduct occurred.²]

☒ ☐ I have identified one possible party to a civil dispute.¹

☒ ☐ I have provided information about my chosen party.²

☒ ☐ I have used signposting in my response, such as 'One possible party'.

9. [A plaintiff is the party that initiates a civil claim against the defendant in court.¹] [On the other hand, a defendant is the party who is being sued by the plaintiff for an alleged breach of civil law.²] [One key difference between plaintiffs and defendants is that plaintiffs have the burden of proof, meaning they must prove the defendant is liable on the balance of probabilities. Alternatively, the defendant only has to defend themselves against the civil claims made by the plaintiff, but does not have to prove they are not liable.³]

☒ ☐ I have provided information about a plaintiff as a possible party to a civil dispute.¹

☒ ☐ I have provided information about a defendant as a possible party to a civil dispute.²

☒ ☐ I have provided one key difference between plaintiffs and defendants as possible parties to a civil dispute.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'On the other hand' and 'Alternatively', when distinguishing.

10. [One possible party to the civil dispute in this scenario is the plaintiff, which is the party that initiates a civil claim against another person in court.¹] [In Barb and Ken's case, they have united with nine other workers to initiate a class action, meaning they are the plaintiffs and will initiate one claim together in court against Dreamhouse as they have all suffered the same loss of being underpaid.²]

[Moreover, another party to the civil dispute in this scenario is the defendant, which is the party who is being sued by another for an alleged breach of civil law.³] [As Barb and Ken are initiating a class action against Dreamhouse, the toy business is the defendant and will have to defend itself against the claims being made by their employees in regards to underpayment.⁴]

☒ ☐ I have identified one possible party to the civil dispute in the scenario.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen possible party.²

☒ ☐ I have identified a second possible party to the civil dispute in the scenario.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen possible party.⁴

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting in my response, such as 'One possible party' and 'another party'.

☒ ☐ I have used connecting words, such as 'Moreover'.

Extended response

11. A; C; D

12. [There are two main parties in every civil dispute. These parties are the plaintiff, which is the party that initiates a civil claim against another person in court, and the defendant, who seeks to defend this claim.¹]

[One possible party to this civil dispute is the plaintiff, which could be Alex, Gloria, and Marty in this scenario.²] [The three customers could each individually initiate a civil claim against King Julien for a breach of duty of care. However, they could also approach other customers who survived the shipwreck and are now in the same situation to form a united group of at least seven people, choosing to launch a class action against King Julien for failing to have the appropriate safety measures aboard the ship.³] [Whether Alex, Gloria, and Marty choose to launch a claim separately or with others in a class action, as the plaintiffs, they will hold the burden of proof, meaning they must prove King Julien is liable for negligence on the balance of probabilities, as it failed to have adequate lifeboats onboard the ship. They can do so by presenting evidence and arguments to prove this breach has occurred.⁴]

[Additionally, another possible party to a civil dispute is the defendant, which is the party who is being sued by another for an alleged breach of civil law.⁵] [In this scenario, the defendant is King Julien, as they will be responsible for defending themselves against any legal action that is initiated by Alex, Gloria, or Marty.⁶] [As the defendant, King Julien does not have to prove it is not liable for the loss and suffering incurred by its cruise ship customers, rather it must defend itself against the claim to argue its actions did not amount to a breach of its duty of care.⁷]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have identified one possible party to this civil dispute.²

☒ ☐ I have provided one example from the scenario and linked it to my chosen party.³

☒ ☐ I have provided a second example from the scenario and linked it to my chosen party.⁴

☒ ☐ I have identified a second possible party to this civil dispute.⁵

☒ ☐ I have provided one example from the scenario and linked it to my chosen party.⁶

-
- ✓ ✕ I have provided a second example from the scenario and linked it to my chosen party.⁷
-
- ✓ ✕ I have used paragraphs to organise my response.
-
- ✓ ✕ I have used signposting in my response, such as 'One possible party' and 'another possible party'.
-
- ✓ ✕ I have used connecting words, such as 'Additionally'.
-

Linking to previous learning

13. [One purpose of civil law is to restore the individual who suffered a loss to their original position before the loss occurred.¹] [In a civil dispute, the person suffering the loss is the plaintiff, which is also the party that initiates a civil claim against the defendant.²] [A plaintiff will initiate a civil claim to gain compensation for any loss or suffering they have incurred. However, they are responsible for proving the defendant is liable for the breach of their rights.³] [Therefore, if a plaintiff is successful in their civil claim, they will usually receive some form of compensation as a remedy, which is a court order that aims to correct a civil wrong and return the plaintiff, as close as possible, to the position they were in prior to the civil breach occurring.⁴]

-
- ✓ ✕ I have provided one purpose of civil law.¹
-
- ✓ ✕ I have defined the term 'plaintiff'.²
-
- ✓ ✕ I have provided information about how my chosen purpose of civil law can be upheld for a plaintiff.³
-
- ✓ ✕ I have provided further information about how my chosen purpose of civil law can be upheld for a plaintiff.⁴
-
- ✓ ✕ I have used signposting in my response, such as 'One purpose'.
-
- ✓ ✕ I have used connecting words, such as 'However' and 'Therefore'.
-

7A Negligence - elements

Check your understanding

- B. False. **Explanation:** Making a claim in negligence law is a civil action, not a criminal offence.
- C. **Explanation:** Breach of negligence is not an element. Rather, there must be a breach of duty.
- A; B; C. **Explanation:** Students do not owe a duty of care to their teacher, but teachers do owe a duty to their students.
- B. **Explanation:** Reasonable foreseeability occurs when a person knew, or ought to have known, that their actions could cause harm to another.
- For a breach of duty in care to be made out, it must be established that the risk of harm was **not** insignificant and **foreseeable**, in that it could have been anticipated that the defendant's act or omission could cause harm to someone else. It must also be established that a **reasonable** person in the same position would have taken precautions.
- A. True. **Explanation:** The 'but for' test is used to determine factual causation.
- 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.
- C. **Explanation:** There are different limitation periods for different types of loss, for property damage the claim can be brought within six years of the incident.

Preparing for exams

Standard exam-style

- [Duty of care is a legal obligation to ensure the safety and wellbeing of others, and to avoid conduct that could be reasonably foreseen to harm another person.¹] [There are certain relationships that give rise to an established duty of care. One of these relationships is that between a doctor and their patient.²] [Another established relationship is between a solicitor and their client.³]
- ✓ ✕ I have defined the term 'duty of care'.¹
- ✓ ✕ I have provided one example of an established duty of care relationship.²
- ✓ ✕ I have provided a second example of an established duty of care relationship.³
- ✓ ✕ I have used signposting in my response, such as 'One of these relationships' and 'Another established relationship'.
- [The limitation of actions is a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.¹] [For property damage claims in negligence, the *Limitation of Actions Act 1958* (Vic) states that such a claim must be brought within six years of the plaintiff's knowledge of the harm.²] [This means plaintiffs who try to bring a claim in negligence after the six-year period may be denied justice.³]

- ✓ ✕ I have identified and defined the term 'limitation of actions'.¹
- ✓ ✕ I have provided information about the limitation of actions for property damage.²
- ✓ ✕ I have provided information about the impact of the limitation of actions for property damage.³
- ✓ ✕ I have referred directly to relevant legislation in my response.

- [Duty of care is a legal obligation to ensure the safety and wellbeing of others, and to avoid conduct that could be reasonably foreseen to harm another person.¹] [In order for duty of care to be satisfied, the plaintiff must prove reasonable foreseeability and that there is a neighbour relationship between the parties.²] [On the other hand, causation refers to the relationship between an event or action and a resulting event.³] [For causation to be satisfied, the plaintiff must prove there was factual causation and that the defendant's actions fall within the scope of liability.⁴]

- ✓ ✕ I have defined duty of care as an element of negligence.¹
- ✓ ✕ I have provided information about duty of care as an element of negligence.²
- ✓ ✕ I have defined causation as an element of negligence.³
- ✓ ✕ I have provided information about causation as an element of negligence.⁴
- ✓ ✕ I have used connecting words, such as 'On the other hand'.

- [The limitation of actions is a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.¹] [For personal injury claims in negligence, the *Limitation of Actions Act 1958* (Vic) states that a claim for personal injury must be brought within three years of the plaintiff's knowledge of the harm.²] [In Jasmine's case, the back injury occurred four years ago, so she would have to make an application to the court for an extension on the limitation period, in order to receive justice.³]

- ✓ ✕ I have defined the term 'limitation of actions'.¹
- ✓ ✕ I have provided information about the limitation of actions for personal injury.²
- ✓ ✕ I have provided information about the impact of the limitation of actions for personal injury.³
- ✓ ✕ I have referred directly to relevant legislation in my response.

- ✓ ✕ I have linked my answer to the scenario where appropriate.

Extended response

- A; B; D
- [Jordan, the plaintiff, would likely be able to establish the elements of negligence concerning Arthur's lack of maintenance to the oval.¹]

[As Jordan has already proven the first element of negligence, duty of care, the second element he would need to prove, on the balance of probabilities, is that Arthur breached his duty of care.²] [Jordan would argue that the risk of harm was foreseeable as Arthur had not maintained the oval for three weeks and a reasonable person would have ensured adequate care of the oval during this period to avoid injury risks to players.³]

[The third element Jordan would have to prove is causation, which refers to the direct relationship between the defendant's actions and the harm suffered by the plaintiff.⁴] [Jordan would need to prove his injuries were a direct result of the uneven ground and Arthur's negligence in maintaining the oval. However, this element may be difficult to satisfy as Arthur could argue that Jordan's injury occurred from playing football not necessarily from the bumpy ground.⁵]

[The fourth element Jordan would need to prove is remoteness of damage, meaning the breach of duty must be a significant cause of the damage suffered.⁶] [This element may be contentious as, if proven, Arthur could then be found liable for all injuries on the football field while it was bumpy.⁷]

[Overall, it is likely that Jordan's negligence claim would be successful.⁸]

- ☒ ☐ I have provided an introduction to answer the question.¹
- ☒ ☐ I have identified the second element of negligence.²
- ☒ ☐ I have provided an example from the scenario and linked it to Jordan's likely success in proving the second element of negligence.³
- ☒ ☐ I have identified the third element of negligence.⁴
- ☒ ☐ I have provided an example from the scenario and linked it to Jordan's likely success in proving the third element of negligence.⁵
- ☒ ☐ I have identified the fourth element of negligence.⁶
- ☒ ☐ I have provided an example from the scenario and linked it to Jordan's likely success in proving the fourth element of negligence.⁷
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁸
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'the second element' and 'The third element'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Overall'.

Linking to previous learning

15. [The limitation of actions is a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.¹] [The *Limitation of Actions Act 1958* (Vic) restricts the time for personal injury and property damage claims, requiring them to be brought within three years and six years respectively.²] [This may limit access when making a negligence claim as those who want to initiate civil action after this time period can be denied access to the legal system and, subsequently, cannot receive a remedy that compensates their loss.³]

- ☒ ☐ I have identified and defined the term 'limitation of actions'.¹
- ☒ ☐ I have provided information about the limitation of actions in negligence claims.²
- ☒ ☐ I have provided information about the impact of the limitation of actions on the achievement of access in negligence claims.³
- ☒ ☐ I have referred directly to relevant legislation in my response.

7B Negligence - defences and remedies

Check your understanding

- B. False. **Explanation:** Although this lesson only explains contributory negligence and voluntary assumption of risk as possible defences to negligence, other potential defences exist.
- B. **Explanation:** Contributory negligence is a defence to negligence where the plaintiff partly contributed to their own harm.
- B. **Explanation:** Voluntary assumption of risk is when the plaintiff understood and had an awareness of the danger involved in an activity that they consensually took part in.
- B. False. **Explanation:** Voluntary assumption of risk is a complete defence, and thus there is no apportionment of damages. In contributory negligence, there is an apportionment process as this is a partial defence.
- A; B. **Explanation:** Where all the elements of negligence are established and no defences are successful, the plaintiff will likely receive compensation. If contributory negligence is made out as a defence, the plaintiff will likely still receive damages, but a reduced amount.
- B. **Explanation:** Exemplary damages are only used in exceptional circumstances in negligence cases.
- If contributory negligence is successful, the plaintiff will receive **less** damages than they would if the elements of negligence were proven without any defences raised by the defendant.
- The defences to negligence are set out in the **Wrongs Act 1958 (Vic)**.

Preparing for exams

Standard exam-style

9. [Contributory negligence refers to the failure by a person, typically a plaintiff, to take reasonable care for their own safety, which adds to the harm the person suffers.¹] [This is a partial defence, meaning it will reduce a defendant's liability partially, but will not fully exempt them from liability.²]

- ☒ ☐ I have defined the defence of contributory negligence.¹
- ☒ ☐ I have provided information about contributory negligence.²

10. [Voluntary assumption of risk is a defence to negligence in which it is claimed the plaintiff accepted and was aware of the risks inherent in the activity.¹] [This requires the plaintiff to have knowledge of the risk and fully appreciate the risk.²] [Furthermore, the plaintiff must have consented to, or voluntarily taken part in, the activity.³]

✓ ✗ I have defined the defence of voluntary assumption of risk.¹

✓ ✗ I have provided information about the defence of voluntary assumption of risk.²

✓ ✗ I have provided further information about the defence of voluntary assumption of risk.³

✓ ✗ I have used connecting words, such as 'Furthermore'.

11. [One defence that Bungee & Co could raise is voluntary assumption of risk.¹] [Voluntary assumption of risk is a defence to negligence where the plaintiff accepted and was aware of the risks inherent in the activity.²] [In Alesha's case, by signing the form prior to bungee jumping, she has clearly consented to the potential muscle soreness that can result from this activity.³]

✓ ✗ I have identified one defence that Bungee & Co could raise.¹

✓ ✗ I have provided information about my chosen defence.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen defence.³

✓ ✗ I have used signposting in my response, such as 'One defence'.

Extended response

12. A; C

13. [One possible defence that Wilbur could raise against Portia is voluntary assumption of risk.¹] [Portia was aware of the risk onstage as she had seen her other castmates fall and hurt themselves.²] [Furthermore, she voluntarily partook in the performance despite the fact her understudy could have stepped in at any time.³]

[Another possible defence Wilbur could raise is contributory negligence.⁴] [The fact that Portia continued to dance after she was injured shows she contributed to her own injury and worsened it.⁵] [Therefore, she may be found partially liable and the amount of damages Wilbur could be required to pay would be reduced.⁶]

✓ ✗ I have identified the defence of voluntary assumption of risk.¹

✓ ✗ I have provided information about the defence of voluntary assumption of risk.²

✓ ✗ I have provided an example from the scenario and linked it to the defence of voluntary assumption of risk.³

✓ ✗ I have identified the defence of contributory negligence.⁴

✓ ✗ I have provided information about the defence of contributory negligence.⁵

✓ ✗ I have provided an example from the scenario and linked it to the defence of contributory negligence.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One possible defence' and 'Another possible defence'.

✓ ✗ I have used connecting words, such as 'Furthermore' and 'Therefore'.

Linking to previous learning

14. a. [The first element Ruth would need to prove for a successful claim in negligence is that Fred owed her a duty of care.¹] [The second element Ruth would need to prove is that Fred had breached his duty of care to her.²] [The third element that must be proven is that Fred's actions directly caused Ruth's loss.³] [Lastly, the fourth element necessary for a claim in negligence to be successful is that the damage caused was not too remote.⁴]

✓ ✗ I have identified the first element of negligence.¹

✓ ✗ I have identified the second element of negligence.²

✓ ✗ I have identified the third element of negligence.³

✓ ✗ I have identified the fourth element of negligence.⁴

✓ ✗ I have used signposting in my response, such as 'The first element' and 'The second element'.

- b. [One possible defence that Fred could raise is contributory negligence.¹] [Contributory negligence refers to the failure by a person, typically a plaintiff, to take reasonable care for their own safety, which adds to the harm the person suffers.²] [In this case, Ruth was negligent in serving contaminated fish to her customers, and thus the amount of damages Fred could be required to pay would likely be reduced.³]

✓ ✗ I have identified one possible defence that Fred could raise.¹

✓ ✗ I have defined my chosen defence.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen defence.³

✓ ✗ I have used signposting in my response, such as 'One possible defence'.

7C Negligence – impact

Check your understanding

- B. False. **Explanation:** A defendant may also be impacted by a claim in negligence, alongside the plaintiff, as they can suffer reputational damage and financial loss.
- A; C; D. **Explanation:** Class actions are not initiated by defendants, they are instead initiated by plaintiffs and may require a defendant to pay more damages to the plaintiffs involved in the class action.
- A. **Explanation:** Both parties will endure the fees associated with legal practitioners and courts. Usually, it is plaintiff who will endure the physical injuries.

4. A defendant involved in a negligence case may incur **reputational damage**, especially if the defendant is a business, as other customers may negatively perceive the business in the future. A defendant can also face **financial loss** as they may be required to pay their own legal expenses alongside the plaintiff's legal expenses.
5. A; B; D. **Explanation:** Fines are a sanction used in criminal proceedings and thus, do not apply to negligence.
6. B. False. **Explanation:** Plaintiffs may benefit from negligence cases when they are successful. Defendants can also protect their reputation in cases where the plaintiff is unsuccessful and they are not found liable.

Preparing for exams

Standard exam-style

7. [One impact of negligence on the plaintiff is the associated psychological injury.¹] [Negligence can cause psychological suffering following incidents on the roads or in the workplace, as the plaintiff may now fear these places if they were previously injured in one of these environments.²] [Furthermore, psychological injury may arise due to frustration from physical injury. For example, if a plaintiff lost their ability to walk due to the negligent act of the defendant, they may become frustrated by this change in their life circumstances, causing them anguish.³]
☒ ☐ I have provided one impact of negligence on the plaintiff.¹
☒ ☐ I have provided information about my chosen impact.²
☒ ☐ I have provided further information about my chosen impact.³
8. [One impact of a negligence claim on the defendant is financial loss.¹] [A defendant that is found liable will often be required to pay damages to the plaintiff, a large portion of the plaintiff's legal expenses, and their own legal costs.²] [Another impact of negligence on the defendant is cultural changes.³] [Major negligence cases can prompt cultural changes and behavioural improvements within an industry to avoid future negligence. These changes may therefore impact the defendant as they now will be expected to comply with new industry standards, such as providing improved health and safety precautions.⁴]
☒ ☐ I have provided one impact that a negligence claim can have on the defendant.¹
☒ ☐ I have provided information about my chosen impact.²
☒ ☐ I have provided a second impact that a negligence claim can have on the defendant.³
☒ ☐ I have provided information about my chosen impact.⁴
☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

Extended response

9. True: I; III
False: II
10. [Kirra's unsuccessful claim in negligence against her employer can have various negative impacts on both her financial and psychological wellbeing.¹]

[One impact of pursuing this negligence case on Kirra is the financial loss she will endure.²] [As she has paid a large sum of money for legal representation and has lost the case, she will not be compensated for these losses by the defendant.³] [Furthermore, she may have suffered further financial losses by likely taking time off work to pursue her negligence claim in the courts. Preparing for court and attending the hearing can take significant time, likely preventing Kirra from working as much and, therefore, causing her to lose money.⁴]

[Another impact of this claim in negligence on Kirra is psychological trauma.⁵] [Kirra is still working for the same employer and may feel anxious about returning to work after initiating legal action against her workplace. Therefore, this may affect her ability to work effectively and feel safe in her workplace.⁶]

[Overall, unsuccessful claims in negligence, like Kirra's claim, can have further negative repercussions than those originally endured by the plaintiff.⁷]

- ☒
- ☐
- I have provided an introduction to my response.
- ¹
-
- ☒
- ☐
- I have identified one impact of negligence on Kirra.
- ²
-
- ☒
- ☐
- I have provided information about my chosen impact.
- ³
-
- ☒
- ☐
- I have provided an example relevant to the scenario and linked it to my chosen impact.
- ⁴
-
- ☒
- ☐
- I have identified a second impact of negligence on Kirra.
- ⁵
-
- ☒
- ☐
- I have provided information about my chosen impact and linked it to an example from the scenario.
- ⁶
-
- ☒
- ☐
- I have provided an example relevant to the scenario and linked it to my chosen impact.
- ⁷
-
- ☒
- ☐
- I have provided a conclusion to my response that links back to the question.
- ⁸
-
- ☒
- ☐
- I have used paragraphs to organise my response.
-
- ☒
- ☐
- I have linked my answer to the scenario where appropriate.
-
- ☒
- ☐
- I have used signposting in my response, such as 'One impact' and 'Another impact'.
-
- ☒
- ☐
- I have used connecting words, such as 'Furthermore' and 'Overall'.

Linking to previous learning

11. a. [Breach of duty is an act or omission by a defendant that is a failure to uphold their duty of care because the behaviour falls below the standard of care that would be expected of a reasonable person in the same position.¹] [In Marlon's case, it could be argued that a reasonable person would have used signage to redirect pedestrians to the other footpath, as that is a standard that is expected from construction sites that obstruct the sidewalk.²] [The risk would not be considered insignificant as Marlon suffered a serious injury and construction sites are inherently dangerous.³]
☒ ☐ I have provided a definition of the element of 'breach of duty'.¹
☒ ☐ I have provided an example relevant to the scenario and linked it to the element of 'breach of duty'.²

✓ ✗ I have provided information about breach of duty in relation to the scenario.³

- b. [One impact of negligence on Marlon, as a plaintiff, is physical injury.¹][As a result of the defendant's negligence, Marlon suffered a broken leg.²]

✓ ✗ I have provided one impact of a negligence claim on Marlon.¹

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen impact.²

✓ ✗ I have used signposting in my response, such as 'One impact'.

7D Defamation – elements

Check your understanding

- C. **Explanation:** Defamation law focuses on protecting peoples' reputations and ensuring they are not tarnished by untrue comments.
- C. **Explanation:** Defamation law only protects people from lies. If true information is spread that will tarnish a person's reputation, this is not actionable in defamation.
- A; D; E; F; G. **Explanation:** Defamatory statements do not have to be insulting nor do they need to be determined by an ordinary or reasonable person. Judges use this standard to ensure impartiality.
- A. **Explanation:** Not-for-profit businesses, small businesses, and individuals can bring actions in defamation. Large businesses are restricted from bringing such actions.
- Parties wishing to instigate a claim in defamation have **one** year/s from the date of publication under the *Limitation of Actions Act 1958*. This may be extended by a court to **three** year/s under certain circumstances.
- B. False. **Explanation:** The judge is responsible for determining the serious harm element, and this will likely occur before the trial commences, unless there are special circumstances.
- A. True. **Explanation:** All five elements of defamation must be proven in court, on the balance of probabilities, for an action in defamation to succeed.

Preparing for exams

Standard exam-style

8. [Defamation law protects a person's right to not have their reputation damaged by false statements.¹][This law protects personal reputations, professional reputations, and business reputations.²]

✓ ✗ I have provided one right that defamation law protects.¹

✓ ✗ I have provided information about my chosen right.²

9. [There are time restrictions that limit when a claim may be pursued in defamation. 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 where it would be unreasonable for the plaintiff to have brought the action within a year.²][For example, if the plaintiff only knew about the defamatory matter one and a half years after the date of its publication, it would be unreasonable for them to be expected to initiate a case within one year.³]

✓ ✗ I have identified and described the limitation of actions for defamation.¹

✓ ✗ I have provided information about the limitation of actions for defamation.²

✓ ✗ I have provided an example of the limitation of actions for defamation.³

✓ ✗ I have referred directly to relevant legislation in my response.

10. [The first element that needs to be proven for a defamation claim to be successful is that the matter is defamatory and an ordinary or reasonable person would perceive the matter to tarnish the reputation of the defendant.¹][The second element is that the matter is false.²][The third element is that the matter is about the plaintiff, or at least identifies the plaintiff either expressly or impliedly.³][The fourth element that must be satisfied is that the defamatory matter has been published to a third party other than the plaintiff.⁴][The final element that must be satisfied is the matter has caused, or is likely to cause, serious harm to the plaintiff's reputation.⁵]

✓ ✗ I have identified the first element of defamation.¹

✓ ✗ I have identified the second element of defamation.²

✓ ✗ I have identified the third element of defamation.³

✓ ✗ I have identified the fourth element of defamation.⁴

✓ ✗ I have identified the fifth element of defamation.⁵

✓ ✗ I have used signposting in my response, such as 'The first element' and 'The second element'.

Extended response

11. A; B; C

12. [Stephan, the plaintiff, would likely be able to establish the elements of defamation concerning Paul's status, as Paul's post was clearly defamatory, false, shared to a third party, and about Stephan.¹]

[As Stephan has already proven the first element of defamation, the matter is defamatory, the second element he would need to prove on the balance of probabilities is that the matter is false.²]

[Paul is aware that the matter is false, and Stephan would likely be able to prove this as the facts point towards him being a loving partner during their relationship.³]

[The third element Stephan would have to prove is that the matter identifies him as the person defamed.⁴][This element is likely to be satisfied as the status clearly states his name. In addition, the ordinary or reasonable person would likely identify that the matter is related to Stephan due to his long-term relationship with Paul.⁵]

[The fourth element Stephan 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 Stephan's friends and had two comments, indicating it was downloaded and comprehended by multiple people.⁷]

[Overall, it is likely that Stephan's defamation claim would be successful.⁸]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have identified the second element of defamation.²

✓ ✗ I have provided an example of whether Stephan would be successful in proving the second element of defamation.³

✓ ✗ I have identified the third element of defamation.⁴

✓ ✗ I have provided an example of whether Stephan would be successful in proving the third element of defamation.⁵

✓ ✗ I have identified the fourth element of defamation.⁶

✓ ✗ I have provided an example of whether Stephan would be successful in proving the fourth element of defamation.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'the second element' and 'The third element'.

✓ ✗ I have used connecting words, such as 'Overall'.

Note: The question specified the elements of defamation that needed to be discussed. Therefore, the only acceptable elements of defamation are the matter is false, the matter is about the plaintiff, and the matter has been published to a third party.

13. A; C; D

14. [As the plaintiff, the first element Fleur would have to prove is that the matter is defamatory, which is likely to be satisfied in Fleur's case as the comment made to Ms Blackwood suggests she is dishonest and a cheater.¹]

[The second element that Fleur would have to prove is that the matter is false, which is unlikely to be satisfied as Hai is adamant that Fleur was looking at her paper. The fact that both Hai and Fleur's answers were identical indicates that Fleur was likely cheating.²]

[The third element Fleur would have to prove is that the matter identifies her as the person defamed, which is likely to be satisfied as Hai clearly stated Fleur's full name when speaking to Ms Blackwood.³]

[The fourth element Fleur would have to prove is that the matter was published to a third party, which is likely satisfied as the comments were made directly to Ms Blackwood.⁴]

[The fifth element Fleur would have to prove is that the matter has caused, or is likely to cause, serious harm to her reputation. This element is unlikely to be satisfied as the allegations merely resulted in Fleur's exam result being invalidated, which is unlikely to be classified as 'serious harm'.⁵]

[Although some elements of defamation are satisfied, since the matter is substantially true and did not cause 'serious harm' to her reputation, Fleur's defamation claim would likely fail. Therefore, Hai would not be found liable for defamation.⁶]

✓ ✗ I have identified the first element of defamation and applied it to the scenario.¹

✓ ✗ I have identified the second element of defamation and applied it to the scenario.²

✓ ✗ I have identified the third element of defamation and applied it to the scenario.³

✓ ✗ I have identified the fourth element of defamation and applied it to the scenario.⁴

✓ ✗ I have identified the fifth element of defamation and applied it to the scenario.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have used paragraphs and topic sentences to organise my response.

✓ ✗ I have used signposting in my response, such as 'The first element' and 'The second element'.

✓ ✗ I have used connecting words, such as 'Although' and 'Therefore'.

Linking to previous learning

15. [In civil cases, the standard of proof is on the balance of probabilities. This standard is lower than in a criminal case and requires the evidence to be more probable than not.¹] [Thus, in a defamation case, all elements must be more probable than not to be made out, in order to satisfy the balance of probabilities.²]

✓ ✗ I have identified the standard of proof in civil cases.¹

✓ ✗ I have provided information about how the standard of proof applies to a defamation case.²

✓ ✗ I have used connecting words, such as 'Thus'.

7E Defamation - defences and remedies

Check your understanding

- If a case of defamation is brought against the **defendant**, they may raise one or more defences to avoid being held liable.
- B. **Explanation:** The justification defence requires the defendant to provide evidence that the statements they made are true in substance, and thus not defamatory.
- A. True. **Explanation:** In circumstances where the untrue statements have done no further damage to the plaintiff's reputation when in context with true statements, the defence of contextual truth can apply.

4. If an opinion is honestly held, the defence of **honest opinion** can be raised.
5. B; C. **Explanation:** Absolute privilege aims to facilitate frank and fearless communication in the courtroom and during parliamentary proceedings.
6. A. **Explanation:** In order for the defence of qualified privilege to apply, the defendant must believe the matter is of interest to the recipient and this belief must be reasonable as per the objective test.
7. Absolute privilege: I; III
Qualified privilege: II; IV
8. If defamatory statements cause a plaintiff to lose work, they may be awarded **specific** damages for lost income.
9. B. False. **Explanation:** Injunctions are court orders that stop a defendant from doing an action, or force a party to take an action, for the benefit of the plaintiff.
10. B; D; E; G. **Explanation:** Self-defence and duress are defences to criminal offences, but do not apply to defamation.

Preparing for exams

Standard exam-style

11. [One remedy that could be awarded to a successful plaintiff in a defamation claim is specific damages, which aim to financially compensate the plaintiff and recover any lost earnings.¹] [Another remedy for defamation is injunctions, which force the defendant to act, or not act, in the best interest of the plaintiff.²]

✓ ✗

I have identified one remedy that could be awarded to a successful plaintiff in a defamation claim.¹

✓ ✗

I have identified a second remedy that could be awarded to a successful plaintiff in a defamation claim.²

✓ ✗

I have used signposting in my response, such as 'One remedy' and 'Another remedy'.
12. [Injunctions are an appropriate remedy in this case as Gossip Magazine is continuing to post defamatory matter about Paola.¹] [Unlike damages, an injunction can force Gossip Magazine to stop publishing defamatory material about Paola.²]

✓ ✗

I have identified one reason why injunctions are an appropriate remedy in this case.¹

✓ ✗

I provided an example from the scenario and linked it to the appropriateness of injunctions as a remedy.²
13. [One defence that could be raised in a defamation case is justification. Justification is a defence that protects the defendant where the matter is substantially true.¹] [Generally, the justification defence requires the defendant to provide evidence that the statements are true.²] [The justification defence is still satisfied even when the matter contains errors, so long as the errors do not alter the overall meaning that the ordinary or reasonable person would conclude from the publication.³]

✓ ✗

I have identified and described one defence to defamation.¹

✓ ✗

I have provided information about my chosen defence.²

- ✓ ✗

I have provided examples from the scenario and linked it to the theory.³
- ✓ ✗

I have used signposting in my response, such as 'One defence'.
- ✓ ✗

I have used connecting words, such as 'Generally'.

14. [One defence that would be appropriate for Kathy to raise is the defence of absolute privilege.¹] [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 statements made in certain settings must be exempt from defamation law.²] [This applies in parliamentary proceedings, and thus to Kathy, as free and open communication is of utmost importance in this setting.³]

- ✓ ✗

I have identified one appropriate defence in Kathy's case.¹
- ✓ ✗

I have provided information about my chosen defence.²
- ✓ ✗

I have provided an example from the scenario and linked it to my chosen defence.³
- ✓ ✗

I have used signposting in my response, such as 'One defence'.

Note: Absolute privilege is the only acceptable answer to this question based on the facts in the scenario.

Extended response

15. A; D
16. [One defence Hai could raise against the accusation of defamation is justification. 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.²] [This would be an appropriate defence for Hai to raise as he saw Fleur copying his exam, and Fleur's answers matched his own. Therefore, it is likely that Hai's statement was substantially true, making this an appropriate defence to raise.³]

[Furthermore, another defence that Hai could raise is the defence of qualified privilege.⁴] [This defence protects the sharing of the defamatory matter where the defendant had a reasonable belief that it was in the interest of the Ms Blackwood to publish the communication.⁵] [This would be an appropriate defence for Hai to raise as he only reported the suspected misconduct to his maths teacher, thus distinguishing between facts and allegations. However, Hai may be unsuccessful in this defence if the matter is considered to not be serious in nature and he is the only source of information, as this would make it difficult to verify the facts.⁶]

✓ ✗

I have identified one defence that Hai could raise.¹

✓ ✗

I have provided information about my chosen defence.²

✓ ✗

I have provided an example from the scenario and linked it to my chosen defence.³

✓ ✗

I have identified a second defence that Hai could raise.⁴

✓ ✗

I have provided information about my chosen defence.⁵

- ☒ ☐ I have provided an example from the scenario and linked it to my chosen defence.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One defence' and 'another defence'.
- ☒ ☐ I have used connecting words, such as 'Therefore' and 'Furthermore'.

17. A; C

18. [One remedy that Zephyra may be awarded is specific damages. Specific damages provide compensation for financial loss and can be calculated exactly.¹] [Zephyra has been fired from four movies. Therefore, specific damages would compensate her for the loss of income from these films.²] [Specific damages may also compensate Zephyra for any medical costs endured, such as the price of any medication she is taking for depression.³]
- [Furthermore, another remedy that Zephyra may be awarded is general damages. General damages compensate for pain and suffering.⁴] [Zephyra has struggled with her mental health since the defamatory statements were published. Hence, general damages would aim to compensate her for the pain and suffering endured.⁵]
- [General damages would not compensate her for the cost of her mental health support, but rather would attempt to compensate her for the pain suffered.⁶]

- ☒ ☐ I have identified one remedy that Zephyra could be awarded.¹
- ☒ ☐ I have provided information about my chosen remedy.²
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen remedy.³
- ☒ ☐ I have identified a second remedy that Zephyra could be awarded.⁴
- ☒ ☐ I have provided information about my chosen remedy.⁵
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen remedy.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One remedy' and 'another remedy'.
- ☒ ☐ I have used connecting words, such as 'Therefore' and 'Furthermore'.

Linking to previous learning

19. a. [One element of defamation that would be difficult to prove in Alyssa's case would be that the defamatory matter is about the plaintiff.¹] [Carissa merely stated that her pizza is the 'Best In Town', but did not explicitly state that Alyssa's pizza is bad.²]
- [Another element of defamation that would be difficult to prove in Alyssa's case is that the matter was published and understood by a third party.³] [Carissa merely sent an email to Alyssa, therefore, the defamatory information has not been understood by a third party.⁴]

- ☒ ☐ I have identified one element of defamation that may be difficult for Alyssa to prove.¹
 - ☒ ☐ I have provided an example from the scenario and linked it to my chosen element of defamation.²
 - ☒ ☐ I have identified a second element of defamation that may be difficult for Alyssa to prove.³
 - ☒ ☐ I have provided an example from the scenario and linked it to my chosen element of defamation.⁴
 - ☒ ☐ I have used signposting in my response, such as 'One element' and 'Another element'.
- b. [One defence that Carissa could raise is justification by arguing that the statements are substantially true.¹] [Carissa and Alyssa's pizzas are both renowned in the area, and both receive good reviews from the community.²] [It could be argued that saying Carissa's pizza is the 'Best In Town' is substantially true as its one of the best.³]
- ☒ ☐ I have identified one defence to defamation that Carissa could raise.¹
 - ☒ ☐ I have provided an example from the scenario and linked it to my chosen defence.²
 - ☒ ☐ I have provided information about my chosen defence.³
 - ☒ ☐ I have used signposting in my response, such as 'One defence'.

7F Defamation – impact

Check your understanding

- A; C. **Explanation:** The parties involved in a defamation claim may suffer financial and emotional impacts. Medical costs are unlikely to impact defamation cases.
- A **plaintiff** who succeeds in a defamation claim may still suffer some reputational damage that **cannot** be undone by the court's decision.
- A. True. **Explanation:** If a plaintiff is successful in proving the defendant defamed them, the defendant's future conduct may be subject to doubt regarding their credibility or accuracy. The stress of the trial can have emotional consequences for the plaintiff, and if their claim is unsuccessful, there can be significant financial implications.
- B. **Explanation:** Plaintiffs may be required to pay the legal fees of the defendant if they are unsuccessful in their claim, alongside their own legal expenses.
- B. False. **Explanation:** Australia's defamation laws prioritise the protection of an individual's reputation over a defendant's freedom of speech.
- If found **liable**, the defendant may be required to pay **damages** to the plaintiff and may also suffer emotional distress as a result of the legal process.

Preparing for exams

Standard exam-style

7. [One impact of a defamation case on a plaintiff is that their reputation may be tarnished.¹] [Winning a defamation claim does not necessarily restore a plaintiff's reputation completely, as a court decision may not override the opinions and beliefs held by the general public and the plaintiff's acquaintances.²] [Another impact of defamation on the plaintiff is the emotional effects of being defamed.³] [The plaintiff may suffer significant humiliation and shame from defamatory statements, and such humiliation may persist even if the court rules in favour of the plaintiff, agreeing the statements made against them were defamatory.⁴]

☒ ☐ I have identified one impact of defamation on a plaintiff.¹

☒ ☐ I have provided information about my chosen impact.²

☒ ☐ I have identified a second impact of defamation on a plaintiff.³

☒ ☐ I have provided information about my chosen impact.⁴

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

8. [One impact of a defamation case on a defendant is potential unemployment.¹] [For example, where a journalist has published a defamatory article, it may be difficult for them to find employment in the future due to reputational damages.²] [Another impact of defamation on the defendant is the financial consequences if they are found liable.³] [In the event that a plaintiff successfully pursues a defamation claim, the defendant may be required to pay damages to the plaintiff for their harm, pay their own legal fees, and can be ordered to pay the plaintiff's legal expenses.⁴]

☒ ☐ I have identified one impact of a defamation case on a defendant.¹

☒ ☐ I have provided information about my chosen impact.²

☒ ☐ I have identified a second impact of a defamation case on a defendant.³

☒ ☐ I have provided information about my chosen impact.⁴

☒ ☐ I have used signposting in my response, such as 'One impact' and 'Another impact'.

9. a. [One impact on Ellie, in this case, is the emotional consequences of being defamed.¹] [Ellie has been avoiding her classmates as the defamatory statements that have been made about her are likely leading to feelings of humiliation and shame, negatively impacting her emotionally.²] [Alternatively, one impact of the defamation case on Stella is that her reputation has been tarnished as a result of defaming Ellie.³] [Following the publication of defamatory information on her social media, the credibility and integrity of Stella's conduct has been questioned by her classmates and they now consider her to be a bully.⁴]

☒ ☐ I have identified one impact of a defamation case on Ellie as the plaintiff.¹

☒ ☐ I have provided an example from the defamation case and linked it to my chosen impact on Ellie.²

☒ ☐ I have identified one impact of a defamation case on Stella as the defendant.³

☒ ☐ I have provided an example from the defamation case and linked it to my chosen impact on Stella.⁴

☒ ☐ I have used signposting in my response, such as 'One impact'.

☒ ☐ I have used connecting words, such as 'Alternatively'.

- b. [Australian defamation laws focus primarily on protecting the rights of plaintiffs with regard to maintaining their reputation, while the rights to free speech are a secondary concern of these laws.¹] [Stella's ability to share her opinion freely may be compromised if Ellie decides to take civil action against her.²] [Alternatively, Ellie's rights as the plaintiff would be upheld, allowing her to protect her reputation from Stella's harmful comments.³]

☒ ☐ I have provided information about the balance between the rights of plaintiffs and the protection of freedom of speech in Australia's defamation laws.¹

☒ ☐ I have provided an example from the defamation case and linked it to Stella's rights as a defendant.²

☒ ☐ I have provided an example from the defamation case and linked it to Ellie's rights as a plaintiff.³

☒ ☐ I have used connecting words, such as 'Alternatively'.

Extended response

10. B

11. [I disagree with this statement as defendants are impacted in various ways by a claim made against them in defamation.¹] [Although the plaintiff is negatively impacted by a defamation claim, as their reputation has been damaged and they have to endure the stress of an ongoing trial, a defendant's reputation can also be damaged.²]

[One impact of a defamation claim on a defendant is that their reputation may be tarnished. Following the publication of defamatory information, the credibility and integrity of the defendant's conduct may be questioned and they may have difficulty finding employment, especially in high-profile cases.³]

[Another impact of defamation on the defendant is the financial consequences if they are found liable. The defendant may be required to pay compensatory damages to the plaintiff for their harm, pay their own legal fees, and the plaintiff's legal expenses.⁴]

[A third impact of a defamation case on a defendant is potential unemployment. For example, if a journalist published a defamatory article, it may be difficult for them to find employment in the future.⁵]

[Despite defamation claims having a significant impact on the plaintiff, the defendant can also suffer consequences for being accused of publishing defamatory content.⁶]

☒ ☐ I have provided an introduction to summarise the extent to which I agree or disagree with the statement, and why.¹

☒ ☐ I have provided one way a plaintiff is impacted by a defamation case.²

☒ ☐ I have provided one way a defendant is impacted by a defamation case.³

- ✓ ✗ I have provided a second way a defendant is impacted by a defamation case.⁴
- ✓ ✗ I have provided a third way a defendant is impacted by a defamation case.⁵
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One impact' and 'Another impact'.
- ✓ ✗ I have used connecting words, such as 'Although'.

Linking to previous learning

12. [If the plaintiff does not receive the amount of damages they were seeking in a defamation case, they may suffer financial detriment.¹] [For example, they may only be awarded sufficient damages to cover their legal expenses and court fees, rather than being fully compensated for the damage to their reputation.²] [Therefore, if the plaintiff does not receive the amount of damages they are seeking, damages may be limited in returning the plaintiff to their original position.³]
- ✓ ✗ I have identified one effect that the amount of damages awarded to the plaintiff can have on them in a defamation case.¹
- ✓ ✗ I have provided an example of how a plaintiff can be affected by the amount of damages awarded to them in a defamation case.²
- ✓ ✗ I have provided information about my chosen effect.³
- ✓ ✗ I have used connecting words, such as 'Therefore'.

7G Misleading or deceptive conduct - elements

Check your understanding

- B. **Explanation:** In Australia, section 18 of the Australian Consumer Law outlines misleading or deceptive conduct, stating 'a person must not, in trade and commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.
- A; C. **Explanation:** The Australian Consumer Law protects consumers in the areas of unfair contract terms, consumer guarantees, product safety, unsolicited consumer agreements, and lay-by agreements.
- When the ACCC initiates court proceedings against misleading or deceptive businesses, this is considered **indirect** protection of consumer rights. However, when a Victorian consumer commences legal action against misleading or deceptive businesses, this is considered a **direct** protection of consumer rights.
- C. **Explanation:** In a misleading or deceptive conduct claim, there are four elements that must be satisfied. If one of these four elements is not met, then the misleading or deceptive conduct claim cannot succeed.
- A. True. **Explanation:** Section 236 of the Australian Consumer Law specifies that a misleading or deceptive conduct claim must be initiated within six years of the cause of action.
- B. False. **Explanation:** Puffery is not considered misleading or deceptive as it is a hyperbolic, unrealistic, or vague claim about a good or service that no one could possibly treat seriously or find misleading.
- A. True. **Explanation:** Misleading or deceptive conduct is a type of civil law that aims to protect consumers and businesses from being misguided when engaging in commercial transactions.

Preparing for exams

Standard exam-style

8. [Misleading or deceptive conduct is a type of civil law that aims to protect consumers and businesses from being misguided when engaging in commercial transactions.¹]
- ✓ ✗ I have provided a definition of misleading or deceptive conduct.¹
9. [One element of misleading or deceptive conduct that needs to be satisfied is that 'a person' must have performed the conduct.¹] [A person is the individual or organisation that allegedly engaged in misleading or deceptive conduct.²]
- ✓ ✗ I have identified one element of misleading or deceptive conduct.¹
- ✓ ✗ I have provided information about my chosen element of misleading or deceptive conduct.²
- ✓ ✗ I have used signposting in my response, such as 'One element'.
10. [Section 18 of the Australian Consumer Law (ACL) outlines misleading or deceptive conduct, stating that 'a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive'.¹] [The ACL protects Australian consumers in areas such as unfair contract terms, consumer guarantees, product safety, unsolicited consumer agreements, and lay-by agreements.²]
- ✓ ✗ I have identified section 18 of the Australian Consumer Law as the legislation that governs misleading or deceptive conduct.¹
- ✓ ✗ I have provided information about the Australian Consumer Law.²
11. [The limitation of actions refers to a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant.¹] [Under s 236 of the Australian Consumer Law (ACL), Mee must initiate proceedings for misleading or deceptive conduct within six years of the cause of action arising.²] [Therefore, Mee has six years from when the builder engaged in the alleged misleading or deceptive conduct in which to initiate a claim. If she waits any longer than this, she will be prevented from commencing legal proceedings due to the limitation of actions for this type of claim.³]

- ✓ ✗ I have defined limitation of actions.¹
- ✓ ✗ I have provided information about the limitation of actions and linked it to Mee's case.²
- ✓ ✗ I have provided information about how limitation of actions may impact Mee's misleading or deceptive conduct claim.³
- ✓ ✗ I have used connecting words, such as 'Therefore'.

12. [One element of misleading or deceptive conduct relevant to Savon's case is 'in trade or commerce', which requires that the conduct occurred during a commercial dealing or transaction, where goods and services were sold or purchased.¹] [As Savon bought the washing machine from the Hung Out to Dry store as a consumer, this element of misleading or deceptive conduct would be satisfied.²] [Another element of misleading or deceptive conduct is 'engage in conduct', which requires that the conduct involved the defendant performing or omitting to perform an act.³] [The advertising that Hung Out to Dry engaged in where it falsely claimed that the washing machine was the best in the world and would have no faults for 5 years, is an example of engaging in misleading or deceptive conduct. Therefore, this element of misleading or deceptive conduct would be met in Savon's case.⁴]

- ✓ ✗ I have identified and defined one element of misleading or deceptive conduct.¹
- ✓ ✗ I have provided information about the relevance of my chosen element with regard to Savon's case.²
- ✓ ✗ I have identified and defined a second element of misleading or deceptive conduct.³
- ✓ ✗ I have provided information about the relevance of my chosen element with regard to Savon's case.⁴
- ✓ ✗ I have used signposting in my response, such as 'One element' and 'Another element'.
- ✓ ✗ I have used connecting words, such as 'Therefore'.

Extended response

13. A; D

14. [In this case, Lacey's claim is likely to be successful as it meets at least three of the elements that are required for misleading or deceptive conduct.¹]

[One element of misleading or deceptive conduct that has been met in Lacey's case against Stitched Up is 'a person'. In misleading or deceptive conduct, a person is an individual or corporation that is treated as a legal entity under the law.²] [With regard to Lacey's knitting kit, the business, Stitched Up, is considered the person.³]

[A second element of misleading or deceptive conduct is 'in trade and commerce', which requires that the conduct occurred during a commercial dealing or transaction, where goods and services were sold or purchased.⁴] [In Lacey's case, when purchasing the knitting kit from Stitched Up, she was engaging in a commercial transaction, therefore satisfying this element of misleading or deceptive conduct.⁵]

[Finally, a third element of misleading or deceptive conduct that Lacey's case must meet is 'engage in conduct', which requires that the conduct involved the defendant performing or omitting to perform an act.⁶] [For Lacey, the refusal of Stitched Up to honour the unsolicited consumer agreement and provide her with her entitled knitting equipment is an example of the business engaging in conduct.⁷]

[Ultimately, as Lacey's case meets three elements of misleading or deceptive conduct, which are a person, in trade or commerce, engaging in conduct, her case against Stitched Up has a high probability of being successful, especially if she can prove the final element of 'misleading or deceptive or likely to mislead or deceive'.⁸]

- ✓ ✗ I have provided an introduction to summarise my answer to the question.¹
- ✓ ✗ I have identified and defined one element of misleading or deceptive conduct.²
- ✓ ✗ I have provided information about the likelihood of Lacey's claim being successful and linked it to my chosen element.³
- ✓ ✗ I have identified and defined a second element of misleading or deceptive conduct.⁴
- ✓ ✗ I have provided information about the likelihood of Lacey's claim being successful and linked it to my chosen element.⁵
- ✓ ✗ I have identified and defined a third element of misleading or deceptive conduct.⁶
- ✓ ✗ I have provided information about the likelihood of Lacey's claim being successful and linked it to my chosen element.⁷
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁸
- ✓ ✗ I have used signposting in my response, such as 'One element' and 'A second element'.

Linking to previous learning

15. [One purpose of civil law, such as misleading or deceptive conduct, is to restore the individual who suffered the loss to their original position before the occurred.¹] [For example, in a misleading or deceptive conduct claim, a plaintiff may be compensated, via a product replacement or refund, to restore them to their position prior to error.²] [Additionally, another purpose of civil law is to provide a system whereby individuals can protect their rights. In the case of misleading or deceptive conduct, consumer rights are protected by the Australian Consumer Law.³]

- ✓ ✗ I have provided one purpose of civil law.¹
- ✓ ✗ I have provided an example of my chosen purpose and linked it to misleading or deceptive conduct.²
- ✓ ✗ I have provided a second purpose of civil law and linked it to misleading or deceptive conduct.³
- ✓ ✗ I have used signposting in my response, such as 'One purpose' and 'another purpose'.
- ✓ ✗ I have used connecting words, such as 'Additionally'.

7H Misleading or deceptive conduct – defences and remedies

Check your understanding

1. A. True. **Explanation:** When an individual or organisation is being sued for misleading or deceptive conduct, they can use defences, such as confusion and erroneous assumption, to disprove the plaintiff.
2. When a defendant argues that the error did not occur via a dealing or transaction, the element of **in trade or commerce** is disproved, preventing the defendant from being found liable for the loss of the plaintiff. A defendant can also use the defence of **confusion** by arguing that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.
3. C. **Explanation:** An erroneous assumption occurs when the ordinary or reasonable person would only be led into error by their own mistaken assumption.
4. A. True. **Explanation:** When arguing that the defendant's conduct did not mislead or deceive the plaintiff, the defendant has to prove that a member of its target audience would not be led into error by its conduct.
5. A; B. **Explanation:** Remedies for misleading or deceptive conduct can include monetary compensation, a product replacement, or the repair of the faulty product.
6. Defences to misleading or deceptive conduct are important in allowing the **defendant** to argue their case. On the other hand, remedies for misleading or deceptive conduct are ordered for the benefit of the **plaintiff**.

Preparing for exams

Standard exam-style

7. [An erroneous assumption is a defence to misleading or deceptive conduct in which it is claimed that an error by the plaintiff was caused by the plaintiff's own incorrect assumption.¹]
☒ ☐ I have provided a definition of the term 'erroneous assumption'.¹
8. [With regard to s 18 of the Australian Consumer Law, 'in trade or commerce' refers to activities that occur during a commercial dealing or transaction, where goods and services are sold or purchased.¹]
 [Therefore, for a defendant to disprove the element of misleading or deceptive conduct associated with 'in trade or commerce', they must prove that it occurred privately or did not involve a commercial dealing or transaction.²]
☒ ☐ I have provided information about the Australian Consumer Law.¹
☒ ☐ I have linked the information about the Australian Consumer Law to the defence of 'not in trade or commerce'.²
☒ ☐ I have used connecting words, such as 'Therefore'.

9. [One possible defence to misleading or deceptive conduct is confusion in which it is claimed that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.¹]
 [The defendant can use the defence of confusion by arguing that a person in their target audience may be puzzled by their conduct, but the conduct would not result in the reasonable person actually being deceived.²]
 [Therefore, whilst the defendant admits that their conduct may have been confusing, the defendant will not be found liable if it can be proven that the conduct was not deceptive.³]

☒ ☐ I have identified and defined one possible defence to misleading or deceptive conduct.¹

☒ ☐ I have provided information about my chosen defence.²

☒ ☐ I have provided further information about my chosen defence.³

☒ ☐ I have used signposting in my response, such as 'One possible defence'.

☒ ☐ I have used connecting words, such as 'Therefore'.

10. [One possible defence to misleading or deceptive conduct is that the conduct did not occur in trade or commerce.¹]
 [Another defence for misleading or deceptive conduct that Elordi's could use is confusion.²]
 [A third possible defence that could be used to argue against Jacob's claim is erroneous assumption.³]
 [Finally, a fourth defence of misleading or deceptive conduct that Elordi's could utilise is that the conduct was not misleading or deceptive or likely to mislead or deceive.⁴]

☒ ☐ I have identified one possible defence to misleading or deceptive conduct and linked it to the claim against Elordi's.¹

☒ ☐ I have identified a second possible defence to misleading or deceptive conduct and linked it to the claim against Elordi's.²

☒ ☐ I have identified a third possible defence to misleading or deceptive conduct and linked it to the claim against Elordi's.³

☒ ☐ I have identified a fourth possible defence to misleading or deceptive conduct and linked it to the claim against Elordi's.⁴

☒ ☐ I have used signposting in my response, such as 'One possible defence' and 'Another defence'.

11. [One possible defence that ZoomAir could claim against a claim of misleading or deceptive conduct is that the error occurred due to an erroneous assumption in which it is claimed that an error by the plaintiff was caused by the plaintiff's own incorrect assumption.¹]
 [Arguing this defence would require ZoomAir to prove that a regular member of its target audience would not have been led to an error in thinking that the flight would be faster than cooking a roast dinner and that Kari instead had incorrectly assumed it would be an unrealistically short flight duration.²]
 [On the other hand, a possible remedy that Kari could seek if her misleading or deceptive conduct claim against ZoomAir is successful is damages, which is monetary compensation to compensate her loss caused by the misleading or deceptive conduct.³]
 [Kari could be awarded an amount to compensate her for the loss suffered as a result of missing her second flight and other associated costs incurred from this event.⁴]

- ✓ ✗ I have identified and defined one possible defence for misleading or deceptive conduct.¹
- ✓ ✗ I have provided an example from the scenario and linked to my chosen defence.²
- ✓ ✗ I have identified and defined one possible remedy for misleading or deceptive conduct.³
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen remedy.⁴
- ✓ ✗ I have linked my answer to the scenario where appropriate.
- ✓ ✗ I have used signposting in my response, such as 'One possible defence' and 'a possible remedy'.
- ✓ ✗ I have used connecting words, such as 'On the other hand'.

Extended response

12. A; E

13. [There are various possible defences that Yao can use to defend itself against Lucy's misleading or deceptive conduct claim. Although, if Lucy is successful in her claim, she can seek remedies from Yao as compensation for her loss.¹]

[One possible defence that Yao could utilise is confusion, which is when it is claimed that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error.²] [In this case, Yao could argue that an ordinary or reasonable person of its target audience may be confused by its radio advertisement for the y-Phone, but that the conduct would not actually deceive them into thinking that a set of Yao headphones would come complimentary with the purchase of the phone.³]

[Moreover, a second possible defence that Yao could make use of is erroneous assumption in which it is claimed that an error by the plaintiff was caused by the plaintiff's own incorrect assumption.⁴]

[Arguing that Lucy's error occurred due to an erroneous assumption would require Yao to convince the court that an ordinary or reasonable member of its target audience would not be led into error by its radio advertisement, but rather that Lucy's misunderstanding was due to her own false assumptions.⁵]

[On the other hand, if Yao's defences are unsuccessful and it is found to have engaged in misleading or deceptive conduct, a possible remedy that Lucy could seek is an order entitling her to reject the goods and obtain a refund of the purchase price of the phone. This would restore her to the position she was in before the conduct occurred.⁶]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have identified and defined one possible defence to misleading or deceptive conduct.²
- ✓ ✗ I have provided an example from the scenario and linked it to my first chosen defence.³
- ✓ ✗ I have identified and defined a second possible defence to misleading or deceptive conduct.⁴
- ✓ ✗ I have provided an example from the scenario and linked it to my second chosen defence.⁵

- ✓ ✗ I have provided one possible remedy for misleading or deceptive conduct and linked it to the scenario.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One possible defence' and 'a second possible defence'.
- ✓ ✗ I have used connecting words, such as 'Moreover' and 'On the other hand'.

Linking to previous learning

14. [Limitation of actions is a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant. Under s 236 of the ACL, 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 arising.¹] [Therefore, if a plaintiff is seeking remedies for misleading or deceptive conduct, such as a product refund or replacement, they must file a claim within six years of the conduct.²]

- ✓ ✗ I have defined the term 'limitation of actions' in relation to misleading or deceptive conduct.¹
- ✓ ✗ I have provided information about how the limitation of actions may influence a plaintiff when seeking possible remedies for misleading or deceptive conduct.²
- ✓ ✗ I have used connecting words, such as 'Therefore'.

71 Misleading or deceptive conduct – impact

Check your understanding

- B. False. **Explanation:** Even if a plaintiff is successful in their misleading or deceptive conduct claim, they may be negatively impacted by the associated financial expense of the claim, as well as the emotional and psychological effects of the conduct.
- A; B; D. **Explanation:** When a plaintiff files a misleading or deceptive conduct claim, they often incur loss associated with the good or service purchased, as well as legal fees and a loss of income whilst attending court. A plaintiff is not required to pay a defendant to appear in court.
- If a defendant is found to be **liable** for misleading or deceptive conduct, this can cause consumers to question their honesty and integrity, potentially causing them to seek alternative businesses.
- A. True. **Explanation:** The courts have the power to penalise misleading or deceptive conduct. Such penalties can require corporations to pay up to \$50,000,000 as a consequence of their behaviour.
- B. **Explanation:** Psychological impacts of misleading or deceptive conduct may involve experiencing distrust and paranoia in society, especially when making purchases from commercial or trading institutions.
- Whilst a misleading or deceptive conduct claim is initiated by a **plaintiff** to compensate for their loss, they are likely to be further impacted by this claim, both financially and emotionally, alongside the **defendant**.

Preparing for exams

Standard exam-style

7. [One impact of misleading or deceptive conduct on Chirag, as the plaintiff, is the psychological toll of the experience. Chirag may feel paranoid or lack trust when making purchases from commercial businesses due to the mental impact of his falsely advertised juicer.¹] [Moreover, another impact of misleading or deceptive conduct on Chirag is the financial expense that he has incurred as a result of initially purchasing the falsely advertised juicer, alongside any potential legal fees he could pay if the case is taken to court.²]

[On the other hand, one impact of misleading or deceptive conduct on Emily, as the defendant, is the emotional effects it can have. Emily may feel guilt, shame, and embarrassment for falsely advertising her juicers, potentially lowering her overall mental wellbeing.³] [Additionally, another impact of this conduct on Emily is the financial stress it may cause as, prior to the conduct, Emily had already experienced a period of financial loss at her business. Hence, this situation may worsen Emily's financial situation as she could be required to cover various expenses, including compensating Chirag.⁴]

- ✓ ✗ I have provided one impact of misleading or deceptive conduct on Chirag.¹
- ✓ ✗ I have provided a second impact of misleading or deceptive conduct on Chirag.²
- ✓ ✗ I have provided one impact of misleading or deceptive conduct on Emily.³
- ✓ ✗ I have provided a second impact of misleading or deceptive conduct on Emily.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One impact' and 'another impact'.
- ✓ ✗ I have used connecting words, such as 'Moreover' and 'On the other hand'.

8. [I do not agree with this statement as although a plaintiff is initially burdened by losses incurred from misleading or deceptive conduct, a defendant can be held responsible and may be impacted in various ways.¹]

[One impact of misleading or deceptive conduct on a plaintiff is the financial burden it can have. The plaintiff would have likely incurred an initial monetary loss as a result of the conduct, whilst they may also be required to pay legal expenses associated with representation and pursuing the case in court.²] [However, a defendant may also be financially impacted by misleading or deceptive conduct as, if they are found to be liable, they could be required to compensate the plaintiff monetarily, cover repair or replacement costs, and/or finance some or all of their legal fees.³]

[Furthermore, another impact of misleading or deceptive conduct on a plaintiff is the emotional toll of the situation. A plaintiff may experience feelings of anger and manipulation following the conduct, whilst they could suffer from stress and anxiety if pursuing the case in court.⁴] [Although, a defendant may be impacted in a similar way as they could feel embarrassed, guilty, or ashamed for their behaviour, whilst they may also experience the stress and mental drain of defending themselves in court, especially if they are innocent.⁵]

[Ultimately, a plaintiff and defendant may both be impacted by misleading or deceptive conduct, especially if the defendant is found responsible for such actions.⁶]

- ✓ ✗ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹
- ✓ ✗ I have provided one impact of misleading or deceptive conduct on a plaintiff.²
- ✓ ✗ I have linked my chosen impact of misleading or deceptive conduct on a plaintiff to its corresponding impact on a defendant.³
- ✓ ✗ I have provided a second impact of misleading or deceptive conduct on a plaintiff.⁴
- ✓ ✗ I have linked my chosen impact of misleading or deceptive conduct on a plaintiff to its corresponding impact on a defendant.⁵
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One impact' and 'another impact'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.

Extended response

9. True: I; II
False: III; IV
10. [Whilst a plaintiff, like Scotty, mostly experiences negative impacts as a result of misleading or deceptive conduct and taking his case to court, he may receive some compensation to counteract the unlawful behaviour of the defendant.¹]

[One impact of misleading or deceptive conduct on a plaintiff is the emotional toll, as Scotty may feel manipulated and stressed as a result of the defendant's behaviour and the court case.²]

[Enter Your Cam-Era's misleading or deceptive conduct towards Scotty may have induced increased anxiety, unease, intimidation, and guilt, especially with regard to the court case and having to expose the business. This could negatively impact Scotty's ability to enjoy his work and overall life.³]

[A second impact of misleading or deceptive conduct on a plaintiff is the financial burden it may place on Scotty, especially since he is currently unable to work and generate an income as a result of the faulty camera.⁴] [The cost of Scotty's loss, alongside any legal fees may further exacerbate his ability to financially support himself. Moreover, the process of going to court, hiring legal representation, and sacrificing more of his income is likely to exemplify Scotty's distress and may lower his standard of living.⁵]

[However, one positive impact of pursuing a misleading or deceptive conduct claim in court is that Scotty could be provided with monetary compensation.⁶] [If Scotty is successful in his claim against Enter Your Cam-Era, the judge may order the defendant to provide him with remedies in the form of damages, including monetary compensation for his loss, repair or replacement of the camera, and financial payment of his legal fees.⁷]

[Thus, whilst misleading or deceptive conduct negatively impacts a plaintiff's emotional, psychological, and financial position, they may be monetarily compensated to minorly improve their situation.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one impact of misleading or deceptive conduct on a plaintiff.²

✓ ✗ I have provided information about my chosen impact of misleading or deceptive conduct on a plaintiff.³

✓ ✗ I have provided a second impact of misleading or deceptive conduct on a plaintiff.⁴

✓ ✗ I have provided information about my chosen impact of misleading or deceptive conduct on a plaintiff.⁵

✓ ✗ I have provided a third impact of misleading or deceptive conduct on a plaintiff.⁶

✓ ✗ I have provided information about my chosen impact of misleading or deceptive conduct on a plaintiff.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One impact' and 'A second impact'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'However'.

✓ ✗ I have used signposting in my response, such as 'One element'.

✓ ✗ I have used connecting words, such as 'Moreover'.

Linking to previous learning

11. [One element of misleading or deceptive conduct is 'in trade or commerce', which refers to activities that occur during a commercial dealing or transaction, where goods and services are sold or purchased.¹] [A defendant can use the defence of 'not in trade or commerce' to convince the court that they are not liable for misleading or deceptive conduct by proving the relevant conduct occurred privately or did not involve a commercial dealing or transaction.²] [During the process of presenting this defence, a defendant may be financially impacted as they are likely to utilise legal representation to present their case, which comes with legal fees and can, consequently, negatively affect their financial position.³] [Moreover, a defendant's reputation may be tarnished when defending a misleading or deceptive conduct claim as consumers may question the honesty and integrity of the business, potentially opting for competitors in future, whilst other corporations may be unwilling to undertake partnerships with the defendant.⁴]

✓ ✗ I have identified one element of misleading or deceptive conduct.¹

✓ ✗ I have provided a relevant defence for my chosen element of misleading or deceptive conduct.²

✓ ✗ I have provided one impact of misleading or deceptive conduct on a defendant.³

✓ ✗ I have provided a second impact of misleading or deceptive conduct on a defendant.⁴

8A The principles of justice in the civil justice system

Check your understanding

- B. False. **Explanation:** There are three principles of justice; fairness, equality, and access.
- The principle of **fairness** ensures all people can participate in the justice system and that its processes are impartial and open.
- C. **Explanation:** The defendant is allowed to present their case in civil trials, if they wish to do so, contributing to fairness.
- The principle of **equality** aims to ensure uniform treatment of all individuals in the civil justice system, with the exception of instances where it may lead to disadvantage.
- B. False. **Explanation:** Equality has not been achieved as Nadja is not being tried before a court for her alleged civil breach due to the fact she is in a position of power as the Prime Minister. Therefore, the rule of law has not been achieved as Nadja has received favourable treatment due to her societal status.
- A. **Explanation:** Access would not be achieved if everyone could access funding from VLA. This funding should only be accessible to those of a low socioeconomic status who require additional funds so they can afford legal representation.
- A. True. **Explanation:** Justice can be evaluated through the three principles of justice and aims to allow all people to interact and use the legal system effectively.

Preparing for exams

Standard exam-style

- [Access is the principle of justice that aims to ensure all people can engage with the justice system and its processes on an informed basis.¹] [For example, there are out-of-court settlement options for civil disputes where the parties can negotiate a resolution with an independent third party, allowing access to a just outcome in a timely manner, as these methods are often cheaper to engage in than the courts.²]

✓ ✗ I have provided a definition of the principle of access.¹

✓ ✗ I have provided an example of access being upheld in the Victorian justice system.²

- [One civil process that upholds equality is the use of an independent judge and/or jury.¹] [In a civil dispute, the judge and jury must strive to be impartial and unbiased, basing their decisions solely on the facts presented and not the characteristics of the plaintiff or the defendant.²] [Jury members with preconceived ideas or biases about either party will be found ineligible to participate in the jury for the relevant case.³]

✓ ✗ I have provided one civil process that upholds equality.¹

✓ ✗ I have provided information about my chosen civil process that upholds equality.²

✓ ✗ I have provided further information about my chosen civil process that upholds equality.³

✓ ✗ I have used signposting in my response, such as 'One civil process'.

- [I agree with this statement to a large extent as there are many ways in which fairness is achieved in the civil justice system.¹]

[Fairness is the principle that all people can participate in the justice system and its processes should be impartial and open. This is achieved through the lower standard of proof in a civil case, being 'on the balance of probabilities'.²] [The law perceives the two parties to be on equal footing in a civil dispute, thus the standard of proof is lowered, leading to a fairer outcome. If the standard of proof was the higher threshold of 'beyond reasonable doubt' that is used in criminal cases, plaintiffs may struggle to prove liability and thus may find it difficult to participate in civil proceedings.³]

[Moreover, fairness is also achieved in the civil justice system as a defendant is able to provide evidence and call upon witnesses to defend themselves in a civil dispute, so as to avoid being found falsely liable.⁴] [This does not change the burden of proof. The plaintiff must still prove the defendant is liable for their claimed loss. However, the defendant also has the option of presenting evidence relevant to the case. It is this option that promotes fairness as it allows both parties to participate in the civil justice process.⁵]

✓ ✗ I have provided an introduction to summarise the extent to which I agree or disagree with the statement.¹

✓ ✗ I have provided one example of how the civil justice system upholds the principle of fairness.²

✓ ✗ I have provided information about my chosen example.³

✓ ✗ I have provided a second example of how the civil justice system upholds the principle of fairness.⁴

✓ ✗ I have provided information about my chosen example.⁵

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Moreover'.

Extended response

- A; B

- [The Politician Exemption Act 2050 (Cth) would hinder equality in the civil justice system as it would prevent all people in Australia from being on equal footing, instead allowing politicians to be treated as if they are above the law.¹]

[One reason why the Politician Exemption Act 2050 (Cth) would hinder equality is that it breaches the rule of law, which is the principle that the law applies to everyone equally regardless of status.²] [All members of the community are subject to the same standards of behaviour set by civil law and people with a higher social status should not have a separate set of laws as this is unequal.³]

[Furthermore, procedures in the courts should be applied in the same manner in all civil cases, regardless of personal characteristics, such as age, gender, wealth, native language, ethnicity, or religion.⁴]

[In this way, the Politician Exemption Act would hinder equality by treating politicians differently to the average person due to their position in society.⁵]

[Thus, this new act would prevent the achievement of the principle of equality in the civil justice system due to the special treatment it provides to politicians.⁶]

- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have provided one limitation of the Politician Exemption Act in upholding the principle of equality.²
- ☒ ☐ I have provided information about my chosen limitation.³
- ☒ ☐ I have provided a second limitation of the Politician Exemption Act in upholding the principle of equality.⁴
- ☒ ☐ I have provided information about my chosen limitation.⁵
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One reason'.
- ☒ ☐ I have used connecting words, such as 'Furthermore'.

Linking to previous learning

13. [Australian Consumer Laws aim to protect consumers from unfair contract terms and misleading or deceptive conduct, therefore giving them rights when purchasing goods and services and ultimately upholding the principle of fairness.¹] [Contract terms are considered unfair if they cause an imbalance in the rights and obligations of parties involved, are not necessary to protect the parties' interests, and/or would cause one party detriment if they were applied.²] [For example, if a contract with a telecommunications company allows the provider to cancel or suspend services without the customer having done anything wrong, this may be considered an unfair contract term.³]

- ☒ ☐ I have identified one way laws regulating misleading or deceptive conduct uphold fairness.¹
- ☒ ☐ I have provided information about my chosen way these laws uphold fairness.²
- ☒ ☐ I have provided an example of how these laws uphold fairness.³

14. a. [One possible party to the civil dispute in this scenario is the plaintiff, which is the party that initiates a civil claim against another person in court.¹] [In the scenario, the film stars, producers, and crew have united as a 100-worker collective to initiate a class action, meaning they are the plaintiffs and will initiate one claim together in court against the director through a class action, as they have all suffered the same loss of being underpaid.²]

- ☒ ☐ I have identified one possible party to the civil dispute.¹
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen party.²
- ☒ ☐ I have used signposting in my response, such as 'One possible party'.

- b. [One way the principles of justice have been upheld in this scenario is through the presence of a judge and jury to adjudicate the facts of the case and determine the liability of the defendant.¹] [The judge and jury in a civil case must be impartial, as they were in this scenario, in order to make a decision based on the facts of the case, as opposed to basing their decision on preconceived ideas or biases against certain parties.²]

[Another way the principles of justice have been upheld is that the case was decided on the balance of probabilities, the standard of proof in all civil disputes.³] [The standard of proof is lower in civil cases than in a criminal case, leading to a fairer outcome. If the standard of proof was the higher threshold of 'beyond reasonable doubt' in civil cases, like it is for criminal cases, plaintiffs, such as those from 'The Spring I Became Cool', may struggle to prove liability. Hence, due to this lower threshold, the plaintiffs were able to prove the director committed the breach, allowing them to all obtain damages for their underpayment.⁴]

- ☒ ☐ I have identified one way the principles of justice are upheld in a civil case.¹

- ☒ ☐ I have provided an example from the scenario and linked it to my chosen way the principles of justice are upheld in a civil case.²

- ☒ ☐ I have identified a second way the principles of justice are upheld in a civil case.³

- ☒ ☐ I have provided an example from the scenario and linked it to my chosen way the principles of justice are upheld in a civil case.⁴

- ☒ ☐ I have used paragraphs to organise my response.

- ☒ ☐ I have used signposting in my response, such as 'One way' and 'Another way'.

- ☒ ☐ I have used connecting words, such as 'Hence'.

8B Methods of civil dispute resolution

Check your understanding

- B. False. **Explanation:** The methods of civil dispute resolution do not involve a judge and jury. Mediation and conciliation occur in an informal location, whilst arbitration occurs in a court-like setting but involves an independent third-party arbitrator instead of a judge and jury.
- Mediation: I; III
Arbitration: II; IV
- A. **Explanation:** Mediation does not require legal representation. Consequently, disputing parties can avoid the time-consuming nature and expense associated with obtaining legal representation, thus providing them with greater access to resolving civil conflicts.
- When a third party encourages and enables conversation between disputing parties without contributing to the resolution itself, this is **mediation**. However, when the independent third party is an expert in the specific dispute and offers their advice and perspective in the resolution process, this is **conciliation**.

5. Appropriate: I; III; IV
Not appropriate: II
6. A. True. **Explanation:** If one party obtains legal representation in any dispute resolution method whilst the other does not, this can result in one party's arguments, perspectives, and opinions being represented more strongly than the other, possibly resulting in an unequal outcome.
7. A; C; D. **Explanation:** The certainty provided by a legally binding decision, the unbiased nature of the third-party arbitrator, and the ability of the parties to choose an arbitrator, can ensure both parties are treated without favouritism or discrimination in the justice system.
8. A. True. **Explanation:** All methods of civil dispute resolution are less formal than a court hearing with a judge, jury, or both. These dispute-resolution methods also minimise the strain on the court system.

Preparing for exams

Standard exam-style

9. [Mediation is a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.¹] [One key feature of mediation as a method of dispute resolution is that the mediator facilitates conversation between disputing parties but does not provide any legal advice, opinions, or recommendations.²]
- ☒ ☐ I have defined mediation as a method of civil dispute resolution.¹
- ☒ ☐ I have provided information about mediation as a method of civil dispute resolution.²
- ☒ ☐ I have used signposting in my response, such as 'One key feature'.
10. [One feature of conciliation is that the conciliator offers their own opinions, suggestions, and solutions to assist disputing parties reach a resolution.¹] [Another feature of conciliation is that the agreement reached at the end of the process is not legally binding, meaning any of the disputing parties can go against the agreed upon resolution in future.²] [Finally, a third feature is that conciliation is a less formal dispute resolution method than arbitration and occurs in a supportive environment where legal representation is rarely used.³]
- ☒ ☐ I have provided one feature of conciliation as a method of civil dispute resolution.¹
- ☒ ☐ I have provided a second feature of conciliation as a method of civil dispute resolution.²
- ☒ ☐ I have provided a third feature of conciliation as a method of civil dispute resolution.³
- ☒ ☐ I have used signposting in my response, such as 'One feature' and 'Another feature'.

11. [Mediation is a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.¹] [On the other hand, arbitration is a non-judicial resolution process involving an independent third party who listens to parties present evidence and makes a final, legally binding decision.²] [One key difference between mediation and arbitration is that at the end of the arbitration process, the dispute is guaranteed to be resolved by a legally-binding decision made by the arbitrator. However, there is no certainty in mediation as no legally binding decision is made to enforce a resolution.³]

- ☒ ☐ I have defined mediation as a method of civil dispute resolution.¹
- ☒ ☐ I have defined arbitration as a method of civil dispute resolution.²
- ☒ ☐ I have provided one key difference between mediation and arbitration as methods of civil dispute resolution.³
- ☒ ☐ I have used signposting in my response, such as 'One key difference'.
- ☒ ☐ I have used comparison words, such as 'On the other hand' and 'However', when distinguishing.

12. [One reason why mediation may be appropriate in this situation is that it can help Camilla save money and time, as more formal proceedings, such as arbitration or a court ruling, are often expensive and may be unaffordable for her.¹] [However, conciliation is also a relatively inexpensive method of civil dispute resolution, so it offers similar advantages in this situation, whilst it may also save greater amounts of time for Camilla and Palace Stables than mediation, as the conciliator is able to offer effective advice.²]

[One reason why mediation may be an inappropriate method of dispute resolution is that the mediator only facilitates conversation between Camilla and Charles, but does not offer any expertise or opinions on how they can resolve the horse-feeding dispute productively. Hence, it could be a waste of time and money for both parties, which Camilla may not be able to afford.³] [Alternatively, conciliation would be a more appropriate method for the parties as the conciliator is able to offer experience, expertise, and valid perspectives to Camilla and Charles when negotiating and resolving the dispute. Therefore, an effective resolution is more likely to be reached using conciliation.⁴]

[Thus, the most inexpensive and effective method for Camilla and Charles to use in this situation is conciliation, rather than mediation.⁵]

- ☒ ☐ I have provided an example from the scenario and linked it to one reason why mediation is an appropriate method of dispute resolution.¹
- ☒ ☐ I have provided an example from the scenario and linked it to one reason why conciliation is an appropriate method of dispute resolution.²
- ☒ ☐ I have provided an example from the scenario and linked it to one reason why mediation is an inappropriate method of dispute resolution.³
- ☒ ☐ I have provided an example from the scenario and linked it to a second reason why conciliation is an appropriate method of dispute resolution.⁴
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁵

✓ ✗ I have used signposting in my response, such as 'One reason why'.

✓ ✗ I have used connecting words, such as 'However' and 'Alternatively'.

13. [One method of dispute resolution that is appropriate for Anna and Hayley is arbitration.¹] [Arbitration is a non-judicial resolution method involving an independent third party, known as the arbitrator, who listens to parties present evidence and makes a binding decision.²] [The process of arbitration would require Anna and Hayley to present their arguments to an arbitrator in a court-like setting, potentially with the assistance of a legal representative. The esteemed guest who defamed the artists would also be required to present evidence to defend their case.³] [After hearing both sides of the defamation dispute, the arbitrator would make a legally binding decision that guarantees a resolution between the disputing parties and prevents a similar defamation case from occurring between the artists and the guest.⁴]

✓ ✗ I have identified arbitration as the appropriate method of civil dispute resolution for Anna and Hayley.¹

✓ ✗ I have defined arbitration as a method of civil dispute resolution.²

✓ ✗ I have provided information about arbitration as a method to resolve Anna and Hayley's civil dispute.³

✓ ✗ I have provided further information about arbitration as a method to resolve Anna and Hayley's civil dispute.⁴

✓ ✗ I have used signposting in my response, such as 'One method of dispute resolution'.

Note: Arbitration is the only method of civil dispute resolution that results in a legally binding decision and therefore, is the only acceptable answer.

Extended response

14. Strengths: I; IV; V
Limitations: II; III; VI
15. [I agree with this statement to a moderate extent because although arbitration can uphold various principles of justice, it is not the best method of civil dispute resolution for doing so, especially due to its high expense and limited accessibility.¹]
[One way arbitration upholds the principle of fairness is that it guarantees a legally binding resolution is made, which must be upheld by both parties. This ensures both disputing parties are legally obliged to follow the resolution that has been enforced by the arbitrator, therefore achieving the principle of fairness.²] [Additionally, arbitration can also uphold the principle of access as it has looser rules of evidence and procedure than court proceedings, meaning the parties can decide on an arbitrator and achieve a more flexible approach than if the case were to go to court. Therefore, this may allow individuals with busy lifestyles to access arbitration.³]
[However, arbitration can fail to uphold the principle of fairness as if one or both parties are unhappy with the final, legally binding decision, they have limited rights to appeal it. Therefore, fairness for one or both parties may be limited.⁴] [Furthermore, arbitration can limit the achievement of equality if one party lacks legal representation as this can create a power imbalance between

disputing parties. Consequently, the represented party may be able to represent their case more strongly, potentially resulting in an unequal and unfair resolution being reached.⁵] [Finally, the principle of access may also be limited by arbitration as it is often more expensive than other methods of civil dispute resolution. This may prevent parties with limited financial means from pursuing arbitration as a viable method of resolving a dispute. Thus, this limits the principle of access.⁶]

[Overall, despite the guarantee of reaching an impartial, legally binding decision, arbitration is extremely limited to only resolving disputes for financially able parties, which prevents all three principles of justice, fairness, access, and equality, from being upheld. The limited rights to appeal the legally binding decision can further prevent the achievement of fairness.⁷]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have provided one way arbitration can achieve the principle of fairness.²

✓ ✗ I have provided one way arbitration can achieve the principle of access.³

✓ ✗ I have provided one way arbitration can limit the achievement of fairness.⁴

✓ ✗ I have provided one way arbitration can limit the achievement of equality.⁵

✓ ✗ I have provided one way arbitration can limit the achievement of access.⁶

✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One way'.

✓ ✗ I have used connecting words, such as 'Additionally' and 'However'.

Linking to previous learning

16. [The primary purpose of civil law is to restore the individual who suffered loss to their original position before the loss occurred.¹]
[One method of civil dispute resolution that could be used to resolve a civil claim is arbitration, which is a non-judicial resolution method involving an independent third party, known as the arbitrator, who listens to parties present evidence and makes a binding decision.²] [The arbitration process would involve the parties to the dispute presenting evidence to an independent, third-party arbitrator in a court-like setting, and may involve the use of legal representation by parties.³] [After hearing each case, the arbitrator will then make a legally-binding decision to resolve the civil dispute, which will aim to restore the individual who suffered the loss to their original position.⁴]
✓ ✗ I have identified one purpose of civil law.¹
✓ ✗ I have identified and defined one method of civil dispute resolution that could be used to resolve a civil dispute.²

- ✓ ✗ I have provided information about my chosen method of civil dispute resolution.³
- ✓ ✗ I have provided information about my chosen method of civil dispute resolution and linked it to my chosen purpose of civil law.⁴
- ✓ ✗ I have used signposting in my response, such as 'One method'.

8C Institutions that resolve civil disputes

Check your understanding

- B. False. **Explanation:** There are other institutions, such as VCAT, that have the power to impose a legally-binding decision on parties.
- Tribunals** aim to resolve civil disputes in a less **formal**, more timely manner.
- B; D. **Explanation:** The Fair Work Ombudsman is an example of an ombudsman, and the Fair Work Commission is an example of a tribunal.
- B. False. **Explanation:** Ombudsmen can only enter the premises of organisations they are investigating.
- D. **Explanation:** VCAT's three distinct purposes are to provide low-cost, efficient, and accessible resolution of civil cases.
- A; B. **Explanation:** CAV only hears claims initiated by tenants and consumers that are made against landlords and businesses respectively.
- Tribunals: III, IV
Ombudsmen: II
Complaints bodies: I

Preparing for exams

Standard exam-style

- [One limitation of ombudsman in their ability to uphold fairness in the civil justice system is that most industry ombudsmen, such as the Fair Work Ombudsman, cannot compel parties to participate in its mediation services.¹] [If one party is unwilling to attempt mediation, the party who claims the law has been breached must instead take action in the courts. This may be inaccessible to those with limited finances.²] [For example, an employee initiating a civil claim against an employer for workplace discrimination may be unable to pursue their case through the Fair Work Ombudsman if their employer is in denial and unwilling to consider the validity of the claims.³]

- ✓ ✗ I have provided one limitation of ombudsmen in upholding the principle of fairness.¹
- ✓ ✗ I have provided information about my chosen limitation.²
- ✓ ✗ I have provided an example of how ombudsmen may be limited in their ability to uphold the principle of fairness.³
- ✓ ✗ I have used signposting in my response, such as 'One limitation'.

- [Consumer Affairs Victoria (CAV) is an appropriate institution to assist Jack.¹] [One reason why CAV is appropriate is that the parties have already attempted to resolve the dispute themselves. Therefore, CAV would be able to provide alternative services, such as conciliation, to assist in resolving the dispute, especially since both Jack and his landlords appear willing to engage in the dispute resolution process.²] [Another reason why CAV would be an appropriate dispute resolution body is that Jack would be the individual, as the tenant, initiating the claim against his landlords. Consequently, CAV would be able to assist Jack as his claim is within its jurisdiction.³]

- ✓ ✗ I have identified an appropriate institution to assist Jack.¹
- ✓ ✗ I have provided one reason why my chosen institution is appropriate to assist Jack.²
- ✓ ✗ I have provided a second reason why my chosen institution would be appropriate to assist Jack.³
- ✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.
- ✓ ✗ I have used connecting words, such as 'Therefore' and 'Consequently'.

- [One way VCAT upholds the principle of access is through its cost-effective services.¹] [Resolving a dispute through VCAT is relatively cheap in comparison to court proceedings, therefore promoting access to civil dispute resolution for those who have limited financial resources.²] [A second way VCAT upholds the principle of access is through its informality.³] [The processes conducted at VCAT are less formal than the courts and greater support is provided to parties, making it a less intimidating and more accessible institution for dispute resolution.⁴]

- ✓ ✗ I have identified one way VCAT upholds the principle of access.¹
- ✓ ✗ I have provided information about my chosen way VCAT upholds the principle of access.²
- ✓ ✗ I have identified a second way VCAT upholds the principle of access.³
- ✓ ✗ I have provided information about my chosen way VCAT upholds the principle of access.⁴
- ✓ ✗ I have used signposting in my response, such as 'One way' and 'A second way'.

Extended response

- Strengths of VCAT: I; II
Limitations CAV: III; IV
- [The Victorian Civil and Administrative Tribunal (VCAT) would be a more appropriate body to hear this dispute, as Leo is seeking a legally-binding resolution, which can be enforced by VCAT as opposed to Consumer Affairs Victoria (CAV).¹]
[VCAT is a cost-effective and informal tribunal.²] [A strength of VCAT in relation to this matter is that it has the ability to hand down legally-binding decisions through hearings, the outcomes of which are enforceable by the courts. This is important in regards to Leo's matter, as Rushil is refusing to negotiate or cooperate.³] [A second

strength of VCAT is that it provides a low-cost alternative to bringing a claim through the courts, especially for parties that cannot afford or are unwilling to engage in court proceedings. This is particularly important for Leo as he is a low-income earner and may be unable to afford the funds required to initiate a civil claim in the courts.^{4]}

[On the other hand, CAV would be limited in its ability to resolve this dispute, as it relies on collaboration between parties.^{5]} [The process of conciliation that is offered by CAV requires parties to cooperate and find resolutions to disputes together. However, Leo's landlord, Rushil, has been unwilling to discuss the matter and would, therefore, be unlikely to attend and participate in conciliation.^{6]}

[Additionally, CAV is limited in its ability to provide legally-binding resolutions. For a final outcome to be binding, as Leo desires, both parties must agree to sign a deed of settlement. Given Rushil's lack of cooperation, it is highly unlikely that, even if the parties determine a resolution, Rushil will sign a deed.^{7]}

[Ultimately, VCAT can be utilised as a more appropriate body to handle this dispute, given its ability to hand down legally-binding decisions in a low-cost manner. In contrast, CAV is highly dependent on cooperation between parties and, as such, is not suitable to hear this dispute.^{8]}

- ☒ ☐ I have provided an introduction to my response to summarise my answer to the question.¹
- ☒ ☐ I have provided a topic sentence to introduce the main idea of my paragraph.²
- ☒ ☐ I have provided one strength of VCAT as an institution that resolves disputes and linked it to the scenario.³
- ☒ ☐ I have provided a second strength of VCAT as an institution that resolves disputes and linked it to the scenario.⁴
- ☒ ☐ I have provided a topic sentence to introduce the main idea of my paragraph.⁵
- ☒ ☐ I have provided one limitation of CAV as an institution that resolves disputes and linked it to the scenario.⁶
- ☒ ☐ I have provided a second limitation of CAV as an institution that resolves disputes and linked it to the scenario.⁷
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁸
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'A strength', and 'A second strength'.
- ☒ ☐ I have used connecting words, such as 'On the other hand' and 'However'.

Linking to previous learning

13. [Conciliation is a non-judicial dispute resolution method involving an independent third party, known as a conciliator, who possesses specialist knowledge about the type of dispute in question and assists parties in a dispute reach a resolution.^{1]} [CAV utilises conciliation for many of the disputes before it, meaning parties are in control of the final outcome, therefore enabling a fair negotiation process to occur and a beneficial resolution to be reached.^{2]} [Furthermore, CAV employs independent conciliators to act as unbiased and impartial opinions that favour neither party, whilst the advice and experience they offer may enable a more fair and mutually beneficial resolution

to be reached.^{3]} [Finally, a third way CAV upholds the principle of fairness is by providing free and timely conciliation services that can ensure a just and fair outcome is reached.^{4]}

- ☒ ☐ I have provided the definition of the term 'conciliation'.¹
- ☒ ☐ I have provided one way CAV upholds the principle of fairness.²
- ☒ ☐ I have provided a second way CAV upholds the principle of fairness.³
- ☒ ☐ I have provided a third way CAV upholds the principle of fairness.⁴
- ☒ ☐ I have used signposting in my response, such as 'Finally, a third way'.
- ☒ ☐ I have used connecting words, such as 'Furthermore' and 'Ultimately'.

8D Civil jurisdictions of Victorian courts

Check your understanding

- A. True. **Explanation:** Whilst some Victorian courts have original and appellate jurisdiction to hear civil cases, the Magistrates' Court, County Court, and Supreme Court – Court of Appeal do not have both in relation to civil matters.
- The Magistrates' Court has no **appellate** jurisdiction. However, its **original** jurisdiction enables it to hear minor civil disputes with claims of up to \$100,000.
- B; C. **Explanation:** The County Court can hear civil disputes with claims of any amount, however, it will usually only hear those with claims exceeding \$100,000. The County Court does not have any appellate jurisdiction to hear civil matters.
- B. **Explanation:** The Supreme Court – Trial Division has original jurisdiction to hear civil claims of any amount, whilst it has appellate jurisdiction to hear appeals from the Magistrates' Court and Victorian Civil and Administrative Tribunal (VCAT). The Supreme Court – Court of Appeal only has appellate jurisdiction to hear appeals from the County Court, Supreme Court – Trial Division, and cases heard by the President or Vice President of VCAT.
- B; C. **Explanation:** The Victorian court hierarchy provides access to independent, experienced, and knowledgeable judicial officers, whilst it aims to uphold the provision of justice for both the plaintiff and defendant, meaning both parties have the right to an appeal.
- A. **Explanation:** The Victorian court hierarchy is advantageous as it allows the principles of justice to be achieved in civil law, whilst it creates a more efficient and effective legal system that aims to deliver justice to both parties, meaning the defendant is not always found liable.

Preparing for exams

Standard exam-style

7. [The original jurisdiction of the County Court provides it with the power to hear civil claims of any amount.¹] [However, the County Court does not have any appellate jurisdiction in the civil justice system.²]
- ☒ ☐ I have provided information about the original civil jurisdiction of the County Court.¹
- ☒ ☐ I have provided information about the appellate civil jurisdiction of the County Court.²
- ☒ ☐ I have used connecting words, such as 'However'.
8. [One role of the courts that has been demonstrated in this scenario is to provide an independent, experienced, and knowledgeable judicial officer.¹] [Clayton's civil claim was heard by a well-versed magistrate who heard both sides of the dispute in an impartial and unbiased manner, therefore ensuring the provision of justice.²]
- [Furthermore, another role of the Victorian courts is to order a remedy.³] [The magistrate, Magistrate Gawn, ordered Christian and Angus to pay damages to Clayton after they were found liable. Therefore, this remedy aimed to compensate Clayton for his loss and return him to his original position prior to the civil wrong.⁴]
- ☒ ☐ I have identified one role of the Victorian courts from the scenario.¹
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen role.²
- ☒ ☐ I have identified a second role of the Victorian courts from the scenario.³
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen role.⁴
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One role' and 'another role'.
- ☒ ☐ I have used connecting words, such as 'Furthermore' and 'Therefore'.
9. [I do not agree with this statement as, although providing a remedy to the plaintiff if the defendant is found liable of a civil breach is one role of the courts in relation to civil matters, it is not their only role.¹]
- [One role of the courts, other than deciding on an appropriate remedy, is to provide a legally-binding outcome to the dispute. For example, in a dispute regarding the sale of land, the court may oblige the defendant to complete a sale of land and transfer the property to the plaintiff. The defendant must legally comply with this decision.²]
- [Another role of the courts is to provide an opportunity for both parties to appeal the outcome of their case where they have grounds to do so, including as a question of law where legal principles were incorrectly applied by the judge.³]
- [Finally, the courts also have a role in setting precedent for future cases. For example, if the Supreme Court decides a term of a contract is 'unfair' and, therefore invalid, judges in future cases where a party has included this term in their contract will be bound,

depending on the court they are within, to also regard this term as 'unfair' if the cases have similar facts.⁴]

- ☒ ☐ I have stated whether I agree or disagree with the statement and provided a summary of the reason for my answer.¹
- ☒ ☐ I have provided one role of the courts when deciding civil matters.²
- ☒ ☐ I have provided a second role of the courts when deciding civil matters.³
- ☒ ☐ I have provided a third role of the courts when deciding civil matters.⁴
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'One role' and 'Another role'.

Extended response

10. Strengths: II; III; IV
Limitations: I; V
11. [The Supreme Court can uphold the principles of justice to a moderate extent in the dispute against the soccer association.¹]
- [Firstly, the Supreme Court can uphold the principle of fairness in this class action through administrative convenience. By having a serious and complex case, like a class action, heard in the Supreme Court, delays can be minimised and a consistent outcome can be determined for the players and association.²] [Although, the achievement of fairness can be limited if one party is dissatisfied with the outcome and is unable to appeal the outcome due to the associated financial expenses.³] [For example, if the court allows the soccer association to appeal, the players may be unable to afford legal representation to represent themselves in court. Consequently, they may be forced to enter into a settlement, therefore limiting the achievement of fairness as it could leave them with an unjust outcome.⁴]
- [Moreover, one way the principle of equality can be upheld by the Supreme Court is that, despite characteristic differences, such as race, gender, and religion, the judge should treat all individuals in the same manner.⁵] [In this scenario, even though the soccer association may have more financial resources, the players should not be discriminated against based on their financial status and should not be treated with any disadvantage.⁶] [Despite this, the achievement of equality may be limited if, for example, the players are unable to afford an appeal, as parties will not have equal access to challenging court decisions.⁷]
- [Finally, the achievement of access is upheld by the Supreme Court as it publishes free information online about court processes, procedures, and other relevant information.⁸] [Therefore, this may enable Kozzy and Steven, alongside the other players, to access information that allows them to better understand the judicial process of a class action.⁹]
- [Ultimately, although the Supreme Court's original and appellate jurisdiction can enable it to achieve the principles of justice in this class action, the achievement of justice can be limited to a certain degree due to the player's financial capacity to appeal.¹⁰]
- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have provided one way the achievement of fairness is upheld by the Supreme Court.²

- ✓ ✗ I have provided one way the achievement of fairness is limited by the Supreme Court.³
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen way the achievement of fairness is limited by the Supreme Court.⁴
- ✓ ✗ I have provided one way the achievement of equality is upheld by the Supreme Court.⁵
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen way the achievement of equality is upheld by the Supreme Court.⁶
- ✓ ✗ I have provided one way the achievement of equality is limited by the Supreme Court.⁷
- ✓ ✗ I have provided one way the achievement of access is upheld by the Supreme Court.⁸
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen way the achievement of access is upheld by the Supreme Court.⁹
- ✓ ✗ I have provided a conclusion to my response that links back to the question.¹⁰
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'Firstly' and 'one way'.
- ✓ ✗ I have used connecting words, such as 'Although' and 'Moreover'.

Linking to previous learning

12. [One similarity between the criminal and civil jurisdictions of the Magistrates' Court is that in both criminal and civil law, the Magistrates' Court does not have an appellate jurisdiction.¹] [However, a difference between these jurisdictions is that, for criminal cases, the Magistrates' Court can hear preliminary matters, such as bail and warrant applications. Alternatively, civil matters in the Magistrates' Court go straight to trial.²]
- ✓ ✗ I have provided one similarity between the criminal and civil jurisdictions of the Magistrates' Court.¹
- ✓ ✗ I have provided one difference between the criminal and civil jurisdictions of the Magistrates' Court.²
- ✓ ✗ I have used signposting in my response, such as 'One similarity' and 'a difference'.
- ✓ ✗ I have used comparison words, such as 'However' and 'Alternatively', when comparing.

8E The jury in a civil trial

Check your understanding

- A. **Explanation:** The jury in a civil trial is a group of six individuals who are randomly selected from the electoral roll to attend and hear a civil trial in the court and then determine the final verdict based on the evidence presented. A jury of 12 is only used in criminal trials.
- B. False. **Explanation:** Unlike in criminal trials, the cost of a jury in a civil dispute is not paid for by the courts. Instead, the party or parties requesting the jury must bear the associated expenses themselves.
- C; D. **Explanation:** If a civil trial is being heard in the Magistrates' Court or on appeal, a jury will not be permitted to determine the verdict of the trial.
- When a jury member is **excused**, this means they were initially selected but the individual requested, with a good reason for doing so, to no longer be included in the civil dispute. Alternatively, an individual is considered **disqualified** from jury duty if they have committed crimes that make it difficult for them to be an impartial determiner of liability.
- True: II; IV
False: I; III
- A. True. **Explanation:** A civil trial by jury can provide parties with more diverse perspectives as jury members are randomly selected individuals of the general public. Consequently, the principles of justice may be upheld to a greater extent when a civil jury is used compared to when a civil case is heard by a judge alone.

Preparing for exams

Standard exam-style

- [One condition under which a civil trial by jury cannot be requested is if the dispute was initiated in the Magistrates' Court.¹] [Another condition where parties cannot request a civil trial by jury is if the case is being heard on appeal.²]
- ✓ ✗ I have identified one condition under which parties cannot request a civil trial by jury.¹
- ✓ ✗ I have identified a second condition under which parties cannot request a civil trial by jury.²
- ✓ ✗ I have used signposting in my response, such as 'One condition' and 'Another condition'.
- [In a civil trial, a jury consists of six individuals who are randomly selected from the electoral roll to attend and hear a civil dispute in a court and then determine the final verdict based on the evidence presented.¹] [For an individual to be selected as a juror, they must be qualified and liable for jury service, meaning they are both at least 18 years old and are enrolled to vote in Victoria.²] [However, a person may be ineligible for jury duty even if they do satisfy these two conditions. For example, a person may be disqualified from jury duty due to committing an indictable offence and being sentenced to a term of imprisonment of at least three years.³]
- ✓ ✗ I have provided one aspect of the composition of a jury in a civil trial.¹
- ✓ ✗ I have provided a second aspect of the composition of a jury in a civil trial.²

✓ ✗ I have provided a third aspect of the composition of a jury in a civil trial.³

✓ ✗ I have used connecting words, such as 'However'.

9. [One role of Martha and Stewart as jurors in this civil dispute is to remain objective when determining the final verdict of the plane crash class action.¹] [During the civil trial, Martha and Stewart must ensure they consider both the plaintiff and defendant's perspectives to make an impartial and independent decision.²] [Furthermore, another role of jurors in a civil trial is to listen to the directions of the judge throughout all court proceedings.³] [When the judge provides Martha and Stewart with directions regarding the law, evidence, and the decision they need to make, they should listen attentively and ensure they understand all aspects of their role and responsibility in upholding the law.⁴]

✓ ✗ I have identified one role of Martha and Stewart as jurors in this civil dispute.¹

✓ ✗ I have provided information about my chosen role of Martha and Stewart.²

✓ ✗ I have identified a second role of Martha and Stewart as jurors in this civil dispute.³

✓ ✗ I have provided information about my chosen role of Martha and Stewart.⁴

✓ ✗ I have used signposting in my response, such as 'One role' and 'another role'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

10. B; C; E; F

11. [In a civil trial, the use of a jury can provide parties with more diverse perspectives of society, contributing to the achievement of the principles of justice. However, there are limitations to the use of a jury that may prevent the achievement of these principles.¹]

[One way the use of a civil jury can uphold the principle of fairness is that, as the jury consists of a random cross-section of the community, parties are having their case determined by their peers who are also members of the general public, therefore promoting fairness.²] [The presence of a jury can help promote fairness as there is a reduced risk of bias when a decision about a defendant's liability is being made by the community as opposed to a single judge, who may have their own prejudices against certain people.³] [Although, the achievement of fairness may be limited by the fact that jurors do not need to provide the rationale for their verdict, meaning there is no guarantee the law has been correctly applied in accordance with the facts presented. This could potentially result in an unjust and unfair verdict for civil parties.⁴]

[Furthermore, one way the achievement of equality is upheld by the use of a civil trial is that both the plaintiff and defendant have the right to request a jury trial in a civil dispute, regardless of personal characteristics.⁵] [Despite this, equality may be limited as the civil parties must bear the cost of a trial by jury themselves. Therefore, individuals of low socioeconomic status may be denied a trial by jury due to limited financial capacity.⁶]

[Finally, one way the principle of access can be achieved is that the use of a jury can increase the use of plain English, consequently making a trial more understandable and accessible to all parties.⁷]

[Whilst juries can enhance the achievement of this principle of justice, access may be limited in the case of a hung jury or mistrial due to juror misconduct.⁸] [This is because the resolution to the civil dispute is likely to be delayed, hindering the timely and efficient access to justice for parties.⁹]

[Ultimately, whilst trials by jury in the civil justice system can uphold the principles of justice, in some circumstances the achievement of these principles may still be limited.¹⁰]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the principle of fairness is upheld by the use of a jury in a civil dispute.²

✓ ✗ I have provided information about my chosen way the principle of fairness is upheld.³

✓ ✗ I have provided one way the principle of fairness is limited by the use of a jury in a civil dispute.⁴

✓ ✗ I have provided one way the principle of equality is upheld by the use of a jury in a civil dispute.⁵

✓ ✗ I have provided one way the principle of equality is limited by the use of a jury in a civil dispute.⁶

✓ ✗ I have provided one way the principle of access is upheld by the use of a jury in a civil dispute.⁷

✓ ✗ I have provided one way the principle of access is limited by the use of a jury in a civil dispute.⁸

✓ ✗ I have provided information about my chosen way the principle of access is limited.⁹

✓ ✗ I have provided a conclusion to my response that links back to the question.¹⁰

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One way' and 'Finally'.

✓ ✗ I have used connecting words, such as 'However' and 'Although'.

Linking to previous learning

12. [One similarity between a criminal and civil jury is that jurors must determine the final verdict solely based on the evidence presented and are not permitted to conduct their own research on the trial or use prior knowledge, such as information exposed in the media.¹]

[Another similarity between juries in criminal and civil trials is that, to determine the guilt or liability of an accused or defendant respectively, a majority or unanimous verdict must be established.²]

[However, one difference between a criminal and civil jury is that whilst jurors in criminal trials determine the verdict of an accused, they are not involved in the sentencing of an offender if they are found guilty. Alternatively, jurors in civil trials may be required to determine what remedies should be awarded.³] [Moreover, a second difference is that the standard of proof used to determine the jury's verdict is different in criminal and civil trials. Jurors in criminal trials must determine whether the accused is guilty beyond reasonable doubt, whereas the jury in a civil trial considers the liability of the defendant on the balance of probabilities.⁴]

- ✓ ✗ I have provided one similarity between juries in criminal and civil trials.¹
- ✓ ✗ I have provided a second similarity between juries in criminal and civil trials.²
- ✓ ✗ I have provided one difference between juries in criminal and civil trials.³
- ✓ ✗ I have provided a second difference between juries in criminal and civil trials.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One similarity' and 'Another similarity'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Moreover'.
- ✓ ✗ I have used comparison words, such as 'Alternatively' and 'whereas', when comparing.

8F First Nations people and the civil justice system

Check your understanding

- B. False. **Explanation:** Aboriginal and Torres Strait Islander peoples may face difficulties in the civil justice system, as well as the criminal justice system, due to various factors, including geographical barriers, language barriers, and socioeconomic disadvantage.
- A; C. **Explanation:** Geographical barriers faced by Aboriginal and Torres Strait Islander peoples arise as many of them live in rural regions as opposed to metropolitan areas. Theft and cybercrime fall under criminal, not civil law, therefore if a First Nations person were to commit these acts they would be interacting with the criminal justice system.
- Direct questioning is generally considered **rude** in some Aboriginal cultures. Therefore, an Aboriginal party to a civil dispute may feel **shame** when being questioned by a lawyer during a civil dispute.
- A. **Explanation:** Victoria Legal Aid's assistance to eligible Aboriginal and/or Torres Strait Islander peoples in criminal matters is not relevant in a civil law context.
- A; C. **Explanation:** Although parties in a civil dispute are able to request an interpreter if needed, they must bear the cost and the responsibility of paying for and arranging this interpreter.
- The principle of access is **limited** for Aboriginal and Torres Strait Islander plaintiffs as, if the limitation period has passed in the relevant area of civil law the breach occurred under, they can no longer commence a civil action against a defendant. On the other hand, access can be **upheld** as Victorian Aboriginal Legal Service (VALS) has client-serving offices in several metropolitan and regional locations across Victoria.
- A. True. **Explanation:** If First Nations parties to a civil dispute struggle to present evidence due to cultural and language barriers, equality is limited as they may be on unequal footing to a non-Indigenous party in the dispute, simply on the basis of their race.

- A. **Explanation:** The high proportions of First Nations peoples living in rural areas is a limitation of the civil justice system achieving fairness as it may result in a plaintiff or defendant being unable to access legal advice. Thus, this may prevent their case from being presented in the best light, which could lead to an unfair outcome.
- B. False. **Explanation:** Although the principles of justice are limited to a certain extent; some mechanisms, such as the Victorian Aboriginal Legal Service, exist to strengthen justice for Aboriginal and/or Torres Strait Islander peoples.

Preparing for exams

Standard exam-style

- [One difficulty faced by First Nations peoples in the civil justice system is difficulties asserting property rights due to Australia's colonial past and connections.¹] [Despite the *Native Title Act 1993* (Cth) and the Mabo Case that allowed First Nations peoples to assert property rights over Australian land, which they have a strong cultural connection over, in reality, this is difficult to prove. Therefore, this native title civil right is often not upheld.²]
- ✓ ✗ I have provided one difficulty faced by First Nations peoples in the civil justice system.¹
- ✓ ✗ I have provided information about my chosen difficulty.²
- ✓ ✗ I have used signposting in my response, such as 'One difficulty'.
- [One difficulty experienced by First Nations peoples in the civil justice system, which limits access to justice, is geographical barriers.¹] [Many Aboriginal and Torres Strait Islander peoples live in remote or rural parts of Victoria, therefore limiting their ability to access legal advice or representation.²]
- ✓ ✗ I have provided one difficulty experienced by First Nations peoples in the civil justice system that limits the principle of access.¹
- ✓ ✗ I have provided information about my chosen difficulty.²
- ✓ ✗ I have used signposting in my response, such as 'One difficulty'.
- [One difficulty faced by First Nations peoples in the civil justice system is language barriers, as proficiency in speaking Standard English may be limited for some First Nations peoples.¹] [Certain English words may have different meanings, creating miscommunications and misinterpretations for First Nations individuals when being questioned or presenting evidence as a plaintiff or defendant.²] [As a result, the judge or jury in a civil trial may find it difficult to understand the statements given by the party, or the party in the civil dispute may face difficulties when presenting evidence or understanding civil proceedings.³] [However, the civil justice system seeks to address this difficulty by allowing Aboriginal and/or Torres Strait Islander peoples to request an interpreter if needed when resolving civil disputes in the courts.⁴]
- ✓ ✗ I have identified one difficulty faced by First Nations peoples in the civil justice system.¹
- ✓ ✗ I have provided information about my chosen difficulty.²
- ✓ ✗ I have provided further information about my chosen difficulty.³

- ☒ ☐ I have identified one process, procedure, or institution that seeks to address my chosen difficulty.⁴
- ☒ ☐ I have used signposting in my response, such as 'One difficulty'.
- ☒ ☐ I have used connecting words, such as 'As a result' and 'However'.

13. [I agree with this statement to a minimal extent as, although Australia is by no means perfect in preventing difficulties faced by First Nations peoples in the civil justice system, there are several mechanisms in place that seek to rectify these difficulties, demonstrating that Australia does make efforts to do so.¹]

[Firstly, Victoria Legal Aid may provide representation in matters relating to family law, child support, immigration, residential tenancy, and anti-discrimination. It provides culturally-safe family dispute resolution by collaborating with the Victorian Aboriginal Legal Service (VALS).²] [Another way in which the Australian civil justice system addresses difficulties experienced by First Nations peoples is through VCAT's 'Koori Support Team' that enables culturally-safe hearings to be conducted.³] [Finally, VALS provides information, referrals, legal advice, and casework for a number of different family and civil law matters, such as tenancy and discrimination disputes.⁴]

- ☒ ☐ I have provided an introduction to state the extent to which I agree or disagree with the statement, and why.¹
- ☒ ☐ I have provided one way the Australian civil justice system addresses difficulties experienced by First Nations peoples.²
- ☒ ☐ I have provided a second way the Australian civil justice system addresses difficulties experienced by First Nations peoples.³
- ☒ ☐ I have provided a third way the Australian civil justice system addresses difficulties experienced by First Nations peoples.⁴
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Another way'.

Extended response

14. Strengths: II; III
Limitations: I; IV

15. [Although Jedda is likely to face several difficulties as a First Nations woman interacting with the civil justice system, mechanisms are in place that seek to rectify these difficulties to help achieve justice.¹]

[Firstly, the principle of equality may be limited as Jedda is currently unable to afford new accommodation, meaning she is likely experiencing financial hardship and therefore, is likely unable to afford legal representation.²] [This could lead to unequal footing between her and her landlord as they may be able to afford high-quality lawyers to present their facts of the case.³] [However, Victoria Legal Aid (VLA) provides representation in matters relating to residential tenancy disputes.⁴] [Therefore, although Jedda does not have the required financial resources to afford legal representation, VLA may still be able to provide her with free legal services or representation. This ensures Jedda is still represented if the matter goes to court, allowing her case to be presented in the best possible light and promoting equal footing between her and the landlord defendant.⁵]

[Secondly, access to justice may be limited if Jedda does not pursue justice, despite it being clear that her civil rights have been breached.⁶] [Jedda seems unaware of how to go about initiating a civil action against the landlord, likely due to limited access to civil law services in rural communities.⁷] [Despite this limitation, access can be achieved for Jedda if she does reach out to a free legal advice service.⁸] [Bodies, such as the Victorian Aboriginal Legal Service (VALS), can provide tailored assistance to Aboriginal peoples interacting with the civil justice system. Therefore, Jedda can develop a better understanding of the legal proceedings and her obligations if the matter goes to court, promoting access.⁹]

[Overall, although processes, procedures, and institutions are in place to assist the achievement of the principles of access and equality for Jedda, if she fails to reach out to gain any legal advice in the first place, she may never access justice for herself, therefore limiting the achievement of the principles of justice.¹⁰]

- ☒ ☐ I have provided an introduction to my response to summarise my answer.¹
- ☒ ☐ I have provided one way the civil justice system does not achieve the principle of equality for Jedda.²
- ☒ ☐ I have provided information about my chosen way the civil justice system does not achieve the principle of equality for Jedda.³
- ☒ ☐ I have provided one way the civil justice system achieves the principle of equality for Jedda.⁴
- ☒ ☐ I have provided information about my chosen way the civil justice system achieves the principle of equality for Jedda.⁵
- ☒ ☐ I have provided one way the civil justice system does not achieve the principle of access for Jedda.⁶
- ☒ ☐ I have provided information about my chosen way the civil justice system does not achieve the principle of access for Jedda.⁷
- ☒ ☐ I have provided one way the civil justice system achieves the principle of access for Jedda.⁸
- ☒ ☐ I have provided information about my chosen way the civil justice system achieves the principle of access for Jedda.⁹
- ☒ ☐ I have provided a conclusion to my response that links back to the question.¹⁰
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting, such as 'Firstly' and 'Secondly'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Therefore'.

Linking to previous learning

16. a. [The limitation period for defamation cases is one year.¹]

- ☒ ☐ I have identified the limitation period for one civil matter.¹

- b. [A limitation period is the time limit in which a plaintiff must commence a civil action in court. Once this time period expires, the plaintiff is unable to bring an action relating to the civil wrong against the defendant.¹] [Therefore, a lack of financial resources can prevent plaintiffs, who feel they were subject to a civil breach, from accessing justice in the permitted time frame and they may never be compensated for the civil wrong.²] [This is likely to be a prevalent difficulty among First Nations peoples in the civil justice system due to the proportionally higher levels of socioeconomic disadvantage they experience.³]

✓ ✗ I have defined the term 'limitation period'.¹

✓ ✗ I have provided one way limitation periods for civil matters may limit the achievement of the principle of access for First Nations peoples.²

✓ ✗ I have provided information about my chosen way limitation periods may limit the achievement of the principle of access for First Nations peoples.³

8G Difficulties faced by some groups in the civil justice system

Check your understanding

- B. False. **Explanation:** People of low socioeconomic status, young people, people living in remote, regional, or rural areas, and others may all experience difficulties and, therefore, limited equality before the law when interacting with the civil justice system.
- The principle of fairness can be **upheld** for people of lower socioeconomic status who are successful in a civil dispute as the court can order adverse cost orders, allowing the successful party to have some or all of their legal costs compensated.
- A; B. **Explanation:** Children may have a limited understanding of the legal system and their rights under civil law, due to a lack of life experience or education, limiting their ability to know when their rights have been breached under civil law.
- B. **Explanation:** When a judge or jury is assessing the liability of a child for committing a civil wrong, they must consider the child's ability to foresee the consequences of their actions, therefore resulting in children being held to a lower standard than adults in the civil justice system.
- B. False. **Explanation:** Although there has been an increase in the legal services available in RRR areas, living in metropolitan areas still allows for far greater access to the courts and legal services as parties can more easily access such services.
- A; C. **Explanation:** Although there are several Magistrates' Courts in regional locations, the quality of these courts is usually much poorer than the quality of those in metropolitan areas. Furthermore, a majority of practising solicitors practice in metropolitan areas, with only around 10% practising in rural areas according to 2016 data.
- Strengths: II
Limitations: I; III; IV

Preparing for exams

Standard exam-style

8. [One difficulty faced by people of low socioeconomic status in the civil justice system is that they may be unable to pay for a jury in a civil dispute.¹] [Another difficulty they may face could be due to having limited education, consequently causing them to be unaware of their civil rights.²]

✓ ✗ I have identified one difficulty faced by people of low socioeconomic status in the civil justice system.¹

✓ ✗ I have identified a second difficulty faced by people of low socioeconomic status in the civil justice system.²

✓ ✗ I have used signposting in my response, such as 'One difficulty' and 'Another difficulty'.

9. [Juniper may experience difficulties in the civil justice system due to her young age, being 15 years old. One of these difficulties may be a lack of understanding about the civil legal system.¹] [Young people are often unaware of their civil rights and the ways their actions could breach civil law. This may result in children becoming embroiled in a civil dispute without knowing they breached the law.²] [This is demonstrated in Juniper's scenario as she was unaware that the rumours posted online could be considered defamatory material and lead to legal action.³]

✓ ✗ I have provided one difficulty Juniper may face in the civil justice system.¹

✓ ✗ I have provided information about my chosen difficulty.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen difficulty.³

✓ ✗ I have used signposting in my response, such as 'One of these difficulties'.

10. [One difficulty faced by people in remote, regional, or rural (RRR) areas in the civil justice system is that they may have poor quality internet coverage, creating barriers to them trying to access legal advice online.¹] [As a result, a party to a civil dispute may have to travel to seek in-person advice or consultations, which could prevent a plaintiff from pursuing civil action to begin with as they believe it is too difficult to do so.²]

[Furthermore, another difficulty experienced by people in RRR areas may be associated with the appropriateness of seeking legal advice online, or consulting a lawyer via video chats, for some civil cases.³] [Certain civil disputes, such as family matters, can be highly personal to the parties. Therefore, divulging personal and vulnerable information online may be uncomfortable for some people.⁴]

✓ ✗ I have provided one difficulty faced by people in RRR areas in the civil justice system.¹

✓ ✗ I have provided information about my chosen difficulty.²

✓ ✗ I have provided a second difficulty faced by people in RRR areas in the civil justice system.³

✓ ✗ I have provided information about my chosen difficulty.⁴

✓ ✗ I have used paragraphs to organise my response.

  I have used signposting in my response, such as 'One difficulty' and 'another difficulty'.

  I have used connecting words, such as 'As a result' and 'Furthermore'.

11. [One difficulty Belly may face in the civil justice system is trouble affording an appeal of a decision, considering she is on the verge of bankruptcy.¹] [In order to file for an appeal in a higher court when a party believes the decision made by the judge at first instance was incorrect, a plaintiff or defendant must pay for the filing fee of doing so, which can be significant.²] [Therefore, given her financial circumstances, if Belly is unsatisfied with the outcome of her civil dispute she may be unable to challenge it in an appeal.³]

[Additionally, a second difficulty Belly may experience is difficulty accessing legal advice, considering she lives in a regional town in Victoria.⁴] [National data suggests a majority of practising solicitors do not practice in rural areas, therefore, it may be difficult for people in such regions to find a lawyer.⁵] [Considering Belly's civil dispute is between her and customers of her pie shop, who are likely members of the same regional town she lives in, the few lawyers that are available may already be representing the customer plaintiffs. Hence, these lawyers would be unable to offer advice to Belly due to conflict of interest issues.⁶]

  I have provided one difficulty Belly may face in the civil justice system.¹

  I have provided information about my chosen difficulty.²

  I have provided an example from the scenario and linked it to my chosen difficulty.³

  I have provided a second difficulty Belly may face in the civil justice system.⁴

  I have provided information about my chosen difficulty.⁵

  I have provided an example from the scenario and linked it to my chosen difficulty.⁶

  I have used paragraphs to organise my response.

  I have used signposting in my response, such as 'One difficulty' and 'a second difficulty'.

  I have used connecting words, such as 'Therefore' and 'Additionally'.

Extended response

12. Strengths: I; IV
Limitations: II; III
13. [Considering Susannah is living in a rural area and is of a low socioeconomic status, it may be difficult for the principles of justice to be achieved in her civil dispute. However, certain policies, procedures, and institutions that exist in the civil justice system can counteract the difficulties Susannah may experience, helping achieve the principles of justice.¹]

[Firstly, the principle of access may be limited by the fact that Susannah lives in a rural area and, therefore, may experience difficulties in seeking legal advice due to the lack of legal aid services and practising solicitors in rural areas.²] [As a result, she may be unable to understand her civil rights or gain representation to seek damages against the manufacturer of her knee implant.³]

[However, the principle of access can be upheld as Susannah may be able to gain free legal advice online through her computer, considering several community legal centres (CLCs) and legal aid services publish their information online or have features whereby people can call or email them.⁴] [This can allow Susannah to better understand her legal rights and possibly join the class action, therefore enabling her to access possible compensation for the loss she endured as a result of the implant.⁵]

[Secondly, the principle of fairness is achieved by the fact that Susannah can join the class action being filed against the knee implant manufacturer.⁶] [By joining a class action, the financial burdens of initiating civil action against a defendant are removed as the lead plaintiff typically bears the cost of initiating the civil claim. This promotes a fair outcome for participants if everyone is able to gain compensation for a loss they all endured.⁷] [Despite this, Susannah's low socioeconomic status and noted lack of education, having dropped out of school in year 10, may prevent her from understanding how to access this class action, limiting fairness if she is unable to receive a just outcome for the breach of rights she has endured.⁸]

[Overall, Susannah's low socioeconomic status and the fact she lives in a remote region of Victoria may act as barriers to the achievement of access and fairness. However, if she is able to access free advice online, allowing her to enter into the class action against the implant manufacturer, justice may be achieved for Susannah.⁹]

  I have provided an introduction to summarise my answer to the question.¹

  I have provided one way the principle of access is limited in Susannah's case.²

  I have provided information about my chosen way the principle of access is limited.³

  I have provided one way the principle of access is achieved in Susannah's case.⁴

  I have provided information about my chosen way the principle of access is achieved.⁵

  I have provided one way the principle of fairness is achieved in Susannah's case.⁶

  I have provided information about my chosen way the principle of fairness is achieved.⁷

  I have provided one way the principle of fairness is limited in Susannah's case.⁸

  I have provided a conclusion to my response that links back to the question.⁹

  I have used paragraphs to organise my response.

  I have used signposting in my response, such as 'Firstly' and 'Secondly'.

  I have used connecting words, such as 'However' and 'As a result'.

Linking to previous learning

14. [Mediation refers to a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.¹] [Mediation is considered a low-cost alternative to parties settling a dispute in the courts, as it can often be completed without parties having to engage lawyers, and does not require a judge or jury to adjudicate the case as the parties themselves decide on the final resolution to their dispute.²] [Therefore, for people of low socioeconomic status, mediation can increase access to justice and promote the resolution of their dispute as they are not restricted by the cost of legal representation and court fees.³]

☒ ☐ I have defined the term 'mediation'.¹

☒ ☐ I have provided information about mediation.²

☒ ☐ I have provided information about how mediation may help overcome the difficulties faced by people of low socioeconomic status.³

☒ ☐ I have used connecting words, such as 'Therefore'.

9A Purposes of remedies

Check your understanding

- B. False. **Explanation:** The role of remedies is to return the plaintiff to their original position before the civil breach occurred.
- D. **Explanation:** Rehabilitating an offender is a purpose of criminal sanctions, but is not a purpose of remedies.
- Recognising the rights of the **plaintiff** through the award of a remedy provides a sense of justice and helps restore their faith in the legal system.
- A. **Explanation:** Whilst Mercedes was successful in receiving a remedy, therefore having their rights upheld, they were unable to be returned to their original position due to the severity of their injuries.
- A **remedy** is the outcome of a civil trial that affirms a plaintiff's civil rights where the defendant is found **liable**.
- C. **Explanation:** The primary purpose of remedies is to return the plaintiff to their original position before the civil breach occurred.

Preparing for exams

Standard exam-style

- [A remedy is a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant.¹] [If a defendant is found liable, a remedy is provided at the conclusion of the civil dispute to affirm the plaintiff's civil rights.²]
☒ ☐ I have provided a definition of the term 'remedy'.¹
☒ ☐ I have provided information about remedies.²
- [One purpose of remedies is to return the plaintiff to their original position before the civil breach occurred.¹] [Another purpose of remedies is to uphold the plaintiff's rights.²]
☒ ☐ I have identified one purpose of remedies.¹
☒ ☐ I have identified a second purpose of remedies.²
☒ ☐ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.
- [One purpose of remedies that could be achieved in Kurt's case if a remedy is awarded is upholding the plaintiff's rights.¹] [By awarding a remedy, the court would be acknowledging that Kurt has been wronged and his rights have been violated by Rachel.²] [Recognising the plaintiff's rights through the award of a remedy can provide a sense of justice and closure to Kurt, helping restore his faith in the legal system.³]
☒ ☐ I have identified one purpose of remedies in Kurt's case.¹
☒ ☐ I have provided information about my chosen purpose.²
☒ ☐ I have provided further information about my chosen purpose.³
☒ ☐ I have used signposting in my response, such as 'One purpose'.

Extended response

10. C

- [Remedies can achieve their purposes in Blaine's case to a moderate extent, as he was awarded damages for the civil wrong against him, although they were insufficient to properly compensate him for his loss.¹]

[One purpose of remedies that has been achieved in Blaine's case is upholding the plaintiff's rights as the judge was able to recognise that Blaine had his rights breached by the stage manager. Consequently, Blaine could have potentially been provided with a sense of justice.²]

[However, since the amount of money received was less than the loss Blaine suffered, he was not adequately restored to his original position before the breach occurred.³] [As Blaine's loss of income and medical expenses cost over \$1000, receiving only \$100 from the courts was insufficient to achieve the main purpose of remedies, which is to restore the plaintiff to their original position.⁴]

[Furthermore, since the amount of damages awarded was so insignificant, this would not serve to deter other people from committing a similar breach and other stage managers may not take extra care to move costumes and props.⁵]

[Thus, the purposes of remedies are not fully achieved in Blaine's case.⁶]

☒	☐	I have provided an introduction to summarise my answer to the question. ¹
☒	☐	I have provided one purpose of remedies that has been achieved in Blaine's case. ²
☒	☐	I have provided one purpose of remedies that has not been achieved in Blaine's case. ³
☒	☐	I have provided information about my chosen purpose. ⁴
☒	☐	I have provided a second purpose of remedies that has not been achieved in Blaine's case. ⁵
☒	☐	I have provided a conclusion to my response that links back to the question. ⁶
☒	☐	I have used paragraphs to organise my response.
☒	☐	I have used signposting in my response, such as 'One purpose'.
☒	☐	I have used connecting words, such as 'Consequently' and 'However'.

Linking to previous learning

- [One purpose of remedies is to deter other people from committing civil breaches.¹] [If Brittany was ordered by the court to pay Artie a large sum of money, this may serve to deter others from online bullying and defamation.²] [This helps deter potential wrongdoers from engaging in similar conduct and promotes a safer and more just society.³]
☒ ☐ I have identified one purpose of remedies relevant to the scenario.¹
☒ ☐ I have provided an example from the scenario and linked it to my chosen purpose of remedies.²

- ✓ ✗ I have provided information about my chosen purpose of remedies.³
- ✓ ✗ I have used signposting in my response, such as 'One purpose'.

9B Types of remedies

Check your understanding

- Damages: II; IV
Injunctions: I; III
- A; C; D. **Explanation:** Nominal damages do not fall within the category of compensatory damages as their aim is not to compensate the plaintiff but rather, to uphold the plaintiff's rights and establish that the civil breach they incurred was wrong.
- A. True. **Explanation:** Injunctions aim to remedy breaches that have already occurred and prevent breaches that may occur in the future.
- C. **Explanation:** The medical costs and loss of work resulting from a broken arm can be compensated by specific damages. However, general damages, not specific damages, compensate for pain and suffering.
- Injunctions are **court orders** compelling a party to do something, or preventing a party from doing something. They aim to either remedy a past civil breach or prevent potential civil breaches from occurring.
- B. **Explanation:** The main purpose of damages is to return the plaintiff to their original position, for example providing money to compensate a plaintiff for a medical injury or loss of wages as they cannot work while injured.

Preparing for exams

Standard exam-style

- [One reason why a plaintiff may be seeking damages is to compensate for a loss.¹][Damages aim to compensate for tangible loss, such as loss of wages, or intangible loss, such as pain and suffering caused by a civil breach.²]
- ✓ ✗ I have identified one reason why a plaintiff may seek damages.¹
- ✓ ✗ I have provided information about damages.²
- ✓ ✗ I have used signposting in my response, such as 'One reason'.
- [An injunction is a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action.¹][One purpose of an injunction, more specifically a mandatory injunction, is to change the situation to benefit the plaintiff.²][Mandatory injunctions force the defendant to complete an action that benefits the plaintiff by stopping a breach or preventing a potential breach, thus aiming to return the plaintiff to their original position before their rights were infringed.³]

- ✓ ✗ I have provided a definition of the term 'injunction'.¹
- ✓ ✗ I have provided information about injunctions.²
- ✓ ✗ I have provided further information about injunctions.³
- ✓ ✗ I have used signposting in my response, such as 'One purpose'.

- [Injunctions are a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action.¹][On the other hand, damages are a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.²][One key difference between injunctions and damages is that damages include payment of money to the plaintiff, whereas, injunctions do not.³]

- ✓ ✗ I have defined injunctions.¹
- ✓ ✗ I have defined damages.²
- ✓ ✗ I have provided one key difference between injunctions and damages.³
- ✓ ✗ I have used signposting in my response, such as 'One key difference'.
- ✓ ✗ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

- [The most appropriate remedy for Jacob to seek in this instance is a restrictive injunction.¹][Restrictive injunctions aim to prevent the defendant from acting in a way that could cause harm and breach the plaintiff's rights.²][Due to the fact the extension has not yet been built, a restrictive injunction would prevent the extension from being built and protect Jacob's right to enjoy his property.³]

- ✓ ✗ I have identified an appropriate civil remedy for Jacob.¹
- ✓ ✗ I have provided information about my chosen remedy.²
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen remedy.³

Note: 'Damages' is not an appropriate answer to this question.

Extended response

- True: I; III
False: II; IV
 - [I agree with this statement as the main purpose of damages is to return the plaintiff to their original position before the civil breach occurred.¹][In Rebel Wilson's dispute, the purpose of the remedy was to compensate her for the loss of income and reputational damage caused as a result of the defamatory publication.²]
- [In this dispute, damages are more appropriate than an injunction for several reasons. Firstly, an injunction would have required the defendant, Bauer Media, to stop publishing false information about Rebel Wilson.³][However, given the damage had already occurred and the false information had been widely disseminated, an injunction would not have been an effective remedy to address the harm already suffered by Wilson, or to restore her to the position she was in prior to the material being published.⁴]

[Secondly, damages provide a more tangible and measurable form of compensation for the harm suffered by Wilson.⁵][In this dispute, the specific damages awarded were meant to compensate Wilson for the loss of acting roles as a result of the defamatory publication. This loss could be calculated and quantified, making it more appropriate than an injunction.⁶]

✓ ✗ I have stated whether I agree or disagree with the statement, and why.¹

✓ ✗ I have provided information about damages and linked it to the scenario.²

✓ ✗ I have provided one reason why damages are more appropriate than an injunction.³

✓ ✗ I have provided information about my chosen reason.⁴

✓ ✗ I have provided a second reason why damages are more appropriate than an injunction.⁵

✓ ✗ I have provided information about my chosen reason.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

✓ ✗ I have used connecting words, such as 'However'.

13. Strengths: I; II; V

Limitations: III; IV; VI

14. [Damages are able to achieve their purposes to a moderate extent, but there are limitations to their ability to achieve each purpose completely.¹]

[One purpose of damages is to return the plaintiff to their original position.²][Compensatory damages can wholly or partially compensate the plaintiff for their actual losses, such as medical bills, lost income, property damage, pain, and suffering.³][However, the amount of compensation awarded for intangible consequences of a civil breach may not fully reflect the extent of harm suffered by the plaintiff, as quantifying pain and suffering can be difficult.⁴]

[Another purpose of damages is to uphold the plaintiff's rights.⁵][Even in cases where the damages awarded are minimal, or where the plaintiff is seeking nominal damages, the court's decision to award such compensation acknowledges the plaintiff's right to a legal remedy and upholds their right to seek justice for a violation of their rights.⁶][Although, in some cases, the harm suffered by the plaintiff may be so significant that damages cannot fully restore their rights, such as in the case of wrongful death.⁷]

[A third purpose of damages is to deter others from civil breaches.⁸][In some cases, the defendant's actions may have been intentional or reckless, and damages awarded can deter others from enacting similar behaviour in the future.⁹][There is no guarantee that damages will deter others from enacting harmful behaviour, especially if they perceive the potential risk of the behaviour to be outweighed by the benefits, or if they are unaware of the risk of being sued for damages.¹⁰]

[Therefore, while damages are somewhat able to achieve their purposes, there are some limitations to this ability.¹¹]

✓ ✗ I have provided an introduction to my response to summarise my answer to the question.¹

✓ ✗ I have identified one purpose of damages.²

✓ ✗ I have provided a strength of damages in achieving my chosen purpose.³

✓ ✗ I have provided a limitation of damages in achieving my chosen purpose.⁴

✓ ✗ I have identified a second purpose of damages.⁵

✓ ✗ I have provided a strength of damages in achieving my chosen purpose.⁶

✓ ✗ I have provided a limitation of damages in achieving my chosen purpose.⁷

✓ ✗ I have identified a third purpose of damages.⁸

✓ ✗ I have provided a strength of damages in achieving my chosen purpose.⁹

✓ ✗ I have provided a limitation of damages in achieving my chosen purpose.¹⁰

✓ ✗ I have provided a conclusion to my response that links back to the question.¹¹

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

✓ ✗ I have used connecting words, such as 'However' and 'Although'.

Linking to previous learning

15. [A fine is a sanction that requires the offender to make a monetary payment as a penalty for a criminal offence.¹][On the other hand, damages refer to a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach.²][One key difference between fines and damages is that the plaintiff will receive the damages in a civil dispute, if they are awarded, whereas the money paid by an offender for a fine goes to the state.³]

✓ ✗ I have defined fines.¹

✓ ✗ I have defined damages.²

✓ ✗ I have provided one key difference between fines and damages.³

✓ ✗ I have used signposting in my response, such as 'One key difference'.

✓ ✗ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

10A An introduction to human rights

Check your understanding

- A. **Explanation:** Human rights apply to everyone regardless of their age or working status.
- A; B; D. **Explanation:** The right to education would be considered a human right, however, tertiary education would not be considered one as it is optional. Financial assistance from the government is also not necessarily a human right if an individual's wages already sufficiently provide them with food, water, and shelter.
- B. False. **Explanation:** According to Amnesty International, Australia violates human rights in several regards. For example, its lack of climate action violates Torres Strait Islander peoples' rights to enjoy their culture.
- B. **Explanation:** Although the establishment of the United Nations in 1948 was a significant moment in the development of human rights, this is not the point in which the broad concept of human rights was first considered.
- B. False. **Explanation:** The UDHR cannot be signed or ratified by any countries as it is a declaration. Therefore, its articles are only legally binding when enshrined in Australia's law through the process whereby State or Commonwealth Parliaments create laws protecting the Declaration's human rights.
- A. **Explanation:** The *Race Discrimination Act 1975* (Cth) was created by the Commonwealth Parliament, not the Victorian Parliament. It upholds Article 7 of the UDHR by ensuring the right to equality before the law regardless of race.
- A. **Explanation:** The UDHR is not legally binding on countries unless a country has created its own legislation that enshrines in the country's law each article of the Declaration. Furthermore, the UDHR is challenged by cultural differences as some argue that global standards cannot be created that apply to everyone whilst respecting religious identity.
- B. False. **Explanation:** Although many of the events contributing to human rights development that were discussed in this lesson occurred in America and England, the developments that occurred in these countries broadly created society's perception of human rights, making human rights also applicable to Australian citizens.

Preparing for exams

Standard exam-style

- [Human rights are entitlements and liberties that exist for all human beings, irrespective of any personal qualities and characteristics.¹] [In democratic societies, human rights that governments aim to protect include civil, political, economic, social, and cultural rights.²]

☒ ☐ I have defined the term 'human rights'.¹

☒ ☐ I have provided information about human rights.²
- [One human right in Australia is the right to non-discrimination on the basis of race.¹] [Another right in Australia is the right to equality regardless of gender.²]

☒ ☐ I have defined the term 'human rights'.¹

☒ ☐ I have provided information about human rights.²

☒ ☐ I have identified one human right in Australia.¹

☒ ☐ I have identified a second human right in Australia.²

☒ ☐ I have used signposting in my response, such as 'One human right' and 'Another right'.

- [The *Universal Declaration of Human Rights* (UDHR) is significant because, although it is not legally binding on countries, it has acted as an origin point for several other international treaties or conventions that have come into force since the UDHR was created.¹] [Examples of these international conventions or treaties that have been created since the UDHR's establishment include the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and the *Convention on the Rights of the Child* (1989).²] [These conventions or treaties may be able to be signed or ratified by parties, unlike the UDHR, therefore allowing countries to create legislation that upholds human rights principles set out in each of these conventions, such as the *Sex Discrimination Act 1984* (Cth).³]

☒ ☐ I have provided one reason why the *Universal Declaration of Human Rights* is significant.¹

☒ ☐ I have provided information about my chosen reason.²

☒ ☐ I have provided further information about my chosen reason.³

- [One event that led to the development of human rights was the creation of the English Bill of Rights in 1689.¹] [This was an Act of the English Parliament and was significant because it established principles of free elections, freedom of speech within parliament, and just treatment by the courts.²] [Another event that developed human rights was the British Parliament's abolition of slavery in 1833.³] [The *Slavery Abolition Act 1833* was an Act that abolished slavery in most British colonies, resulting in more than 800,000 enslaved Africans being freed. This led to greater racial equality and justice.⁴]

☒ ☐ I have identified one event that contributed to the development of human rights.¹

☒ ☐ I have provided information about my chosen event.²

☒ ☐ I have identified a second event that contributed to the development of human rights.³

☒ ☐ I have provided information about my chosen event.⁴

☒ ☐ I have used signposting in my response, such as 'One event' and 'Another event'.

Extended response

- Strengths: I; IV; V
Limitations: II; III
- [The *Universal Declaration of Human Rights* (UDHR) sets out a number of human rights that everyone is theoretically entitled to and can protect human rights to a certain extent. However, in practice, the document itself is unable to ensure everyone is provided with these rights and arguably reflects a Western idea of 'human rights'.¹]

☒ ☐ I have identified one event that contributed to the development of human rights.¹

☒ ☐ I have provided information about my chosen event.²

☒ ☐ I have identified a second event that contributed to the development of human rights.³

☒ ☐ I have provided information about my chosen event.⁴

☒ ☐ I have used signposting in my response, such as 'One event' and 'Another event'.

[One strength of the UDHR is that it has acted as the origin point of several international treaties and conventions that have come into force since 1948.²] [Many of these conventions and declarations that the UN has created since the UDHR's establishment can be signed or ratified by Member States, therefore encouraging or requiring individual States to create their own laws that protect human rights in order to ratify the human rights treaties that the UDHR inspired.³] [Although, one limitation of the UDHR is that it is not legally binding, meaning citizens or governments will not face legal consequences for failing to uphold the principles set out in a declaration.⁴] [For example, if a country had not established legislation ensuring equal wages are provided to both men and women for the same work, unequal pay could occur in that country and the UN would have no ability to sanction the government for violating human rights to equality, unless the country had ratified a convention specifically related to ensuring equal rights for women.⁵]

[Another strength of the UDHR is that it has been translated into 337 different languages, indicative of its worldwide significance as governments from across the world are all able to comprehend the Declaration and implement the text accordingly.⁶] [However, although a number of countries may understand the Declaration, they may not implement it in their law due to cultural challenges, as the UDHR has been criticised for reflecting a Western, Judea-Christian perception of human rights, failing to consider other cultures and religious views.⁷]

[Ultimately, the UDHR is an effective way of setting international expectations of human rights and which rights should be legally protected by governments. However, the Declaration is limited in some ways and is not able to completely protect all human rights.⁸]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have identified one strength of the UDHR in protecting human rights.²

✓ ✗ I have provided information about my chosen strength.³

✓ ✗ I have identified one limitation of the UDHR in protecting human rights.⁴

✓ ✗ I have provided information about my chosen limitation.⁵

✓ ✗ I have identified a second strength of the UDHR in protecting human rights.⁶

✓ ✗ I have identified a second limitation of the UDHR in protecting human rights.⁷

✓ ✗ I have provided a conclusion to my response that links back to the question.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One strength' and 'Another strength'.

✓ ✗ I have used connecting words, such as 'Although' and 'However'.

✓ ✗ I have identified one role of the jury in a civil dispute.¹

✓ ✗ I have provided information about my chosen role.²

✓ ✗ I have used signposting in my response, such as 'One role'.

- b. [Human rights have existed and been in development for the past thousands of years, such as the right to trial by jury which was established in 1215 by the Magna Carta.¹] [This right was initially developed when barons in England made the King sign a document containing many human rights they wanted to have, such as the right to trial by one's peers.²] [In the 1700's, when the United States Bill of Rights was created, this right to trial by jury was further developed as it was a principle enshrined in the US Constitution.³]

✓ ✗ I have provided one way human rights have developed over time.¹

✓ ✗ I have provided one example of the right to trial by jury being developed over time.²

✓ ✗ I have provided a second example of the right to trial by jury being developed over time.³

10B Australia's protection of human rights - the Constitution

Check your understanding

- B. False. **Explanation:** Unlike other legislation in Australia, which can be amended with the approval of a majority of parliament, the Constitution and the rights enshrined in it can only be changed if a successful referendum occurs.
- B. **Explanation:** Express rights are the rights explicitly enshrined in the Constitution. There are five express rights in the Australian Constitution.
- The protection of freedom of religion is an **express right**, whereas freedom of political communication is an **implied right** preserved by the Constitution.
- B. False. **Explanation:** The principle of representative government upholds the rights of the majority in society, as politicians may fear they could be voted out of power if they do not conform to the views of the majority. Unpopular minorities have little role in influencing the laws created by parliament regarding human rights.
- B. **Explanation:** One of the express rights enshrined in the Australian Constitution is the right to freedom of religion, which would be infringed upon if legislation was created that banned certain religious practices.
- C. **Explanation:** There is an implied right to freedom of political communication that the High Court has determined as being a protection the Constitution intended to enshrine. Therefore, legislation banning people from talking about a politician's performance on social media would not be constitutionally valid.
- The **separation of powers** is the system in which the government is divided into three different branches; the judiciary, the legislative, and the executive.

Linking to previous learning

15. a. [One role of the jury in a civil dispute is to listen to the evidence and submissions presented by the plaintiff and defendant as they provide witnesses or physical evidence to support their case.¹] [When listening to the relevant evidence, a jury must be objective and make a decision on whether the defendant is liable for the civil breach based on the facts, not personal bias.²]

8. A; B; D; E. **Explanation:** The protection of women's and LGBTQIA+ rights is set out in regular legislation made by the Parliament, such as the *Sex Discrimination Act 1984*. These protections are not contained in the Constitution.

Preparing for exams

Standard exam-style

9. [An implied right is a right that is not explicitly outlined in the Australian Constitution but has been interpreted by the High Court to exist.¹] [The High Court has interpreted freedom of communication on political issues as an implied freedom within the Constitution. Therefore, critiques of politicians may be protected under this freedom.²]

✓ ✗ I have provided the definition of the term 'implied right'.¹

✓ ✗ I have provided an example of an implied right.²

10. [One limitation of express rights is that laws breaching express rights operate until the legislation is challenged in the High Court. Challenging a piece of legislation in the High Court requires a party to have the standing to take this legal action.¹] [Bringing a claim to the High Court can be costly and time-consuming for a party, which may prevent people from challenging legislation, causing laws which impede on these express rights to continue in force as a result.²]

✓ ✗ I have identified and described one limitation of express rights as a means of protecting human rights.¹

✓ ✗ I have provided information about my chosen limitation of express rights.²

✓ ✗ I have used signposting in my response, such as 'One limitation'.

11. [One of the structural protections enshrined by the Constitution is the separation of powers. The separation of the judicial branch of power from the executive and legislature branches ensures judges make independent decisions regarding whether legislation is constitutionally invalid, allowing laws that infringe upon express or implied rights to be declared invalid.¹] [The separation of powers also ensures that law-makers in parliament cannot decide who has broken the law, even if it is politically popular to do so. Therefore, all accused people have their right to a trial by a judge protected.²] [The system of a representative government is also a structural protection upheld by the Constitution. As a result of parliament being elected by the people, law-makers are less likely to make laws that could infringe upon people's rights.³]

✓ ✗ I have provided one way structural protections uphold human rights in Australia.¹

✓ ✗ I have provided a second way structural protections uphold human rights in Australia.²

✓ ✗ I have provided a third way structural protections uphold human rights in Australia.³

✓ ✗ I have used signposting in my response, such as 'One of'.

✓ ✗ I have used connecting words, such as 'Therefore'.

12. [One strength of the system of representative government is that law-makers are likely to pass laws that protect the rights valued by the majority of voters, in order to continue gaining votes during elections and remain in their positions of political power.¹] [For example, Australian society broadly began to prioritise women's rights in the 1980's. Therefore, in 1984, the *Sex Discrimination Act* was passed to align with the views of the majority of society and better uphold women's rights.²]

[However, one limitation of representative government is that voters make decisions based on the views of the majority. Therefore, minorities are often unable to have their rights protected as politicians may see little political benefit in doing so.³] [For example, asylum seekers and refugees have restricted rights in Australia and are allowed to be detained indefinitely. Law-makers are not acting to address this issue because asylum seekers are a minority in Australia.⁴]

✓ ✗ I have provided one strength of the principle of representative government in protecting human rights.¹

✓ ✗ I have provided information about my chosen strength.²

✓ ✗ I have provided one limitation of the principle of representative government in protecting human rights.³

✓ ✗ I have provided information about my chosen limitation.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One strength' and 'one limitation'.

✓ ✗ I have used connecting words, such as 'However' and 'Therefore'.

Extended response

13. Strengths: I; IV
Limitations: II; III

14. [The Australian Constitution protects human rights in Australia to a moderate extent as, although the rights of the majority are typically protected by the Constitution, minorities have a tendency to have their rights ignored.¹]

[One strength of the Australian Constitution is that human rights are protected through express rights. In order to change the Constitution and remove any of the five express rights, a successful referendum would need to occur which is a difficult and lengthy process, preventing these rights from being easily removed.²] [Another strength of the Constitution is that the separation of powers ensures judges are independent in determining whether legislation is constitutionally valid, which can allow the rights set out in the Constitution to be upheld in legislation.³]

[However, one limitation of the Constitution in protecting human rights is that members of unpopular or disadvantaged minorities, such as asylum seekers, are usually ignored by parliament as the system of representative government serves to protect the rights of the majority.⁴] [Another limitation is that a law breaching an express right can be in operation until it is challenged in the High Court, requiring a party with standing to take legal action, which is a costly and time-consuming process.⁵]

[Overall, although the Australian Constitution protects rights through express rights and the representative government, the power of the Constitution to protect the rights of all Australians is limited in a number of ways⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one strength of the Constitution as a means of protecting human rights in Australia.²

✓ ✗ I have provided a second strength of the Constitution as a means of protecting human rights in Australia.³

✓ ✗ I have provided one limitation of the Constitution as a means of protecting human rights in Australia.⁴

✓ ✗ I have provided a second limitation of the Constitution as a means of protecting human rights in Australia.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One strength' and 'Another strength'.

✓ ✗ I have used connecting words, such as 'However' and 'Overall'.

15. Strengths: I; II
Limitations: III; IV

16. [Express rights protect the human rights of Australians to a certain extent, however, due to the fact that there are only five express rights, the protection these rights provide is limited.¹]

[One express right set out in s 92 of the Constitution is the right to free interstate trade, commerce, and intercourse.²] [One strength of this express right is that it ensures the Commonwealth and state parliaments cannot pass laws that restrict the movement of goods between states. This is beneficial for Australian businesses as it ensures states cannot put high taxes on the goods produced by businesses in other states.³] [However, the High Court's interpretation of this express right is limited. As long as a law is created for a legitimate purpose, and only has the side-effect of restricting movement between states, it is still likely to be valid. Therefore, laws could be made that bar people from entering a state and, as long as the law barring people is non-discriminatory and serves a legitimate purpose, it would still be valid.⁴]

[Another express right is freedom of religion under s 116 of the Constitution.⁵] [One strength of this right is that it prevents the Commonwealth from imposing a religion on any individual, providing each Australian citizen with autonomy to choose their own religion.⁶] [Although a limitation of this right is that it applies to the Commonwealth's law-making powers but not the state's. Therefore, it would be constitutionally valid for state parliaments to introduce a law limiting freedom of religious practices.⁷]

[A final overall disadvantage of express rights is that there are only five, unlike the more extensive list of human rights protected by the Constitution of countries with a Bill of Rights, which Australia has not adopted.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have used a topic sentence to identify one express right.²

✓ ✗ I have provided one strength of my chosen express right in protecting Australians.³

✓ ✗ I have provided one limitation of my chosen express right in protecting Australians.⁴

✓ ✗ I have used a topic sentence to identify a second express right.⁵

✓ ✗ I have provided one strength of my chosen express right in protecting Australians.⁶

✓ ✗ I have provided a second limitation of my chosen express right in protecting Australians.⁷

✓ ✗ I have provided a general limitation of express rights in protecting Australians.⁸

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One express right' and 'One strength'.

✓ ✗ I have used connecting words, such as 'However' and 'Therefore'.

Linking to previous learning

17. a. [One role of the jury in a criminal trial is to carefully consider the evidence presented and weigh it against the legal standards set out by the judge in their instructions.¹] [The jury must make their decision based solely on the evidence presented in court and not on any outside information or biases.²] [This ensures the accused person is given a fair and impartial trial and that justice is served.³]

✓ ✗ I have identified one role of the jury in a criminal trial.¹

✓ ✗ I have provided information about my chosen role.²

✓ ✗ I have provided further information about my chosen role.³

✓ ✗ I have used signposting in my response, such as 'One role'.

b. [Under section 80 of the Australian Constitution, Australians are guaranteed the right to trial by jury for Commonwealth indictable offences. One strength of this express right in upholding human rights is that it guarantees the Commonwealth cannot legislate to have Commonwealth indictable offences tried by a judge alone, which can ensure trials are fair.¹]

[However, this right is limited in several ways. Firstly, most criminal offences are created by state laws, not Commonwealth law, therefore banning the Commonwealth from creating indictable offences tried by a judge alone has limited applications.²]

[A second limitation of this express right is that s 80 relates only to indictable offences. Consequently, the Commonwealth can create a law that makes a criminal offence a summary offence instead of an indictable offence. This offence that was declared by law to be a summary offence could, therefore, be tried by a judge alone.³] [Finally, a third limitation is that s 80 of the Constitution can be easily undermined. This is because even if an offence was a very serious criminal offence, the Commonwealth does not have specific standards for categorising offences as 'indictable' or 'summary' offences, therefore this serious offence could still be declared a summary offence.⁴]

- ✓ ✗ I have provided one strength of the express right to trial by jury in protecting human rights.¹
- ✓ ✗ I have provided one limitation of the express right to trial by jury in protecting human rights.²
- ✓ ✗ I have provided a second limitation of the express right to trial by jury in protecting human rights.³
- ✓ ✗ I have provided a third limitation of the express right to trial by jury in protecting human rights.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One strength' and 'Firstly'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Consequently'.

10C Australia's protection of human rights – statute and common law

Check your understanding

- B. False. **Explanation:** Statute law is not the only way rights are protected in Australia. The Australian Constitution protects human rights through express rights and implied rights. However, statute law and common law are also required to guarantee Australians additional human rights protections.
- The human rights protections enshrined in state and federal legislation are examples of rights being protected by **statute law**. On the other hand, **common law** aims to protect human rights by giving meaning to statutes and interpreting them in such a way that is compatible with human rights.
- A. **Explanation:** The Victorian Charter of Human Rights and Responsibilities is a piece of state legislation, not federal legislation.
- B. False. **Explanation:** The Charter enforces bills being passed through the Victorian Parliament to be debated in consideration of human rights. However, an Act may still be passed, and will still be valid, even if it contravenes human rights.
- B; C. **Explanation:** The Charter does not prevent bills from being passed if they violate human rights, it just encourages debate about these rights violations. The Charter also only applies to laws created in the Victorian Parliament, not federal legislation.
- B; D. **Explanation:** The Charter establishes 20 human rights, not five, and does not permit citizens from bringing a case against the Victorian Parliament if a law violating their human rights, as set out in the Charter, is breached.
- A. **Explanation:** One weakness of statute law is that parliament can amend legislation or remove certain laws as long as the majority of parliament approves of the law change, therefore legislation protecting human rights is not always guaranteed to exist for Australians.
- A; B; C. **Explanation:** Australia does not have a Bill of Rights therefore this is not one of the ways human rights are protected in Australia.

Preparing for exams

Standard exam-style

- [One piece of statute law protecting human rights in Australia is the *Racial Discrimination Act 1975* (Cth).¹] [Another statute in Australia that aims to protect human rights is the *Sex Discrimination Act 1984* (Cth).²]
 ✓ ✗ I have identified one piece of statute law in Australia that protects human rights.¹
 ✓ ✗ I have identified a second piece of statute law in Australia that protects human rights.²
 ✓ ✗ I have used signposting in my response, such as 'One piece' and 'Another statute'.
- [One way that common law protects human rights in Australia is through ensuring the courts interpret legislation in a way that upholds human rights.¹] [As established in *Coco v The Queen* (1994), the courts should only interpret legislation in a way that interferes with fundamental human rights if the legislation clearly intended to violate these rights by using unambiguous and unmistakable language.²]
 ✓ ✗ I have provided an example of one way common law protects human rights in Australia.¹
 ✓ ✗ I have provided information about my chosen way common law protects human rights in Australia.²
 ✓ ✗ I have used signposting in my response, such as 'One way'.
- [One role of statute law relating to human rights in Australia is that it establishes where certain discrimination is unlawful, therefore aiming to protect the right to equality of citizens by preventing unfair discrimination.¹] [For example, Acts in Victoria prevent discriminating against a person for reasons such as gender, sexual orientation, or race when considering who to offer employment to.²]
 ✓ ✗ I have identified one role of statute law in protecting the Australian people's human rights.¹
 ✓ ✗ I have provided information about my chosen role of statute law.²
 ✓ ✗ I have used signposting in my response, such as 'One role'.
- [One limitation of the Victorian Charter of Human Rights and Responsibilities (VCHRR) is that it only encourages Victorian Parliament to debate pieces of legislation in consideration of human rights. However, it does not prevent Acts that violate key human rights from being created.¹] [As long as Victorian Parliament, after debating the Statement of Compatibility, still believes a law that may infringe on human rights is appropriate for Victorians, the Act can be passed.²] [For example, it could be argued that the lockdown laws and mandatory vaccinations infringed on human rights, such as the right of bodily autonomy whereby medical procedures require consent. Despite this, these orders were still made.³] [The mandatory vaccinations in Australia demonstrate how the human rights set out in the charter do not necessarily need to be complied with and an Act will not be considered 'void' even if it violates human rights in the Charter.⁴]

- ✓ ✗ I have identified one limitation of the Victorian Charter of Human Rights and Responsibilities in protecting the human rights of Victorians.¹
- ✓ ✗ I have provided information about my chosen limitation of the Victorian Charter of Human Rights and Responsibilities.²
- ✓ ✗ I have provided an example of my chosen limitation of the Victorian Charter of Human Rights and Responsibilities.³
- ✓ ✗ I have provided further information about my chosen limitation of the Victorian Charter of Human Rights and Responsibilities.⁴
- ✓ ✗ I have used signposting in my response, such as 'One limitation'.

Extended response

13. Strengths: I; III
Limitations: II; IV; V

14. [The *Charter of Human Rights and Responsibilities Act 2006* (Vic), aims to ensure human rights are protected in Victoria, however, the Charter is limited in achieving this aim in several ways.¹]

[One way the Charter upholds the human rights of Victorians is that it ensures human rights issues are considered and debated publicly when all proposed legislation is considered in Victoria. This creates a political risk for law-makers who intend to introduce laws breaching human rights, discouraging Ministers from doing so.²] [Another way the Charter protects human rights in Australia is that it enforces obligations onto public authorities in Victoria, ensuring they act compatibly with human rights and consider human rights when making decisions.³] [Victoria Police, for example, are not allowed to use severe and disproportionate force when making an arrest, therefore constraining abuses of power by police authorities.⁴]

[Despite the Charter's ability to protect human rights in some regard, it is limited in protecting human rights in many ways. Firstly, although the VCHRR requires Victorian law-makers to explicitly consider whether new laws violate the Charter's human rights, it does not stop such laws from being created.⁵] [Secondly, the Charter only applies to laws created in Victoria, and has no impact on laws developed in the Commonwealth Parliament.⁶]

[Therefore, the Charter is able to protect human rights in Victoria to a moderate extent, but there are limitations to its ability.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one strength of the Victorian Charter in protecting human rights in Australia.²
- ✓ ✗ I have provided a second strength of the Victorian Charter in protecting human rights in Australia.³
- ✓ ✗ I have provided information about my chosen strength.⁴
- ✓ ✗ I have provided one limitation of the Victorian Charter in protecting human rights in Australia.⁵
- ✓ ✗ I have provided a second limitation of the Victorian Charter in protecting human rights in Australia.⁶

- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁷
- ✓ ✗ I have used signposting in my response, such as 'One way' and 'Another way'.
- ✓ ✗ I have used connecting words, such as 'Firstly' and 'In addition'.

15. Strengths: I; II; IV
Limitations: III; V

16. [Common law and statute law in Australia essentially 'fill in the gaps' left by the lack of human rights expressly stated in the Constitution. However, the ability of these mechanisms to protect human rights is limited in several ways.¹]

[One strength of common law in Australia is that it allows the courts to give meaning to the words in Federal and State legislation and the Constitution to determine whether particular actions do or do not breach human rights. This is beneficial as society changes and new issues, and new scenarios of potential rights abuses arise.²]

[However, it can be expensive and time-consuming for a court to clarify the words of legislation to determine the scope of human rights protections and whether human rights have been breached. Therefore, there are limited opportunities for Australians to assert their rights under common law.³] [Another benefit of common law is that it guides the courts to only interpret legislation in a way that contravenes human rights if the wording of the legislation unmistakably intended to breach human rights. Therefore, the courts will generally aim to protect human rights.⁴]

[Similarly, statute law provides human rights protections but has certain deficiencies. Rights protection can evolve alongside the evolution of society's expectations and values as parliament can create new laws that reflect the desires of Australians for human rights protection.⁵] [Although, one limitation of statute law is that certain communities still remain unprotected by laws in Australia and Victoria. For example, refugees have very limited human rights protections, such as the right to freedom of movement.⁶]

[Furthermore, parliament can choose to amend or eliminate certain statutory protections of human rights, as long as a majority of members of parliament vote to do so, therefore these rights are not permanently guaranteed.⁷]

[Although statute law and common law are limited in their ability to protect Australia's human rights in some regards, they are both always evolving to incorporate new human rights protections as values in society shift, making them an effective tool in protecting rights.⁸]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one strength of common law in protecting human rights in Australia.²
- ✓ ✗ I have provided one limitation of common law in protecting human rights in Australia.³
- ✓ ✗ I have provided a second strength of common law in protecting human rights in Australia.⁴
- ✓ ✗ I have provided one strength of statute law in protecting human rights in Australia.⁵
- ✓ ✗ I have provided one limitation of statute law in protecting human rights in Australia.⁶

✓ ✕ I have provided a second limitation of statute law in protecting human rights in Australia.⁷

✓ ✕ I have provided a conclusion to my response that links back to the question.⁸

✓ ✕ I have used paragraphs and topic sentences to organise my response.

✓ ✕ I have used signposting in my response, such as 'One strength' and 'Another benefit'.

✓ ✕ I have used connecting words, such as 'However' and 'Therefore'.

Linking to previous learning

17. a. [The presumption of innocence is the right for all accused persons to be presumed innocent until it is proven otherwise beyond reasonable doubt.¹] [This is a common law principle, however, it is also now a right protected under section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).²]

✓ ✕ I have provided a definition of the term 'presumption of innocence'.¹

✓ ✕ I have provided information about the term 'presumption of innocence'.²

- b. [The presumption of innocence was previously a common law principle, therefore, judges would implement this presumption and ensure all accused persons receiving a trial were initially assumed innocent, due to precedent binding judges to maintain this principle.¹] [However, the presumption of innocence is now a right protected under section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).²]

✓ ✕ I have provided the role of common law in protecting the right to the presumption of innocence.¹

✓ ✕ I have provided the role of statute law in protecting the right to the presumption of innocence.²

11A The rights of young people

Check your understanding

1. A. **Explanation:** Mobile phones, video games, and bicycles are all items that young people often have, however, they are not guaranteed by the law.
2. A. True. **Explanation:** The Victorian Liberal Party has campaigned and called for the driving age in Victoria to be lowered to 17 years old.
3. B. False. **Explanation:** While Australia has ratified the UNCRC, there is no national bill of young people's rights.
4. Young people often have **difficulty** when advocating for reform in relation to their rights.
5. C. **Explanation:** The *Equal Opportunity Act 2010* (Vic) protects against discrimination in places such as schools.
6. A; B. **Explanation:** Reducing the voting age and increasing the age of criminal responsibility have been publicly campaigned for by high-profile organisations, political parties, and institutions in Australia.
7. A. True. **Explanation:** Australia has not only signed but has also ratified the UNCRC, meaning that Australia has international obligations to uphold the principles and rights outlined in the UNCRC.

Preparing for exams

Standard exam-style

8. [One right of a young person in Australia is the right to healthcare.¹] [Another right of a young person in Australia is the right to a safe and healthy environment.²]

✓ ✕ I have identified one right of a young person in Australia.¹

✓ ✕ I have identified a second right of a young person in Australia.²

✓ ✕ I have used signposting in my response, such as 'One right' and 'Another right'.
9. [One way young people's rights are protected internationally is through the *United Nations Convention on the Rights of the Child* (UNCRC).¹] [This convention has 140 signatory countries and outlines rights that are essential for youth to be raised in a just and healthy environment.²]

✓ ✕ I have identified the *United Nations Convention on the Rights of the Child* (UNCRC).¹

✓ ✕ I have provided information about the UNCRC.²

✓ ✕ I have used signposting in my response, such as 'One way'.
10. [One of the rights of young people is the right to work.¹] [This right is upheld in Victoria through the *Child Employment Act 2003* (Vic).²] [This legislation allows young people to enter the workforce at a minimum of 15 years of age unless the employer holds a special permit.³]

✓ ✕ I have identified one right of a young person in Australia.¹

✓ ✕ I have linked this identified right to a piece of Victorian or Australian legislation.²

✓ ✕ I have provided information on how this legislation operates in relation to the identified right.³

✓ ✕ I have referred directly to relevant legislation in my response.

✓ ✕ I have used signposting in my response, such as 'One of the rights'.

11. a. [The right that will likely be involved in Jordan's case will be the right to a safe and healthy environment.¹]

✓ ✕ I have identified one right that is related to Jordan's case.¹

- b. [One of the rights of young people in Australia is the right to a safe and healthy environment. Alcohol is known to be damaging and potentially dangerous for young people under the age of 18, and therefore, legislation upholding this right, such as the *Liquor Control Reform Act 1998* (Vic), aims to reduce the risk of alcohol exposure for youth.¹] [By doing so, young people may experience better health outcomes, therefore protecting their right to a healthy environment and upbringing.²]

✓ ✕ I have provided information on the right to a safe and healthy environment in relation to Jordan's case.¹

✓ ✕ I have provided information about how this right is important for young people.²

✓ ✕ I have referred directly to relevant legislation in my response.

✓ ✕ I have used signposting in my response, such as 'One of the rights'.

12. [One recommended reform in regards to young people's rights is an increase in funding for the public school system in Australia.¹] [This reform would support and improve the right to an education that young people are offered in Australia by improving facilities, quality of programs, and accessibility.²] [This reform has been supported by groups such as Save Our Schools, the Australian Education Union, and The Greens.³]

✓ ✕ I have identified one recommended reform to young people's rights in Australia.¹

✓ ✕ I have provided information about my chosen reform and linked it to a relevant right of young people.²

✓ ✕ I have provided further information about my chosen reform.³

✓ ✕ I have used signposting in my response, such as 'One proposed reform'.

Extended response

13. A; D; E

14. [Young people in Australia have a right to a safe and healthy environment, and mandatory early education vaccinations can contribute to providing that by stopping or minimising the spread of childhood diseases.¹]

[One argument that supports the need for mandatory early childhood vaccinations is that mandatory vaccinations can help achieve herd immunity, which means that all people in the community, including children, have access to a safe and healthy environment.²][Another argument in support of mandatory early education vaccinations is the fact that the required vaccinations are tested and proven to be effective and are free of charge, so any risks or costs do not outweigh the benefit of children having access to a safe and healthy environment.³]

[However, one argument against mandatory early education vaccinations is that the laws infringe upon a child's bodily autonomy.⁴]

[Overall, the benefits of mandatory early education vaccinations in protecting the right to a safe and healthy environment outweigh any drawbacks of the law.⁵]

✓ ✗ I have identified one right of a young person in Australia and linked it to mandatory early education vaccinations.¹

✓ ✗ I have provided one argument in support of mandatory early education vaccinations and linked it to the identified right.²

✓ ✗ I have provided a second argument in support of mandatory early education vaccinations and linked it to the identified right.³

✓ ✗ I have provided an argument against mandatory early education vaccinations.⁴

✓ ✗ I have provided a conclusion to my response which links back to the question.⁵

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One argument' and 'Another argument'.

Linking to previous learning

15. [One feature of the Victorian Charter of Human Rights and Responsibilities (VCHRR) is the Statement of Compatibility in which the Minister who introduces the bill must outline how their proposed law is compatible with the VCHRR.¹][In this case, the Minister would need to outline how the Open Roads Bill 2061 (Vic) would be in alignment with the VCHRR before this bill could proceed any further.²][As one of the rights in the VCHRR is 'the protection of families and children', it is unlikely that the bill would be compatible with the VCHRR. A statement of incompatibility would be issued and then, this breach would have to be debated in parliament and possibly amended before the law would be passed.³]

✓ ✗ I have identified one feature of the Victorian Charter of Human Rights and Responsibilities (VCHRR).¹

✓ ✗ I have identified how my chosen feature of the VCHRR would affect the Open Roads Bill 2061 (Vic).²

✓ ✗ I have provided further information about how the VCHRR would affect the Open Roads Bill 2061 (Vic).³

11B Rights of young people - Raise The Age campaign

Check your understanding

- A. True. **Explanation:** Raise The Age is an Australian campaign advocating for the age of criminal responsibility to be increased from 10 to 14 years of age. At its core, the campaign argues that the imprisonment of children as young as 10 years can have detrimental cognitive and developmental implications.
- The United Nations Committee on the Rights of the Child has recommended the age of criminal responsibility across all countries should be **14 years of age**.
- A. True. **Explanation:** Those who are against raising the age of criminal responsibility may believe that increasing the age will result in children not being held accountable for their actions and denies victims of justice as no one is considered responsible for their trauma.
- For: I; III; IV
Against: II
- A; B. **Explanation:** Community values in society have shifted towards prioritising the protection of children. Furthermore, ensuring children are not imprisoned at a young age could increase their chances of rehabilitation, therefore protecting society in the future as fewer children are likely to become repeat offenders.
- B; C. **Explanation:** Individuals and organisations that are against raising the age believe that the relatively small number of children that are imprisoned in Australia is insignificant and would therefore, have minimal impact on the future of the country. Furthermore, they believe the procedures currently in place are enough to ensure children are only sent to prison for valid reasons.
- B. **Explanation:** The Raise The Age campaign acknowledges that although children should not be placed in prison, they should be held responsible for their actions. Therefore, it proposes that community-based rehabilitation should be a priority, where childhood trauma and behaviour can be addressed in a safe, culturally appropriate, and supportive environment.

Preparing for exams

Standard exam-style

8. [The age of criminal responsibility is the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges.¹][In Australia, the age of criminal responsibility for all Commonwealth offences is 10 years and older.²]

✓ ✗ I have provided a definition of the term 'age of criminal responsibility'.¹

✓ ✗ I have provided information about the age of criminal responsibility.²

9. [The Raise The Age campaign is an Australian campaign advocating for the age of criminal responsibility to be increased from 10 to 14 years of age.¹][Raise the Age recognises that children as young as 10 are highly vulnerable to the detrimental cognitive and developmental implications associated with imprisonment, therefore advocating for the age of criminal responsibility to be increased.²]

✓ ✗ I have provided information about the Raise The Age campaign.¹

✓ ✗ I have provided further information about the Raise The Age campaign.²

10. [One reason for reform of the age of criminal responsibility in Australia is a shift in community values.¹] [Another reason for increasing the age of criminal responsibility in Australia is to improve the legal system.²]

✓ ✗ I have identified one reason for reform of the age of criminal responsibility in Australia.¹

✓ ✗ I have identified a second reason for reform of the age of criminal responsibility in Australia.²

✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.

11. [One group that has influenced raising the age of criminal responsibility in Australia is Amnesty International, which is one of the nine organisations that developed the Raise The Age campaign.¹] [One way Amnesty International has influenced the age of criminal responsibility debate is by recognising the historical resemblance of separating children from their families and culture through child imprisonment, highlighting the implications of such separation.²] [Moreover, another way Amnesty International has impacted raising the age of criminal responsibility in Australia as a founder of Raise The Age is by advocating for community rehabilitation rather than imprisonment.³]

✓ ✗ I have identified one specific individual or group that has influenced raising the age of criminal responsibility in Australia.¹

✓ ✗ I have provided one way that my chosen individual or group has influenced raising the age of criminal responsibility in Australia.²

✓ ✗ I have provided a second way that my chosen individual or group has influenced raising the age of criminal responsibility in Australia.³

✓ ✗ I have used signposting in my response, such as 'One group' and 'One way'.

✓ ✗ I have used connecting words, such as 'Moreover'.

12. [Although a majority of people in Australia support the reform to increase the age of criminal responsibility in Australia, this support is not unanimous.¹]

[One individual or group in support of raising the age of criminal responsibility is Daniel Andrews, the former Premier of Victoria. Like most of Australia, Andrews has been a strong advocate for the Raise The Age campaign, particularly during his time as premier where he was willing to commit Victoria to raising the age of criminal responsibility regardless of the stance of other states and territories.²] [Another individual or group in favour of raising the age is the Australian Indigenous Doctors' Association which is one of the nine founders of the Raise The Age campaign. This organisation believes that raising the age is a necessary measure to protect vulnerable children from the harm that may be endured from imprisonment.³]

[However, whilst most Australians are supportive of raising the age of criminal responsibility, some individuals and groups are against this decision, including parliamentarians. One argument against raising the age is that the number of children in custody is relatively small and insignificant.⁴] [Furthermore, another reason against raising the age of criminal responsibility is that changing the law does not address various complex factors underlying a child's offences and therefore, does not prevent them from committing future crimes.⁵]

✓ ✗ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹

✓ ✗ I have provided one reason why an individual or group would be in favour of raising the age of criminal responsibility.²

✓ ✗ I have provided a second reason why an individual or group would be in favour of raising the age of criminal responsibility.³

✓ ✗ I have provided one reason why an individual or group would be opposed to raising the age of criminal responsibility.⁴

✓ ✗ I have provided a second reason why an individual or group would be opposed to raising the age of criminal responsibility.⁵

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One individual or group' and 'Another individual or group'.

✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.

13. a. [Cheryl Axelby is the CEO of Change the Record and a First Nations activist for raising the age of criminal responsibility, believing 'the current institutions aren't working' and rather, they drive First Nations peoples 'further into the [criminal justice] system'.¹] [One role of Axelby as an individual influencing the protection of children's rights is to advocate against the imprisonment of children, as she recognises the harmful impacts of imprisonment upon Aboriginal and Torres Strait Islander children, due to the negative implications that separation has had and, continues to have, on their development.²]

✓ ✗ I have provided information about Cheryl Axelby as an individual influencing the protection of children's rights.¹

✓ ✗ I have provided one role of Cheryl Axelby as an individual influencing the protection of children's rights.²

✓ ✗ I have linked my answer to the stimulus material where appropriate.

✓ ✗ I have used signposting in my response, such as 'One role'.

- b. [One reason why the recommendations of the Raise The Age campaign should be implemented in Australia is that it will protect children from the potential harm that imprisonment can cause.¹] [At ages as young as 10, children are highly vulnerable and their cognitive, behavioural, and social development can be largely influenced by the confinement and isolation of imprisonment, which is detrimental to the prevalence of a healthy upbringing.²]

[Another reason why the Raise The Age campaign should be implemented is that it advocates for community-based rehabilitation.³] [Implementing community-based rehabilitation programs and activities, instead of imprisonment, can allow children to address childhood trauma and behavioural issues in a supportive, culturally appropriate, and safe environment. Consequently, this may improve rehabilitation outcomes and minimise the likelihood of children recommitting criminal offences in the future.⁴]

- ✓ ✗ I have identified one reason why the Raise The Age campaign should be implemented in Australia.¹
- ✓ ✗ I have provided information about how my chosen reason would improve the protection and wellbeing of children.²
- ✓ ✗ I have identified a second reason why the Raise The Age campaign should be implemented in Australia.³
- ✓ ✗ I have provided information about how my chosen reason would improve the protection and well-being of children.⁴
- ✓ ✗ I have signposted my response by using 'One reason' and 'Another reason'.
- ✓ ✗ I have used connecting words, such as 'Consequently'.

Extended response

14. For: II; III

Against: I; IV

15. [Despite some opposition towards raising the age of criminal responsibility in Australia, there are greater benefits to the justice system and protection of children if this reform is enacted.¹]
- [One strength associated with raising the age of criminal responsibility in Australia is that society would be able to address the disparity between the crime rates of First Nations and non-Indigenous children, likely improving future prospects for all Australian children.²]
- [Another strength of raising the age is that it would allow young children to avoid imprisonment and its associated cognitive, behavioural, and developmental harms. This can allow more Australian children to grow up in a safe and healthy environment, therefore improving child protection.³]
- [However, a limitation of increasing the age of criminal responsibility in Australia is that victims of crime may feel disregarded and disempowered by the justice system as they believe their child perpetrator is not being held responsible for their crime.⁴]
- [Furthermore, another limitation is that raising the age does not necessarily stop children from committing future crimes as the factors underlying their offences are not addressed.⁵]
- [Overall, despite the potential for reoffending and victim injustice, raising the age of criminal responsibility poses great benefits in regard to child protection and equality, as children, especially First Nations children, can be supported to cognitively and behaviourally develop in a healthy environment. Therefore, it is less likely that such children will be involved in the criminal justice system in future.⁶]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one reason for supporting raising the age of criminal responsibility in Australia.²
- ✓ ✗ I have provided a second reason for supporting raising the age of criminal responsibility in Australia.³
- ✓ ✗ I have provided one reason for opposing raising the age of criminal responsibility in Australia.⁴
- ✓ ✗ I have outlined a second reason for opposing raising the age of criminal responsibility in Australia.⁵
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One strength' and 'Another strength'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.

Linking to previous learning

16. [The Raise The Age campaign is an Australian campaign advocating for the age of criminal responsibility to be increased from 10 to 14 years of age.¹] [The rights of young people are the rights that extend upon baseline human rights to protect people under 18 years of age during their growth into adulthood.²] [The Raise The Age campaign aims to protect the rights of young people by advocating for an increase in the age of criminal responsibility to prevent children from being exposed to the potential developmental and cognitive harm of imprisonment.³]
- ✓ ✗ I have provided information about the Raise The Age campaign.¹
 - ✓ ✗ I have provided information about the rights of young people.²
 - ✓ ✗ I have provided information about the relationship between the Raise The Age campaign and the rights of young people.³

11C The right to vote

Check your understanding

- B. False. **Explanation:** The *Commonwealth Electoral Act 1918* (Cth) outlines that certain people are prohibited from voting, such as those under the age of 18 and individuals who are of unsound mind.
- A; C; D. **Explanation:** In 1973, the voting age was lowered from 21 to 18, not to 16. As of 2023, the voting age in Australia is 18, despite calls for the voting age to be lowered to allow 16 and 17-year-olds to vote.
- Sections 7 and 28** of the Australian Constitution require regular elections for the Senate and House of Representatives, respectively.
- A. True. **Explanation:** As Australians must elect members to represent them on each of the three levels of government, states and territories each have their own legislation to protect voting rights in such elections.

5. A. **Explanation:** Australia's mandatory voting system has been criticised as it forces individuals to vote, even if they do not necessarily want to, or do not feel that those running for election represent their views and values.
6. A; B; D. In Australia, some reforms have been suggested to expand the eligibility criteria to allow certain groups to vote, such as young people aged 16–17 and prisoners. Additionally, other reforms seek to address improving the processes and systems involved in federal elections, such as introducing electronic voting.
7. B. False. **Explanation:** Whilst sections 7 and 24 of the Constitution broadly protect the right to vote, they do not restrict nor specify who can vote, where, and under what conditions. Therefore, the Commonwealth Parliament can reform laws relating to the right to vote, including lowering the voting age or enabling electronic voting.

Preparing for exams

Standard exam-style

8. [One way the Australian Constitution protects the right to vote in federal elections is through sections 7 and 24, which require members of the Commonwealth Parliament to be 'directly chosen by the people'.¹] [Another way is through sections 7 and 28 of the Australian Constitution, which require regular elections for the Senate and House of Representatives, respectively.²]

✓ ✗ I have identified one way the Australian Constitution protects the right to vote in federal elections.¹

✓ ✗ I have identified a second way the Australian Constitution protects the right to vote in federal elections.²

✓ ✗ I have used signposting in my response, such as 'One way' and 'Another way'.

9. [One proposed law reform in relation to the right to vote is to lower the voting age from 18 to 16 years old.¹] [In Australia, the current voting age is 18, although, some believe the voting age should be lowered to 16, as many 16 and 17-year-olds are politically engaged and impacted by governmental decisions, therefore, they should have the right to vote.²] [In recent years, attempts have been made by politicians to lower the voting age by introducing bills into the Australian Parliament. For example, in 2018, the Commonwealth Electoral Amendment (Lowering Voting Age and Increasing Voter Participation) Bill 2018 (Cth) was introduced in the Australian Parliament. The bill sought to lower the voting age to allow 16 to 17-year-olds to vote in federal elections, proposing that voting would not be compulsory for this age group. However, this bill was unsuccessful.³]

✓ ✗ I have provided one proposed law reform in relation to the right to vote.¹

✓ ✗ I have provided information about my chosen law reform.²

✓ ✗ I have provided further information about my chosen law reform.³

✓ ✗ I have used signposting in my response, such as 'One proposed law reform'.

10. [One event that contributed to the development of the right to vote in Australia is that women gained suffrage in 1894.¹] [South Australia became the first electorate in the world to grant equal political rights to both men and women. The remaining colonies followed soon after.²]

[Another event was when Aboriginal and Torres Strait Islander peoples were granted equal voting rights in 1984.³] [Prior to 1984, voting was not compulsory for First Nations peoples, despite it being mandatory for other Australians. Therefore, a significant contribution to the development of the right to vote was the declaration that voting would be mandatory for all Aboriginal and Torres Strait Islander peoples.⁴]

✓ ✗ I have provided one event that contributed to the development of the right to vote in Australia.¹

✓ ✗ I have provided information about my chosen event.²

✓ ✗ I have provided a second event that contributed to the development of the right to vote in Australia.³

✓ ✗ I have provided information about my chosen event.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One event' and 'Another event'.

✓ ✗ I have used connecting words, such as 'Therefore'.

11. [One way Rohaan's right to vote in federal elections is protected in Australia is through statute law, such as the *Commonwealth Electoral Act 1918* (Cth) which is the main statute governing the right to vote in Australia.¹] [This statute sets out the key principles involved in voting in federal elections, such as outlining that it is compulsory for eligible citizens over the age of 18 to vote, including Rohaan who has just turned 18.²]

[Another way the right to vote is protected is through common law, such as the principle established in the case of *Rowe v Electoral Commissioner*.³] [This case restored the number of days available for individuals, such as Rohaan, who is not yet enrolled to vote, to enrol to vote after the calling of a federal election, changing the number of days available to enrol from three to seven. Therefore, Rohaan has seven days to enrol to vote after the calling of the next federal election, rather than three.⁴]

✓ ✗ I have provided one way the right to vote in federal elections is protected in Australia.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have provided a second way the right to vote in federal elections is protected in Australia.³

✓ ✗ I have provided an example from the case study and linked it to my chosen reason.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One way' and 'Another way'.

✓ ✗ I have used connecting words, such as 'Therefore'.

Extended response

12. For: I; III
Against: II; IV

13. [There has been debate in Australia concerning the current paper ballot systems and whether Australia should convert to electronic voting systems.¹]

[One argument for switching to electronic voting is that the current paper voting system is insecure as it relies on the integrity and competence of groups of people who are involved in the movement and storage of ballots, who may make mistakes when manually counting votes.²][However, one argument against this is that paper processes are more verifiable than electronic voting systems because ballot papers can be recounted, whilst an online system would be unlikely to produce any evidence of the correctness of any of the votes.³]

[Furthermore, another argument for switching to electronic voting is that currently, blind voters, or those with a visual impairment, have the option of voting via the assisted telephoning system. However, many do not use this system because the vote is not anonymous and there is no way to ensure the vote has been lodged correctly.⁴]

[However, one argument against this is that trials of remote electronic assisted voting for blind people or individuals with a visual impairment were unsuccessful when conducted in the 2007 federal election.⁵][This is partly due to the low participation experienced during the trials, as well as the high costs involved in the delivery of these solutions.⁶]

[Overall, there are calls for Australia to move to electronic voting systems due to increased reliability and the ability to provide anonymous voting for blind people and those with a visual impairment. However, there are some concerns surrounding the inability to recount ballots using electronic voting systems and the unsuccessful trial conducted in the 2007 federal election.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
-
- ✓ ✗ I have provided one argument for switching to electronic voting.²
-
- ✓ ✗ I have provided one argument against switching to electronic voting.³
-
- ✓ ✗ I have provided a second argument for switching to electronic voting.⁴
-
- ✓ ✗ I have provided a second argument against switching to electronic voting.⁵
-
- ✓ ✗ I have provided information about my chosen argument against switching to electronic voting.⁶
-
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁷
-
- ✓ ✗ I have used paragraphs to organise my response.
-
- ✓ ✗ I have used signposting in my response, such as 'One argument' and 'another argument'.
-
- ✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.
-

Linking to previous learning

14. [The *Universal Declaration of Human Rights* (UDHR) is significant because, although it is not legally binding on states, it is an aspirational document that many states, such as Australia, have sought to incorporate in their law-making systems.¹]

[For example, the UDHR acknowledges the right to vote in Article 21 by recognising that all people have the right to 'take part in the government' of their country.²][Although the UDHR is non-binding, it has influenced Australia's voting system to ensure many Australian citizens can vote and have their say in who is elected to form government.³]

- ✓ ✗ I have provided one reason why the *Universal Declaration of Human Rights* is significant.¹
-
- ✓ ✗ I have provided an example relevant to my chosen reason and linked it to the right to vote.²
-
- ✓ ✗ I have provided information about my chosen reason.³
-

11D The right to vote – Roach v Electoral Commissioner

Check your understanding

- B. False. **Explanation:** *Roach v Electoral Commissioner* reinstated the right to vote for prisoners serving a sentence of less than three years, only protecting the right to vote for prisoners who meet this criteria.
- A; C; D. **Explanation:** Roach argued that the Commonwealth law breached the principle of representative government, protected by ss 7 and 24 of the Constitution, and the implied right to freedom of political communication. Therefore, the Commonwealth had created the law beyond its law-making powers.
- The majority in the High Court **disagreed** with Roach's argument that the Constitution protects the right for all adults serving any term of imprisonment to vote.
- A; B; C. **Explanation:** Restoring the right to vote for some prisoners allowed a significant proportion of First Nations peoples to have their voices heard, whilst also ensuring parliament is 'directly chosen by the people'. Thus, preventing parliament from passing laws beyond its powers.
- A. True. **Explanation:** As an individual with standing, Vickie Roach invested her own time and money to challenge the validity of the law banning all prisoners from voting in Commonwealth elections. By taking the matter to the High Court of Australia, she was able to have the law declared invalid.

Preparing for exams

Standard exam-style

- [One reason for reforming the law regarding the right to vote is to protect First Nations peoples' rights.¹][Another reason is to enhance the principle of representative government.²]
- ✓ ✗ I have identified one reason for reforming the law in relation to the right to vote.¹
-
- ✓ ✗ I have identified a second reason for reforming the law in relation to the right to vote.²
-
- ✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.
-

7. [One individual who protected the right to vote in *Roach v Electoral Commissioner* was Vickie Roach, the woman who challenged the validity of the Commonwealth's 2006 amendment to the *Commonwealth Electoral Act 1918* (Cth) in the High Court of Australia.¹] [Roach was a prisoner at the time the law was passed and therefore, had standing to challenge the law's validity in the High Court. She invested her own time and money to take the matter to the High Court.²] [She was able to have the law declared invalid on various grounds, including that it breached the principle of representative government that is protected by the Australian Constitution. This issue was of particular importance to Vickie, as a Yuin woman, considering the disproportionate effects a blanket ban would have had on the voting rights of First Nations peoples. Roach's actions ultimately enabled the law to be declared invalid.³]

✓ ✗ I have identified one specific individual or group that has protected the right to vote.¹

✓ ✗ I have provided one way my chosen individual or group has protected the right to vote.²

✓ ✗ I have provided information about how my chosen individual or group has protected the right to vote.³

✓ ✗ I have used signposting in my response, such as 'One individual'.

8. [One way *Roach v Electoral Commissioner* protected First Nations rights was by restoring the right to vote for a significant proportion of First Nations people.¹] [The law to ban all prisoners from voting resulted in a large proportion of First Nations peoples losing their right to vote. Many individuals, including Roach, argued that this law was silencing the political voices of Aboriginal and Torres Strait Islander peoples.²] [Therefore, by invalidating this law and ensuring prisoners with sentences of less than three years have the right to vote, this safeguarded an essential right for First Nations individuals who were adversely affected by the legislation.³]

✓ ✗ I have provided one way *Roach v Electoral Commissioner* protected First Nations rights.¹

✓ ✗ I have provided information about my chosen way *Roach v Electoral Commissioner* protected First Nations rights.²

✓ ✗ I have provided further information about my chosen way *Roach v Electoral Commissioner* protected First Nations rights.³

✓ ✗ I have referred to a relevant case example to support my response.

✓ ✗ I have used signposting in my response, such as 'One way'.

✓ ✗ I have used connecting words, such as 'Therefore'.

9. [Protected by ss 7 and 24 of the Australian Constitution, representative government is a system in which Members of Parliament are elected by the people of a community or nation to best represent the needs and views of those people.¹] [The High Court held that a complete ban on all prisoners from voting was unconstitutional as it was inconsistent with the protection of the representative government principle under ss 7 and 24 of the Constitution.²] [The government must be chosen by the substantial majority of the population and thus, the right to vote could only be removed for a significant reason. Subsequently, *Roach v Electoral Commissioner* upheld the principle of representative government by restoring the right to vote for approximately 10,000 prisoners in Australia.³]

✓ ✗ I have defined representative government.¹

✓ ✗ I have provided information about how banning all prisoners from voting breaches the principle of representative government.²

✓ ✗ I have provided information about how *Roach v Electoral Commissioner* upheld the principle of representative government.³

✓ ✗ I have referred directly to the relevant section of the Constitution in my response.

✓ ✗ I have referred to a relevant case example to support my response.

Extended response

10. For: II; III
Against: I; IV

11. [Across Australia, there were various individuals and groups who held differing views as to whether the law banning all prisoners from voting should remain or be declared invalid.¹]

[One argument for the Commonwealth's decision to ban the right to vote for all prisoners was that people who commit an offence serious enough to be punishable by imprisonment and denied their freedom, should forfeit their right to vote.²] [Another argument for the blanket ban was that banning all prisoners from voting in Commonwealth elections deters other individuals within the community from committing similar offences as they would also lose their ability to vote.³]

[Alternatively, one argument against the complete ban was that prisoners serving a sentence of less than three years should be granted the right to vote in federal elections. This is because, upon release into society during a government's term, they should have their say on the government of the time.⁴] [Another argument against the complete ban is that it is discriminatory against First Nations peoples who represent a significant proportion of the prison population.⁵] [At the time of *Roach v Electoral Commissioner*, First Nations peoples accounted for 25% of the prison population. Therefore, the law removed the right to vote for a large proportion of First Nations peoples.⁶]

[Overall, those supporting the Commonwealth law argued that it would adequately punish offenders and deter further offending. Alternatively, arguments against the ban focused on how the law was discriminatory against First Nations peoples and that prisoners should have a say in who is in government at the time of their release.⁷]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one argument for the Commonwealth's decision to ban the right to vote for all prisoners.²

✓ ✗ I have provided a second argument for the Commonwealth's decision to ban the right to vote for all prisoners.³

✓ ✗ I have provided one argument against the Commonwealth's decision to ban the right to vote for all prisoners.⁴

✓ ✗ I have provided a second argument against the Commonwealth's decision to ban the right to vote for all prisoners.⁵

-
- ✓ ✕ I have provided information about my chosen argument against the Commonwealth's decision to ban the right to vote for all prisoners.⁶
-
- ✓ ✕ I have provided a conclusion to my response that links back to the question.⁷
-
- ✓ ✕ I have used paragraphs to organise my response.
-
- ✓ ✕ I have used signposting in my response, such as 'One argument for' and 'one argument against'.
-
- ✓ ✕ I have used connecting words, such as 'Alternatively' and 'Therefore'.
-

Linking to previous learning

12. [I agree with this statement as the High Court case of Roach significantly contributed to who is currently afforded the right to vote in Australia.¹]

[*Roach v Electoral Commissioner* involved Vickie Roach challenging the validity of Commonwealth legislation that banned all prisoners from voting in Commonwealth elections.²] [One way the case led to the development of the right to vote is that the High Court restored the right to vote for prisoners serving a prison sentence of less than three years.³] [Another way is that the High Court's interpretation of ss 7 and 24 of the Australian Constitution in this case restricted the Commonwealth's ability to pass laws regarding who may vote.⁴]

-
- ✓ ✕ I have provided an introduction to state the extent to which I agree or disagree, and a brief reason for my answer.¹
-
- ✓ ✕ I have provided information about *Roach v Electoral Commissioner* in relation to the right to vote.²
-
- ✓ ✕ I have provided one way *Roach v Electoral Commissioner* led to the development of the right to vote.³
-
- ✓ ✕ I have provided a second way *Roach v Electoral Commissioner* led to the development of the right to vote.⁴
-
- ✓ ✕ I have referred directly to the relevant section of the Constitution in my response.
-
- ✓ ✕ I have referred to a relevant case example to support my response.
-
- ✓ ✕ I have used signposting in my response, such as 'One way' and 'Another way'.
-

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Glossary

A

Abrogation the process of parliament overruling common law by creating a statute contrary to a decision of the courts. p. 25

Absolute privilege a defence to defamation that may be raised when statements were made in situations where unrestricted communication is crucial and immune to defamation law. p. 334

Access the principle that all people should be able to engage with the justice system and its processes on an informed basis. p. 12, 171, 376

Accessory any person who knows or believes that a person is guilty of a serious indictable offence and acts to prevent the arrest, prosecution, or punishment of that person. p. 89

Actus reus a Latin term meaning 'guilty act' that forms the physical element of a crime and refers to the physical acts or omissions the offender must have undertaken as part of a crime. p. 66, 95

Administrative convenience the systematic benefit derived from legal matters being distributed amongst the courts according to their complexity and severity. p. 40

Age of criminal responsibility the age at which the law considers a child capable of understanding their wrongful actions and therefore, the age at which a child can face criminal charges. p. 68, 500

Aggravating factors aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.

p. 253

Appeal a legal process that a dissatisfied party may pursue to have a court's decision reviewed by a higher court. p. 40, 195, 402

Arbitration a non-judicial dispute resolution method involving an independent third party, known as the arbitrator, who listens to parties present evidence and makes a binding decision. p. 384

Assault the intentional or reckless application of force, or threat of force, to the body of another person without lawful excuse. p. 118

Australian Constitution the founding document of Australia that sets out the composition of the Australian Parliament, its function and layout, and its powers. p. 466

Automatism bodily movements that are not consciously initiated by the mind, such as sleepwalking or breathing. p. 154

B

Balance of probabilities the standard of proof in civil cases that requires the plaintiff to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable. p. 292

Beyond reasonable doubt the standard of proof applicable in criminal proceedings, which requires the prosecution to prove that there is no reasonable doubt that the accused is guilty of the crime(s) they have been charged with. p. 70

Breach an act or omission that represents a failure to meet a legal obligation. p. 289

Breach of duty an act or omission by a defendant that is a failure to uphold their duty of care because the behaviour falls below the standard of care that would be expected of a reasonable person in the same position. p. 304

Burden of proof the responsibility of a party to prove the facts of a case. p. 69, 292

C

Causation the relationship between an event or action and a resulting event. p. 96, 290, 305

Civil law an area of law that defines the rights and responsibilities of individuals, government entities, and organisations, and provides a legal framework for when these parties interact with each other. p. 46, 284

Class action a legal proceeding brought by one or numerous plaintiffs acting for themselves as well as on behalf of a wider group of people who have a claim with similar facts. p. 297

Clear and understood a characteristic of an effective law in that individuals can comprehend the requirements of a law and are able to abide by it. p. 17

Codification the process of parliament confirming common law precedent by enacting legislation to give effect to the legal principles. p. 25

Common law the body of law that is derived from judicial reasoning and decisions in past cases. p. 24, 30

Community correction order (CCO) a non-custodial sanction that is served by the offender in the community with certain conditions attached. p. 246

Complaints bodies organisations that can deal with complaints and assist with dispute resolution in relation to the provision of goods and services, or decisions made by authorities p. 396

Conciliation a non-judicial dispute resolution method involving an independent third party, known as a conciliator, who possesses specialist knowledge about the type of dispute in question and assists parties in a dispute reach a resolution. p. 382

Confusion a defence to misleading or deceptive conduct in which it is claimed that an ordinary or reasonable member of the target audience would merely be confused by the conduct as opposed to actually being led into error. p. 359

Consent the voluntary agreement by one party to engage in or accept an act initiated by another person. p. 128

Consumer Affairs Victoria (CAV) the Victorian civil complaints body that provides information and helps resolve disputes to create a fair and competitive marketplace for consumers and businesses. p. 396

Contextual truth a defence to defamation that may be raised where the statement does not damage the plaintiff's reputation when read in context with other truthful statements. p. 333

Contributory negligence failure by a person, typically a plaintiff, to take reasonable care for their own safety, which adds to the harm the person suffers. p. 310

County Court of Victoria Victoria's principal trial court that hears and determines criminal and civil matters. p. 196, 403

Court hierarchy the arrangement of courts in order of superiority. p. 37, 195, 402

Court a legal institution concerned with the interpretation and application of laws, in order to make legal decisions involving crimes or legal disputes. p. 24

Crime against the person criminal offences where a person is harmed or harm is threatened. p. 75

Crime an act or omission that violates an existing law, causes harm to an individual, or society as a whole, and is punishable by law. p. 74

Crimes against property criminal offences that involve using force or deception to obtain, damage, or destroy property. p. 75

Criminal law an area of law that aims to protect society from harm by defining prohibited behaviours and outlining sanctions for those who participate in illegal conduct. p. 45, 54

Criminal negligence a type of mens rea that requires the accused to have failed to behave with a level of care that a reasonable person would have exercised under the same circumstances. p. 99

Culpable driving causing death a criminal offence whereby an individual causes the death of another person when driving a motor vehicle recklessly, negligently, or under the influence of drugs or alcohol. p. 143

Cybercrime crimes directed at computers or where the use of computers, or information and communication technologies, are key components of an offence. p. 76

D

Damages a type of remedy in which monetary compensation is awarded to the plaintiff in a civil dispute to compensate their loss caused by a civil breach. p. 312, 336, 360, 447

Defamation an area of civil law that aims to protect a plaintiff from having their reputation unfairly damaged. p. 321

Defence a legally recognised argument used by a party to justify their actions, so as to claim they are innocent of a crime, or not liable for a civil breach. p. 103

Defendant the party that is defending themselves against a claim by another person, the plaintiff, for an alleged breach of civil law. p. 298

Delegated body a specialised government agency that has been given authority from parliament to make and enforce laws within its area of specialisation. p. 178

Denunciation the act of publicly condemning an offender's criminal behaviour. p. 240

Deterrence the act of discouraging an offender, or other individuals, from reoffending or committing similar crimes, through the imposition of a criminal sanction. p. 55, 239

Diversion program an alternative to the court system that allows low-level offenders to avoid a criminal record, provided they make amends for their wrongdoing. p. 263

Doctrine of precedent a rule in which judges must follow the reasons for decisions given by superior courts in the same court hierarchy when deciding a case before them with similar facts. p. 30, 41

Drug Court a specialised court established to treat and rehabilitate offenders with a substance dependency through imposing a drug and alcohol treatment order. p. 260

Duress a defence that can be raised whereby criminal behaviour was induced, against the accused's better judgement, by threat, violence, or coercion from a third party. p. 105, 127, 152

Duty of care a legal obligation to ensure the safety and wellbeing of others, and to avoid conduct that could be reasonably foreseen to harm another person. p. 303

E

Enforceable a characteristic of an effective law, in that it is possible to monitor whether people abide by a law, allowing consequences to be provided to those who do not. p. 16

Engage in conduct an element of misleading or deceptive conduct, requiring that the conduct involved the defendant performing or omitting to perform an act. p. 351

Equality the principle that all people engaging with the justice system and its processes should be treated in the same way. If the same treatment creates disparity or disadvantage, adequate measures should be implemented to allow all to engage with the justice system without disparity or disadvantage. p. 10, 170, 374

Erroneous assumption a defence to misleading or deceptive conduct in which it is claimed that an error by the plaintiff was caused by the plaintiff's own incorrect assumption. p. 359

Express rights the five human rights that are explicitly stated and entrenched in the Australian Constitution. p. 467

Fairness the principle that all people can participate in the justice system and its processes should be impartial and open. p. 9, 168, 372

F

Fine a sanction that requires an offender to make a monetary payment as a penalty for a criminal offence. p. 245

G

Grievous bodily harm a severe injury that typically involves a victim sustaining permanent or serious disfiguring. p. 98

Guilty plea a full admission of guilt by an accused person of an offence for which they have been charged. p. 255

H

Hate crimes acts involving violence that are motivated by prejudice on the basis of gender, ethnicity, religion, or sexual orientation. p. 77

High Court of Australia the most superior court in Australia that hears matters of federal significance and appeals from federal, state, and territory courts. p. 37

Honest opinion a defence to defamation that may be raised when the defendant's statement was a statement of opinion. p. 333

Human rights entitlements and liberties that exist for all human beings, irrespective of any personal qualities and characteristics. p. 458, 490

I

Implied right a right that is not explicitly outlined in the Australian Constitution but has been interpreted by the High Court to exist. p. 469

Imprisonment a sanction that removes an offender from the community and places them in prison for a given period of time. p. 248

In trade or commerce an element of misleading or deceptive conduct requiring that the conduct occurred during a commercial dealing or transaction, where goods and services were sold or purchased. p. 351, 358

Indictable offence a criminal offence that is serious in nature and generally heard by a judge and jury in the County or Supreme Court. p. 83

Indictable offences heard summarily a subset of indictable offences that can be heard in the Magistrates' Court in a similar manner to a summary offence. p. 84

Injunction a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action. p. 312, 336, 451

Intention the type of mens rea requiring an accused to have acted with a conscious desire to, or foresight that their actions almost certainly would, cause harm to the victim. p. 98

J

Jury a group of randomly selected people who are required to deliver a verdict in a trial based on the evidence presented to them in court. p. 203, 410

Justice (concept) the idea that people are to be treated in a manner that is fair, that people should be held accountable for their actions, and adequately compensated when they have suffered harm. p. 56

Justification a defence to defamation that may be raised where the defendant has published information that is substantially true. p. 333

K

Known a characteristic of an effective law in that people are aware of a law and any changes to it, with adequate time being provided to become familiar with any new laws or changes p. 16

Koori Court an alternative sentencing court for First Nations offenders who have pleaded guilty to their criminal offence, developed to take into account the different cultural values of Aboriginal and Torres Strait Islander peoples. p. 262

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness. p. 495, 518

Limitation of actions a restriction on the time limit in which a plaintiff must commence a civil action in court, after which the plaintiff is unable to bring an action relating to the civil wrong against the defendant. p. 291, 306, 327, 353

L

Loss a disadvantage experienced by a party due to an action or the inaction of another party. p. 291

M

Magistrates' Court of Victoria the first level of the Victorian court system in which relatively minor matters are heard and determined by judicial officers, such as magistrates. p. 196, 403

Malice aforethought the state of mind of an offender in a murder case to cause death or serious bodily harm. p. 98

Mandatory minimum sentence a term of imprisonment that an offender must receive if they committed a certain offence. There is no ability for the judge to award a different, less harsh sanction. p. 274

Manslaughter unlawfully causing the death of another person without malice aforethought. p. 99

Mediation a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups. p. 380

Mens rea a Latin term meaning 'guilty mind' that forms the mental element of a crime and refers to an offender's awareness of their criminal behaviour and its potential consequences. p. 66, 95

Minimum standards of behaviour the expectations established in criminal law that intend to regulate how each person in society should act and establish the punishments they will receive if they do not act in a certain way. p. 57

Misleading or deceptive conduct a type of civil law that aims to protect consumers and businesses from being misguided when engaging in commercial transactions. p. 348

Mitigating factors aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence. p. 254

Murder the action of intentionally or recklessly causing the death of a human. p. 94

N

Natural consequences test a test utilised in murder cases to determine the extent to which the victim's conduct caused their own death, and whether their actions were motivated by fear induced by the accused's actions. p. 96

Negligence a failure to behave with a level of care to prevent loss or injury to another person, that a reasonable person would have exercised under the same circumstances. p. 302

O

Ombudsman an independent authority that operates on state and federal levels and is created to investigate complaints against a company or organisation. p. 394

Organised crime a crime committed in a planned and methodical way by criminal syndicates, gangs, or crime families. p. 77

P

Parliament a legislative body, comprised of elected representatives, that is primarily concerned with creating the laws of the society it represents. p. 22

Parliamentary supremacy the legal concept that parliament has the freedom to make, amend, or abolish laws, subject to limitations outlined in the Australian Constitution, and is supreme over other arms of government, such as the executive and the judiciary. p. 24

Person an individual or corporation that is treated as a legal entity under the law. p. 350

Plaintiff the party that initiates a civil claim against another person, the defendant, in court. p. 296

Presumption of innocence the right for all accused persons to be presumed innocent until it is proven otherwise beyond reasonable doubt p. 60

Principal offender the individual who actually commits the offence and/or is directly linked to the enactment of the crime. p. 88

Protection of society a purpose of criminal law that aims to reduce danger and chaos in society and prevent individuals from experiencing harm. p. 55

Protection the act of ensuring offenders do not pose a significant risk to the welfare and safety of their victims and broader society. p. 240

Punishment the infliction of pain or loss to ensure an offender is adequately penalised and held accountable for their crimes and their impact on their victims and society as a whole. p. 238

Q

Qualified privilege a defence to defamation that may be raised where the defendant had a reasonable belief that it was in the interest of the recipient to publish the communication. p. 335

R

Raise The Age an Australian campaign advocating for the age of criminal responsibility to be increased from 10 to 14 years of age. p. 502

Recklessness the type of mens rea requiring an accused to have engaged in conduct that they would reasonably foresee as being capable of causing harm to the victim. p. 98

Reflect society's values a characteristic of an effective law in that the law upholds what the majority of society accepts and believes in. p. 15

Rehabilitation the act of restoring an offender to normal life as a law-abiding member of the community after they have engaged in criminal activity. p. 241

Remedy a court order that aims to enforce a right by preventing a civil breach, or correct a civil breach and return the plaintiff to the position they were in prior to the breach by the defendant. p. 284, 312, 336, 360, 442

Remoteness an element of negligence concerned with the extent of liability, which considers whether the consequences of the negligent action were so far removed from it as to have been unforeseeable by the defendant p. 305

Representative government a system in which Members of Parliament are elected by the people of a community or nation to best represent the needs and views of those people. p. 471

Rights of young people rights that build upon baseline human rights to protect people under 18 years of age during their growth into adulthood. p. 490

Rule of law the principle that the law applies to everyone equally regardless of status. p. 56

S

Sanction a penalty imposed by a court, or an authorised body, on an offender when they plead guilty or are found guilty of a crime. p. 106, 238

Self-defence as a defence to assault a defence that recognises a person may lawfully use force, or the threat of force, to prevent unlawful harm against themselves or another. p. 126

Self-defence as a defence to murder a defence that recognises a person may lawfully cause the death of another person in order to prevent unlawful harm, being death or really serious injury, against themselves or another. p. 104

Self-incrimination a situation in which an accused person provides evidence or testimony that proves they are guilty of a crime. p. 60

Sentencing the act of deciding and declaring the sanction an offender will receive after pleading or being found guilty of an offence. p. 238

Separation of powers a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate. p. 471

Social cohesion the presence of strong relationships and bonds that unite society and encourage cooperation, alongside an absence of war and conflict. p. 4

Specialisation the process of a court developing expertise in a particular area of law as a result of hearing similar matters regularly. p. 39

Stable a characteristic of an effective law in that a law should not change so frequently that it is difficult to keep up with. p. 18

Standard of proof the degree to which the facts of a case must be proven in court. p. 70, 292

Statute law the body of law that comprises laws made by parliament, also known as legislation. p.22, 33

Statutory interpretation a process whereby the courts give meaning to the words in legislation when applying the legislation to a case. p.32

Strict liability a type of criminal responsibility that does not require the mens rea element of a crime to be proven for the offender to be found guilty. p. 67

Structural protections the systems and mechanisms established by the Constitution that indirectly protect human rights by ensuring the government's actions achieve human rights protections. p.471

Substantial and operating cause test a test utilised in murder cases to determine the extent to which the accused's actions caused the death of the victim when there are subsequent, intervening events. p.96

Sudden or extraordinary emergency a defence that can be raised where criminal activity occurred under circumstances involving a real risk of death or serious injury. p.105, 153

Summary offence a minor criminal offence usually heard in the Magistrates' Court. p.81

Supreme Court of Victoria the most superior court in Victoria that deals with the state's most serious criminal and civil cases. p.197, 404

T

Tribunal an institution with the authority to judge, adjudicate, or determine civil claims or disputes. p.390

U

Universal Declaration of Human Rights (UDHR) a document created by the United Nations that sets out the common entitlements that should be afforded to all peoples across all nations. p.461

V

Victim Impact Statement (VIS) a written or verbal statement made to a court about the effect of an offence upon the victim. p.170, 256

Victorian Charter of Human Rights and Responsibilities (VCHRR) a piece of Victorian legislation that sets out human rights, freedoms, and the responsibilities of the government and public bodies to protect these. p.478

Victorian Civil and Administrative Tribunal (VCAT) a dispute resolution body that has the power to hear and determine certain types of civil and administrative disputes. p.390

Voluntary assumption of risk a defence to negligence in which it is claimed the plaintiff accepted and was aware of the risks inherent in the activity. p.311

W

White-collar crime financially motivated crimes that are non-violent. p.78

Acknowledgements

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Text

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