



Edrolo

VCE LEGAL STUDIES

Units 3 & 4





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FEATURES OF THIS BOOK

Edrolo's VCE Legal Studies Units 3 & 4 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.

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.

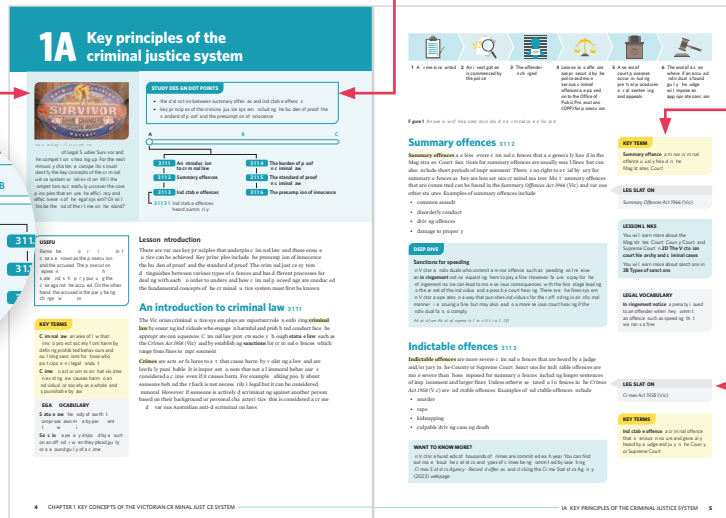
Real-world examples provide context for understanding legal principles, processes and institutions.

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

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

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

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

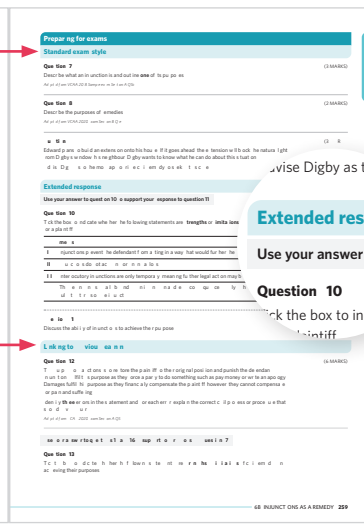
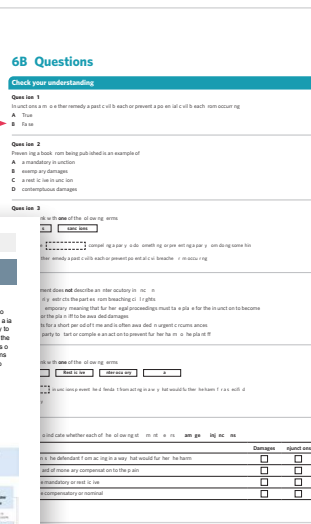
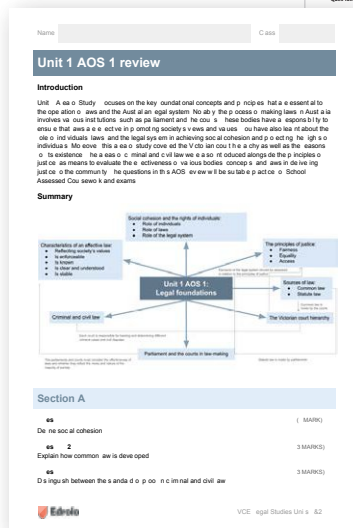


Questions and Reviews

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 between 5 and 10 marks



Extended response

Question 10

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

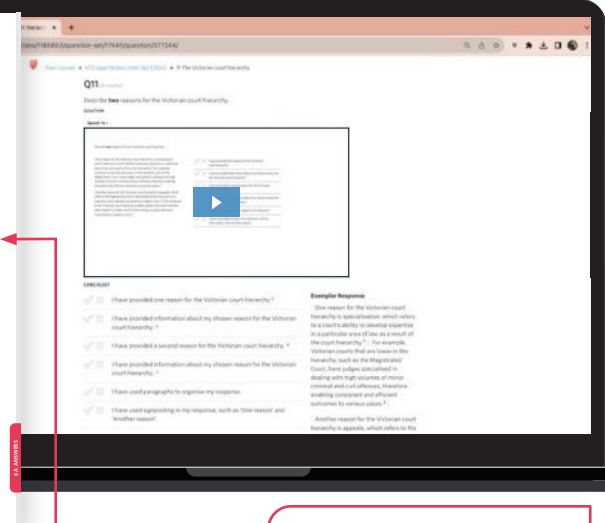
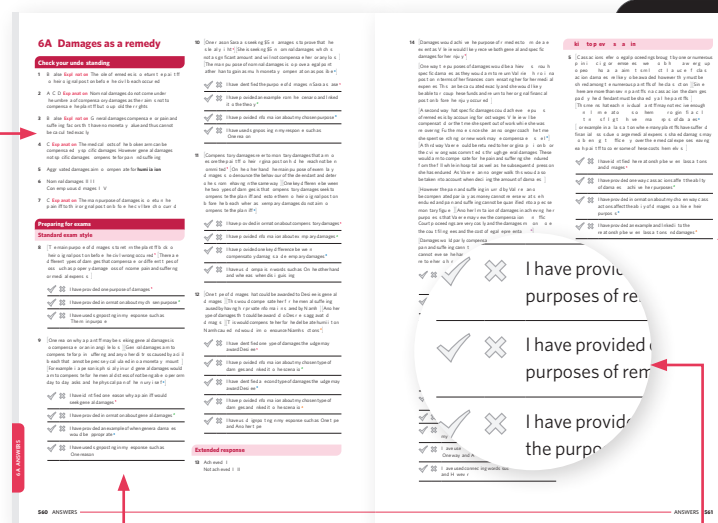
'Linking to previous learning' questions promote continuous revision and encourage students to see the relationships between concepts and topics.

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

An introduction to Legal Studies



Image: SaiArLawKa2/Shutterstock.com

'There are no secrets to success. It is the result of preparation, hard work, and learning from failure.' —Colin Powell (American politician, 1994)

These words hold true in every aspect of life, and VCE Legal Studies is no exception. To achieve excellence, one must lay a solid foundation of knowledge and understanding. That is where this lesson, 'An introduction to Legal Studies', comes into play. Whether you are a student revisiting the key concepts from Legal Studies Units 1 and 2 or a fresh-faced learner studying Legal Studies for the first time, this introduction will outline fundamental legal concepts needed to succeed in VCE Legal Studies Units 3 and 4. The content in this section of the textbook is not all directly assessable content in the VCE Legal Studies Units 3 and 4 course, however some concepts introduced here will be helpful to have an understanding of first as a solid foundation for the rest of the course.

Introduction

As a multicultural and diverse country, Australia's laws, legal system, and citizens are each responsible for maintaining social cohesion. The law establishes societal codes of moral behaviour, whilst the legal system plays a crucial role in protecting the rights of individuals and ensuring a safe and harmonious society.

Although laws aim to promote social cohesion, it is inevitable that these laws may be broken. Thus, the legal system has established processes and procedures to ensure justice is achieved in both criminal and civil cases.

The principles of justice

The **principles of justice** are the foundation of the Victorian legal system, and in VCE Legal Studies, these principles are discussed to determine the achievement of justice. 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 links and connections between them. Oftentimes, the achievement of one principle of justice will contribute to the achievement of another.

KEY TERM

Principles of justice underlying principles of the legal system, and in VCE Legal Studies, these principles can be applied to the Victorian justice system in order to assess whether justice is achieved.

USEFUL TIP

The Victorian Curriculum and Assessment Authority (VCAA) study design provides definitions for the principles of justice. It is helpful to know these definitions, but also ensure you understand their meaning and can apply the three principles to examples about the Victorian civil and criminal justice system.



Figure 1 The three principles of justice are all interrelated

Fairness

Fairness is the principle that all people can participate in the justice system and its processes should be impartial and open. This principle is centred around the idea that all individuals have the right to a fair trial. It provides individuals and businesses in legal disputes, or individuals who have been accused of a crime, with the right to have their case heard by an unbiased third party.

An example of fairness in criminal law is the presumption of innocence, whereby an accused is always considered to be innocent until proven guilty in a court of law. It would not be fair to presume guilt before all the evidence is presented to the court and a judge or jury has decided the verdict based on that evidence.



KEY TERM

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

Equality

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. This principle is about recognising where the law treats people differently due to personal circumstances and aims to remedy where the law discriminates against disadvantaged groups.

The principle of equality is closely linked with the **rule of law**, which states that all persons, businesses, and governments are equal before the law, and no one is above the law. However, this can become complicated if, for example, children are held to the same standard as the average adult.

An example of an equitable mechanism in Victorian society is the Children's Court of Victoria which allows children under the age of 14 to be sentenced differently. This is because children are more susceptible to the negative effects of the justice system due to their impressionable age. Thus, the Children's Court is an equitable policy implemented by the government to ensure children are not unfairly imprisoned and are afforded the right to rehabilitation.



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.

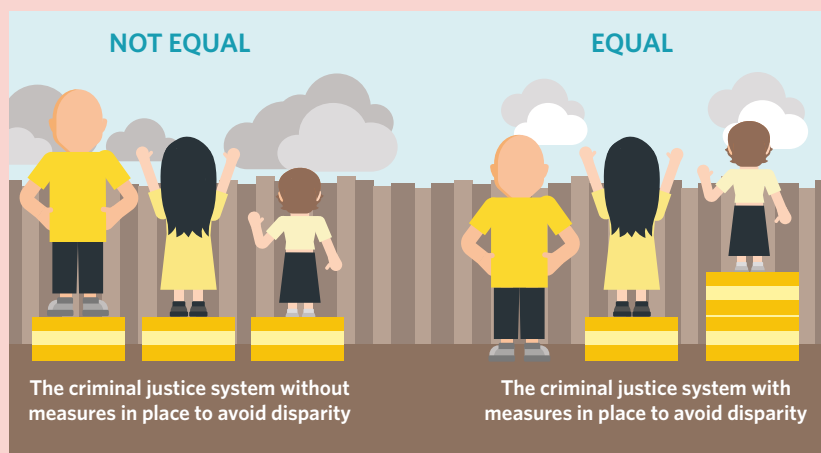


Figure 2 The principle of equality

Whilst equality is often associated with equal treatment for all people, it is more accurately described as an equal result for everyone involved. Equality is achieved when individuals ultimately reach the same outcome, which may require treating them differently through the use of equitable policies.

**KEY TERM**

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

Access

Access is the principle that all people should be able to engage with the justice system and its processes on an informed basis. It is a requirement in our society that individuals and businesses inform themselves of, and understand, the law. Therefore, it is vital that laws are available and easily understandable so citizens understand their legal rights and are aware of the laws that apply to them.

An example of the principle of access in the Victorian justice system is the availability of free legal information and advice from organisations such as Victoria Legal Aid and community legal centres. The services provided by these organisations promote access to the law for all citizens.

The Australian Constitution

Prior to colonisation in Australia, First Nations peoples had complex legal systems and customs, which are still practised today. In order to legally justify colonising Australia, British settlers declared Australia ‘Terra Nullius’, translating to ‘the land of no one’, upon arrival into Australia, allowing them to legitimise the land dispossession of First Nations peoples.

Following British colonisation, settlers created the **Australian Constitution**, which is a legally-binding document establishing the legal and parliamentary systems of government that can only be altered when changes are approved by Australian citizens. The institutionalisation of the Constitution occurred on 1 January 1901, the day of **Federation**, and involved the transition of the six Australian colonies into states.

KEY TERMS

Australian Constitution the founding document of Australia that sets out the composition of the Australian Parliament, its function and layout, and its powers.

Constitutional monarchy a system of government in which the Crown is the Head of State, but elected representatives have the power to create laws.

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

Federation the process of uniting states into a cohesive group under centralised authority.

Democracy a system of government whereby the people have the power to elect representatives to make laws on their behalf.

Referendum a compulsory national vote in which members of the electoral roll vote ‘yes’ or ‘no’ to alter the Australian Constitution.

Constitutional monarchy

Australia is a **constitutional monarchy**. This means the monarch’s authority adheres to the Constitution, whilst lawful decisions are made by the parliament. Although Australia’s legal system is still aligned with that of the United Kingdom, in practice, the King’s interaction with Australian law is minimal. The Governor-General of Australia and state Governors act on behalf of the King to grant royal assent to legislation created by the Commonwealth Parliament and state parliaments respectively. The Australian legal system can also be described as a **democracy** as members of parliament are voted in by the people to represent the people.

The Constitution in society

The **High Court of Australia** is the only Australian court that can interpret the Constitution. The Constitution safeguards Australian citizens from abuses of power by any person or entity through stated mechanisms that ensure law-making powers are shared and the rights of the people are not undermined. Moreover, any modifications to the Constitution require the approval of Australians through a double majority **referendum** vote.



Image: Den Rozhnovsky/Shutterstock.com

Figure 3 The Crown is the term used to describe the governing authority in Australia at both the state and federal level

Sources of law

Laws are made by members of parliament (MPs), who are elected politicians chosen by Australians. The laws made by MPs are **statute laws**, also referred to as legislation. Judges in the courts can also make laws, as some court decisions become precedents, or rules, that must be followed in future cases in the same hierarchy with similar material facts. These judge-made laws are **common laws**.

Parliament's role in creating statute law

The Commonwealth Parliament serves as the representative body for all of Australia, enacting laws that impact everyone, regardless of their place of residence in Australia's states or territories. Each state also possesses its own parliament, which establishes legislation only for its residents. Altogether, Australia has nine parliaments: the Commonwealth Parliament and eight state and territory parliaments.

At the federal level, Australia operates under a system with a **bicameral parliament**, where two distinct Houses of Parliament coexist. The upper house and lower house collaborate in the process of transforming bills into laws.

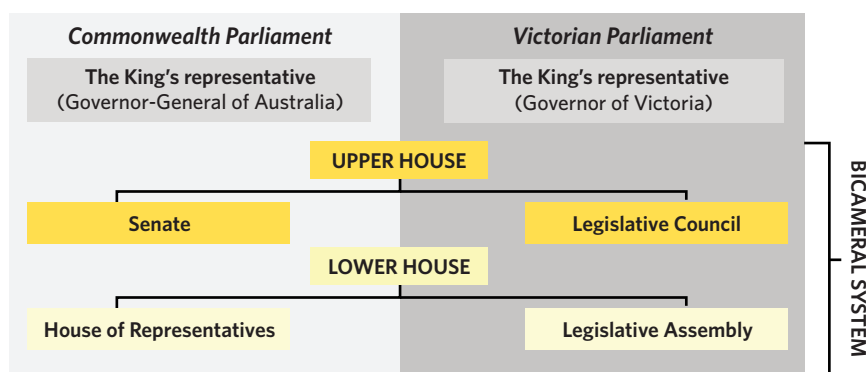


Figure 4 The Commonwealth and Victorian parliaments

When establishing legislation, an MP will introduce a **bill**, which is a proposed law that has not yet become an Act. To be legislated, this bill must pass through the lower house, with the majority of members approving of the bill, be reviewed, scrutinised, and approved by the upper house, and receive royal assent from the state Governor or Governor-General, depending on whether the law is a state or federal law respectively.

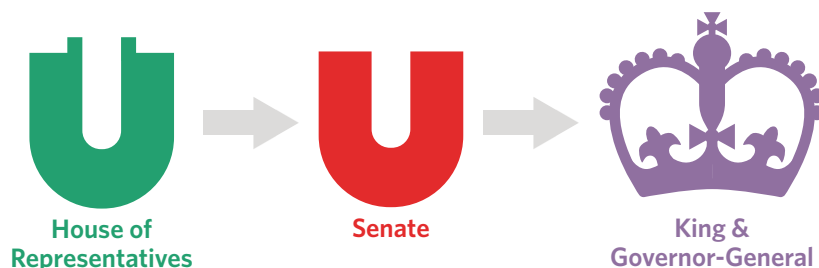


Figure 5 Features of the Commonwealth Parliament

USEFUL TIP

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

Citing Acts of parliament

Acts made by parliament are expressed in a specific way where the titles include key information about the law. Titles of Acts include:

- the name of the Act
- the year it was passed in parliament
- the parliament it was passed in.

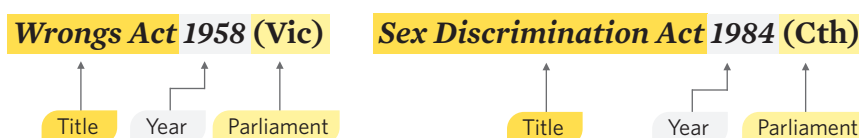


Figure 6 Citing Acts of parliament

KEY TERMS

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.

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.

USEFUL TIP

Precedent can also be referred to as 'judge-made law' or 'common law'. They are interchangeable terms that all refer to law made by the courts.

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

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

Accused the party who is charged with a criminal 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.

The court's role in creating precedent

The common law system is based upon the doctrine of precedent, whereby courts lower in the court hierarchy follow the decisions of the courts higher in the hierarchy to provide consistency, predictability, and justice.

Statutory interpretation occurs when the courts apply and interpret legislation for the case presented before them. The courts must interpret and clarify the meaning of legislation to resolve disputes and provide justice and this ultimately forms **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 to court before a judge can interpret the law. Alternatively, an accused must commit a crime and plead not guilty in order for their case to go to court so a judge can make law on the matter. As precedent is only binding on lower courts in the same court hierarchy, higher courts are bound by fewer prior decisions and can make new legal decisions that set a precedent.

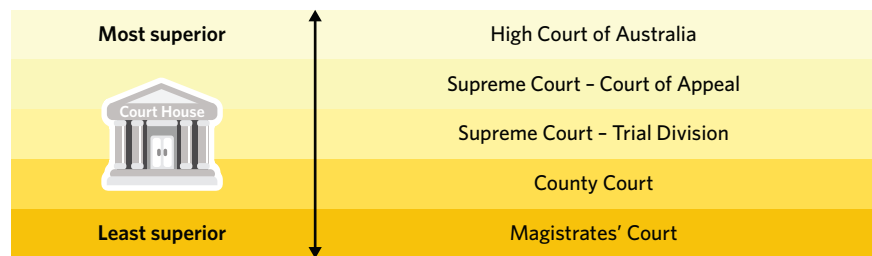


Figure 7 The lower courts are bound by the decisions of the higher courts in the Victorian court hierarchy

Citing cases

Legal cases, like legislation, are specifically written in order to easily identify key information about the case. The title of a legal case will include:

- the names of the parties involved in the case
- the year the case was heard
- the court identifier.

The Director of Public Prosecutions (DPP) or the Office of Public Prosecution (OPP) is often a party to criminal matters as they bring the case to court on behalf of the victim.

Deing v Tarola [1993] 2 VR 163



DPP v Hayden [2023] VCC 985



Figure 8 Citing legal cases

Types of law

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 these are enforced, will vary depending on the type of law that has been broken.

Criminal law

Criminal law establishes and addresses harmful behaviours that disrupt social cohesion. In Victoria, most crimes, such as assault, murder, manslaughter, culpable driving, and theft, are defined in the *Crimes Act 1958* (Vic). Criminal law involves the **prosecution** of **accused** individuals, the determination of guilt, and the imposition of **sanctions**, such as imprisonment, by a judge or magistrate if guilt is made out.

In a criminal case, the burden of proof lies with the prosecution, who must prove the accused's guilt beyond reasonable doubt.



Figure 9 Types of crime

Civil law

Civil law protects individuals, businesses, and organisations by granting them the right to seek compensation when their rights have been breached. Civil claims include negligence, defamation, misleading or deceptive conduct, divorce disputes, and child custody. The **plaintiff** initiates the claim against the **defendant**, who allegedly caused their harm or loss.

In a civil dispute, the burden of proof lies with the plaintiff, meaning they must prove on the balance of probabilities that the defendant was responsible for the plaintiff's loss or suffering. If the defendant is found liable, the judge or magistrate can compensate the plaintiff by awarding a **remedy**.

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.

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.

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.

Table 1 Types of civil law

Type of civil law	Explanation	Example
Negligence law	A type of law that focuses on protecting people from harm and ensuring parties owing a duty of care uphold this duty.	- An allergic reaction due to a business selling food without providing allergy warnings. - Medical bills incurred as a result of physical harm caused by another person.
Defamation law	A type of 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 lower their reputation.	- A false statement claiming a politician committed an offence against another person. - A false statement claiming a person is acting unethically or irresponsibly in their workplace.
Consumer law	A type of law that governs the relationship between businesses and consumers by ensuring product safety, protecting customers from unfair contract terms, and guaranteeing that items purchased are fit for purpose.	- Faulty products that have been recalled cannot be sold to consumers. - If a contract with a telecommunications company allows the provider to cancel or suspend services with the customer for no reasonable explanation, this may be considered an unfair contract term.
Workplace law	A type of law that regulates the relationship between employees and their employers, including matters such as pay and working conditions.	- Within the <i>Fair Work Act 2009</i> (Cth), there are over one hundred 'awards' that outline the minimum conditions that employees in a specific industry are entitled to. - An employer cannot unfairly terminate an employee's employment or discriminate against them due to certain characteristics.

LEGAL VOCABULARY

Human rights privileges and liberties that should be offered to all human beings, irrespective of any qualities and characteristics.

Legal rights an entitlement provided and protected by legislation and/or common law.

LEGISLATION

Equal Opportunity Act 2010 (Vic)

Racial Discrimination Act 1975 (Cth)

Sex Discrimination Act 1984 (Cth)

Rights

Human rights, legal rights, and moral rights are distinguishable based on the purpose of creating the right and the effect these entitlements have on individuals.

Human rights are the universal entitlements that any individual can exercise, whilst **legal rights** refer to the specific rights that an individual is legally entitled to enjoy, enforced by the state or government. Moral rights emphasise the universal ethical rights and principles that people can adhere to, which may or may not be legal rights. Individual's perceptions of moral rights may differ according to their culture, views, and beliefs.

Australia utilises various international human rights declarations and treaties to inform law-making and ensure fundamental human rights are upheld.

Parliamentary laws that enforce human rights in Australia include:

- *Equal Opportunity Act 2010 (Vic)*
- *Racial Discrimination Act 1975 (Cth)*
- *Sex Discrimination Act 1984 (Cth)*

Table 2 Types of rights

	Human rights	Legal rights
What are they?	Universal rights that are, theoretically, afforded to all people.	Rights that are written in legislation and enforceable in law.
Who do they apply to?	Universally applies to all people.	Differs depending on a person's place of residence.
Who creates them?	International bodies, such as the United Nations.	Written in legislation made by the government.
What are the sanctions or punishments for breaching the rights?	No punishment until a sanction for breaching the right is included in legislation by a specific country or state parliament.	Punishments and penalties dictated by legislation.

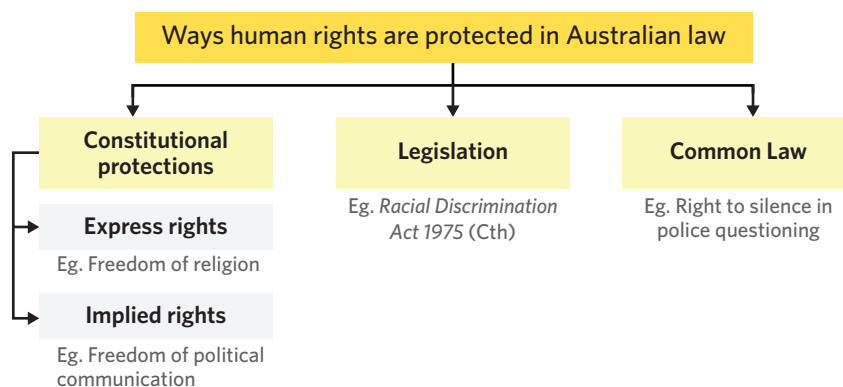


Figure 10 Human rights protection in Australia

International treaties and declarations

An **international treaty**, also known as a covenant or convention, is an agreement between two or more nations or international bodies about certain actions. Treaties cover a wide range of topics, including rules about international trade and aviation, climate change, and military action. An **international declaration** is a statement of principles that is not binding upon a nation, for example, the *Universal Declaration of Human Rights*.

By signing international treaties, Australia has committed to protecting human rights, as contained within these conventions. However, such an agreement is not automatically incorporated within Australian law. Instead, relevant legislation containing the principles of the treaty and a commitment to protect human rights must be passed through parliament to give effect to the human rights contained within such a treaty.

LEGAL VOCABULARY

International treaty an agreement between two or more countries or international organisations, that creates international rights and obligations.

International 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.

Constitutional protections

Every Australian is guaranteed five **express rights**, which 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 that if a person or organisation believes parliamentary legislation breaches a certain express right, they may challenge the law's validity in the High Court of Australia.

Implied rights are not explicitly stated in the Constitution, but have been interpreted and ruled to exist by the High Court. These freedoms are also fully enforceable.

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 administration of justice. The three branches of government this doctrine suggests should be separated are the executive, the judiciary, and the legislature.

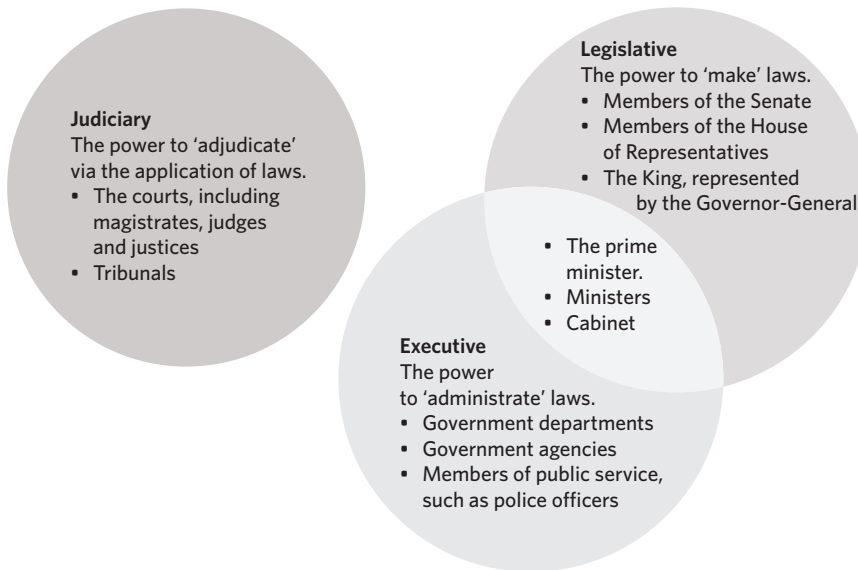


Figure 11 The separation of powers

Summary

A strong grasp of legal principles is essential for success in Legal Studies.

The contents of this introduction to Legal Studies are designed to provide you with some relevant background information to begin your studies of Units 3 and 4 Legal Studies. The overview of content that this introduction provides will be further explored throughout this textbook, further building on the foundational knowledge and understanding established here.

LEGAL VOCABULARY

Express rights the five human rights that are explicitly stated and entrenched in the Australian Constitution.

Implied right a freedom that is not explicitly outlined in the Australian Constitution but has been interpreted by the High Court to exist.

Separation of powers a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate.

Approaching exam-style questions

The VCE Legal Studies examination is worth 50% of your study score for Units 3 and 4. Therefore, it is important for you to understand how to interpret exam-style questions and respond to them appropriately. To excel in the exam, you will need to understand how to:

- dissect a question and respond appropriately
- use stimulus material in your response
- plan a response
- approach 10 mark questions.

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.

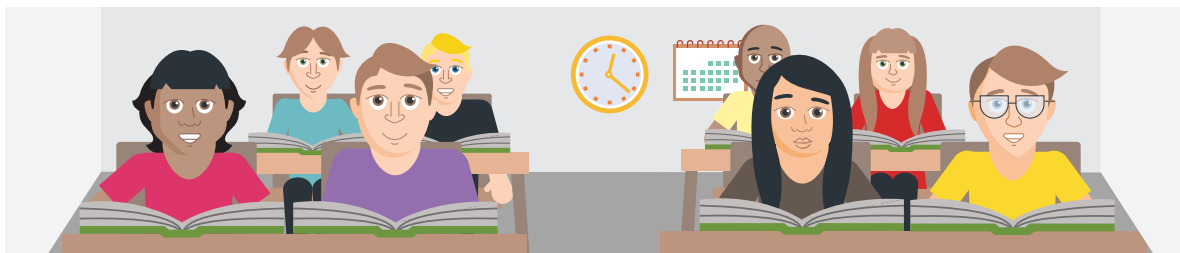
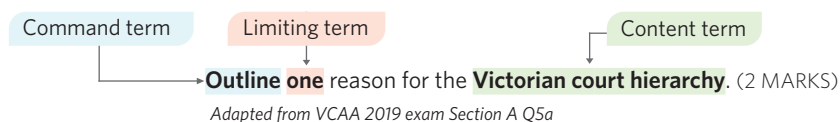


Figure 1 Preparation is the key to success in exams

Dissecting a question

Before approaching an exam-style question, it is necessary to dissect 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. Please note, 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.

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 outline a choice you must make in your answer, with a term such as ‘either’. In Example A, the limiting term is ‘one’, indicating that you must limit your answer to only providing a singular reason for the court hierarchy.

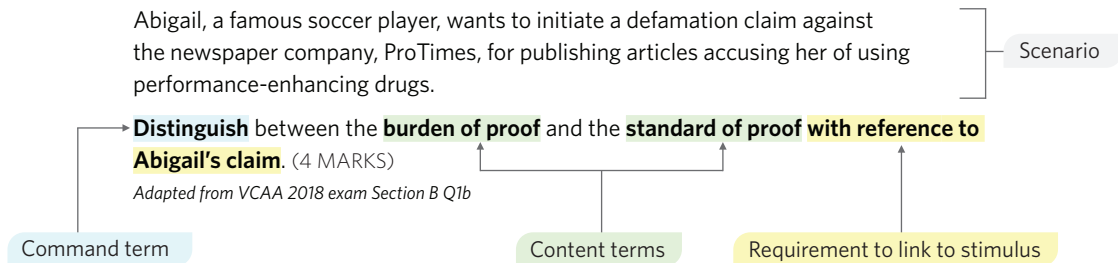
Content terms

Content terms are the terms 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 the ‘Victorian court hierarchy’ as it is a key, legal concept from the Study Design.

Approaching exam-style questions with stimulus material

Many questions in past VCE Legal Studies exams have contained scenarios or other stimulus material, such as quotes, extracts from legislation, or other legal sources. These require you to link your theoretical understanding of legal concepts to the stimulus when responding to the question. When faced with a question like Example B, it is necessary to make 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 resources 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

[The burden of proof refers to the responsibility of a party to prove the facts of a case. In a civil case, the burden of proof rests with the plaintiff.¹] **On the other hand**, the standard of proof refers to the degree to which the facts of the case must be proven in court. The standard of proof in civil proceedings is on the balance of probabilities.²] **One key difference** between these two concepts is that the burden of proof refers to which party is responsible for proving the facts of a case, **whereas** the requirement in relation to the standard of proof is about the degree to which that party must prove the facts.³] **Therefore**, in Abigail's case, as the plaintiff, she has the burden of proof or the responsibility of proving her version of the facts of the case. Alternatively, in relation to the standard of proof, the requirement is for Abigail to prove that her version of the facts is more likely to be correct than ProTimes' version of the facts.⁴]

- ☒ ☐ I have provided information about the burden of proof.¹
- ☒ ☐ I have provided information about the standard of proof.²
- ☒ ☐ I have provided one key difference between the burden of proof and the standard of proof.³
- ☒ ☐ I have provided an example from the scenario and linked it to the burden of proof and the standard of proof.⁴
- ☒ ☐ I have used signposting in my response, such as '**One key difference**'.
- ☒ ☐ I have used connecting words, such as '**Therefore**'.
- ☒ ☐ I have used comparison words, such as '**On the other hand**' and '**whereas**', when distinguishing.

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 each specific element required for marks to be allocated for each 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.

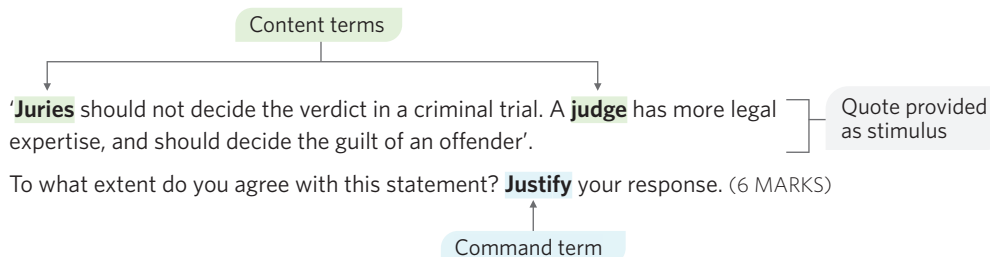
Extended-response questions

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. Extended-response questions are often expressed in a similar way to an English essay prompt. These questions often require you to consider the strengths and limitations of a concept or explore circumstances when a particular legal process or institution may be appropriate or inappropriate.

This Edrolo resource provides you with guidance when answering these questions. Consider Example C.

Example C

Extended-response question



This question is different to the previous examples since there are no content terms in the question itself, but the relevant content is shown in the quote. The question requires you to draw upon your knowledge of judges and juries to discuss whether judges are more suited to deciding criminal trial verdicts than juries.

Example C requires you to consider arguments in support of, and against, the quoted statement. These arguments can be drawn from the strengths and limitations of judges and juries, detailed in the 'strengths and limitations' tables within the relevant lesson.

This Edrolo resource also provides supporting questions by asking a short question that can help you identify relevant factors, arguments, or examples that could form part of their extended response. For example, some questions require you to identify which statements represent strengths, and which represent limitations. 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 judges and juries in a criminal trial.

Statement	Strengths	Limitations
I. Juries are comprised of a cross-section of the community that represent a diverse range of views. The use of juries helps ensure the legal system is accountable to the people.	☒	☐
II. Judges have extensive legal expertise and training, which allows them to interpret complex legal concepts and apply them correctly to a criminal trial.	☒	☐
III. Jury members are ordinary and randomly selected individuals, meaning they may not be equipped with legal reasoning skills and their verdict may be incorrectly informed or lack consideration of key legal principles.	☐	☒

IV.	Jurors are likely to be influenced by personal prejudices and emotions, increasing the risk of an unfair verdict that is based on their biases as opposed to the facts of the case.	☐	☒
V.	Judges are familiar with legal precedents and the principles of legal reasoning, allowing them to make justified rulings that ensure a fair trial.	☒	☐
VI.	Judges have experience in setting aside their personal beliefs so as to remain impartial and unbiased in their rulings.	☒	☐
VII.	Judges are government-appointed officials and may be subject to political pressure or biases.	☐	☒

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

Answer

[I agree with this statement to a moderate extent, because even though judges have more experience and expertise than juries, juries may be less subject to political bias and they represent a cross-section of the community.¹]

[Firstly, judges have extensive legal expertise and training, allowing them to interpret complex legal concepts and apply them correctly to a criminal trial.²] [They are also familiar with legal precedents and the principles of legal reasoning, which allows them to make justified rulings that ensure a fair trial.³] [However, as ordinary and randomly selected individuals, jurors may not be equipped with these skills and their verdict may be incorrectly informed or lack consideration of key legal principles.⁴]

[Moreover, judges have experience in setting aside their personal beliefs so as to remain impartial and unbiased in their rulings.⁵] [Jurors, on the other hand, are more likely to be influenced by personal prejudices and emotions, increasing the risk of an unfair verdict that is based on their biases as opposed to the facts of the case.⁶]

[However, there are also arguments against judges deciding verdicts.⁷] [One of the main criticisms is that judges are government-appointed officials and may be subject to political pressure or biases. This can potentially compromise their impartiality and lead to unfair or unjust verdicts.⁸]

[Another limitation of judges deciding verdicts is that it limits the participation of ordinary citizens in the legal process.⁹] [Juries are comprised of a cross-section of the community that represents a diverse range of views. The use of juries helps ensure the legal system is accountable to the people.¹⁰]

[In conclusion, while judges may have more legal expertise and experience in remaining impartial in their decisions, the use of juries to determine verdicts is a valuable means of public participation in the criminal legal system.¹¹]

A checklist associated with the given exemplar response is shown below. 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 represent marks that would be awarded by assessors. As you can see from the checklist below, 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.

Checklist

- ✓ ✕ 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 strength of judges deciding the verdict in criminal cases.²

- ✓ ✕ I have provided information about the first strength of judges deciding the verdict in criminal cases.³

- ✓ ✕ I have provided one limitation of juries deciding the verdict in criminal cases, and linked it to the first strength of judges deciding.⁴

- ✓ ✕ I have provided a second strength of judges deciding the verdict in criminal cases.⁵

- ✓ ✕ I have provided a second limitation of juries deciding the verdict in criminal cases, and linked it to the second strength of judges deciding.⁶

- ✓ ✕ I have provided a topic sentence to introduce the main idea of my paragraph.⁷

- ✓ ✕ I have provided one limitation of judges deciding the verdict in criminal cases.⁸

- ✓ ✕ I have provided a second limitation of judges deciding the verdict in criminal cases.⁹

- ✓ ✕ I have provided one strength of juries deciding the verdict in criminal cases, and linked it to the second limitation of judges deciding.¹⁰

- ✓ ✕ I have provided a statement summarising the discussion and restating the extent to which I agree.¹¹

- ✓ ✕ I have used paragraphs to organise my response.

- ✓ ✕ I have used signposting in my response, such as 'Firstly' and 'Another limitation'.

- ✓ ✕ I have used connecting words, such as 'Moreover' and 'However'.

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

Using multiple extracts of stimulus material in your responses

In past VCE Legal Studies exams, Section B requires responses to questions with reference to stimulus material, such as extracts from legislation, parliamentary debates, academic journal articles, media reports, or real or hypothetical case studies.

It is important that, when required, you link your responses to the stimulus material provided, to show an application of theoretical knowledge to real or hypothetical legal situations and information.

Example D demonstrates how the use of a checklist can ensure you regularly link to the stimulus material in your answer.

Example D

Source 1

Joaquin's case

Joaquin was admitted to a hospital for a routine surgical procedure. However, due to an error by hospital staff, Joaquin was administered the wrong medication, which led to further health complications. Joaquin was forced to undergo additional surgery and has not been able to work for months due to the adverse effects of the medication. He wants to pursue a civil case in negligence against the hospital and believes a jury trial would lead to a more just outcome.

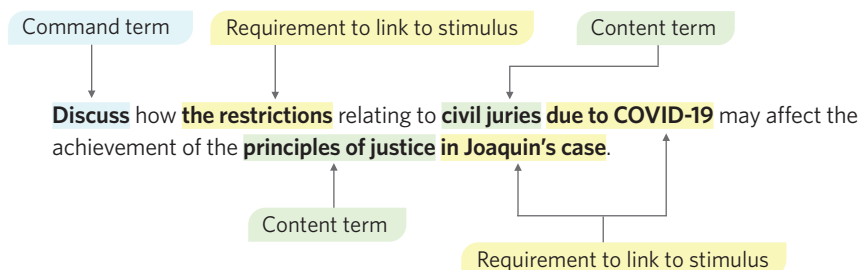
Source 2

The following is an extract of information provided by the County Court of Victoria in 2021, to assist parties to understand updated arrangements and expectations of the Common Law Division. Section 11.2 (b) is omitted due to irrelevance.

Section 11 Juries

- 11.1 Since March 2020, due to the COVID-19 pandemic, the Court has not had a capacity to hear any civil jury trials. However, it is now possible for civil jury trials to resume on a limited basis at the County Court building in Melbourne.
- 11.2 At present, the limitations on the resumption of civil jury trials include the following:
 - (a) There are only two civil jury court rooms available, which have been recently renovated to allow for social distancing:
 - (b) [omitted]
 - (c) The empanelment of a jury is conducted remotely, using a videolink between the trial courtroom and the jury pool room, to ensure social distancing between panel members and conform to the density requirements within the courtroom.
 - (d) There is a limitation on the number of jury trials that can be empanelled on any given day. Priority is given to Supreme Court and County Court criminal jury trials.
- 11.3 Noting the above restrictions, the Court will accommodate, wherever possible, cases where a party has elected trial by jury as the mode of trial in accordance with the Rules. However, given the limitations referred to in paragraph 11.2 above, this is likely to mean that not all proceedings where there is a prima facie entitlement to a jury will proceed as a jury trial. If the choice is between maintaining the trial date and hearing the case as a cause, or adjourning the case until a jury is available, the interests of justice will ordinarily favour the case proceeding as a cause, noting that both are equally just modes of trial.

Adapted from 'Arrangements and expectations during coronavirus (COVID 19 restrictions): Common Law Division', (County Court Victoria, 2021)



Answer

[The achievement of the principles of justice may be affected somewhat by the restrictions relating to civil juries, but this effect is likely to be small since the use of judges in civil trials also upholds the principles.¹]

[One way juries are able to uphold the principles of justice is by promoting fairness. A randomised cross-section of the community is used to determine the verdict, so Joaquin would have the opportunity to have his case decided by his peers.²] [However, as per Section 11 Juries, the use of civil juries has been limited as a result of COVID-19. The reduced capacity of courts to facilitate civil trials by jury could limit the achievement of access to justice and a fair trial as Joaquin may not be permitted to have his case tried in front of a jury.³]

[Another way in which juries promote the principles of justice is that all parties usually have the right to request a jury trial in a civil dispute, regardless of personal characteristics, upholding the principle of equality.⁴] [The COVID-19 restrictions on juries state that if the choice is between maintaining the trial date or adjourning the case until a jury is available, the case will proceed. This means that not all parties are able to access a jury, limiting equality and access.⁵]

[However, the principles of justice can still be upheld very effectively with judge-only, civil trials and may not be limited because of the restrictions on civil juries.⁶] [Judges can also uphold the principle of fairness because an independent judge ensures a trial is conducted without bias and according to rules of evidence, so the decisions in Joaquin's case would be based on law and facts alone.⁷] [Another reason why the restrictions may not limit the principles of justice is that the right to request a jury is usually limited by a party's capacity to bear the cost of a jury anyway. Even if the restrictions were not in place, Joaquin may not have been able to afford the fees associated with a civil jury trial, meaning access and equality were limited, even without the restrictions.⁸] [Finally, without the use of a jury, the risk of a hung jury or a mistrial due to juror misconduct is eliminated, so there will be no risk of a retrial that results in delays. The use of a judge instead of a jury in Joaquin's case could, therefore, promote better access to justice by removing the risk of time and cost delays, particularly given the restrictions outlined in Source 2 provide only two civil jury rooms.⁹]

[Therefore, even though there are some reasons why the restrictions on juries may affect the principles of justice in Joaquin's case, overall the impact will be small, and there are reasons why the use of a judge instead of a jury can better uphold the principles of justice.¹⁰]

You should consistently use examples from the case and other stimulus material provided to support your response.

This checklist demonstrates how theoretical knowledge can be linked to the stimulus material and the case throughout the response.

Checklist

- ✓ ✕ I have provided an introduction to my response.¹

- ✓ ✕ I have provided one way in which juries uphold the principles of justice and linked this to Joaquin's case.²

- ✓ ✕ I have provided one reason why the restrictions relating to civil juries may limit the principles of justice, and linked it to the stimulus material.³

- ✓ ✕ I have provided a second way in which juries uphold the principles of justice and linked this to Joaquin's case.⁴

- ✓ ✕ I have provided a second reason why the restrictions relating to civil juries may limit the principles of justice, and linked it to the stimulus material.⁵

- ✓ ✕ I have provided a topic sentence to introduce the main idea of the paragraph.⁶

- ✓ ✕ I have provided one reason why the restrictions relating to civil juries may not limit the principles of justice, and linked it to Joaquin's case.⁷

- ✓ ✕ I have provided a second reason why the restrictions relating to civil juries may not limit the principles of justice, and linked it to Joaquin's case.⁸

- ✓ ✕ I have provided a third reason why the restrictions relating to civil juries may not limit the principles of justice, and linked it to Joaquin's case.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 'Another way'.

- ✓ ✕ I have used connecting words, such as 'However' and 'Therefore'.

USEFUL TIP

The command term 'discuss' requires you to 'present a clear, considered and balanced argument or prose that identifies issues and shows the strengths and weaknesses of, or points for and against, one or more arguments, concepts, factors, hypotheses, narratives and/or opinions' (VCAA, 2022).

In the VCE Legal Studies, a 'discuss' question might require you to consider how effectively an element of the justice system can achieve the principles of justice, which requires you to consider both strengths and limitations. In other questions, you might need to discuss the arguments for and against using a particular legal process or institution, which requires you to consider strengths and limitations, and/or the circumstances when something is appropriate or not.

Unlike an 'evaluate' question, it isn't usually necessary to make a conclusive judgement when responding to the command term 'discuss'. However, in this Edrolo resource, the exemplar responses and checklists usually include a conclusion. This may not be strictly necessary to achieve full marks, but a conclusive statement can help clarify any points you have made throughout the discussion, adding to the overall quality of your response.

Although, when responding to a question that asks you to 'discuss the extent to which you agree' with a statement or idea, it is important to provide a concise answer to this question, and the exemplars and answer checklists in this Edrolo resource will always include an introduction and a conclusion for these types of discuss questions.

10 mark questions

In past VCE Legal Studies exams, one of the questions has been an extended-response question worth 10 marks.

Many extended-response questions require you to demonstrate in-depth knowledge of a particular topic, whilst showing your ability to apply this knowledge to different scenarios. This is an opportunity for you to show how well you can connect and apply different areas of the study design. There are often many approaches to these extended-response questions and there is not necessarily one correct answer, but many. Assessors will mark your response 'globally' by considering the overall quality of the response and how well you have demonstrated the relevant knowledge and skills, overall.

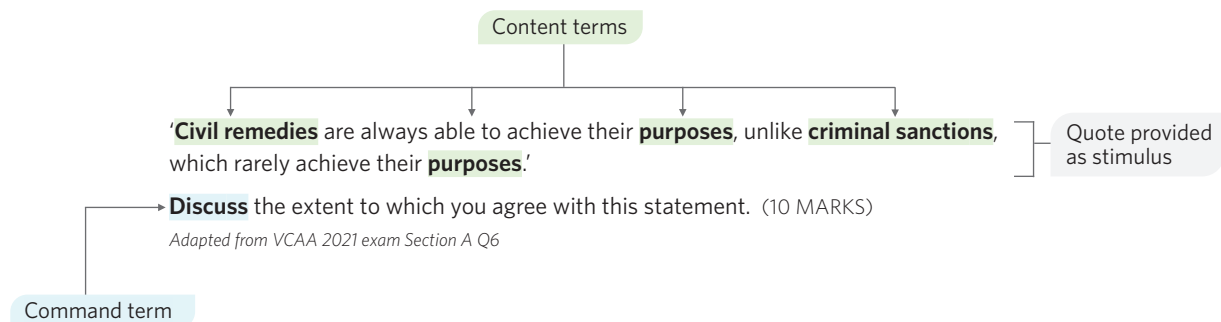
Students often wonder if it is necessary to provide specific examples and references to legislation or other evidence in their responses. Whilst additions like this are not essential, they can contribute to the overall quality of your response, so it may be appropriate to include these details if relevant.

The flowchart and given example demonstrate how you can approach a 10 mark question.



Figure 2 A strategy for approaching a 10 mark question

Example E



An example of how to plan for a response to this 10 mark question using a concept map is shown below. It is important to note that the concept map represents an example of brainstorming possible ideas to mention in the extended response; it is not a comprehensive outline of every possible idea that could be mentioned.

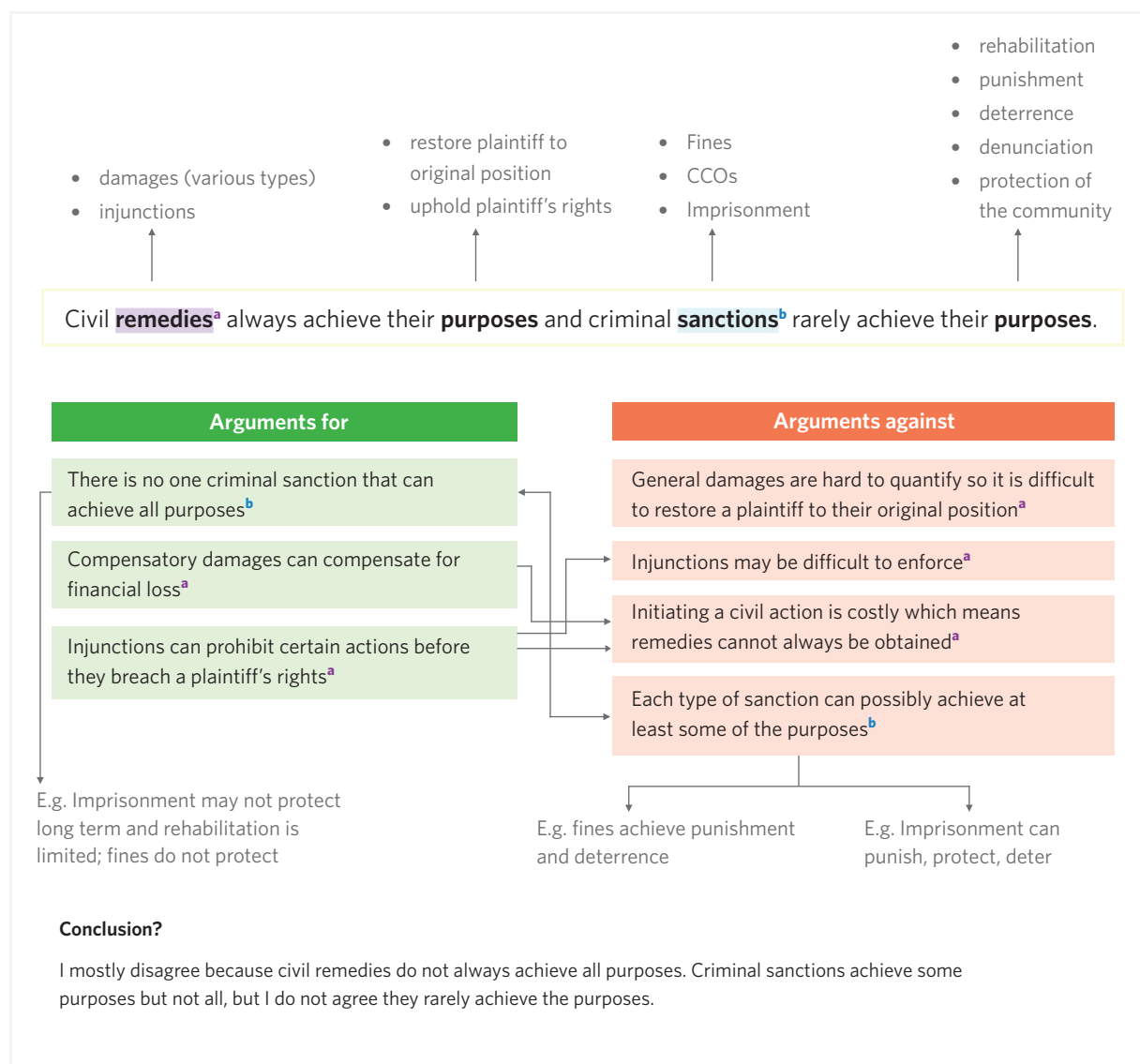


Figure 3 Brainstorming possible arguments and associated examples can help you decide what your overall conclusion or answer is

The following exemplar response is annotated to show elements that can contribute towards achieving the 10 marks for this question.

Answer

[I disagree with this statement to a large extent because criminal sanctions and civil remedies are both able to achieve their purposes in some circumstances, even though they are both limited in this ability in some ways.¹]

An introduction answers the question and summarises the reason/s why.¹

Arguments in support of the statement are shown in blue.^{3 8}

[It is true that civil remedies are able to achieve their purposes to a large extent, but there are limitations to this ability.²] [Compensatory damages aim to restore the plaintiff to their original position, before the loss caused by the civil breach. I agree that specific damages are effective in achieving this purpose, in that they have a precise value and are easily quantifiable, meaning it is possible to restore the plaintiff to their original financial position.³] [An example of specific damages is money provided to the plaintiff to cover their medical bills and loss of income.⁴]

Topic sentences identify the focus of each paragraph.^{2 7 11}

Examples are used throughout to support arguments.^{4 6 13 14 15}

[On the other hand, general damages, which aim to compensate a plaintiff who has endured general pain and suffering, do not have a precise value and are not easily quantifiable. For this reason, their ability to achieve their purpose of restoring the plaintiff to their original position is limited.⁵] [For example, it is difficult for monetary damages to compensate a plaintiff for shortened life expectancy resulting from a civil breach.⁶]

Arguments against the statement are shown in purple.^{9 10 12}

[Injunctions are another type of civil remedy, which can achieve their purposes to a certain extent, but there are limitations.⁷] [One purpose of injunctions is to uphold the plaintiff's rights. By obtaining an injunction, the plaintiff can seek a court order to prohibit or require certain actions from the defendant, effectively safeguarding their rights.⁸] [However, initiating a civil action comes with high costs, so not all plaintiffs will be able to apply for this relief.⁹] [In addition, 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.¹⁰]

Connecting words are shown in grey.

[I do not agree that criminal sanctions rarely achieve their purpose,¹¹ because, like civil remedies, criminal sanctions are able to achieve their purposes to a large extent, but there are also limitations to this ability.¹¹] [The purposes of sanctions are rehabilitation, punishment, deterrence, denunciation, and protection of the community. Two common types of sanctions, fines and imprisonment, are able to achieve some of these purposes to a moderate extent, even though neither of these sanctions can achieve all purposes.¹²] [For example, fines can achieve the purposes of punishment and deterrence quite effectively, but are not effective in achieving purposes such as rehabilitation and protection of the community.¹³] [Likewise, imprisonment achieves most purposes of sanctions quite effectively, but not all purposes are achieved. For instance, whilst protection is achieved for the period of imprisonment, many prisoners who are released will reoffend, so community protection is not achieved in the long term.¹⁴] [Additionally, high recidivism rates also indicate that imprisonment is limited in its ability to achieve both rehabilitation and deterrence.¹⁵]

Connecting words are shown in grey.

[In conclusion, I do not agree with the contention that civil remedies are always able to achieve their purposes and criminal sanctions rarely do, because whilst there are different types of remedies and sanctions that can each be effective in achieving different purposes, there are also limitations of each type of remedy or sanction in relation to one or more of the purposes.¹⁶]

A conclusion summarises the discussion and links back to the question.¹⁶

A checklist for this question and exemplar is shown below. The checklist doesn't indicate how marks would be awarded, but it is helpful to guide a suitable structure for the extended response.

Checklist

☒	☐	I have provided an introduction to state the extent to which I agree, and a brief reason for my answer. ¹
☒	☐	I have provided a topic sentence to introduce the main idea of the paragraph. ²
☒	☐	I have provided one argument in support of the statement. ³
☒	☐	I have provided an example relevant to the first argument in support of the statement. ⁴
☒	☐	I have provided a topic sentence to introduce the main idea of the paragraph. ⁵
☒	☐	I have provided one argument against the statement. ⁶
☒	☐	I have provided an example relevant to the first argument against the statement. ⁷
☒	☐	I have provided a topic sentence to introduce the main idea of the paragraph. ⁸
☒	☐	I have provided a second argument in support of the statement. ⁹
☒	☐	I have provided an example relevant to the second argument in support of the statement. ¹⁰
☒	☐	I have provided a second example relevant to the second argument in support of the statement. ¹¹
☒	☐	I have provided a topic sentence to introduce the main idea of the paragraph. ¹²
☒	☐	I have provided a third argument against the statement. ¹³
☒	☐	I have provided an example relevant to the third argument against the statement. ¹⁴
☒	☐	I have provided a second example relevant to the third argument against the statement. ¹⁵
☒	☐	I have provided a conclusion to my response that links back to the question. ¹⁶
☒	☐	I have used paragraphs to organise my response.
☒	☐	I have used connecting words, such as 'On the other hand' and 'However'.

USEFUL TIP

The 2022 VCE Legal Studies external assessment report provided some good 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.

Summary

VCE Legal Studies exam questions aren't 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 tasks (SACs).

3

UNIT 3

Rights and justice

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

Students explore topics such as the rights available to an accused and to victims in the criminal justice system, the roles of the judge, jury, legal practitioners and the parties, and the ability of sanctions and remedies to achieve their purposes. Students investigate the extent to which the principles of justice are upheld in the justice system. Throughout this unit, students apply legal reasoning and information to actual and/or hypothetical scenarios.

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UNIT 3 AOS 1

The Victorian criminal justice system

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

In this area of study, students explore the criminal justice system, key personnel, and the use of plea negotiations to determine a criminal case. Students investigate the rights of the accused and of victims, and explore the purposes and types of sanctions and sentencing considerations.

They consider the impact of time, costs and cultural differences on the ability of the criminal justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the criminal justice system to actual and/or hypothetical scenarios.

Outcome 1

On completion of this unit the student should be able to explain the key principles in the criminal justice system, discuss the ability of sanctions to achieve their purposes and evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case.

Reproduced from VCAA VCE Legal Studies Study Design 2024–2028

KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the rights of an accused and of victims in the criminal justice system
- explain the roles of Victoria Legal Aid and Victorian Community Legal Centres in assisting an accused and victims of crime
- analyse the roles of key personnel in a criminal case
- justify the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals
- discuss the appropriateness of plea negotiations
- discuss the impact of costs, time and cultural differences on the achievement of the principles of justice during a criminal case
- discuss the ability of sanctions to achieve their purposes
- evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

CHAPTER 1

Key concepts of the Victorian criminal justice system

LESSONS

- 1A** Key principles of the criminal justice system
- 1B** Rights of an accused
- 1C** Rights of victims

Image: Alex Cimbai/Shutterstock.com

KEY KNOWLEDGE

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

1A Key principles of the criminal justice system

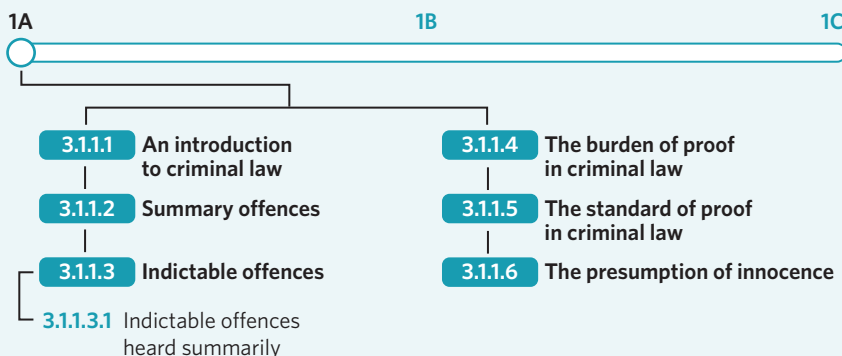


Image: Fer Gregory/Shutterstock.com

It is day 100 of Legal Studies Survivor and the competition is heating up. For the next immunity challenge, competitors must identify the key concepts of the criminal justice system or risk eviction. Will the competitors successfully uncover the core principles that ensure the efficiency and effectiveness of the legal system? Or will this be the end of their time on the island?

STUDY DESIGN DOT POINTS

- the distinction between summary offences and indictable offences
- key principles of the criminal justice system, including the burden of proof, the standard of proof, and the presumption of innocence



USEFUL TIP

Remember, the two parties in a criminal case are known as the prosecution and the accused. The prosecution represents the Commonwealth, or a 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

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.

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

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

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

Lesson introduction

There are various key principles that underpin criminal law, and these ensure justice can be achieved. Key principles include the presumption of innocence, the burden of proof, and the standard of proof. The criminal justice system distinguishes between various types of offences and has different processes for dealing with each. In order to understand how criminal proceedings are conducted, the fundamental concepts of the criminal justice system must first be known.

An introduction to criminal law 3.1.1.1

The Victorian criminal justice system plays an important role in enforcing **criminal law** by ensuring individuals who engage in harmful and prohibited conduct face the appropriate consequences. Criminal law protects society through **statute law**, such as the *Crimes Act 1958* (Vic), and by establishing **sanctions** for criminal offences, which range from fines to imprisonment.

Crimes are acts, or failures to act, that cause harm, by violating a law, and are lawfully punishable. It is important to note that not all immoral behaviour is considered a crime, even if it causes harm. For example, talking poorly about someone behind their back is not necessarily illegal but it can be considered immoral. However, if someone is actively discriminating against another person based on their background or personal characteristics, this is considered a crime under various Australian anti-discrimination laws.

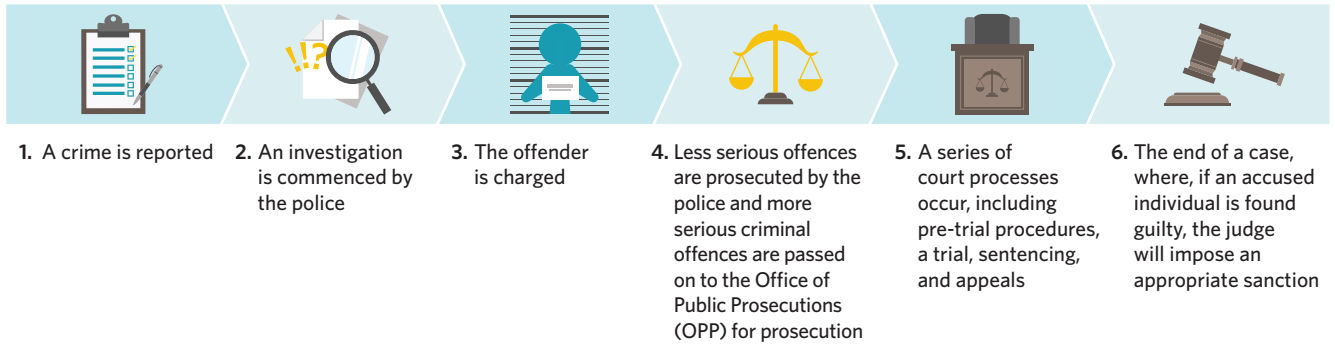


Figure 1 An overview of the processes involved in a criminal case in Victoria

Summary offences 3.1.1.2

Summary offences are less severe criminal offences that are generally heard in the Magistrates' Court. Sanctions for summary offences are usually small fines, but can also include short periods of imprisonment. There is no right to a trial by jury for summary offences as they are less serious criminal matters. Most summary offences that are committed can be found in the *Summary Offences Act 1966* (Vic) and various other statutes. Examples of summary offences include:

- common assault
- disorderly conduct
- driving offences
- damage to property.

DEEP DIVE

Sanctions for speeding

In Victoria, individuals who commit a minor offence, such as speeding, will receive an **infringement** notice requesting them to pay a fine. However, failure to pay for the infringement notice can lead to more serious consequences, with the final stage leading to the arrest of the individual and a possible court hearing. Therefore, the fines system in Victoria operates in a way that punishes individuals for their offending in an informal manner, like issuing a fine, but may also lead to a more serious court hearing if the individual fails to comply.

Adapted from 'About infringements' (Fines Victoria, 2023)

KEY TERM

Summary offence a minor criminal offence usually heard in the Magistrates' Court.

LEGISLATION

Summary Offences Act 1966 (Vic)

LESSON LINKS

You will learn more about the Magistrates' Court, County Court, and Supreme Court in **2D The Victorian court hierarchy and criminal cases**.

You will learn more about sanctions in **3B Types of sanctions**.

LEGAL VOCABULARY

Infringement notice a penalty issued to an offender when they commit an offence, such as speeding, that warrants a fine.

Indictable offences 3.1.1.3

Indictable offences are more severe criminal offences that are heard by a judge and/or jury in the County or Supreme Court. Sanctions for indictable offences are more severe than those imposed for summary offences, including longer sentences of imprisonment and larger fines. Unless otherwise stated, all offences in the *Crimes Act 1958* (Vic) are indictable offences. Examples of indictable offences include:

- murder
- rape
- kidnapping
- culpable driving causing death.

WANT TO KNOW MORE?

In Victoria hundreds of thousands of crimes are committed each year. You can find out more about the statistics and types of crimes being committed by searching 'Crimes Statistics Agency - Recorded offences' and clicking the Crime Statistics Agency (2023) webpage.

LEGISLATION

Crimes Act 1958 (Vic)

KEY TERMS

Indictable offence a criminal offence that is serious in nature and generally heard by a judge and jury in the County or Supreme Court.

Indictable offences heard summarily 3.1.1.3.1

KEY TERMS

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.

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 less serious indictable offences that can be heard, similar to summary offences, in the Magistrates' Court. An accused person will generally choose to have their offence heard summarily where possible as it is less costly, less time-consuming, and the maximum penalties imposed in the Magistrates' Court are less severe. During a **committal proceeding**, the magistrate will determine whether an offence can be heard summarily.

An indictable offence may be heard summarily where:

- the offence is not punishable by a maximum term exceeding 10 years of imprisonment
- the court agrees and determines it is appropriate
- the accused consents to having their offence(s) heard summarily.

Indictable offences that can be heard summarily are listed in the *Criminal Procedure Act 2009 (Vic)*. For a single offence, the maximum term of imprisonment that can be imposed by a magistrate is two years, whilst two or more offences can result in up to five years in prison.

Table 1 Distinction between summary and indictable offences

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 a trial by jury	No	Yes	No
Statutes related to the offences	<i>Summary Offences Act 1966 (Vic)</i>	<i>Crimes Act 1958 (Vic)</i>	<i>Criminal Procedure Act 2009 (Vic)</i>
Name of the final hearing	Hearing	Trial	Hearing
Examples	• Driving offences • Disorderly conduct • Common assault • Damage to property	• Murder • Rape • Kidnapping • Culpable driving causing death	• Theft and burglary (if the value of the property stolen does not exceed \$100,000) • Recklessly causing serious injury • Property damage

The burden of proof in criminal law 3.1.1.4

KEY TERM

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

The **burden of proof** refers to the responsibility of proving the facts of a case. In a criminal case, the prosecution has the burden of proof. Given the prosecution is pursuing the case against the accused, the onus is on them to prove the facts and charges against the accused. In some circumstances, the burden of proof will be reversed, such as in cases where the accused raises the defence of self-defence or in certain drug possession cases.

HYPOTHETICAL SCENARIO



Figure 2 An accused person, like Benito, does not have the burden of proof

Benito bears no burdens

Benito has been charged with kidnapping and aggravated burglary. If the case proceeds to trial, it will be the prosecution's responsibility to prove that Benito is guilty of these crimes and present the evidence associated with the case. It is not Benito's responsibility to try to prove his own innocence.

The standard of proof in criminal law 3.1.1.5

The **standard of proof** refers to the strength of the evidence required to prove the guilt of the accused. The standard of proof required in criminal proceedings 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 logical or reasonable conclusions that do not find the accused responsible for the crime(s), the case against them has not been proven beyond reasonable doubt and therefore, they cannot be found guilty.

HYPOTHETICAL SCENARIO

Eenie, meenie, miney... moe?

Moe was charged with arson after his neighbour accused him of starting a fire that engulfed an abandoned house at the end of their street. The neighbour claimed they saw 'a tall figure wearing a hoodie' running away from the crime scene and believed it was Moe, as he had seen Moe wearing a hoodie earlier that day. However, while testifying on the stand, the neighbour admitted they did not see the face of the alleged offender and had no other reason to believe Moe was the arsonist. Therefore, there was a reasonable doubt as to whether Moe committed the crime and a likelihood that another individual was responsible.

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

It is common for SACs and exams to ask you to distinguish between the burden of proof and the standard of proof. Therefore, ensure you can identify and explain the concepts individually and also provide one key difference between them. Remember to reference any provided information or scenarios in your answer.

The presumption of innocence 3.1.1.6

The **presumption of innocence** is the right for all accused persons to be presumed innocent until it is proven, beyond a reasonable doubt, that they are guilty. Whilst this is an old common law principle, it is also protected under section 25 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

There are several features and principles of criminal justice that uphold the presumption of innocence, including:

- the right to silence; an accused person does not have the obligation to answer any questions and cannot be pressured to give evidence to prove their innocence.
- the right to apply for **bail**; unless there are reasonable grounds for denying bail, like if the accused is a threat to the safety of the community, they have the right to receive bail while awaiting their trial.
- the right to appeal a case; if an accused believes they have been wrongfully convicted, they have the right to appeal their case and uphold their innocence.
- prior **convictions** not being revealed until the sentencing hearing; this is to ensure the jury, if one is used, is not subconsciously prejudiced against the accused before the case is presented.

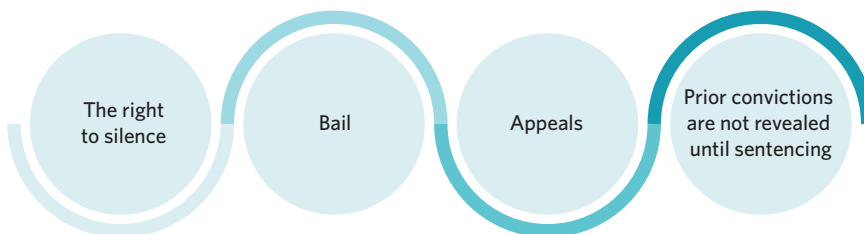


Figure 3 Features and principles that uphold the presumption of innocence

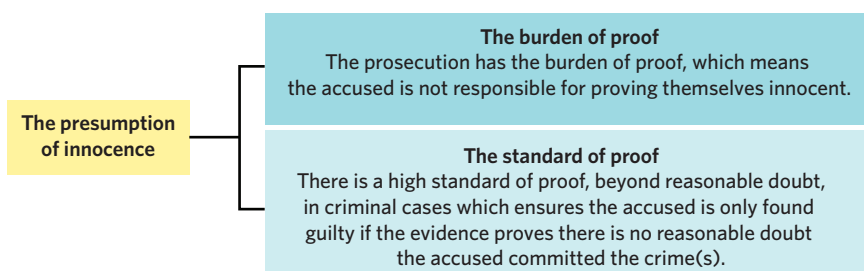


Figure 4 The relationship between the presumption of innocence and the burden and standard of proof

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)

KEY TERM

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

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.

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

LESSON LINKS

You will learn more about the right to silence in **1B Rights of an accused**.

You will learn more about appeals in **2D The Victorian court hierarchy and criminal cases**.

Lesson summary

In the criminal justice system, criminal offences are outlined and categorised in various sections of the law based on their severity.

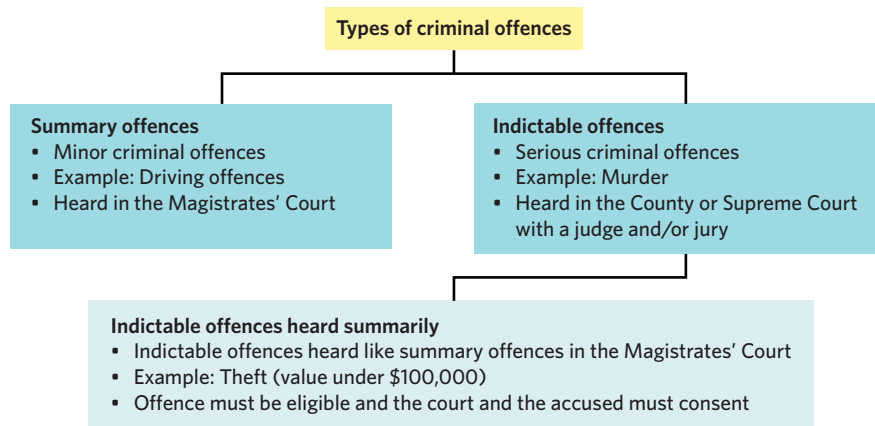


Figure 5 Summary of the types of criminal offences

- The burden of proof is the responsibility of proving the facts of the case. In criminal proceedings, this responsibility rests with the prosecution.
- The standard of proof refers to the strength of evidence or the degree to which a case must be proven. This is 'beyond reasonable doubt' in a criminal case.
- The presumption of innocence is the right for all accused persons to be presumed innocent until it is proven they are guilty beyond reasonable doubt.

1A Questions

Check your understanding

Question 1

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

Statement	True	False
I. Crimes are acts or omissions that violate an existing law and can cause harm.	☐	☐
II. Immoral behaviour, like leaving a hate comment, is considered a crime.	☐	☐
III. Imprisonment is the only sanction available for crimes.	☐	☐
IV. Laws outlining different crimes seek to protect society and punish those who engage in illegal activity.	☐	☐
V. Crimes and their sanctions are outlined in the <i>Crimes Act 1958</i> (Vic).	☐	☐

Question 2

Summary offences are minor criminal offences.

- A. True
B. False

Question 3

Which of the following statements are requirements for an indictable offence to be heard summarily?

(Select all that apply)

- A. The victim of the crime consents.
B. The offender is eligible as the offence is not punishable by a term exceeding 10 years of imprisonment.
C. The Magistrates' Court has room in its daily schedule.

- D. The court agrees and determines it is appropriate.
- E. The accused consents.

Question 4

Indictable offences are generally heard in the County or Supreme Court and can be found in the:

- A. *Indictable Offence Act 1958* (Vic).
- B. *Crimes Act 1948* (Vic).
- C. *Criminal Act 1958* (Vic).

Question 5

Fill in the blanks with the following terms:

prosecution

responsibility

facts

standard of proof

The burden of proof refers to the [] of a party to prove the facts of a case. In a criminal case, the burden of proof rests with the []. On the other hand, the [], which is beyond reasonable doubt in criminal cases, refers to the degree to which the [] of the case must be proven in court in order to find the accused guilty.

Question 6

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

- A. True
- B. False

Question 7

Which of the following statements are correct about indictable offences heard summarily?

(Select all that apply)

- A. It can be cost and time effective to have an offence heard summarily.
- B. There can be less severe penalties as the maximum imprisonment sentence in the Magistrates' Court for one offence is two years.
- C. The court does not need consent as it is the decision of the accused to have their offence heard summarily.
- D. All indictable offences can be heard summarily.

Question 8

An example of an indictable offence that can be heard summarily is:

- A. manslaughter.
- B. robbery when the value of the stolen goods is less than \$100,000.
- C. culpable driving causing death.

Question 9

The presumption of innocence is upheld through:

- A. a low standard of proof and the prosecution having the responsibility of proving the facts of the case.
- B. the responsibility of the accused to prove their innocence beyond reasonable doubt.
- C. a high standard of proof where the prosecution must prove the guilt of the accused beyond reasonable doubt.

Preparing for exams

Standard exam-style

Question 10

(2 MARKS)

Section 4(a) of the *Summary Offences Act 1996* (Vic) states:

'Any person who - burns rubbish shavings or other materials in a public place shall be guilty of an offence.'

Referring to the section of the *Summary Offences Act 1966* (Vic) provided, describe why burning rubbish shavings or other materials is a summary offence rather than an indictable offence.

Adapted from VCAA 2021 exam Section A Q3b

Question 11

(2 MARKS)

Acacia has been charged with culpable driving causing death. Their case is set to be heard in the Supreme Court.

Who has the burden of proof in this case and what is the standard of proof?

Adapted from VCAA 2018 exam Section A Q5a

Question 12

(5 MARKS)

Kavi has been charged with murder and has been told by a friend that he may be able to have his offence heard summarily.

- a. Outline whether Kavi has been charged with a summary or indictable offence.

2 MARKS

Adapted from VCAA 2020 exam Section B Q1a

- b. Is Kavi's friend correct in saying that he may be able to have his case heard summarily? Justify your answer.

3 MARKS

Question 13

(3 MARKS)

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

Adapted from VCAA 2018 Sample exam Section B Q2a

Question 14

(3 MARKS)

Olive has been charged with stalking and harassing a well-known celebrity, Harriet. Her legal representation has advised her that she does not need to prove the facts of the case, assuring her that it can be difficult for the prosecution to prove guilt in criminal cases due to the high standard of proof.

Distinguish between the burden of proof and the standard of proof with reference to the scenario above.

Extended response

Use your answer to question 15 to support your response to question 16.

Question 15

Which of the following statements are correct about how the criminal justice system upholds the presumption of innocence? **(Select all that apply)**

- A. The right to silence ensures an accused is not obliged to answer questions related to the relevant offence, enabling them to avoid incriminating themselves.
- B. The criminal justice system ensures all accused individuals are immediately assumed guilty of their crimes.
- C. Judges are likely to be biased and reveal any prior convictions the accused may have to influence the jury.
- D. An accused has the right to apply for bail and await trial whilst in the community, unless there are reasonable grounds to deny their bail request.
- E. If an accused believes they have been wrongfully convicted they have the right to apply for an appeal.

Question 16

(6 MARKS)

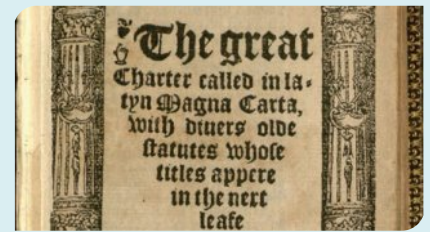
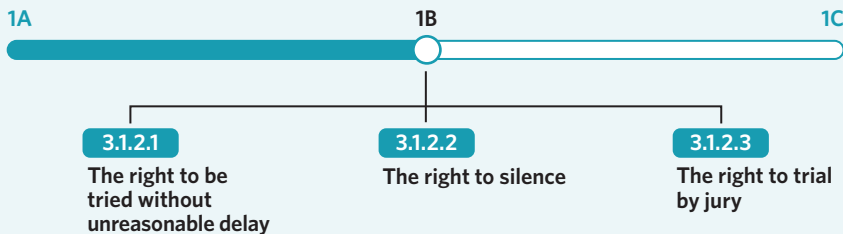
Discuss the extent to which the criminal justice system upholds the presumption of innocence.

Adapted from VCAA 2018 Sample exam Section A Q8

1B Rights of an accused

STUDY DESIGN DOT POINT

- the rights of an accused, including the right to be tried without unreasonable delay, the right to silence, and the right to trial by jury



'We not pass upon him, nor [condemn him] but by lawful judgement of his Peers, or by the Law of the Land.'— Magna Carta (1215)

Centuries ago, the Magna Carta established that a person accused of a crime maintains certain rights, such as the right to be tried in front of an impartial jury. Despite being written hundreds of years ago, modern Australian law upholds similar fundamental ideas to the Magna Carta, including providing certain rights of an accused person.

Lesson introduction

In the Victorian criminal justice system, the *Charter of Human Rights and Responsibilities Act 2006* (Vic), also referred to as 'the Charter', aims to protect the human rights of all Victorians, including those accused of a criminal offence. The Charter guides the creation of legislation in Victoria in an attempt to ensure all laws are compatible with human rights. The Charter has, and continues to, influence laws so that accused persons are guaranteed certain rights, such as:

- the right to be tried without unreasonable delay
- the right to silence
- the right to trial by jury.

LEGISLATION

Charter of Human Rights and Responsibilities Act 2006 (Vic)

The right to be tried without unreasonable delay 3.1.2.1

The **right to be tried without unreasonable delay** ensures an accused person has their case heard in a timely fashion. This right is protected by s 21(5) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Delays to a trial should only occur when a court considers such delays 'reasonable'. A number of factors will be considered to determine what classifies as an 'unreasonable' delay. Therefore, what is considered 'unreasonable' will differ between cases. The case of *R v Upton* [2005] ACTSC 52 found relevant factors in determining the 'unreasonableness' of a delay.



Figure 1 Factors that may be considered by a court to determine if the delay was 'unreasonable', as established in *R v Upton*

KEY TERM

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'.

LEGAL VOCABULARY**Office of Public Prosecution (OPP)**

the public body responsible for initiating, preparing, and conducting legal proceedings for serious criminal matters in Victoria, on behalf of the Victorian community.

USEFUL TIP

To remember the three different rights of an accused covered in the VCE Legal Studies Study Design, use the acronym 'DJs' to help you recall the key words of each right; delay, jury, and silence.

- Right to be tried without unreasonable **Delay**
- Right to trial by **Jury**
- Right to **Silence**

**KEY TERM**

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.

DEEP DIVE**Statutory protection of the right to be tried without unreasonable delay**

Section 21(5) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) says:

(5) A person who is arrested or detained on a criminal charge—

- (a) must be promptly brought before a court; and
- (b) has the right to be brought to trial without unreasonable delay; and
- (c) must be released if paragraph (a) or (b) is not complied with.

HYPOTHETICAL SCENARIO

CONTENT WARNING This section mentions content that is sensitive in nature, relating to violence.

The thirteen-year search for justice

In 1995, Harry allegedly assaulted Akilah by punching and strangling him. The **Office of Public Prosecution (OPP)** was made aware of the attacks in 1996. However, Akilah officially made a statement accusing Harry of these attacks, resulting in a notice being sent to Harry informing him about the accusation in 2009. Harry's trial began three years and four months after he was first made aware of the accusations.

Harry argued that his right to be tried without unreasonable delay had been breached. The court agreed with this argument, determining Harry's right had been breached, considering:

- the relatively straightforward nature of the assaults.
- the fact the OPP had possessed information and evidence about the assault against Akilah for 13 years before launching an official case against Harry.

Table 1 Rationale for the right to be tried without unreasonable delay

Accused's right	Rationale
The right to be tried without unreasonable delay	Witnesses' memories may fade and key aspects of the offence may be forgotten, causing their witness testimonies to be less reliable. This could cause unreliable evidence to be given, which may result in an unfair result for an accused.
	An upcoming trial can cause immense stress on the accused, victims, and their families as the outcome of the criminal case remains unknown, possibly increasing anxiety for all parties.
	If a criminal trial has garnered media attention, increased delays may make it more difficult for 12, unbiased jury members to be found as most members of the public could have heard about the case and formed their own opinions about it prior to the trial commencing.
	Long delays before a trial may increase legal costs for an accused as they may need to hire a lawyer for the entire period before their trial.

The right to silence 3.1.2.2

The **right to silence** ensures the presumption of innocence is upheld as an accused person's choice to not speak during questioning or in court cannot be viewed as a sign of guilt. It also helps an accused to avoid accidentally incriminating themselves. An accused's right to silence can be exercised at any time prior to and during a trial, including when:

- being confronted by law enforcement at the time of an arrest or when being accused of committing an offence.
- in a court of law, meaning an accused can choose to remain silent instead of defending themselves against the prosecution or answering their questions.

This right has been developed by the courts, making it a **common law** principle, although legislation has also been created to protect this right. Section 89 of the *Evidence Act 2008* (Vic) states that no negative inferences should be drawn about an accused because of their failure or refusal to answer one or more questions. As the burden of proof lies with the prosecution to establish the accused's guilt beyond reasonable doubt, an accused can choose to be silent in a criminal trial. By remaining silent, they are relying on the prosecution's case not being strong enough to meet the high standard of proof.

The *Jury Directions Act 2015* (Vic) also allows an accused's lawyer to request that a judge makes directions to a jury informing them that the:

- failure of an accused to give evidence cannot be considered an admission of guilt by the accused.
- failure of an accused to call witnesses cannot be used as evidence against the accused.

There are certain exceptions to the right to silence. For example, the *Criminal Procedure Act 2009* (Vic) sets out that an individual pulled over whilst driving must provide their driver's licence, or their name and address, if asked by police.

LEGAL VOCABULARY

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

LEGISLATION

Evidence Act 2008 (Vic)

Jury Directions Act 2015 (Vic)

LEGISLATION

Criminal Procedure Act 2009 (Vic)

LEGAL CASE

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

Taylor-Joyce v R [2021] NSWCCA 29

Facts

In 2021, a case was brought to the NSW Supreme Court that was attempting to appeal a previous decision. The accused argued that a lack of directions to the jury about his right to silence had made his trial unfair.

The Crown argued that in 2017, Mr Dwyer hit Dylan Taylor-Joyce on the head with a toy baseball bat outside of a restaurant after Taylor-Joyce had demanded drugs and money from another person earlier that day. Taylor-Joyce then pulled a machete out of his backpack and cut Mr Dwyer's arm. Taylor-Joyce claimed his act was in self-defence after being 'hit very hard in the back of the head'.

After the events at the restaurant, police were called by witnesses. That night, police arrested Taylor-Joyce. He asserted he would exercise his right to silence and did not reveal any information about the altercation.

Legal issue

In the original trial, the jury returned a guilty verdict for the charge that Taylor-Joyce had intended to cause grievous bodily harm. Taylor-Joyce appealed this decision, arguing the jury came to this decision unfairly because the judge had not informed them that Taylor-Joyce's silence during his first arrest should not unfavourably impact the jurors' decision about his guilt. The accused's lawyers never requested the judge to make a direction to the jury that they should not interpret Taylor-Joyce's silence as an admission of guilt as he had the right to remain silent.

Decision

The Supreme Court determined the judge was not required to make directions to the jury about the right to silence. It was the obligation of the accused's representatives to seek that a direction be made by the judge.

Significance

This case highlights how the right to silence can be exercised when being arrested, and emphasises the fact that jurors should not make their decision about whether an accused is guilty based on their silence.

LESSON LINKS

You learnt about the standard of proof, the burden of proof, and the presumption of innocence in **1A Key principles of the criminal justice system**.

You will learn more about judges' directions in **2E Judges, magistrates, and juries in a criminal case**.

WANT TO KNOW MORE?

The development of the right to silence as a common law principle dates back to the 16th century. You can find out more about the development of the right to silence by searching 'History of the Right To Silence laws' and clicking the Proctor & Associates Solicitors & Barristers (2022) webpage.

Table 2 Rationale for the right to silence

Accused's right	Rationale
The right to silence	The right reflects the burden of proof in a criminal case in that the onus is on the prosecution to prove the accused is guilty, not the responsibility of the accused to prove their innocence. Therefore, an accused may remain silent if they believe the prosecution will be unable to gather sufficient evidence to prove their guilt.
	As being questioned by police may be stressful, an accused could make statements in the heat of the moment that they would later regret or seek to amend. These statements could be used against them, as any evidence gathered at a crime scene, including statements made by an accused, is admissible in court. The right to silence ensures an accused is able to refrain from making such statements that could be incriminating.
	The right protects an accused person from an invasion of their privacy and liberty. If an accused wants to keep certain information to themselves to retain privacy, they are legally able to do so.
	The right to silence aims to reduce the power imbalance between the prosecution and the accused. Where an accused was unlawfully coerced into admitting certain details or confessing to a crime, this may be inadmissible evidence . Therefore, police and other authorities cannot use their powerful position to force an accused, who is more vulnerable comparatively, into confessing.

LEGAL VOCABULARY

Inadmissible evidence
evidence that does not abide by the rules of procedure, and is, therefore, prohibited from being presented to the court.

DEEP DIVE

Miranda rights

'You have the right to remain silent. Anything you say can and will be used against you in a court of law.'

You may have heard this phrase said by police officers on television or you may have had it said to you personally if being questioned by public transport inspectors, for example. You may have wondered where this phrase has come from, and what it actually means.

This phrase must be said by police during questioning to comply with each individual's 'Miranda rights' by informing an accused of their right to remain silent. The term 'Miranda right' is based on a landmark decision in the US Supreme Court case of *Miranda v Arizona*.

In Australia, there is a similar right protected by law. If approached by police in Victoria and questioned in relation to an indictable offence, police are obliged to caution you that you have a right to silence. Police must convey:

- you do not have to say anything
- if you do say something, it may be used as evidence against you
- you may contact a friend or family member and tell them your whereabouts
- you may contact a lawyer for advice before the interview takes place.

Under s 139(1)(c) of the *Evidence Act 2008* (Vic), evidence is taken to have been obtained improperly if 'before starting the questioning, the investigating officer did not caution the person that the person does not have to say or do anything but that anything the person does say or do may be used in evidence'.

Adapted from 'Miranda Rights: Do you have the right to remain silent in Australia?' (Criminal Defence Lawyers Australia, 2023)

The right to trial by jury 3.1.2.3

The **right to trial by jury** allows accused persons to have their guilt, for the offence they have been accused of, to be determined by impartial members of the community rather than a single judge. This right applies to people accused of indictable offences, who plead not guilty, according to the *Criminal Procedure Act 2009* (Vic). Therefore, these trials by jury occur in the County Court and Supreme Court – Trial Division. Trial by jury is also a right enshrined in the Australian Constitution for all Commonwealth indictable offences.

Who is eligible to be a jury member, how a jury is to operate, and how a jury is to be selected is all set out in the *Juries Act 2000* (Vic).

Table 3 The requirements for an accused to receive a trial by jury for a criminal offence

	Summary offence	Indictable offence with guilty plea	Indictable offence with no guilty plea
Example of offence	Driving 10km over the speed limit	Murder	Armed robbery
Tried by jury?			
Who decides the verdict?	Determined by a magistrate or penalised through an infringement notice.	The offender moves straight to a sentencing hearing with a judge alone.	A jury.

KEY TERM

Right to trial by jury a right to be tried by unbiased members of the community who have been randomly selected from the electoral roll.

LEGISLATION

Juries Act 2000 (Vic)

LESSON LINKS

You will learn more about juries in a criminal trial in **2E Judges, magistrates, and juries in a criminal trial**.

You will learn more about the right to trial by jury for Commonwealth indictable offences in **7K The Constitution as a check on parliament – express protection of rights**.

REAL WORLD EXAMPLE

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

Woman behind bars over lethal biscuit

In September 2020, Rebecca Payne ground up a sedative drug called Temazepam, laced biscuit 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. It took the jury two days of deliberation to reach this guilty verdict. As a result of Payne being found guilty, Judge Incerti handed Payne a sentence of 16 years imprisonment with a non-parole period of 10 years.

Adapted from 'Rebecca Payne sentenced to 16 years' jail for murdering husband with drug laced biscuits' (Clark, 2023)



Image: Bozena Fulawka/Shutterstock.com

Figure 2 A woman who killed her husband by poisoning a biscuit's icing was sentenced to 16 years in prison

Table 4 Rationale for the right to trial by jury

Accused's right	Rationale
The right to trial by jury	A jury is an impartial and unbiased decision maker in a criminal case. Jurors are required to have no connections to either the prosecution or the accused and cannot have prior knowledge about the facts of the case. Therefore, a jury should represent a cross-section of the community and not be biased towards either party.
	The presence of a jury will likely result in lawyers using clear, plain English instead of legal jargon when presenting evidence. This enables all parties of the case, including the jury, the accused, and the victim, to understand the proceedings with greater ease.

Continues →

LESSON LINKS

You learnt about indictable offences in **1A Key principles of the criminal justice system**.

You will learn more about the Country Court and the Supreme Court in **2D The Victorian court hierarchy and criminal cases**.

Table 4 Continued

Accused's right	Rationale
The right to trial by jury	For an accused to be found guilty, usually a unanimous verdict is required. In some cases, the judge can direct the jury to return a majority verdict, where all but one juror agrees, but this is only possible in certain circumstances. This requirement for all (or a majority in some circumstances) of the jurors to believe an individual is guilty beyond reasonable doubt aims to prevent accused persons from being wrongfully convicted of a crime they did not commit. A jury is likely to more accurately reflect a cross-section of the community than the judges who adjudicate criminal cases. This is because the 12 jurors are likely to be of diverse socioeconomic status, age, ethnicity, occupation, and experience. Therefore, bias against certain minority groups may be less prevalent among jurors than a single judge.

Lesson summary

An accused person has several rights in Australia, protected by either statute or common law. These rights include:

- the right to be tried without unreasonable delay
- the right to silence
- the right to trial by jury.

Table 5 Strengths and limitations of the rights of an accused

	Strengths	Limitations
The right to be tried without unreasonable delay	• An accused person does not have to endure prolonged periods of stress and anxiety that may be experienced if having to wait a long time for their trial to commence. • Witnesses are more likely to remember key facts of the events they saw if a criminal trial takes place in a reasonable time after the events in question occurred, promoting fairness as evidence presented is therefore, more reliable.	• A trial that is delayed for years may still be considered 'reasonable' if the delay was a result of actions of the accused, such as their alleged crime being particularly complex, thus requiring a range of evidence to be collected against them. • Considering a trial may be delayed for extended periods if reasonable, the memory of witnesses may fade, or a witness may pass away, preventing a fair trial from being achieved.
The right to silence	• The presumption of innocence is upheld by the right to silence as an accused is presumed innocent, and does not need to say anything to achieve this presumption. • The right to silence can reduce the power imbalance between the prosecution and the accused as police are unable to coerce an accused into making false confessions. • Juries are directed to not make any inferences from an accused's silence, promoting fairness as jurors should not believe an accused is guilty just because they are silent.	• Although a judge may direct a jury that an accused's silence is not an indicator of their guilt, a jury may still inadvertently believe an accused failing to defend themselves is an indicator of guilt, potentially leading to an unfair result. • The right to silence can cause an accused to be uncooperative with police, possibly resulting in barriers to justice for the victim/s. • This right is not comprehensive as there are exceptions to this right, such as when a person is pulled over for a suspected driving offence, and must reveal their name or address.
The right to trial by jury	• The use of a jury aims to ensure an accurate reflection of society is selected at random to determine an accused's guilt, therefore promoting fairness as the jury is inherently impartial when making determinations. • A jury will encourage lawyers to speak clearly and avoid using legal jargon when presenting their evidence, promoting access as jurors and the parties can gain a better understanding of the court proceedings.	• To have a jury decide a case is costly and time consuming for the criminal justice system as jurors must be paid for their participation. Therefore, using a jury to determine an accused's guilt may place strain on the justice system and cause delays, impeding the ability of the right to trial without unreasonable delay to be satisfied for all accused persons. • Juries may not always be impartial as they could be swayed by preconceived biases or emotions, deciding an accused's guilt based on these factors as opposed to just the plain facts of the case.

1B Questions

Check your understanding

Question 1

Which of the following are rights of an accused? **(Select all that apply)**

- A. The right to silence
- B. The right to be presumed guilty unless proven innocent
- C. The right to trial by jury for all criminal offences, including indictable and summary offences
- D. The right to be tried without unreasonable delay

Question 2

The court has determined that a delay for a criminal trial that exceeds one year will always be considered an 'unreasonable' delay.

- A. True
- B. False

Question 3

Which of the following are factors a court may consider when determining whether a delay is 'unreasonable' in a criminal trial? **(Select all that apply)**

- A. The length of the delay
- B. The complexity of the case
- C. The degree of expertise of the accused's lawyer
- D. The number of offences committed

Question 4

Fill in the blanks with the following terms:

be tried without unreasonable delay

silence

The right to [] ensures a person is not obliged to supply information to a person in authority, whereas the right to [] ensures an accused person's case is heard in a timely manner.

Question 5

The right to silence upholds:

- A. the presumption of innocence as an accused person is believed to be innocent, and it is the responsibility of the prosecution to disprove this presumption and establish their guilt.
- B. the right for police to interrogate an accused, when they are first arrested, for their initial statement on an alleged offence so this information can be used in court.

Question 6

Under the *Jury Directions Act 2015* (Vic), an accused's lawyer can request that a judge make directions to a jury that the failure of their client, the accused, to give evidence:

- A. can be judged by a jury as being an admission by the accused that they are guilty.
- B. cannot be viewed by the jury as being an admission of guilt by the accused.

Question 7

Which of the following statements are correct about the right to trial by jury? **(Select all that apply)**

- A. A jury is an impartial and unbiased decision maker in a criminal case as they are randomly selected from the community, making them an accurate reflection of society.
- B. A minimum of six or more jury members must believe an accused is guilty for them to be convicted of a crime, therefore ensuring accused persons who have committed a crime are held accountable.
- C. If a potential jury member has personal connections to either the prosecution or the accused, they will not be eligible to be a juror. This can improve the ability of a jury to be impartial as no juror is biased towards a party due to personal connections.
- D. The presence of a jury is likely to encourage a lawyer to use clear, plain English instead of legal jargon, improving the jurors and the accused's access to understandable legal proceedings.

Question 8

An accused person's rights are only protected by common law in Australia.

- A. True
- B. False

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

(2 MARKS)

Identify **two** rights of an accused in the Victorian criminal justice system.

Adapted from VCAA 2018 exam Section A Q4a

Question 10

(2 MARKS)

Describe the right of an accused to be tried without unreasonable delay.

Question 11

(3 MARKS)

Explain how the right of an accused to trial by jury upholds the principle of fairness.

Adapted from VCAA 2018 exam Section A Q4b

Question 12

(3 MARKS)

Marika has been accused of stabbing Piper in a jealous frenzy after Piper won a dance competition over her. She was arrested and is now awaiting trial.

Will Marika be required to give evidence as an accused at the trial? Justify your answer.

Adapted from VCAA 2018 Sample exam Section B Q3b

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.

Chirag has been accused of murdering Lucy after his fingerprints were found on the weapon that was used in her attack. He pleaded not guilty to the charge of murder. During his trial, he remained silent instead of attempting to disprove the arguments raised by the prosecution. He was tried in front of a jury that was selected at random from the community.

Question 13

Tick the box to indicate whether each of the following statements are ways in which fairness may be **upheld** or **limited** in Chirag's criminal case.

Statement	Upheld	Limited
I. Chirag is exercising his right to silence, therefore his lawyer could request that a judge directs the jury to not make any inferences from his silence and remain impartial.	☐	☐
II. Jury members may still base decisions on their emotions or inherent biases they hold against certain races, ethnicities, and occupations, instead of solely making their decision according to the facts, preventing jurors from being impartial.	☐	☐
III. A jury is an impartial decision-making body that would not contain anyone that personally knows Chirag, therefore ensuring juror members would not have a bias for or against Chirag before the trial began.	☐	☐
IV. Just because a judge gives a direction to jury members to not view Chirag's silence unfavourably, this does not mean they will actually do so. Jury members may view Chirag's silence as an admission of guilt, despite the judge's direction. This may result in jurors basing their decision on their own ideas and inklings, instead of deciding the result from the facts.	☐	☐

Question 14

(6 MARKS)

Discuss **one** of the principles of justice in relation to Chirag's criminal case.

Linking to previous learning**Question 15**

(3 MARKS)

After receiving her licence, Lucia was accused of committing a driving offence for driving 60 km/hour in a school zone during school pick-up time. She admitted to driving over the limit because she was in a rush to see her boyfriend.

Does Lucia have a right to trial by jury? Justify your response.

Question 16

(3 MARKS)

Explain how the right to silence upholds the presumption of innocence in a criminal case.

1C Rights of victims



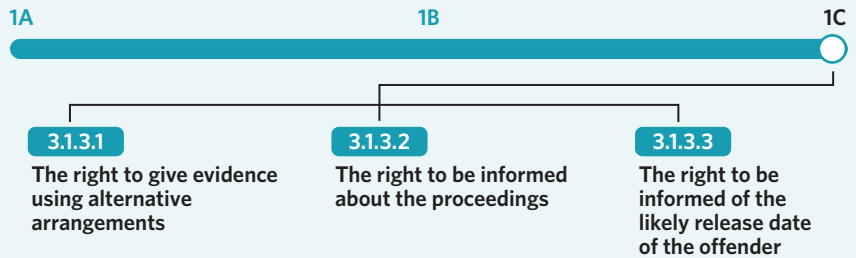
Image: Ground Picture/Shutterstock.com

'Every victim matters... Too often, the trauma suffered by victims is then compounded by their experience of the criminal trial process.'

—The Honourable Philip Cummins AM
(Former Chair of the Victorian Law Reform Commission and former judge in the criminal division of the Supreme Court) (2015)

STUDY DESIGN DOT POINT

- the rights of victims, including the right to give evidence using alternative arrangements, the right to be informed about the proceedings, and the right to be informed of the likely release date of the offender



LEGISLATION

Victims' Charter Act 2006 (Vic)

Criminal Procedure Act 2009 (Vic)

Lesson introduction

In the Victorian criminal justice system, laws exist to uphold the rights of victims of crime and their families. The *Victims' Charter Act 2006 (Vic)* creates various rights for victims regarding how crimes are prosecuted and how offenders are sanctioned. In addition, the *Criminal Procedure Act 2009 (Vic)* outlines provisions for certain witnesses to give evidence via alternative arrangements, such as via video link or in a closed court. Three victim's rights that are crucial to Victoria's criminal justice system are:

- the right to give evidence via alternative arrangements
- the right to be informed about proceedings
- the right to be informed of the likely release date of the offender.

The right to give evidence using alternative arrangements 3.1.3.1

The **right to give evidence using alternative arrangements** is a right provided to victims or witnesses of certain crimes in Victoria where they can give evidence in court in a non-standard way. The purpose of this right is to reduce the trauma associated with giving evidence in court and encourage witnesses to provide such evidence. This right is provided in the *Criminal Procedure Act 2009 (Vic)*. The provisions specify certain categories of witnesses that are eligible to give evidence in court using alternative arrangements. This applies to criminal proceedings that relate, wholly or partly, to a charge for:

- sexual offences
- family violence offences**
- summary offences involving the use of obscene or indecent language
- summary offences involving sexual exposure.

KEY TERM

Right to give evidence using alternative arrangements an entitlement for victims or witnesses of certain crimes in Victoria to give evidence in court in a non-standard way that aims to be less traumatic for the victim.

LEGAL VOCABULARY

Family violence offences behaviours set out in the *Family Violence Protection Act 2008 (Vic)* that include, but are not limited to, acting towards a family member in a way that is physically, sexually, emotionally, psychologically, or economically abusive.

DEEP DIVE

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

Family violence offences

Family violence offences include any behaviours meeting the definition of family violence from the *Family Violence Protection Act 2008* (Vic), which includes, but is not limited to:

- behaviour by a person towards a family member that is:
 - physically, sexually, emotionally, psychologically, or economically abusive
 - threatening, coercive, or in any way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person; or
- behaviour by a person that causes a child to hear or witness behaviour described in the list above
- intentionally damaging a family member's property, or threatening to do so
- depriving a family member of their liberty, or threatening to do so.

The above list provides examples, but is not a comprehensive list of behaviours that fit the legal definition of family violence.

You can find out more about laws relating to family violence and access resources that support victims of family violence by searching 'Family Violence Law help' (2019) and 'White Ribbon Australia' (2023) and clicking the relevant links.

LEGISLATION

Family Violence Protection Act 2008 (Vic)

Section 360 of the *Criminal Procedure Act 2009* (Vic) specifies that the court may direct a witness to give evidence in accordance with alternative arrangements. The purpose of these arrangements is to ensure witnesses feel safe giving evidence, reducing the chance of **secondary victimisation**. Sometimes being involved in criminal legal proceedings can be as traumatic for victims as their experience of the crime itself. For instance, victims may feel their integrity is questioned when being cross-examined on the witness stand. The adverse effects of this can be further amplified if this occurs in a public courtroom, particularly if the case is also reported in the media.

Table 1 Alternative arrangements for giving evidence and their effects on the witness

Alternative arrangement	Effect
Giving evidence from outside the courtroom by closed-circuit television (CCTV)	The witness does not have to physically face the accused in a courtroom or risk contact before or after the court session, therefore reducing the possibility of further psychological harm.
Using a screen to remove the accused from the witness' line of vision	The witness does not have to see the accused while they are on the witness stand in the courtroom.
Allowing a person to be beside the witness while they are giving evidence to provide emotional support	The witness can draw strength from the proximity of their support person while giving evidence.
Closing the court to everyone except specified people while the witness is giving evidence	Removing the possibility of a large public audience in the courtroom can make the process less intimidating for witnesses.
Requiring legal practitioners to not wear a robe or requesting them to remain seated during examination-in-chief and cross-examination	These measures can make the process of examination-in-chief and cross-examination less intimidating for witnesses.

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.

Examination-in-chief the questioning of a witness in court by the party who called that witness to give evidence.

Cross-examination the interrogation in court of the opposing party's witness who has already testified, in order to check or discredit the witness's evidence.

LESSON LINK

You learnt about the presumption of innocence and the standard of proof in **1A Key principles of the criminal justice system**.

HYPOTHETICAL SCENARIO

Figure 1 The negative effects on victims from giving evidence in court were demonstrated in Jyah's case

Table 2 Rationale for the right to give evidence using alternative arrangements

Victims' right	Rationale
The right to give evidence using alternative arrangements	The process of giving evidence can be made less traumatic for victims.
	As the accused is presumed innocent until proven guilty, and the prosecution must prove guilt beyond reasonable doubt, alternative arrangements can improve a witness's willingness and ability to give evidence. Therefore, this can improve the prosecution's ability to prove their case and achieve justice.
	Victims may be less likely to feel intimidated by the accused, therefore improving their ability to present reliable evidence.

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

The abandoned trial

A high-profile CEO was accused of raping Jyah, an intern at the company, after she was working late one night. The case received substantial media attention and Jyah was supposed to present evidence at the trial. An initial trial was aborted after jury misconduct, however, the prosecution subsequently dropped the charges against the CEO, due to concerns for Jyah's mental health if she were to be subject to the trauma of intrusive cross-examination again. In this particular case, the trauma was amplified due to the relentless media attention directed at Jyah and the case. Situations, such as Jyah's, highlight the benefits of alternative arrangements for certain witnesses when giving evidence.

The right to be informed about the proceedings 3.1.3.2

KEY TERM

Right to be informed about the proceedings an entitlement whereby victims can be provided with information about the case they are involved in, subject to certain limitations.

LEGAL VOCABULARY

Victims of crime people who have suffered physical, mental, or emotional harm, economic loss, or an infringement of their rights, through acts of crime.

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.

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.

Victims of crime have a **right to be informed about the proceedings** related to the case in which they are involved and are therefore, entitled to be provided with information, subject to certain limitations. These limitations include whether disclosing information to a victim might jeopardise any investigation or adversely affect any other proceeding. The right to be informed about the proceedings is outlined in the *Victims' Charter Act 2006* (Vic). This information will be provided to victims of crime by the **Office of Public Prosecutions (OPP)** and Victoria Police. However, if a victim feels their rights under the Act, such as the right to be informed about the proceedings, have been breached, they cannot take civil action.

Table 3 Examples of information about the proceedings

Information	Examples
The offences the accused has been charged with	Victims are entitled to information related to: whether any charges are withdrawn or changed, and the reasons why.
Key developments in the case	Victims are entitled to information related to: - whether bail has been granted to the accused - the date and time of the trial - whether an appeal has been lodged following a trial and, if so, details about the grounds for appeal.
Outcomes of a trial or appeal	Victims are entitled to information related to: - if the accused has been found guilty or not guilty - any sanction imposed by the court if the verdict is guilty.

Table 4 Rationale for the right to be informed about the proceedings

Victims' right	Rationale
The right to be informed about the proceedings	Being informed about proceedings against the accused is important for victims, as victims often have a strong desire to observe the provision of justice and that the accused is held accountable, should they be found guilty.
	Uncertainty is eliminated, which can minimise the risk of victims suffering secondary victimisation as a result of the legal proceedings.

LESSON LINKS

You will learn more about sanctions in **3B Types of sanctions**.

You will learn more about appeals in **2D The Victorian court hierarchy and criminal cases**.

HYPOTHETICAL SCENARIO**Bobby's bar brawl**

Bobby was at a bar one night and was caught in a physical brawl. He suffered severe cuts after Justin, his attacker, smashed a beer glass in his face. Justin was charged with assault. The Victorian police officer who investigated the assault notified Bobby of the charges laid against Justin and stated he will keep Bobby informed about:

- when a date for the trial is set
- further developments in the case
- the outcome of the case
- any sanction imposed on Justin if he is found guilty.



Figure 2 Bobby has the right to be informed about the proceedings related to Justin's case

The right to be informed of the likely release date of the offender 3.1.3.3

Victims of violent crimes have a **right to be informed of the likely release date of the offender** by applying to be registered on the **Victims Register**. The Victims Register informs victims about a relevant prisoner or offender. Registered victims can also make submissions to have their say about how a crime has affected them and suggest **parole** conditions for the Adult Parole Board to consider.

According to s 17 of the *Victims Charter Act 2006* (Vic), a person can be placed on the Victims Register if they, or their family member, are a victim of a criminal act of violence. 'Criminal acts of violence' are defined in s 30A(1) of the *Corrections Act 1986* (Vic). Examples of behaviours that fit this definition are shown in Figure 3.



Figure 3 Examples of 'criminal acts of violence'

In addition to an offender's release date, a victim on the Victims Register can be advised of other information, including:

- the length of the offender's sentence and any changes to the length of the sentence
- the earliest possible release date
- whether the offender applies for or is released on parole, and any conditions attached to parole
- if the offender is on parole, whether parole is cancelled
- an offender's death or escape from prison.

KEY TERM

Right to be informed about the likely release date of the offender

a right provided to victims of violent crimes whereby they can apply to be registered on the Victims Register and will be informed about the likely release date of an offender who has been imprisoned.

LEGISLATION

Corrections Act 1986 (Vic)

LEGAL VOCABULARY

Victims Register a Victorian government record of victims who have registered to receive information about a prisoner or offender.

Parole the early release of a prisoner, after their minimum term of imprisonment is served, which is subject to supervision and certain conditions.

LEGAL VOCABULARY

Incarcerated the condition of being confined in a facility, such as a prison, after being found guilty of a criminal offence.

Intervention order a court order that restricts behaviour and is designed to protect a victim, their children, and their property from someone who is using violence, threatening them, or making them feel unsafe.

Table 5 Rationale for the right to be informed of the likely release date of the offender

Victims' right	Rationale
The right to be informed of the likely release date of the offender	Victims of violent offences often have a strong desire to know the offender is imprisoned, as in many cases, victims still fear for their safety once the offender is released. Knowing the offender is still incarcerated can provide comfort to victims. Therefore, the right to be informed of this information can remove the uncertainty that would otherwise exist.
	Victims can take precautions, such as applying for or extending an intervention order , to prevent the offender from contacting them.
	Victims on the Victims Register also have the right to make a submission to the Adult Parole Board to express the effect that the offender's release may have on them, and this will be considered when the decision to grant parole is made.

WANT TO KNOW MORE?

You can find out more about various types of intervention orders, how to apply for one, and what happens when a person breaches an intervention order by searching 'Victoria Legal Aid how intervention orders work' and clicking the 'Victoria Legal Aid' (2022) webpage.

HYPOTHETICAL SCENARIO



Figure 4 As a victim of a criminal act of violence, Talia has the right to be informed of the likely release date of her offender

CONTENT WARNING This section mentions content that is sensitive in nature that relates to family violence.

Tackling the impacts of family violence

Talia was a victim of family violence and her ex-partner, Jack was convicted of assault alongside a number of other charges in relation to threats and violence towards her. Jack was imprisoned for two years, with his earliest possible release date being after he had served 12 months. Talia now lives with a friend and feels safer knowing Jack is behind bars and cannot contact her. Talia is on the Victims Register and will be notified when Jack applies for parole or is released. She is nervous about the time when Jack might be released but plans to ensure a current intervention order is in place that prevents Jack from contacting or approaching her.

USEFUL TIP

Explicit application of the principles of justice to key concepts in this lesson is not required by the VCE Legal Studies Study Design 2024–2028. However, these principles can still be a useful framework for assessing the strengths and weaknesses of a right, institution, process, or legal provision.

Lesson summary

In Victoria, victims of crime are granted rights in legislation. These rights include:

- victims of sexual offences, family violence offences, and some summary offences have the right to give evidence using alternative arrangements.
- all victims have the right to be informed about the proceedings in relation to the case in which they are involved.
- victims of 'criminal acts of violence' have the right to be informed of the likely release date of the offender.

Table 6 The strengths and limitations of victims' rights

	Strengths	Limitations
The right to give evidence using alternative arrangements	- The use of alternative arrangements reduces victim trauma associated with giving evidence in court. - Alternative arrangements provide witnesses, who may otherwise be too intimidated to participate in a trial, a means by which they can still be involved. This reduces the likelihood of the trial being discontinued due to victims' fear of giving evidence. - Alternative arrangements can ensure victims do not present unreliable evidence as a result of feeling intimidated in front of the accused.	- Not all witnesses meet the eligibility criteria to give evidence using alternative arrangements. Only witnesses involved in trials relating to certain offences, such as sexual offences, are covered by the provisions in the <i>Criminal Procedure Act 2009</i> (Vic). - Despite being eligible for alternative arrangements, some witnesses may still wish to avoid giving evidence.
The right to be informed about the proceedings	- The right to be informed about proceedings ensures police and prosecutors keep victims informed and minimise further suffering, promoting fairness. - All victims are provided with information about proceedings, regardless of the type of offence involved, and regardless of their personal characteristics, promoting equality.	- As the criminal justice system is complex, information about proceedings may be confusing to victims if they have no prior knowledge and experience of the legal system. - A victim who feels their right to be informed about the proceedings, as outlined in the <i>Victims' Charter Act 2006</i> (Vic), has been infringed, cannot take civil action. - Information will not be provided to victims where the disclosure might jeopardise or prejudice any investigation or proceeding.
The right to be informed of the likely release date of the offender	- The right to be informed about the likely release date of the offender can ensure victims do not face uncertainty, promoting fairness. - Being aware of the likely release date of an offender can enable a victim to take precautions, such as applying for or extending an intervention order to prevent the offender from contacting them.	- Only victims of serious offences can apply to be on the Victims Register for information about the offender. This right is therefore limited in achieving equality as it does not extend to victims of less serious violent offences. - A victim who feels their right to be informed of the likely release date of the offender, as outlined in the <i>Victims' Charter Act 2006</i> (Vic), has been infringed, cannot take civil action.

1C Questions

Check your understanding

Question 1

The *Victims' Charter Act 2006* (Vic) contains provisions outlining the rights of victims in Victoria's criminal justice system.

- A. True
B. False

Question 2

In Victoria, a witness must always give evidence, in a trial for a serious crime, in an open courtroom that is accessible to the public.

- A. True
B. False

Question 3

Which of the following offences does **not** give rise to witnesses having the right to give evidence using alternative arrangements in Victoria?

- A. Sexual offences
- B. Family violence offences
- C. Road traffic offences
- D. Summary offences involving indecent language

Question 4

Which of the following witnesses would meet the requirements for being able to give evidence via alternative arrangements, according to the *Criminal Procedure Act 2009* (Vic)? **(Select all that apply)**

- A. Flynn, 6, has witnessed acts of family violence in his home.
- B. Celeste was an alleged victim of indecent exposure when walking home from school one day.
- C. Dilesh witnessed an armed robbery of a jewellery shop at a shopping centre.
- D. Harper has been physically and emotionally abused by their de facto partner on multiple occasions.
- E. Kairo was the victim of a car accident and is suing the driver of the other vehicle.

Question 5

Fill in the blanks with the following terms:

Victims Register

sentence

Victims' Charter Act 2006 (Vic)

The [] provides that the police or Office of Public Prosecutions

may give information concerning an offender to a person included on the [].

This could include information such as, the length of the [].

Question 6

Which of the following statements is correct about a victim's right to be informed about proceedings involving the accused?

- A. Information about proceedings involving the accused will be provided to victims of crime by the accused's legal representative.
- B. Victims often have a strong desire for justice to occur, where the accused is held accountable for their offence, should they be found guilty.

Question 7

The right to be informed about the likely release date of the offender is a right provided to all victims of crime.

- A. True
- B. False

Question 8

Which of the following victims would **not** be eligible for the Victims Register?

- A. A victim of burglary
- B. A victim of kidnapping
- C. A victim of stalking
- D. A family member of a murder victim

Question 9

Tick the box to indicate whether the following statements are **strengths** or **limitations** of victims' rights.

Statement	Strengths	Limitations
I. As the criminal justice system is complex, information about proceedings may be confusing to victims if they have no prior knowledge and experience of the legal system.	☐	☐
II. The right to give evidence using alternative arrangements can reduce victim trauma associated with giving evidence in court.	☐	☐
III. Being aware of the likely release date of an offender can enable a victim to take precautions, such as applying for or extending an intervention order to prevent the offender from contacting them.	☐	☐
IV. Not all witnesses meet the eligibility criteria for giving evidence using alternative arrangements. Only witnesses involved in trials relating to certain offences, such as sexual offences, are covered by the provisions of the <i>Criminal Procedure Act 2009</i> (Vic).	☐	☐

Preparing for exams**Standard exam-style****Question 10**

(2 MARKS)

Identify **two** rights of victims in the Victorian criminal justice system.

VCAA 2018 exam Section A Q4a

Question 11

(6 MARKS)

Seiko was out with her friends in the Geelong CBD when a group of young men drove past and shouted vulgar comments. One of the young men proceeded to get out of the vehicle and approach Seiko, indecently exposing himself, while continuing to shout obscenities. The young man was charged with a number of summary offences relating to this behaviour.

- a. Will Seiko be able to give evidence via alternative arrangements? Justify your answer.

3 MARKS

Adapted from VCAA 2018 Sample exam Section B Q3b

- b. Besides the right to give evidence via alternative arrangements, explain **one** other right Seiko has as a victim of this alleged crime.

3 MARKS

Question 12

(4 MARKS)

CONTENT WARNING This section mentions content that is sensitive in nature, relating to family violence.

Makani's ex-husband, Bob, was found guilty of a number of family violence offences against her. At the time of the offences, Makani genuinely feared for her life. Bob was sentenced to a period of imprisonment but may be released on parole soon.

Referring to Makani's situation, justify how the right to be informed of the likely release date of the offender is beneficial for victims. Provide **two** reasons in your response.

Adapted from VCAA 2021 exam Section B Q1b

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 Victorian criminal

justice system in protecting victims of crime.

Statement	Strengths	Limitations
I. Victims of serious crimes have a right to be provided with information about the case in which they are involved, enabling them to observe the provision of justice.	☐	☐
II. Only victims of some serious offences can apply for the Victims Register to be informed about the offender's release date.	☐	☐
III. The right to give evidence via alternative arrangements is only available to witnesses giving evidence in trials for sexual offences, family violence offences, and summary offences involving sexual exposure or the use of obscene or indecent language.	☐	☐
IV. The <i>Criminal Procedure Act 2009</i> (Vic) contains provisions that allow some categories of witnesses to give evidence using alternative arrangements, enabling the process to be less traumatic for victims.	☐	☐
V. Victims of serious crimes have a right to be notified of the likely release date of the offender.	☐	☐

Question 14

(6 MARKS)

'Following a crime, victims are supported and protected adequately in the Victorian criminal justice system.'

Discuss the extent to which you agree with this statement and justify your response.

Adapted from VCAA 2021 exam Section B Q2b

Linking to previous learning

Question 15

(4 MARKS)

Nick pressed charges against his ex-girlfriend Leina, for the indictable offence of aggravated assault. At the conclusion of her trial, Leina was sentenced to a term of imprisonment but is likely to be released early on parole due to her good behaviour in prison.

Describe **one** right that Leina had as an accused person, prior to being convicted, and describe **one** right that Nick has as a victim.

Use your answer to question 16 to support your response to question 17.

Question 16

Which of the following statements supports the right to give evidence using alternative arrangements?

(Select all that apply)

- A. Victims of family violence and sexual offences must face the accused in court when giving evidence to ensure justice is served.
- B. A victim's evidence could be crucial for the prosecution to prove an offender's guilt beyond reasonable doubt, so it is important that this evidence is heard by the judge and/or jury.
- C. Victims of crime who have been traumatised by their experience are more likely to give evidence as a witness in the accused's trial if they can do so via CCTV without physically seeing the accused.
- D. Alternative arrangements enable witnesses who may otherwise be too intimidated to participate in a trial, a means by which they can still be involved. This can prevent the discontinuation of a trial due to victims' fear of giving evidence.
- E. It is possible for the prosecution to prove the guilt of an accused, even without the victim's witness evidence of the alleged crime.

Question 17

(5 MARKS)

'Given the standard of proof required in criminal trials, it is crucial that witnesses are able to give evidence using alternative arrangements, as this can assist the prosecution in proving their case.'

Do you agree with this statement? Justify your answer.

2

CHAPTER 2

The principles of justice during a criminal case

LESSONS

- 2A** The principles of justice during a criminal case
- 2B** Victoria Legal Aid and community legal centres
- 2C** Plea negotiations
- 2D** The Victorian court hierarchy and criminal cases
- 2E** Judges, magistrates, and juries in a criminal case
- 2F** The parties in a criminal case
- 2G** Legal practitioners in a criminal case
- 2H** The impact of costs and time – criminal cases
- 2I** The impact of cultural differences – criminal cases

KEY KNOWLEDGE

The principles of justice during a criminal case

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

Image: Brian A Jackson/Shutterstock.com

2A The principles of justice during a criminal case



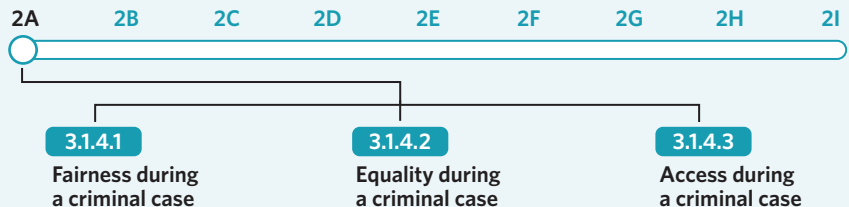
Image: Kaspars Grinvalds/Shutterstock.com

'What is justice? For different people at different times it means different things.'
—The Honourable Marilyn Warren AC, Former Chief Justice of the Supreme Court of Victoria (2014)

There is no universal definition of 'justice' or conversely 'injustice'. Therefore, a 'just' outcome for one person may be different to that of another.

STUDY DESIGN DOT POINT

- the principles of justice: fairness, equality and access



Lesson introduction

The principles of justice underpin Victoria's criminal justice system and assist in determining whether justice has been achieved in particular cases. The principles aim to ensure the justice system remains accessible for all individuals, everyone is treated equally, and a fair trial occurs. There are various legal processes and procedures that exist in the criminal justice system to uphold the principles of fairness, equality, and access.

Fairness during a criminal case 3.1.4.1

The principle of **fairness** is essential in the criminal justice system as each accused person is entitled to receive just processes and an impartial hearing. Those affected by crime are also entitled to participate in the system and have the assurance that justice is achieved. The Victorian criminal justice system aims to achieve fairness through a variety of legal principles and procedures.



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 exam and SAC questions, avoid using the word 'fair' to define 'fairness'. Instead, try using words such as 'impartial' or 'just', and when explaining how an element of the justice system can uphold the principle of fairness, refer to other words from the definition, such as 'participation' and 'open processes'.

Table 1 Legal principles and procedures that uphold the principle of 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, but rather, the prosecution has 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 is not the responsibility of the accused to prove their own innocence, as this would be unfair.
The 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 does not have any reasonable doubt that the accused committed the crime.

Continues →

Table 1 Continued

Legal principle or procedure	How it contributes to the achievement of fairness
Most hearings are open to the public	The public nature of criminal trials ensures the presentation of facts is open and accessible to allow all members of the community to participate in the justice system. This provides transparency and accountability for the legal decisions made in the court system.
A right to seek legal representation	As the law is highly complex, all accused persons have a right to seek and utilise legal representation to present their case in the best light possible. However, this usually comes with a financial burden.
An accused person has the opportunity to present their case	An accused person has the right to defend a criminal charge by disproving the prosecution's case, as well as the opportunity to present their own evidence and witnesses if they choose.
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 ensures a just outcome to the case.
An independent decision-maker	A judge, magistrate, and jury must be impartial and unbiased, 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 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 should be.
Prejudicial and irrelevant evidence is not admissible in court	Prejudicial evidence , such as an accused's prior convictions, is not admissible evidence and is therefore, not permitted to be presented in court. This is because it may result in the magistrate, judge, or jury delivering a guilty verdict based on irrelevant factors rather than the facts of the case.
Victims of some serious crimes have a right to give evidence using alternative arrangements	Flexibility in the way in which victims can give evidence ensures they can more easily participate in the criminal justice system to be heard and validated in the process.
A right to be informed about proceedings, and in some cases, about the likely release date of the offender	A right to information reflects the concept of open processes, a key aspect of fairness.
Any victim of a crime can make a victim impact statement (VIS), which can be considered by a judge when sentencing an offender	A VIS is a way for a victim to communicate the adverse effects that a crime has had on them. By allowing victims the opportunity to communicate this, it ensures their views are heard and considered when sentencing, enabling better victim participation in the justice system.

LEGAL VOCABULARY

Prejudicial evidence evidence that may unfairly influence a decision-maker to decide on an improper or erroneous basis.

Admissible evidence evidence that abides by the rules of procedure and is, therefore, allowed to be presented to the court.

LESSON LINKS

You learnt about the presumption of innocence, the burden of proof, and the standard of proof in **1A Key principles of the criminal justice system**.

You learnt about the rights of an accused in **1B Rights of an accused**.

You learnt about the rights of a victim in **1C Rights of victims**.

You will learn more about victim impact statements in **3C Factors considered in sentencing**.

LEGAL CASE



Image: Gorodenkoff/Shutterstock.com

Figure 1 The right to legal representation contributes to the achievement of fairness

CONTENT WARNING This section mentions content that is sensitive in nature, relating to drugs.

Dietrich v R (1992) 67 ALJR 1

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 refused to hear his appeal, and later to the High Court.

Legal issue

In the High Court, Dietrich argued that his trial in the County Court was unfair as he had not been provided with legal representation.

Decision

The High Court decided that where a very poor 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 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 by the 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 light possible, promoting a fair trial.

Equality during a criminal case 3.1.4.2



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.

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. Whilst 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 an interpreter for an accused who does not speak English. The ability to use an interpreter or translator is not a right afforded to all accused people, however, this mechanism reduces the likelihood of the accused being disadvantaged before the law due to not understanding court processes and procedures.

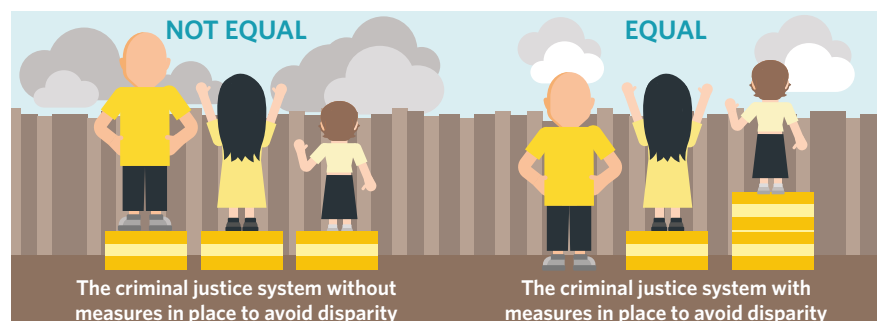


Figure 2 The principle of equality

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

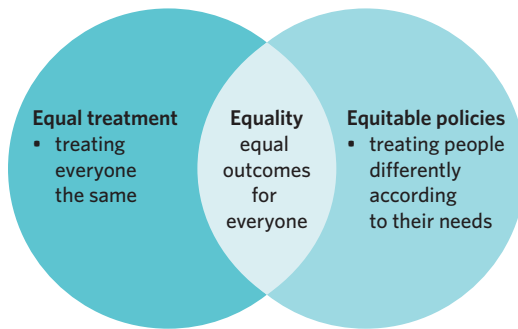


Figure 3 Understanding the relationship between equal treatment and equitable policies

The principle of fairness is closely linked to equality, as fairness is achieved when individuals are granted access to resources that enable equal outcomes. Consequently, access plays a vital role in ensuring equal results, which in turn promotes fairness. It is essential to recognise the intrinsic interconnectedness between the principles of justice in Victoria's criminal justice system.

Table 2 Legal principles and procedures that uphold the principle of equality

Legal principle or procedure	How it contributes to the achievement of equality
The right for all accused people to be treated the same	Each accused person must be treated the same before the law, regardless of personal characteristics such as age, gender, wealth, language background, ethnicity, or religion.
The availability of interpreters	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 in particular circumstances. This reduces the likelihood of an accused being disadvantaged before the law due to not understanding court processes and procedures.
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, such as by providing a victim impact statement, regardless of personal characteristics.
Consistent application of the law	The law is applied in the same manner in all cases, regardless of personal characteristics.
The rule of law	All members of the community are subject to, and must obey the same standards of behaviour set by criminal law. For example, those in more powerful positions in society, such as members of parliament, police officers, and the very wealthy, are not entitled to preferential treatment by the courts as a victim of crime or an accused person.
An independent decision-maker	A judge, magistrate, and jury must remain impartial and unbiased, basing their decisions solely on the facts of the case and not the characteristics of the victim or the accused.
A right to seek legal representation	As the law is highly complex, all accused persons have a right to utilise legal representation. Where an accused person cannot afford legal representation, they may be eligible for free or low-cost representation through Victoria Legal Aid (VLA) or community legal centres (CLCs). This is an example of how a measure can be put in place to avoid disadvantage, and therefore contribute to equality.



Figure 4 The three principles of justice are all interrelated

USEFUL TIP

In your responses, avoid using the word 'equal' to define 'equality'. Instead, try using words such as 'the same' or 'equivalent'. You should also be able to explain how measures to eliminate disparity or disadvantage can contribute to equality.

LESSON LINKS

You learnt about the relationship between the three principles of justice in **An introduction to Legal Studies**.

You will learn more about Victoria Legal Aid and community legal centres in **2B Victoria Legal Aid and community legal centres**.

**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 the role of judges in **2E Judges, magistrates, and juries in a criminal case**.

You will learn more about the Victorian court hierarchy in **2D The Victorian court hierarchy and criminal cases**.

Access during a criminal case 3.1.4.3

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. The Victorian criminal justice system aims to achieve access through a variety of legal principles and procedures.

Table 3 Legal principles and procedures that uphold the principle of access

Legal principle or procedure	How it contributes to the achievement of access
The availability of free legal information for all	VLA and CLCs provide free legal information for all, enabling all people to engage with the justice system on an informed basis.
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 a just resolution of the case.
The right for victims of crime to remain informed about proceedings and to contribute to the sentencing process	All victims of crime are able to engage with the justice system as they are provided with the opportunity to be involved in court proceedings, such as by providing a victim impact statement.
The availability of legal aid	Institutions, such as VLA and CLCs, 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, engage with the justice system on an informed basis.
Most hearings are open to the public	The public nature of criminal trials ensures the presentation of facts is accessible to all members of the community. This also allows all to engage in the justice system and observe the process of justice.
The availability of interpreters	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 in particular circumstances.
The right to a trial by jury for all serious criminal offences	The right to a jury trial allows the community to engage with the justice system by determining whether an accused charged with a serious criminal offence is guilty or not.

REAL WORLD EXAMPLE

Image: Salivanchuk Semen/Shutterstock.com

Figure 5 A university lecturer was sentenced to imprisonment for the murder of his wife after a translated victim impact statement shared the devastation caused by the victim's death

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

Translated victim impact statement devastates courtroom

In May 2023, a university lecturer was sentenced to a 24-year term of imprisonment after stabbing his wife to death the year prior during an altercation between the couple. At the trial, the Supreme Court of Victoria heard statements from the family of the victim. The victim's mother described the loss of her child as being 'like a spear piercing through [her] heart'. Considering the victim and her family were from China, this victim impact statement was translated using the free translation services arranged by the court. The use of translator services allowed those closest to the victim to express their grief over her death, compelling the court to sanction the offender to the 24-year prison sentence. Translators therefore helped the victim's family to access justice for her.

Adapted from 'Deakin lecturer Adam Brown fatally stabbed wife Chen Cheng after childcare dispute, court told' (Silva, 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 as few barriers as possible.

There are a range of legal processes and procedures within the Victorian criminal justice system that are designed to uphold these principles. All three principles are purposefully related, and when they work in harmony, act to deliver just outcomes for all who interact with the criminal justice system.

2A Questions

Check your understanding

Question 1

The three principles of justice are:

- A. fairness, equality, and access.
- B. participation, access, and fairness.

Question 2

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

- A. An accused person has a right to seek legal representation.
- B. An accused person may not be able to afford legal representation and may not be eligible for legal aid.
- C. The characteristics of an offender and the circumstances surrounding the crime are considered when sentencing.

Question 3

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

fairness

equality

The principle of is upheld when all people are able to engage with the justice system without disparity or disadvantage.

Question 4

Which of the following statements promotes the achievement of equality in the criminal justice system?

(Select all that apply)

- A. The judge and jury must not discriminate against either the prosecution or accused based on their personal characteristics, such as race, gender, or ethnicity.
- B. An accused is able to contribute to the sentencing process by providing a victim impact statement.
- C. An accused is provided with an interpreter by the court if they are unable to speak or understand English.
- D. A police officer charged with a crime is not entitled to preferential treatment by the courts.
- E. The judge presiding over a case is allowed to have a bias towards the accused.

Question 5

By understanding their legal rights and the processes involved in their case, an accused likely has greater access to the justice system.

- A. True
- B. False

Question 6

Which of the following statements promotes the achievement of access in the criminal justice system?

(Select all that apply)

- A. Institutions, such as Victoria Legal Aid (VLA) and community legal centres (CLCs), provide free legal assistance to those who need it most.
- B. The public nature of criminal trials ensures the presentation of facts is accessible to all members of the community.
- C. As the law is highly complex, all accused persons have a right to seek legal representation to better understand court processes and procedures.
- D. The courts have no obligation to provide legal representation to a self-represented accused.

Question 7

Fairness and equality 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 8**

(3 MARKS)

Birrani was charged with manslaughter. He speaks very little English and is not familiar with the Victorian criminal justice system. As he cannot afford legal representation, he applied for legal aid, but his application was rejected. As a result, he is planning to plead not guilty and is representing himself at trial.

Referring to the source material, explain why Birrani's decision to represent himself may not achieve equality or fairness.

Adapted from VCAA 2022 exam Section B Q2b

Question 9

(4 MARKS)

Theo is a recent victim 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, consequently causing feelings of stress and anxiousness for Theo.

Describe **two** reasons why Theo's trial may not achieve access.

Adapted from VCAA 2022 exam Section B Q2b

Extended response

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

Use the following information to answer questions 10 and 11.

Axel has pleaded not guilty to three charges related to the possession of drugs and is due for trial in the Victorian County Court. Axel cannot afford legal representation and is representing himself. He is concerned the prosecutor's experience and friendliness with the judge may negatively impact his case. In addition, Axel does not know how to properly present his evidence and is worried he might say something that incriminates himself.

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Victorian criminal justice system in achieving the principles of justice for Axel.

Statement	Strengths	Limitations
I. Axel may not be able to afford legal representation, consequently impacting his ability to present his case in the best possible light.	☐	☐
II. The presumption of innocence means the prosecution must prove Axel is guilty, rather than Axel having to prove his innocence, as the prosecution is the one initiating the claim against Axel.	☐	☐
III. The judge and jury must remain independent and impartial, treating both the prosecution and Axel in the same manner.	☐	☐
IV. All accused persons, including Axel, have the right to seek legal representation to better understand court processes and procedures given the complexity of the law.	☐	☐
V. The judge and jury may have an unconscious bias against either the prosecution or Axel, potentially leading to an unjust outcome.	☐	☐

Question 11

(6 MARKS)

Discuss **two** of the principles of justice in relation to Axel's criminal case.

Adapted from VCAA 2019 exam Section B Q2e

Linking to previous learning**Question 12**

(3 MARKS)

Dewei is a victim of assault. However, he is unsure of his rights within the Victorian criminal justice system.

- a. Identify **one** right of victims in the Victorian criminal justice system.

1 MARK

Adapted from VCAA 2018 exam Section A Q4a

- b. Outline how the right identified in **part a.** aims to uphold the principle of access.

2 MARKS

Adapted from VCAA 2018 exam Section A Q4b

Question 13

(3 MARKS)

Describe the relationship between the burden of proof and the principle of fairness.

Adapted from VCAA 2018 Sample exam Section B Q2a

2B Victoria Legal Aid and community legal centres

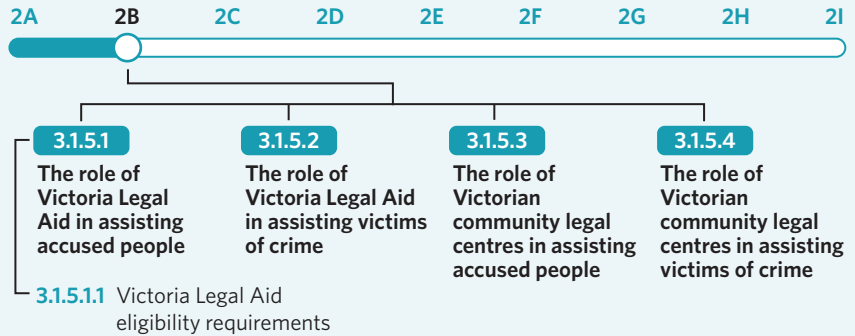


Image: Tiko Aramyan/Shutterstock.com

Just as a boxer requires boxing gloves to protect them during a fight, accused people and victims must be armed with legal knowledge before a legal battle. Victoria Legal Aid and Victorian community legal centres aim to equip accused people and victims with the appropriate legal knowledge and advice to ensure they have the best chance of succeeding at trial.

STUDY DESIGN DOT POINT

- the role of Victoria Legal Aid and Victorian community legal centres in assisting an accused and victims of crime



LESSON LINKS

You will learn more about the court hierarchy in **2D The Victorian court hierarchy and criminal cases**.

You will learn more about plea negotiations in **2C Plea negotiations**.

You learnt about the burden and standard of proof, summary offences, and indictable offences in **1A Key principles of the criminal justice system**.

KEY TERM

Victoria Legal Aid (VLA)

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

Lesson introduction

For accused people and victims of crime, the Victorian justice system can appear rather complex. The hierarchy of courts, plea negotiations, and the burden and standard of proof are difficult concepts for the average person to understand. Government-funded institutions, such as Victoria Legal Aid (VLA) and Victorian community legal centres (CLCs), assist accused persons in understanding their legal rights, striving to create equal access to the law, regardless of personal circumstances.

The role of Victoria Legal Aid in assisting accused people 3.1.5.1

Victoria Legal Aid (VLA) aims to provide free or low-cost legal services to those in the community who need it most. It is a government-funded body that provides legal information, advice, and representation to Victorians. VLA commonly provides services in relation to criminal law and family law matters. It also provides referrals to other services that can provide assistance if the matter is not within its main areas of concern. The main objectives of VLA are to:

- provide accessible legal aid services, such as by providing individuals with information and advice over the phone
- provide free or low-cost legal aid services to those who need it the most, ensuring legal aid is available on an equitable basis in Victoria
- ensure legal aid services are distributed to parties based on their financial situation, individual circumstances, and seriousness and nature of their problem
- ensure legal aid services are of a high-quality, such as by providing a quality framework to help lawyers conducting legal aid work
- provide improved access to justice and legal remedies to the community
- conduct research and evaluation to ensure effective legal aid is provided to individuals based on their different situations.

VLA provides legal services for both victims and accused individuals. Table 1 outlines the assistance VLA can provide to accused persons based on their eligibility and subjective circumstances. Whilst legal information is free and available to everyone, legal advice and representation are provided to those who satisfy set criteria.

Table 1 The role of Victoria Legal Aid in assisting accused persons

Role	Explanation	Eligibility requirements
Provide free legal information 	General legal information is readily available on the VLA website, in brochures, and over the phone. These resources aim to educate the community on legal matters, criminal law procedures, and provide general legal support. Resources are also available in many different languages.	Free and accessible to everyone.
Provide free legal advice 	VLA offers advice regarding court procedures and proceedings that will apply to a specific case. Advice can be provided over the phone, in person, or over video call.	Legal advice tailored to a particular matter is only provided to eligible accused persons, generally based on their income. VLA prioritises more vulnerable groups, for example: • children • First Nations peoples • those with a disability • those who cannot speak English.
Provide duty lawyer services 	Duty lawyers are lawyers who are present in the Magistrates' Court and the Children's Court on a particular day and can provide information and case-specific advice for hearings occurring on the same day. Duty lawyer assistance can extend to representation in court depending on the accused's circumstances. Duty lawyers are not available for indictable offences or committal proceedings.	Duty lawyer services are free for: • child protection • youth crime • adult summary crime • intervention orders • family matters • some civil matters, such as Mental Health Tribunal hearings. For adult criminal offences, accused individuals not in custody must also satisfy the income test.
Provide grants of legal assistance 	In some circumstances, VLA can provide a grant of legal assistance to an accused who cannot afford legal representation. Legal assistance can be provided by a VLA lawyer or an external lawyer who is organised by VLA. The lawyer can assist the accused with the preparation of the case, including any relevant documents, as well as representing the accused in court.	The accused must satisfy the means test to be eligible for a grant of legal assistance. VLA may also consider how likely the case is to succeed and if the case will benefit the community.

WANT TO KNOW MORE?

VLA also coordinates a 'Help Before Court' program which can assist accused individuals prepare for their case by providing them with legal advice from a lawyer if their court date is at least two weeks away. You can find out more about this program, the assistance provided, and the eligibility criteria by searching 'Help before court - for criminal charges' and clicking on the Victoria Legal Aid (2023) webpage.

LEGAL VOCABULARY

Duty lawyers lawyers employed by Victoria Legal Aid who assist people in court on the day of their hearing.

Income test an assessment conducted by Victoria Legal Aid to determine whether an accused person is eligible for a duty lawyer. The test requires an accused person to prove their income is limited or that their primary source of income is welfare provided by the government.

Means test an assessment conducted by Victoria Legal Aid to determine whether an accused person is eligible for a grant of legal assistance. The test takes into account an accused person's income, assets, and expenses.

Grant of legal assistance a sum of money provided by Victoria Legal Aid to pay for a person's legal assistance.

LEGISLATION*Firearms Act 1996 (Cth)***LEGAL CASE****Victoria Police v Lewis [2021] VMC 13****Facts**

The accused was charged with two counts of possessing an unregistered, Category E longarm. However, the gun in her possession was not inherently lethal and shot potatoes and lemons as opposed to bullets. The device has been nicknamed 'veggie canon', 'spud gun', and 'lemon bazookas'.

Legal issue

The issue in this case was whether the 'veggie canon' could be defined as a Category A firearm. The accused was represented by Victoria Legal Aid at the trial in the Magistrates' Court of Victoria. Her defence lawyer argued that the gun in her possession did not come under the definition of a 'firearm' under s 3 of the *Firearms Act 1996* (Cth). The VLA defence lawyer raised points of law and referred to past legal decisions, creating a compelling legal argument that the accused could not have made alone considering her lack of legal training and expertise.

Decision

The VLA lawyer's case was successful and the magistrate agreed 'the device [did] not fit the definition of a firearm by virtue of the argument that it [did] not store or produce gases for the purposes of discharging a missile'.

Significance

The VLA lawyer was able to protect the accused's innocence. Without the assistance of VLA, the accused may not have been successful in defending herself in court and the decision may have been different.



Image: urbanbuzz/Shutterstock.com

Figure 1 An accused dodged a firearms charge in relation to her 'veggie canon'

Victoria Legal Aid eligibility requirements 3.1.5.1.1

VLA has strict eligibility requirements to ensure those who need legal assistance the most, receive it. As VLA is government-funded, it must carefully allocate its limited funds. The eligibility criteria assist VLA in allocating resources to those with the greatest need.

Income test – Duty lawyers

- In order to qualify for duty lawyer assistance, an accused must satisfy the requirements of the income test.
- An accused will satisfy the income test if they can either:
 - demonstrate their income is limited
 - show a current Centrelink Benefit Card or Pensioner Concession Card as this demonstrates their main source of income is welfare payments from the government.

Means test – Grants of legal assistance

- In order to qualify for a grant of legal assistance, an accused must satisfy the requirements of the means test.
- The means test involves VLA considering an accused's income, assets, and expenses to determine whether the applicant meets the required thresholds.
- If an accused satisfies the requirements of the means test and is given a grant of legal assistance, they may still be required to pay some costs. Otherwise known as a contribution, the amount a successful applicant must pay for legal assistance is dependent on their income and assets.
- When reviewing an application for a grant of legal assistance, VLA will also consider how likely it is the case will be successful and the overall benefits to the wider community.



Figure 2 The eligibility criteria for VLA can result in a 'missing middle'

HYPOTHETICAL SCENARIO

Salmon sabotage!

A wild brawl has taken place on the set of reality TV show 'Crazy cooks in the kitchen'. In a semi-final showdown, contestants Manuel and Paul are tasked with creating a complex confit salmon dish. Yet, a physical altercation breaks out between the two after Manuel alleges that Paul sent a member of his team to steal Manuel's salmon and swap it with a charred, burnt piece of salmon. Enraged by such damning allegations, Paul physically attacked Manuel and has been charged with common assault. Paul will face the Magistrates' Court in a few weeks time. Paul has never engaged with the criminal justice system and claims he cannot afford legal advice or legal representation.

Given that common assault is a summary offence and the case will be heard in the Magistrates' Court, Paul may be eligible for VLA duty lawyer assistance. If Paul wishes to obtain tailored legal advice or duty lawyer assistance, he will need to satisfy the income test, meaning he must prove his income is limited or that his main source of income is government welfare payments. Alternatively, he is also able to access free VLA legal information which is available to everybody. Therefore, VLA enhances community access to legal support and resources, however, the extent to which personalised assistance can be delivered is dependent on individual circumstances and certain criteria.



Figure 3 VLA is able to provide tailored assistance to those who satisfy set criteria

The role of Victoria Legal Aid in assisting victims of crime 3.1.5.2

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.

LEGISLATION

Victims' Charter Act 2006 (Vic)

LESSON LINK

You learnt about the *Victims' Charter Act 2006 (Vic)* in **1C Rights of victims**.

WANT TO KNOW MORE?

The Office of Public Prosecutions has resources for victims that inform them about what to expect before entering the courtroom. You can find out more and watch the videos to see inside the courtroom by searching 'Office of Public Prosecutions Victoria, Going to Court' and clicking on the Office of Public Prosecutions (n.d.) webpage.

WANT TO KNOW MORE?

Victoria Legal Aid provides resources for victims on their website. You can find out more about these resources by searching 'Other support for victims of crime' and clicking on the Victoria Legal Aid (2023) webpage.

One of VLA's services is to help victims of crime access justice through their support services and legal advice. It understands the legal process can be overwhelming and intimidating for victims, so it offers a range of resources to help individuals navigate the legal system and seek the justice they deserve. Whether it is providing advice on a victim's rights, assisting with legal proceedings, or helping them access support services, Victoria Legal Aid is committed to ensuring victims of crime have access to the legal support they need. Victims are not considered a party in a criminal case, as the **Office of Public Prosecutions (OPP)** prosecutes the accused on their behalf. Therefore, VLA provides victims with an avenue of support through the legal proceedings and ensures they are treated with courtesy, dignity, and respect. VLA pledges to abide by the *Victims' Charter Act 2006 (Vic)* and provides a summary of the key takeaways of the Charter.

Table 2 The role of Victoria Legal Aid in assisting victims of crime

Role	Explanation	Eligibility requirements
Provide legal information 	VLA provides information on its website and through its Victims Legal Service. It also provides links to external resources, such as child witness services, Victims of Crime Assistance Tribunal, and the OPP website, that assist victims of specific crimes or in certain circumstances.	All victims can access these resources.
Provide a Victims Legal Service 	The Victims Legal Service Helpline is a specialist advice phone line that provides legal information and advice, particularly regarding the financial impact of a crime. This service is a partnership with VLA, CLCs, and Aboriginal legal services.	All individuals affected by a crime can access the service to obtain legal guidance or advice regarding the process of applying for financial aid from the Victims of Crime Assistance Tribunal or filing for restitution and compensation from the perpetrator of the crime.
Provide duty lawyer services 	Duty lawyers are present in the Magistrates' Court to assist victims with information, legal advice, and representation in relation to intervention orders.	All victims are entitled to information from duty lawyers, but advice and in-court advocacy are prioritised based on certain criteria, whereby children and adults with a disability have higher priority.
Provide grants of legal assistance 	Victims can apply for grants of legal assistance in relation to intervention orders.	There are strict eligibility requirements in relation to grants, whereby VLA will consider many factors, such as the merits of the matter and the means of the recipient.

Evaluating Victoria Legal Aid's ability to achieve the principles of justice during a criminal case

STRENGTHS

- The provision of duty lawyers in the courts provides advice and assistance to various accused persons, ensuring a fair hearing for these individuals.
- The VLA is guided by the Victims Charter to uplift victims and ensure their rights set out in the Charter are protected. The Charter is legally binding which ensures VLA treats all victims fairly.

LIMITATIONS

- VLA's limited budget means it is only able to provide legal advice and representation to a small number of accused persons. Many accused persons charged with criminal offences do not meet VLA's eligibility criteria but cannot afford a private lawyer either. As a result, VLA is limited in its ability to ensure all individuals can understand the case against them, participate in the criminal proceedings, and adequately present their case.



STRENGTHS

- VLA provides free information on its website to all accused people and victims, regardless of personal characteristics, such as race, gender, or ethnicity.
- VLA's eligibility criteria ensure legal support is provided to those in most need, regardless of their race, gender, or sexuality. VLA ensures those who are disadvantaged are prioritised in receiving legal aid, thus promoting equality.
- Victims are able to find out more information about their rights and access resources by calling VLA. This service promotes equality as VLA has staff that speak many languages, and the body organises a free interpreter if no one is able to speak the victim's language. This ensures that victims are able to obtain information regardless of their language preferences and abilities.
- VLA provides video resources in Auslan for those who are d/Deaf or hard of hearing. This allows people who are d/Deaf or find it hard to hear or speak on the phone, to not be disadvantaged and be able to access legal information and support.

LIMITATIONS

- The eligibility requirements for a duty lawyer or grants of legal assistance from VLA are strict, meaning very few individuals can gain access to free legal representation. Whilst these requirements prioritise those most in need, others who are in the middle ground, whose circumstances are not considered dire enough to warrant help, are unable to receive legal assistance. This limits equality as these individuals are not uplifted to receive the same treatment as those who can afford representation in the justice system.



STRENGTHS

- VLA provides free information on its website which is accessible to all accused people and victims.
- VLA's services can be accessed in person, over the phone, and online, allowing for multiple avenues of access to legal support.
- Duty lawyers and grants of legal assistance increase an accused individual's access to the justice system and criminal proceedings, ensuring they can participate in the processes in an informed manner.
- Victims are supported through various services offered by VLA, such as Victims Legal Service and VLA's commitment to upholding the Victims Charter, enabling victims to adequately participate in legal proceedings and receive just outcomes.

LIMITATIONS

- The means and income tests prevent many Victorians from accessing many services of VLA, such as tailored advice and legal representation, hindering access to justice.
- VLA does not provide advice about all types of matters, therefore, limiting accessibility to justice for parties involved in these legal matters.
- VLA information about the criminal justice system is readily available online. However, this may be inaccessible for those with low incomes, the homeless, or the elderly who may not have access to internet-connected devices or the knowledge to navigate such technologies to access legal information.
- VLA is limited in its ability to facilitate access to legal resources and support due to a lack of funding.



KEY TERM

Community legal centres (CLCs) not-for-profit community organisations that provide free legal information, advice, education, and casework services.

WANT TO KNOW MORE?

Both generalist and specialist CLCs can be found in a number of locations across Victoria. You can find out where different CLCs are located and the legal services they provide by searching 'Find a Community Legal Centre' and clicking on the Federation of Community Legal Centres (2023) webpage.

USEFUL TIP

In your responses to SAC questions or on the VCAA end-of-year exam, you should write the terms 'Victoria Legal Aid (VLA)' and 'community legal centres (CLCs)' in full, followed by their acronym, the first time you refer to them in a particular question. After the first use of these terms, you can refer to them by their acronyms within the same question.

The role of Victorian community legal centres in assisting accused people 3.1.5.3

Community legal centres (CLCs) are independent, not-for-profit organisations that aim to offer high-quality, free, and accessible legal support and education to members of the community, particularly those facing hardships. CLCs are funded by VLA, state and federal governments, and private donations. Often, VLA and CLCs work together to achieve the shared goal of providing equitable access to legal information, resources, and support services. CLCs can be found in many suburbs across Melbourne and in some larger rural centres.

There are two types of CLCs:

- 1. Generalist CLCs that can assist individuals in a particular geographical area and can provide legal services for a broad range of legal matters.
- 2. Specialist CLCs that can provide legal services regarding a specific area of law or for a particular group of people. For example, the CLC may focus on youth law and providing legal support to young people, or specialise in consumer law and dealing with such matters.

As well as assisting people who come to them for help, community legal centres deliver legal education in plain language to schools, community groups, and other organisations. They create, update, and distribute various types of fact sheets, guides, and handbooks that provide easily understandable legal information to the public.

DEEP DIVE

Tailored legal support

The Victorian Aboriginal Legal Service (VALS) in Preston provides free legal advice, support, and in some cases, legal representation in court to help prepare a defence case for accused First Nations people across Victoria. VALS specialises in family, civil, and criminal law, whilst also advocating for law reform regarding the rights of people in custody and improved policing and correction accountability.

Alternatively, First Step Legal (FSL) is a hub that offers addiction, mental health, and legal services to support more than 1,800 people each year. The organisation understands that vulnerable clients often face multiple legal problems simultaneously. Hence, FSL's legal team possesses a diverse skill set that enables it to assist clients with various legal matters, such as criminal law, family violence, and tenancy issues. This approach provides holistic legal support that aims to mitigate client risk factors. To qualify for ongoing legal support and representation, FLS requires clients to commit to addressing the root causes of their offending, which often involves treatment for mental health, addiction, or violent behaviour.

Adapted from 'Our Areas of Practice' (Victorian Aboriginal Legal Service, n.d.) and 'Legal Services' (First Step Legal, n.d.)

Table 3 The role of community legal centres in assisting accused persons

Role	Explanation	Eligibility requirements
Provide legal information 	General legal information can be provided in person and online. Moreover, specialist CLCs can provide detailed information about their primary area of expertise, or information tailored towards the type of person they specialise in assisting.	Available to everyone. Continues →

Table 3 Continued

Role	Explanation	Eligibility requirements
Provide basic legal advice and assistance 	CLCs provide basic information online and in person. They may also assist individuals with completing various forms and filing relevant applications. Some CLCs also provide advice over the phone or in person with no appointment required.	Most CLCs will provide basic advice to anyone who attends a clinic, but cannot take on casework unless strict eligibility criteria are met. Some centres will cater for particular types of people in speciality clinics.
Provide legal representation 	CLCs will rarely provide representation on urgent matters. Some CLCs are able to provide legal aid to clients.	Each CLC will have its own eligibility requirements. However, in determining whether an accused is eligible for legal representation, they often consider: - the type of legal matter - if the CLC specialises in those types of matters - if the accused is eligible for VLA.

The role of Victorian community legal centres in assisting victims of crime 3.1.5.4

Community legal centres (CLCs) aim to provide support and assistance to victims of crime as they navigate legal proceedings. CLCs can offer a range of support services to victims of crime, including legal advice, assistance with filing complaints or applications, and referrals to other support services, such as counselling or victim advocacy. They can also provide information about the legal process and help victims understand their rights and responsibilities. Some CLCs provide family violence duty lawyer services for victims of family violence.

Table 4 The role of community legal centres in assisting victims of crime

Role	Explanation	Eligibility requirements
Provide legal information 	General legal information can be provided in person and online. Moreover, specialist CLCs can provide detailed information about their primary area of expertise, or information tailored towards the type of person they specialise in assisting.	Available to everyone.
Provide basic legal advice and assistance 	CLCs provide basic information online and in person. They may also assist individuals with making applications and filing relevant documentation. Some also provide advice over the phone or in person with no appointment required.	Most CLCs will provide basic advice to anyone who attends a clinic, but cannot take on casework unless strict eligibility criteria are met. Some centres will only cater for particular types of people in speciality clinics. Continues →

CONTENT WARNING This section mentions content that is sensitive in nature, relating to family violence and sexual assault.

Table 4 Continued

Role	Explanation	Eligibility requirements
Provide duty lawyer services 	Duty lawyers are present in some courts to assist victims with intervention order hearings.	All victims are eligible, but prioritised based on need.
Provide legal representation 	Some CLCs have resources to provide ongoing assistance and representation to victims of crime, usually in relation to family violence or other intervention orders.	Each CLC has different eligibility requirements and some only assist particular types of victims, such as the Women's Legal Service Victoria and the Victorian Aboriginal Legal Service.

DEEP DIVE

Examples of community legal centres assisting victims of crime

There are variations in the level of assistance that CLCs can provide to victims, with some CLCs specialising in helping particular types of people, or in particular areas of law. These are just some of the examples of CLCs in Victoria that provide assistance to victims of crime.

Community legal centre	Type of assistance	Eligibility requirements
Djirra	At Djirra, the sharing and celebration of culture is coupled with practical support for all Aboriginal women, especially those currently experiencing, or those who have previously experienced, family violence. It provides information to clients on how to protect themselves and their children from family violence. Referrals to other services, support for housing, health, finances, and employment, and specialised services, such as counselling and assistance with drug and alcohol issues, are also available to promote future safety.	Djirra provides assistance to First Nations women and focuses on family violence cases.
Disability Discrimination Legal Service	Disability Discrimination Legal Service (DDLS) offers free legal services in multiple areas, including information, referrals, advice, casework assistance, community legal education, policy, and law reform. The service also caters to female-identifying individuals regarding workplace sexual harassment. DDLS provides clients with an information pack on its services.	DDLS provides assistance to those who are Victorian residents with a disability, their advocate, associate, parent, or representative bodies, and to those who have experienced discrimination based on their disability.
Women's Legal Service Victoria	Women's Legal Service Victoria provides legal advice to female victims of crime and promotes women's rights.	Women's Legal Service Victoria prioritises support for people who are experiencing family violence and face other barriers to justice. This may include: • having no or limited access to money • having limited access to other legal support • not having a home • being Aboriginal and Torres Strait Islander • not speaking English or having English as a second language • being on a temporary visa or not having a visa • living with disability • caring for children with disabilities. (Women's Legal Service Victoria, n.d.)

REAL WORLD EXAMPLE

Youthlaw community legal centres supporting victims under 25

Youthlaw assists victims under 25 with navigating the legal system. It assists with making intervention order applications or representing young people in court. It has fact sheets available online with advice for victims about victim impact statements, claiming compensation, and victim rights. Youthlaw understands that young people who are victims of crime may also be dealing with other complex issues, such as mental health problems, homelessness, or substance abuse. Therefore, it works in collaboration with other community services to provide a holistic approach to supporting young victims.

Adapted from 'Victims of Crime' (Youthlaw, 2018)



Image used with permission from Youthlaw

Figure 4 Youthlaw focuses on assisting young people to navigate the legal system



Figure 5 A map showing the location of community legal centres in Victoria

LESSON LINK

You will learn more about victim impact statements in **3C Factors considered in sentencing**.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. The tables in this lesson showing strengths and limitations in relation to each principle can help you evaluate how VLA and CLCs uphold the principles of justice.

Evaluating community legal centres' ability to achieve the principles of justice during a criminal case

STRENGTHS

- CLCs provide high quality, free legal support, and education to members of the community. This enables individuals to adequately participate in legal proceedings and present their cases in the best light, encouraging just and fair outcomes.
- Victims of crime are able to receive legal support from professionals, therefore easing the emotional stress of the trial. This can allow victims to better participate in court proceedings and provide accurate statements to the court, promoting a just and fair outcome.
- In some circumstances, CLCs can provide legal representation to accused individuals. This promotes fairness as the accused is provided with necessary assistance to navigate the complex criminal justice system and adequately present their case.

LIMITATIONS

- CLCs often cannot provide legal representation in court. This means many accused individuals without financial means to gain legal representation must self-represent, unless they are eligible for assistance from VLA. Thus, this may impact the achievement of a fair trial if an individual cannot adequately participate in the legal proceedings.
- CLCs cannot provide assistance to all victims of crime, meaning some victims may not be able to participate in the justice system, limiting fairness.





STRENGTHS

- CLCs often provide an interpreter service to ensure those from non-English speaking backgrounds can access legal assistance, promoting equality in the justice system.
- CLCs can provide specific advice to victims and cater to their individual circumstances, ensuring all people, regardless of personal characteristics such as race, gender, or disability, receive appropriate legal information. For example, the Disability Discrimination Legal Service provides specialised services to those with a disability, ensuring these people are uplifted in the justice system and receive tailored services, promoting equality.

LIMITATIONS

- The eligibility requirements for a duty lawyer or legal representation from a CLC are strict, meaning very few individuals can gain access to free legal representation. Whilst these requirements prioritise those most in need, others who are in the middle ground, whose circumstances are not considered dire enough to warrant help, are unable to receive legal assistance. This limits equality as these individuals are not uplifted to receive the same treatment as those who can afford representation in the justice system.
- The lack of funding received by CLCs impedes their ability to take on many new cases. Therefore, many accused people and victims suffer without representation, as help may be unavailable when required due to the limited capacity of CLCs.
- The majority of CLCs in Victoria are located in metropolitan Melbourne with few centres in rural Victoria. This limits the ability of accused persons and victims living in rural areas to acquire free legal services. This restricts the achievement of equality as rural areas may not have access to services to the same degree as those in metropolitan regions.



STRENGTHS

- CLCs provide free legal advice and information, enhancing access to, and understanding of, the legal system for all individuals in the community.
- Specialist CLCs can provide tailored advice about specific areas of law, increasing access to personalised assistance for certain legal matters.
- CLCs are located across Victoria and in some regional areas, with some providing legal assistance over the phone, promoting access to legal information and advice.
- Victims are able to receive free legal assistance and support from CLCs that is specific to their case, such as by assisting individuals with making applications and filing relevant documentation, promoting access to justice.

LIMITATIONS

- As CLCs usually provide assistance for relatively minor criminal matters, they do not promote access to resources for those charged with very serious criminal matters.
- There are not as many CLCs located in rural parts of Victoria, limiting access to legal assistance for those in remote areas.
- CLCs are limited in their ability to facilitate access to legal resources and support due to a lack of funding.

REAL WORLD EXAMPLE



Image: Ellen Smith/The Guardian

Figure 6 Community legal centres are being forced to reject clients seeking legal assistance

Community legal centres' crisis

Community legal centres play a crucial role in providing free legal advice and representation to vulnerable individuals and marginalised communities. However, a growing demand for their services, coupled with limited resources, has resulted in CLCs being unable to accommodate the demand and only able to assist clients with 'exceptional circumstances'. As Natalie Morale, director of strategy, engagement and projects at Inner Melbourne Community Legal, states 'we're already prioritising the neediest of the needy and now we're not even able to really support them properly'.

There are various factors contributing to the crisis, such as cuts in government funding and an increase in complex legal cases. As a result, community legal centres are compelled to prioritise cases based on severity or urgency, leaving many individuals without the support they desperately need. Furthermore, the emotional toll and distress of legal proceedings is compounded as services are denied and individuals are left to navigate the legal system alone.

Adapted from 'Saying no has an enormous impact': overwhelmed community legal centres forced to turn away clients' (Bucci, 2022)

Lesson summary

Table 5 Victoria Legal Aid and community legal centres summary

	Victoria Legal Aid	Community legal centres
Purpose	VLA is a government-funded body that provides free legal information to the public and no cost or low-cost legal services to eligible individuals.	CLCs are independent organisations that aim to enhance access to justice for members of the community by providing free general and specialist legal services.
Funding	VLA is funded by the state and federal governments.	CLCs are funded by Victoria Legal Aid, state and federal governments, and private donations.
Eligibility requirements	Strict eligibility requirements must be satisfied to receive a duty lawyer or a grant of legal assistance. This includes the means test and the income test.	Each CLC will have different eligibility requirements depending on its resources and areas of expertise.
Role in assisting accused people	VLA can provide: • legal information • legal advice • duty lawyers • grants of legal assistance.	CLCs can provide: • legal information • basic legal advice and assistance • legal representation.
Role in assisting victims of crime	VLA can provide: • legal information • legal advice through the Victims Legal Service • duty lawyers • grants of legal assistance.	CLCs can provide: • legal information • legal advice • duty lawyers • legal representation.

2B Questions

Check your understanding

Question 1

The main purpose of VLA and CLCs is to provide low-cost or no-cost legal assistance to those most vulnerable.

- A. True
- B. False

Question 2

Which of the following is **not** a service VLA provides for accused people?

- A. Duty lawyer services
- B. Free legal advice
- C. Counselling services
- D. Grants of legal assistance

Question 3

Which of the following resources may be provided to victims by CLCs? **(Select all that apply)**

- A. Free legal advice
- B. Legal information
- C. Duty lawyers
- D. Grants of legal assistance

Question 4

Tick the box to indicate whether the following characteristics are **strengths** or **limitations** of CLCs.

Characteristic	Strengths	Limitations
I. CLC services are free.	☐	☐
II. There is a lack of funding.	☐	☐
III. The majority of CLCs are located in metropolitan Melbourne with fewer centres in rural Victoria.	☐	☐
IV. CLCs can provide interpreter services to ensure those with diverse language backgrounds can access legal assistance.	☐	☐

Question 5

Fill in the blanks with the following terms:

means

income

The [] test requires an accused to demonstrate that their income is limited or their main source of income is welfare payments from the government in order to receive duty lawyer assistance. On the other hand, the [] test considers an accused's income, assets, and expenses to determine whether they are eligible for a grant of legal assistance.

Question 6

Victoria Legal Aid contributes to the achievement of equality as: **(Select all that apply)**

- A. the provision of legal support is not determined based on personal characteristics such as race, gender, or sexuality.
- B. the eligibility requirements for a duty lawyer or grants of legal assistance from VLA are strict, meaning those who cannot afford a lawyer and are not eligible for legal aid are unable to receive legal assistance.
- C. it provides free information on its website to all accused people and victims.

Question 7

Community legal centres are limited in their ability to achieve access as:

- A. they provide free legal advice and information.
- B. there are fewer locations in regional Victoria compared to metropolitan areas.
- C. specialist CLCs can provide tailored advice about specific areas of law, increasing access to personalised assistance for certain legal matters.

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

(3 MARKS)

Explain **one** role of Victoria Legal Aid in assisting an accused person.

Adapted from VCAA 2021 exam Section A Q3a

Question 9

(5 MARKS)

- a. Outline the main purpose of community legal centres. 2 MARKS
- b. Explain the role of community legal centres (CLCs) in upholding the principle of fairness when assisting accused people. 3 MARKS

Adapted from VCAA 2022 exam Section B Q2a

Question 10

(3 MARKS)

Charles, a 23-year-old paraplegic, has used a wheelchair for over five years and was recently assaulted by a group of men during his commute to work. They pushed him off the train and onto the platform, causing him to fall out of his wheelchair. After seeking legal support, Charles learnt about specialised assistance for disability discrimination crimes.

Explain the role of community legal centres (CLCs) in providing support to Charles.

Question 11

(3 MARKS)

Kai has just moved to Australia and has no knowledge of the legal system. English is also their second language. They received a speeding fine, but as they could not afford to pay it, the matter has escalated and now Kai must face the Magistrates' Court.

Advise Kai as to whether Victoria Legal Aid or a community legal centre would be more appropriate for Kai in this situation.

Adapted from VCAA 2018 Sample exam Section A Q5

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 Victorian Legal Aid (VLA) and community legal centres (CLCs) in upholding the principle of access.

Statement	Strengths	Limitations
I. VLA's services can be accessed in person, over the phone, and online, allowing for multiple avenues of access to legal support. Likewise, CLCs are across metropolitan Melbourne and in some regional areas, with some providing legal assistance over the phone.	☐	☐
II. VLA duty lawyers and grants of legal assistance ensure eligible accused people can participate in the criminal justice system and its processes in an informed manner. Additionally, CLCs can provide legal representation for accused individuals, and duty lawyers for victims in some circumstances.	☐	☐
III. CLCs usually provide assistance for relatively minor criminal matters and therefore, do not promote access to resources for those charged with very serious criminal matters. Likewise, VLA duty lawyers and grants of legal assistance can only be provided if the accused satisfies the income and means test, respectively, and duty lawyers are only available in the Magistrates' Court and not for indictable offences.	☐	☐
IV. Lack of funding for both VLA and CLCs can limit access to legal services due to the lack of resources and support available. The demand for legal services is greatly disproportionate to the assistance available, hence more individuals may be left uninformed and unable to adequately engage with the criminal justice system and achieve justice.	☐	☐

Question 13

(8 MARKS)

Discuss the ability of Victoria Legal Aid and community legal centres to uphold the principle of access.

Linking to previous learning**Question 14**

(3 MARKS)

Sonia was the victim of a sexual assault offence and the trial for her accused perpetrator is set to take place next month. Sonia has never engaged with the criminal justice system and is seeking to find out more about her rights as a victim.

Explain how a community legal centre could assist Sonia in understanding her rights as a victim.

2C Plea negotiations

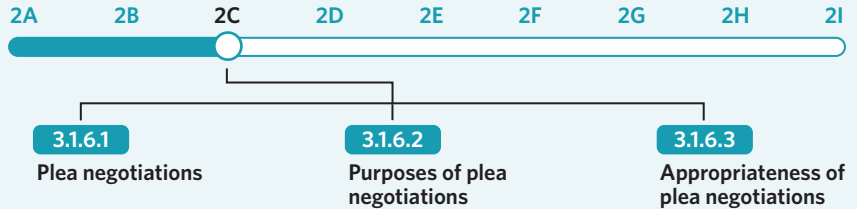


Image: Dmitrii Ivanov/Shutterstock.com

You are the owner of a restaurant and unfortunately added poisonous mushrooms to the risotto you were serving, unaware of their toxicity. Five people die as a result of the toxins. You are given an offer: either risk your chances to plead your innocence, but if you fail, suffer through 20 years of prison, or admit your guilt and only face 10 years in prison instead. Which would you choose?

STUDY DESIGN DOT POINT

- the purposes and appropriateness of plea negotiations



Lesson introduction

In the criminal justice system, it is a common practice for the accused and prosecution to enter into plea negotiations in order to resolve a criminal dispute without a trial or hearing. These negotiations may result in the accused pleading guilty, therefore, aiding in securing a guilty plea for the prosecution, whilst also saving time, costs, and resources for both the parties and the courts.

Plea negotiations 3.1.6.1

Where an accused is willing to plead guilty, they may enter into **plea negotiations** with the prosecution, potentially resulting in a reduction of charges, or a lesser charge altogether. An accused may plead guilty to an offence if doing so is beneficial to them. For example, an accused may plead guilty to an offence in exchange for:

- the withdrawal of some other charges. For example, an accused person charged with two charges may plead guilty to one charge on the condition that the other charge will be dropped.
- a reduction in the severity of the charge. For example, an accused person charged with murder may agree to plead guilty in order to receive a lesser charge, such as manslaughter.
- the accused pleading guilty on a mutually agreed set of facts regarding the offence. For example, if an agreement is reached regarding the extent of the crime, the prosecution's investigation time can decrease and consequently, the offender's punishment may be reduced.

Plea negotiations may be initiated by the prosecution or accused and can occur at any stage before, or during the trial. If an accused pleads guilty to lesser charges during this process, the charges must still reflect the severity of the accused's criminal conduct. Therefore, the court will be notified of the charges the accused has pleaded guilty to and will determine an appropriate **sanction** to impose. However, if a plea negotiation is unsuccessful and does not result in an agreement, any information raised throughout the negotiations cannot be used against the accused if the case proceeds to trial.

KEY TERM

Plea negotiations discussions between the prosecution and the accused, aimed at encouraging the accused to plead guilty to a lesser charge, or fewer charges altogether in exchange for the prosecution requesting a lesser sentence.

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.

LESSON LINKS

You will learn more about the role of the parties in **2F The parties in a criminal case**.

You will learn more about sanctions in **3A Purposes of sanctions** and **3B Types of sanctions**.

Purposes of plea negotiations 3.1.6.2

Plea negotiations serve a wide range of purposes in the determination of criminal cases and can be beneficial to all parties involved in the proceedings.

Table 1 Purposes of plea negotiations

Purpose of plea negotiations	Explanation
Achieve an early determination of a case	Plea negotiations enable criminal matters to be resolved without a trial, which is generally in the best interests of both parties. It also reduces the courts' workloads, minimising delays for matters that do go to trial.
Avoid the stress and trauma associated with a trial	Where plea negotiations result in the accused pleading guilty, it reduces the stress and trauma associated with a criminal trial for the victim(s), their families, and witnesses.
Avoid the costs associated with a trial	Where plea negotiations result in the accused pleading guilty, this results in a prompt resolution of a trial. As a result, the offender may avoid the costs associated with a trial, such as legal representation fees.
Secure a conviction	In cases where witnesses may be reluctant to give evidence, or if the prosecution does not have strong admissible evidence , a successful plea negotiation ensures there is a conviction.
Allow the offender to receive a reduced sentence	Plea negotiations may allow the offender to plead guilty to a less severe charge, or lesser charges. This may lead to a reduced sentence compared to if the case were to proceed to trial.

LEGAL VOCABULARY

Admissible evidence evidence that abides by the rules of procedure and is, therefore, allowed to be presented to the court.

REAL WORLD EXAMPLE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to death.

Plea negotiations result in an admission of guilt for victims' families

Pipecon Pty Ltd is a construction company located in Ballarat, Victoria. In 2018, two of Pipecon's workers were killed after a trench collapsed on top of them. Pipecon was charged with two occupational health and safety offences for failing to provide a safe workplace and failing to provide supervision to ensure a safe workplace. Initially, Pipecon pleaded not guilty. However, following various court delays, Pipecon entered into plea negotiations with the prosecution. Pipecon agreed to plead guilty to one charge of failing to provide supervision to ensure a safe workplace, and in return, the prosecution dropped the other charge. According to Ballarat Trades and Labour Council secretary, Brett Edgington, who worked closely with the victim's families, it was a 'very profound moment' for the families to hear Pipecon 'get up and admit guilt'. In this case, the plea negotiations were beneficial to Pipecon and the families of the victims.

Adapted from 'Pipecon pleads guilty to charge over trench collapse that killed Jack Brownlee, Charlie Howkins' (King, 2021)



Image: Emre Ucarer/Shutterstock.com

Figure 1 Successful plea negotiations resulted in Pipecon Pty Ltd agreeing to plead guilty to one charge in return for a reduction in its number of charges

Appropriateness of plea negotiations 3.1.6.3

While there are benefits to plea negotiations, there are also various considerations that must be accounted for when determining whether a plea negotiation is appropriate in a particular case. As a general rule, the prosecution must ensure its offer to the accused is proportionate to the public interest and accurately reflects the accused's wrongdoing.

USEFUL TIP

It is important to remember that the appropriateness of a plea negotiation will be determined by the nature of a specific case. In assessments, you may be required to discuss whether or not a plea negotiation is appropriate in relation to a case study. Therefore, a high-scoring response would explain how various factors influence the appropriateness of a plea negotiation in relation to the specific facts of the scenario, as opposed to simply listing general factors that determine the appropriateness of plea negotiations.

Table 2 The appropriateness of plea negotiations

Circumstances when plea negotiations are appropriate	Circumstances when plea negotiations are not appropriate
- The accused is willing to plead guilty. - The accused or prosecution wishes to avoid the costs and time associated with a criminal trial. - The accused is representing themselves and is unable to present their case in the best possible light. - Victims and witnesses are reluctant to give evidence, or giving evidence will be particularly traumatic for the victim or witnesses. - The prosecution believes some witnesses may not be believable when giving evidence before a jury, reducing the likelihood of a conviction being secured. - The prosecution is concerned that vital evidence proving an accused person's guilt may be inadmissible at trial, reducing the likelihood of a conviction being secured. - Victimless crimes, such as drug offences or fraud, where a victim's views do not need to be taken into account at sentencing.	- The accused is not prepared to plead guilty to any charges. - The alleged offending is serious to the point that a conviction for lesser charges is not in the public interest and the perception that the accused 'got off lightly' will be too great. - The victim or their family opposes such an agreement. The prosecution will consider this in deciding whether to negotiate a plea. Although, it is ultimately up to only the prosecution to decide whether to enter such an agreement.

HYPOTHETICAL SCENARIO


Figure 2 Plea negotiations allowed Emiko and the prosecution to avoid a full criminal trial

Finding common ground

Emiko was arrested and charged with numerous offences, including armed robbery. She is concerned because she cannot afford legal representation, and is worried about being sent to prison. Emiko has been cooperative with the police since her arrest. Ada was a witness in the case against Emiko and was concerned about giving evidence as she was distressed about the armed robbery.

As Ada was the only witness in the case against Emiko, but was reluctant to give evidence, the prosecution entered into plea negotiations with Emiko. After plea negotiations with the prosecution, Emiko agreed to plead guilty to armed robbery, and in return, the prosecution dropped the other charges that Emiko was facing.

As a result of the plea negotiation, Ada was able to avoid providing evidence at trial and Emiko avoided representing herself at trial. However, the prosecution ensured its offer to Emiko was proportionate to the public's interests and accurately reflected her wrongdoing.

Evaluating plea negotiations' ability to achieve the principles of justice during a criminal case



STRENGTHS

- Plea negotiations may result in the accused pleading guilty to a charge that adequately reflects the crime, leading to a just outcome to the case.
- Plea negotiations secure a conviction in cases where witnesses may be reluctant to give evidence, or where evidence is inadmissible in court, providing an alternative avenue for securing a conviction, without the need for the matter to proceed to trial.

LIMITATIONS

- Where plea negotiations result in the accused pleading guilty to a charge that does not adequately reflect the crime, this may result in the community believing the accused has been 'let off'. This could lead to the impression that the outcome was unfair.
- Plea negotiations may be seen as undermining the achievement of fairness as they are conducted in private, which does not achieve the public element of a fair trial.
- If the victim or their family opposes the idea of a plea negotiation, but the prosecution continues to enter into an agreement with the accused, this may lead to the victim or their family viewing the outcome as unjust.

STRENGTHS

- Personal characteristics, such as the accused's gender and income, are not relevant during plea negotiations, therefore ensuring unbiased and equal treatment.
- Both the accused and prosecution can request a plea negotiation, promoting equal engagement in the criminal justice system without disparity.

LIMITATIONS

- Plea negotiations are not available to all accused persons as they are only possible if the prosecution agrees to it. Therefore, there is not always an equal opportunity for accused persons to enter into a plea negotiation.

**STRENGTHS**

- Plea negotiations save courts time and resources by allowing cases to be resolved before going to trial. This minimises delays and frees up the courts' resources to make the legal system more accessible for cases that do need to go to trial.

LIMITATIONS

- Where plea negotiations result in the accused pleading guilty to a charge that does not adequately reflect the crime, this can prevent victims and their families from accessing justice.
- Access to plea negotiations may be limited for some accused persons as the prosecution has to agree to one.
- Plea negotiations are conducted in private, meaning victims, their families, and society cannot engage in this process, reducing the achievement of access.



Lesson summary

- Plea negotiations are beneficial for both the prosecution and the accused, and can occur at any stage before, or during the trial.
- They can result in a prompt resolution to a criminal case without the need to go to trial as an accused may plead guilty to fewer charges, a lesser charge, or a mutually agreed set of facts.
- Plea negotiations can ensure victims, their families, and witnesses have access to justice without having to experience the stress and trauma associated with a criminal trial.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing the strengths and limitations of plea negotiations in relation to each principle may help you evaluate how these negotiations can uphold the principles of justice.

2C Questions

Check your understanding

Question 1

Plea negotiations can only be initiated by the prosecution.

- A. True
- B. False

Question 2

Which of the following is an agreement that cannot be reached during a plea negotiation?

- A. An agreement on the likely sentence the accused is to receive if they plead guilty.
- B. The withdrawal of some other charges.
- C. A reduction in the severity of the charge.
- D. The accused pleading guilty to an agreed set of facts.

Question 3

Which of the following statements are correct about the purposes of plea negotiations? **(Select all that apply)**

- A. Plea negotiations avoid the stress and trauma associated with a trial for the victim, their family, and the accused.
- B. Plea negotiations result in an early determination of a case as it enables criminal matters to be resolved without the need for a trial.
- C. Plea negotiations allow the prosecution to guarantee the accused receives the maximum penalty possible for the charge(s) they face.
- D. Plea negotiations secure a conviction for the prosecution, particularly in cases where witnesses may be reluctant to give evidence, or if some evidence is inadmissible in court.

Question 4

In which of the following scenarios would plea negotiations be appropriate? **(Select all that apply)**

- A. The accused is facing multiple charges but is not prepared to plead guilty to any of the charges.
- B. The prosecution believes some witnesses may not be comprehensible and convincing when giving evidence before a jury.
- C. The alleged offence(s) are of such high severity that a conviction for lesser charges is not in the public interest.
- D. The prosecution fears vital evidence proving an accused person's guilt may be inadmissible at trial.

Question 5

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

equality

fairness

If a plea negotiation results in the accused pleading guilty to a charge that does not adequately reflect the crime,

this prevents the achievement of [].

Question 6

Plea negotiations are appropriate and can be used in all circumstances.

- A. True
- B. False

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

(2 MARKS)

Identify **two** participants in the plea negotiation process.

VCAA 2021 exam Section A Q1a

Question 8

(4 MARKS)

Under what circumstances might plea negotiations be appropriate in determining a criminal case?
Explain your response.

Adapted from VCAA 2021 exam Section A Q1b

Question 9

(4 MARKS)

Lottie has been charged with culpable driving after being involved in a car accident that caused the death of Nico. The prosecution knows Nico's family is devastated and wants to see Lottie punished severely. The backlog of cases in the County Court means the trial will be more than 14 months away, and Lottie wants the case to be resolved quickly.

Outline **one** reason why a plea negotiation would be appropriate in determining Lottie's case and outline **one** reason why it would not.

Adapted from VCAA 2018 Sample exam Section B Q2c

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.

Tabitha has been charged with stalking and causing serious injury intentionally after allegedly following her ex-boyfriend, Joe, for weeks. After seeing him with his new girlfriend Aria, Tabitha repeatedly punched and kicked him. Tabitha has pleaded not guilty but is worried about the outcome of the trial as she cannot afford legal representation and is unsure how to present her case properly. In addition, Aria has expressed to the prosecution that she does not want to relive the traumatic experience by presenting evidence at trial. However, Joe's parents wish to see justice served at trial.

Question 10

Which of the following statements suggests that plea negotiations are appropriate in this case?

(Select all that apply)

- A. Aria does not want to relive the traumatic experience and is, therefore, reluctant to give evidence at trial.
- B. Joe's parents wish to see justice served at trial.
- C. Tabitha has to represent herself as she cannot afford legal representation but may not present her case properly.
- D. The prosecution may be able to secure a conviction to ensure justice is achieved for Joe, his parents, and Aria.
- E. Tabitha has pleaded not guilty despite having the chance to plead guilty.

Question 11

(5 MARKS)

Discuss the appropriateness of plea negotiations in this case.

Adapted from VCAA 2018 exam Section B Q1c

Linking to previous learning

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 plea negotiations in achieving the principles of fairness and access.

Statement	Strengths	Limitations
I. Plea negotiations save the courts time and resources by allowing cases to be resolved before going to trial, minimising delays and freeing up the courts' resources.	☐	☐
II. Plea negotiations secure a conviction in cases where witnesses may be reluctant to give evidence, or if some evidence is inadmissible in court.	☐	☐
III. Where plea negotiations result in the accused pleading guilty to a charge that does not adequately reflect the crime, this prevents the victims and their families from accessing justice.	☐	☐
IV. Plea negotiations may be seen as undermining the achievement of fairness as they are conducted in private.	☐	☐

Question 13

(6 MARKS)

Discuss the extent to which plea negotiations help the justice system achieve the principles of fairness and access.

Adapted from VCAA 2018 Sample exam Section A Q8

2D The Victorian court hierarchy and criminal cases

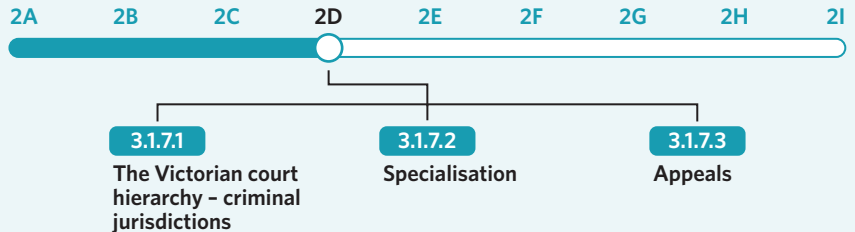


Image: Fer Gregory/Shutterstock.com

In a quaint country town, a gruesome double murder shocks the community. Yet, as the rumour mill begins to churn with whispers of 'whodunit' and speculations about suspicious figures, one question is on everyone's minds...which court will hear and determine this case once the alleged killer is caught?

STUDY DESIGN DOT POINT

- the reasons for the Victorian court hierarchy in determining criminal cases, including specialisation and appeals



Lesson introduction

In Victoria, the courts are arranged in a hierarchy and each court has the power to hear and determine different types of criminal cases. Additionally, some courts in the Victorian court hierarchy have the power to hear and review criminal cases on appeal from lower courts. Therefore, the existence of a court hierarchy ensures Victoria has an efficient and cohesive court system that can facilitate the delivery of justice for the entire community.

The Victorian court hierarchy - criminal jurisdictions 3.1.7.1

KEY TERM

Court hierarchy the arrangement of courts in order of superiority.

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.

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.

Leave to appeal formal permission to appeal the outcome of a case to a higher court.

The Victorian **court hierarchy** is composed of five courts, with the lowest court being the Magistrates' Court and the highest Victorian court being the Supreme Court – Court of Appeal. While these are the main courts, there are also subdivisions of the Magistrates' Court, like the Koori Court. The highest court in Australia is known as the **High Court of Australia**, which deals with federal and constitutional matters. Each of the Victorian courts has its own **jurisdiction**, which refers to the power and legal authority of a court to hear a case. The **original jurisdiction** of a court refers to its ability to hear a case for the first time. For lower courts in the hierarchy, like the Magistrates' Court, its original jurisdiction is limited to determining minor criminal offences, like petty theft, whilst the original jurisdiction of higher courts, like the County Court, allows it to determine more serious offences, like culpable driving.

Additionally, certain courts have **appellate jurisdiction**, which permits them to hear and review a case after the original trial through an appeal. If a party is unsatisfied with the outcome of their case, they may apply for **leave to appeal** and have the decision of the case reviewed by a higher court. It is important to note that the reasons for and jurisdictions of the Victorian court hierarchy differ between criminal and civil law.

WANT TO KNOW MORE?

You can find out more about the caseload and types of offences heard in each court by searching 'Courts and VCAT caseload data' and clicking the 'Court Services Victoria' (2023) webpage.

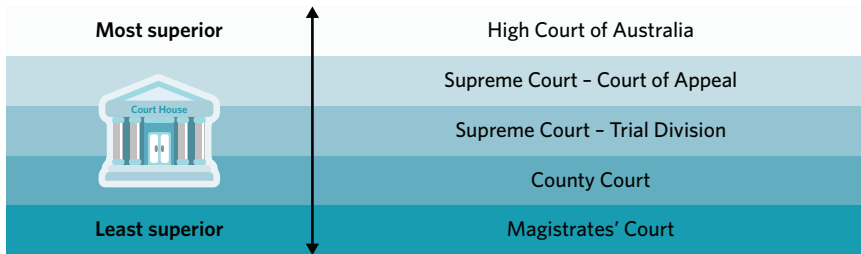


Figure 1 The Victorian court hierarchy

LESSON LINKS

You will learn more about the Victorian court hierarchy and civil cases in **5C The Victorian court hierarchy and civil disputes**.

You learnt about summary and indictable offences in **1A Key principles of the criminal justice system**.

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.

Supreme Court of Victoria the most superior court in Victoria that deals with the state's most serious criminal and civil cases.

Table 1 The original and appellate criminal jurisdiction of Victorian Courts

Court	Original criminal jurisdiction	Appellate criminal jurisdiction
Magistrates' Court of Victoria	- Summary offences - Indictable offences heard summarily - Applications for warrants - Bail hearings	No appellate jurisdiction
County Court of Victoria	Trials for most indictable offences, such as: - rape - armed robbery - serious drug offences.	Appeals from the Magistrates' Court in cases where the: - offender is appealing against the conviction. - offender(s) or the prosecution is appealing the sanction imposed.
Supreme Court of Victoria - Trial Division	Unlimited criminal jurisdiction, but in practice conducts trials only for the most serious indictable offences, such as: - murder and manslaughter - terrorism offences.	Appeals from the Magistrates' Court based on questions of law
Supreme Court of Victoria - Court of Appeal (Often referred to as the Court of Appeal)	No original jurisdiction	Generally, three justices will preside over an appeal case. All appeals for crimes originally heard by a judge and jury in the County Court or Supreme Court – Trial Division can be heard in the Court of Appeal. This includes appeals against the sanction imposed, questions of law, and appeals against a conviction.

Specialisation 3.1.7.2

Courts are able to develop expertise in different areas of law as the court hierarchy facilitates **specialisation** through the different levels in the court structure. The Victorian court hierarchy allows each court to become familiar with hearing certain types of criminal cases and the laws and procedures relevant to these cases. As a result of specialisation, criminal cases are resolved in a more efficient manner. For example:

- the Supreme Court – Trial Division has experienced justices with expertise in laws for the most serious indictable offences, like murder, and are knowledgeable about the process of **jury empanelment**.
- the County Court judges specialise in hearing and determining indictable offences, such as drug trafficking, and are also familiar with the processes of empanelling and managing a jury.

KEY TERM

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

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.

USEFUL TIP

When discussing specialisation as a reason for the Victorian court hierarchy and criminal cases, it is beneficial to provide an example to support your answer. For example, you can elaborate on how the judges in the Supreme Court - Trial Division specialise in hearing serious indictable offences, like murder, to further demonstrate your understanding of the concept.

KEY TERM

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

LESSON LINK

You learnt about the Office of Public Prosecutions in **2B Victoria Legal Aid and community legal centres**.

- the magistrates in the Magistrates' Court are specialised in dealing with minor criminal offences, like driving offences, and can efficiently hear and determine a larger volume of minor cases.

The court hierarchy facilitates specialisation by defining the jurisdiction of each court and setting out the criminal matters that are regularly heard and determined in each court.

HYPOTHETICAL SCENARIO**Terrorism heard in the Trial Division**

Toby has been charged with two terrorism offences and will have his case heard in the Supreme Court – Trial Division. This is because Supreme Court justices have greater knowledge and expertise to deal with terrorist-related offences, compared to judges in the lower courts who do not have as much experience to hear such matters.

Appeals 3.1.7.3

If a party is unsatisfied with the outcome of a case, they may **appeal** the final decision and have it reviewed by a higher court. Typically, the party seeking an appeal, known as the appellant, needs to prove they have valid grounds to appeal and be granted leave to appeal. Therefore, an appeal is not an automatic right. The court hierarchy is necessary for the process of appeals as it allows decisions of lower courts to be reviewed by higher courts, which would not be possible if the courts were not ranked based on superiority.

Table 2 Possible grounds for an appeal

Grounds	Explanation
Appealing the sanction imposed	The prosecution may argue that the sanction imposed does not adequately reflect the severity of the crime committed, whilst the offender may appeal the sanction for being excessive.
Appealing on a question of law	The dissatisfied party may argue that the legal principles or legislation have been incorrectly applied or interpreted.
Appealing the conviction	The party may appeal the jury or judicial officer's verdict.

LEGAL CASE***Lanciana v The King* [2023] VSCA 78****Facts**

In 1994, an elaborate Armaguard van heist occurred in Richmond, in a scheme that involved fake roadwork sites, construction workers, and customised keys. Decades later, in 2016, the offender who organised the heist was finally arrested and charged with armed robbery, false imprisonment, and seven counts of money laundering. In 2021, the offender was found guilty in a trial by jury and sentenced to 14 years in prison. His legal counsel sought to appeal his case on the grounds of 'a substantial miscarriage of justice' due to directions given to the jury during the trial. The leave to appeal was granted.

Legal issue

The Supreme Court – Court of Appeal needed to determine whether 'a substantial miscarriage of justice' had occurred due to the judge's directions to the jury in the original trial.

Decision

The Court of Appeal rejected the appeal to overturn the conviction on such grounds, finding that the judge's directions given to the jury did not compromise the original verdict.

Significance

This case demonstrates that even when an accused has valid grounds for an appeal and leave to appeal, the reversal of the original conviction is not guaranteed.

Evaluating the Victorian court hierarchy's ability to achieve the principles of justice during a criminal case

STRENGTHS

- The existence of a court hierarchy promotes fairness in the criminal justice system through specialisation. As individual courts are able to develop their expertise in dealing with particular crimes and areas of law, cases are presided over by skilled and knowledgeable judges who are able to ensure open and impartial processes and thus a just outcome.

LIMITATIONS

- Some offenders may not be able to appeal the outcome of a case in a higher courts if they cannot afford the fees associated with an appeal. This limits the ability of an offender to have any errors in the outcome resolved, meaning in such cases, the court hierarchy may not deliver a fair outcome for all.



STRENGTHS

- The court hierarchy facilitates the ability to appeal decisions, and all parties have the right to appeal the outcome of a case, regardless of race, sex, or gender, given their appeal is on valid grounds and the judicial officer presiding over the case has given the party leave to appeal.

LIMITATIONS

- Due to the costs associated with an appeal, appeals are not equally accessible to all parties. As a government department, the Office of Public Prosecutions has the necessary resources to fund an appeal, compared to accused individuals, who may not have the resources to do so. Thus, some parties may face disadvantage in being unable to appeal against a wrongful outcome due to their socioeconomic status.



STRENGTHS

- The court hierarchy promotes access to justice by enabling the appeals process to occur, which facilitates the review of judicial decisions. This better enables accused persons to engage with the justice system and its processes.
- Access to the court system is increased due to the specialisation of the courts, as it allows criminal cases to be resolved in a more efficient manner due to the knowledge and expertise of judges within a court. Therefore, delays are minimised and more people can access the criminal justice system in a more timely manner.

LIMITATIONS

- Grounds for appeal must exist and leave to appeal may be necessary. This may render some cases 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 limits an accused's ability to engage with the criminal justice system and its processes.



USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing strengths and limitations in relation to each principle can help you develop this skill in evaluating the ability of the Victorian court hierarchy to achieve the principles of justice.

Lesson summary

The organisation of the Victorian courts in a hierarchical manner facilitates the swift and effective delivery of justice for the entire community.

- The Victorian courts are organised from least to most superior: Magistrates' Court, County Court, Supreme Court – Trial Division, Supreme Court – Court of Appeal, and the High Court of Australia.
- Each court has different original and/or appellate jurisdiction.
- Two reasons for the Victorian court hierarchy in criminal law are specialisation and appeals.

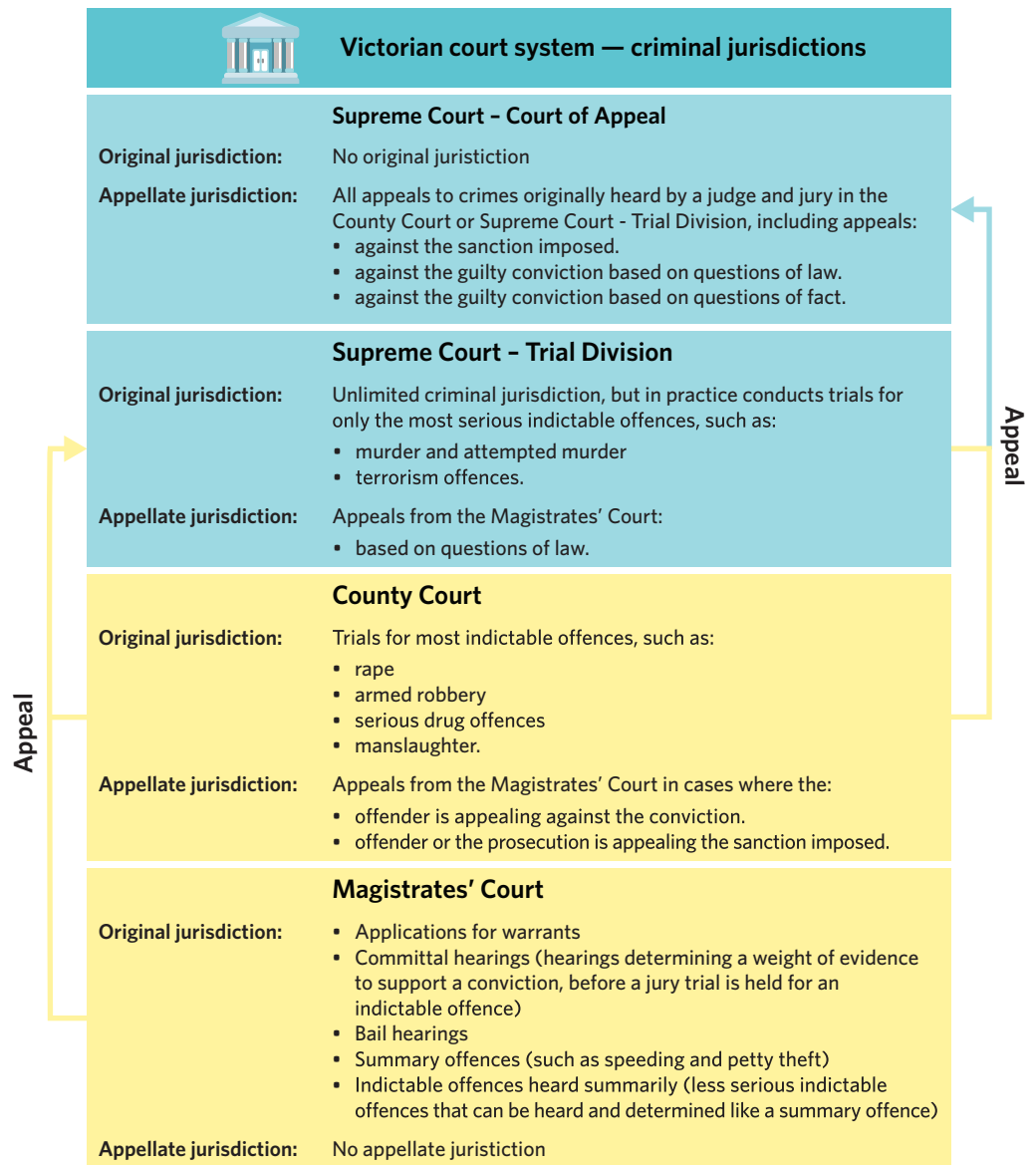


Figure 2 Summary of the Victorian court hierarchy and criminal cases

2D Questions

Check your understanding

Question 1

The Victorian court hierarchy is:

- A. the arrangement of the courts based on superiority.
- B. a room where judges make court decisions.
- C. the ordering of judges from most to least knowledgeable.

Question 2

All courts have appellate jurisdiction.

- A. True
- B. False

Question 3

Mindy has failed to pay a parking fine after multiple warnings and now must attend a court hearing. Her case will most likely be heard in the:

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

Question 4

Fill in the blanks with the following terms:.

cases

court

expertise

Specialisation refers to a court's ability to develop [] in a particular area of criminal law, and in dealing with specific criminal [] as a result of the [] hierarchy.

Question 5

Which of the following can be grounds for an appeal? **(Select all that apply)**

- A. The party is not happy with the result.
- B. The party is appealing on a question of law.
- C. The party is appealing the conviction.
- D. The party disliked the judge who presided over the case.
- E. The party is seeking a review of the sanction imposed.

Question 6

Which of the following statements is correct about the jurisdiction of the Court of Appeal?

- A. The Court of Appeal has original jurisdiction to hear matters relating to terrorism and national defence.
- B. The Court of Appeal has original jurisdiction to hear matters relating to cyberbullying.
- C. The Court of Appeal has no original jurisdiction.

Question 7

The Magistrates' Court can hear murder cases with the permission of the Supreme Court.

- A. True
- B. False

Question 8

An appeal is an automatic right for all accused persons.

- A. True
- B. False

Question 9

The Victorian court hierarchy:

- A. allows courts to specialise in particular areas of criminal law and enables appeals to take place.
- B. only allows for criminal cases to be heard in the High Court.

Preparing for exams

Standard exam-style

Question 10

(2 MARKS)

Outline **one** reason for the Victorian court hierarchy.

Adapted from VCAA 2016 exam Q1b

Question 11

(3 MARKS)

With reference to an example, explain how specialisation is facilitated by the Victorian court hierarchy.

Question 12

(5 MARKS)

Kaya has been sentenced to five years in prison after being found guilty by the County Court of armed robbery. She wishes to appeal the case.

- Outline the grounds on which Kaya could appeal her case. 2 MARKS
- Identify which court would hear the appeal and explain its appellate jurisdiction for criminal offences. 3 MARKS

Adapted from VCAA 2017 exam Q1b

Question 13

(4 MARKS)

'Appeals should not be permitted and a judge's decision should remain final under all circumstances.'

Do you agree with this statement? Referring to **one** principle of justice, justify your response.

Extended response

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

Question 14

Which of the following statements are false regarding the court hierarchy? (**Select all that apply**)

- Each Victorian court has a different original and appellate jurisdiction.
- The court hierarchy ensures judges who are nicer preside over indictable offences.
- The appeals process is reliant on the courts being ranked from least to most superior, and if a party is unsatisfied with the outcome of a case, they have the right to apply for leave to appeal and have the final decision reviewed by a superior court.
- Each court specialises in dealing with specific matters, which means the judges of the respective courts are experienced and skilled in dealing with particular areas of criminal law and the relevant court procedures.
- The court hierarchy ensures only certain people are allowed access to certain courts based on their sex, race, and ethnicity.

Question 15

(5 MARKS)

'The Victorian Court system would be more effective if there was only one level of courts and the courts were not ordered from most to least superior.'

Do you agree with this statement? Justify your answer.

Adapted from VCAA 2013 exam Q11

Linking to previous learning

Question 16

(3 MARKS)

Explain how **one** right of the accused is promoted through the Victorian court hierarchy.

2E Judges, magistrates, and juries in a criminal case

STUDY DESIGN DOT POINT

- the roles of key personnel in a criminal case, including the judge or magistrate, the jury, and the parties

2A 2B 2C 2D 2E 2F 2G 2H 2I

3.1.8.1

The role of the judge or magistrate in a criminal case

- 3.1.8.1.1 The difference between a judge and a magistrate

3.1.8.2

The role of the jury in a criminal case



Image: Gorodenkoff/Shutterstock.com

Just as every actor has their own role in a movie or stage show, there are many roles in a courtroom, each carrying different responsibilities. In a criminal courtroom, it is important that each individual upholds their duties and follows the correct court processes and procedures to ensure the achievement of justice.

Lesson introduction

The roles of the judge, magistrate, and the jury in a criminal case are integral to ensuring criminal trials operate efficiently and justly. Whilst the judges and magistrates are key figures equipped with legal knowledge to manage a case and ensure the relevant procedures are followed, jurors can represent the interests and values of the wider community in the determination of criminal cases.

The role of the judge or magistrate in a criminal case 3.1.8.1

The **judge** or **magistrate** is often referred to as the umpire of the courtroom as they must oversee all personnel and court proceedings, whilst ensuring court rules and procedures are upheld. Judges are often not required to determine the guilt of the accused, as this is the role of the jury, however, they must ensure the trial proceeds fairly and impartially. In the Magistrates' Court, where there is no jury, the magistrate will always determine the verdict. The judge or magistrate must treat each party equally, remain impartial, and have no connections to either party.

The titles of judicial officers vary depending on the court they are in, however, they all share the primary role of administering justice.

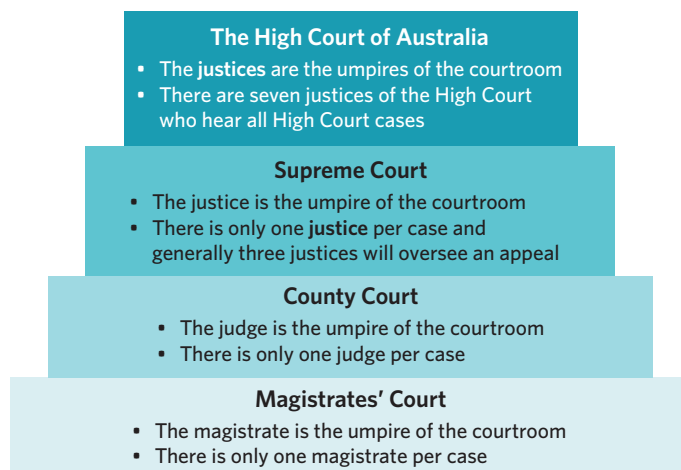


Figure 1 The composition of judges in the court hierarchy

KEY TERMS

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.

LEGAL VOCABULARY

Justice a judge in a relatively superior court in the hierarchy, such as in the Supreme Court of Victoria or the High Court of Australia.

LESSON LINK

You learnt about the court hierarchy in **2D The Victorian court hierarchy and criminal cases**.



Figure 2 The judge or magistrate plays an important role in criminal cases

LEGAL VOCABULARY

Admissible evidence evidence that abides by the rules of procedure and is, therefore, allowed to be presented to the court.

Directions orders given by a judge to parties about the way proceedings are to be conducted.

LEGISLATION

Jury Directions Act 2015 (Vic)

LEGISLATION

Crimes Act 1958 (Vic)

LESSON LINKS

You learnt about the burden of proof and the standard of proof in **1A Key principles of the criminal justice system**.

You will learn more about victim impact statements in **3C Factors considered in sentencing**.

Table 1 The role of the judge or magistrate in a criminal case

Role	Explanation
Manage the trial or hearing	A judge or magistrate ensures the proceedings of the trial or hearing remain on time and that there is an effective use of resources. This can involve judges or magistrates using their powers to control the delivery of evidence and determine whether this evidence should be presented in oral or written formats. A judge or magistrate can improve the efficiency of a trial by: - ensuring correct procedures are followed - monitoring and adjusting the processes of a trial as appropriate - limiting the number of witnesses or topics on which a witness may be questioned - limiting examination-in-chief and cross-examination time
Apply the rules of evidence and procedures	Judges and magistrates are required to make rulings relating to evidence and procedure, such as: - ensuring only admissible evidence is presented in court. - ensuring witnesses are examined and cross-examined lawfully. - giving directions on how evidence is to be presented and what documents the jury is permitted to see. - providing clarity on the rules of evidence and procedure.
Direct the jury (judges only)	The <i>Jury Directions Act 2015 (Vic)</i> informs the directions the judge gives the jury. It outlines what points of law the judge must explain to the jury to ensure a fair trial. For example, in most criminal cases, the judge will explain: - the burden of proof - the standard of proof - the key elements of the relevant offence(s) - the law that applies to the facts - the evidence presented by both parties.
Remain unbiased	A judge or magistrate must remain impartial throughout the trial process.
Determine the guilt of an accused (magistrate only)	Whilst determining guilt is the role of a jury in the County and Supreme courts of Victoria, in the Magistrates' Court, this responsibility falls on the magistrate, who will listen to the evidence and determine the verdict.
Impose an appropriate sanction	A judge or magistrate is responsible for imposing a sanction if an accused is found guilty. The <i>Crimes Act 1958 (Vic)</i> informs the type of sanction a judge or magistrate will impose on an offender who has been found guilty. The Act outlines the maximum sentence for different crimes to ensure there is fairness and consistency between court decisions. The judge or magistrate will also consider victim impact statements and statements from the parties when deciding the severity of the sanction.

REAL WORLD EXAMPLE

From school dropout to judicial powerhouse

Despite dropping out of school at 15, the Honourable Susan Mary Kiefel was appointed Chief Justice of the High Court of Australia on 30 January 2017. Justice Kiefel studied law at night while working full-time, and her determination and hard work earned her Australia's highest judicial office.

'Prior to her appointment, Justice Kiefel was already a trailblazer for women in the legal profession. She was the first female QC appointed in Queensland in 1987,' said Law Council President, Stuart Clark AM.

In her speech at the Australian Academy of Law and Charles Darwin University, Kiefel commented on judicial independence and impartiality:

'If the public are to have confidence in the judiciary and the courts they must see the courts as free from influence and pressure. They must believe that they can rely upon the courts fairly and impartially to hear and determine their cases.'

Adapted from 'Chief Justice appointment a landmark in Australian history' (The Law Society of Western Australia, n.d.)



Image: ChameleonsEye/Shutterstock.com

Figure 3 The High Court of Australia, where the seven Justices sit, is led by Chief Justice Kiefel AC

Evaluating a judge or magistrate's ability to achieve the principles of justice in a criminal case

STRENGTHS

- An independent judge or magistrate ensures the trial and court procedures are conducted fairly, without bias, and according to the rules of evidence.
- Judges give directions to the jury and must explain the key legal concepts of a criminal trial to ensure jurors remain impartial and informed in their decision-making.

LIMITATIONS

- Judges and magistrates can only explain court procedures and legal terminology to the parties and cannot provide additional legal advice or information to a self-represented party. This can increase the likelihood of an unfair trial for self-represented individuals due to the complexities and formalities of a criminal trial.
- Judges and magistrates are appointed by the government and may be more sympathetic to a particular political ideology. This can potentially compromise their impartiality and lead to unfair verdicts.



STRENGTHS

- Judges and magistrates ensure rules of evidence and procedure apply equally to both parties and are consistent across all criminal trials.

LIMITATIONS

- While judges and magistrates are impartial judicial officers, they are still subject to personal bias and therefore, may subconsciously discriminate against certain parties, hindering equality.



STRENGTHS

- Judges and magistrates apply court rules that protect victims, providing access for vulnerable witnesses to safely give evidence. Some of these protections are contained in the *Jury Directions Act 2015* (Vic).
- Judges explain points of law to jury members, allowing jurors to better understand and participate in the trial.

LIMITATIONS

- Judges and magistrates rely on the parties to present all relevant evidence during a trial. If an accused person has no access to legal representation, this may prevent all relevant facts being presented to the court, as judges and magistrates cannot actively seek out evidence that they may need to deliver a verdict or ensure the jury knows all the facts, prohibiting the carriage of justice.



USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing strengths and limitations of judges and magistrates in relation to each principle can help you develop this skill in evaluating the ability of judges and magistrates to achieve the principles of justice.

LESSON LINK

You learnt about the ability to give evidence as a vulnerable witness in **1B Rights of an accused**.

DEEP DIVE

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

The Jury Directions Act 2015 (Vic) and the battle for consent

The *Jury Directions Act 2015* (Vic) aims to ensure the protection of sexual assault victims. For example, the prosecution can request that the judge direct the jury on various issues, such as consent.

The *Crimes Act 1958* (Vic) defines consent as 'free agreement' and outlines the circumstances in which a person does not consent:

- (a) the person submits to the act because of force or the fear of force, whether to that person or someone else;
- (b) the person submits to the act because of the fear of harm of any type, whether to that person or someone else or an animal;
- (c) the person submits to the act because the person is unlawfully detained;
- (d) the person is asleep or unconscious;
- (e) the person is so affected by alcohol or another drug as to be incapable of consenting to the act;
- (f) the person is so affected by alcohol or another drug as to be incapable of withdrawing consent to the act.

Section 46(4)(b) of the *Jury Directions Act 2015* (Vic) states that if one of these circumstances is proven beyond reasonable doubt, the judge must direct the jury that the victim did not consent.

The difference between a judge and a magistrate 3.1.8.1.1

In Victoria, judges and magistrates are both judicial officers, but they serve different functions and have different levels of authority within the court system.

Table 2 The differences between judges and magistrates

	Judge	Magistrate
Court 	Judges are appointed to the higher courts of Victoria, such as the Supreme Court and the County Court.	Magistrates preside over the lower courts in Victoria, such as the Magistrates' Court and the Children's Court.
Types of offences 	Judges hear and determine indictable offences, such as homicide and sexual assault offences.	Magistrates hear and determine summary offences, such as traffic offences and minor criminal offences. Magistrates also have the authority to conduct preliminary hearings in criminal cases and make decisions about bail applications, sentencing, and warrant applications.
Sentencing 	Judges have more discretion than magistrates when it comes to the length of sentences and the types of sanctions imposed. This is because judges are appointed to the higher courts based on their expertise and are expected to exercise their judgement and discretion in accordance with the law and legal precedent.	Magistrates are bound by precedent as they reside in the lowest court and have minimal discretion when it comes to sentencing. Precedent requires magistrates to follow the previous decisions of all higher courts.

Continues →

LESSON LINKS

You learnt about summary and indictable offences in **1A Key principles of the criminal justice system**.

You will learn more about precedent in **8B The doctrine of precedent**.

WANT TO KNOW MORE?

Magistrates determine cases in other courts apart from the Magistrates' Court, such as the Children's Court. You can find out more about the difference between the judge and the magistrate by searching 'An introduction to the Victorian courts' and clicking the 'Victorian Government Solicitor's Office' (2020) webpage.

Table 2 Continued

	Judge	Magistrate
Jury directions 	Judges must follow the <i>Jury Directions Act 2015</i> to ensure the jury understands the law and evidence presented. The judge does not decide the verdict when there is a jury.	Juries are not used in Magistrates' Court hearings, thus the Magistrate does not need to abide by the <i>Jury Directions Act 2015</i> . Therefore, the magistrate determines the guilt of the offender and their sentence.

The role of the jury in a criminal case 3.1.8.2

A **jury** is a group of randomly selected people from the **electoral roll** who are required to deliver a **verdict** in a trial, based on evidence presented to them in court. In criminal trials, a jury is composed of 12 jurors who act to represent a cross-section of the community. Juries are only used in cases where the accused has been charged with an indictable offence and has pleaded not guilty. Therefore, a jury is not used for summary offences as these are resolved in the Magistrates' Court by a magistrate alone. Before the trial begins the judge will inform the jury of their obligation to deliver a verdict solely on evidence presented in court.

Therefore, this means jurors cannot:

- conduct personal research
- discuss the trial with anybody else, including family and friends, except for fellow jurors when inside the jury room
- view extraneous information about the case in the news, media, or on social media
- have relations with either party.

Similarly, the jury is empanelled in a specific way to ensure it is impartial. This includes excluding certain individuals, such as:

- those who have committed an indictable offence
- lawyers
- police officers
- judicial officers.

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.

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 3 The role of the jury in a criminal case

Role	Explanation
Remain objective	Throughout a criminal trial, and when determining the guilt of the accused, 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 other factors, including their occupation, are excused during jury empanelment .
Listen to the evidence presented, judge's directions, and submissions made by legal representatives	The jury must listen to all evidence presented at trial to ensure the verdict is based on all relevant evidence and facts of the case. Therefore, jurors must be alert, take notes, and keep track of information throughout the trial. This involves listening to any directions given by the judge and explanations of key legal concepts.

Continues →



Figure 4 The jury plays a vital role in ensuring justice is achieved in criminal trials

Table 3 Continued

Role	Explanation
Determine the verdict	Once all the evidence has been presented to the jury, it must determine the guilt. A guilty verdict must be determined beyond reasonable doubt. Jurors must base this verdict solely on the evidence presented during the trial, disregarding any personal or external opinions. Generally, a unanimous verdict must be delivered, meaning all 12 jurors believe the accused is guilty or not guilty. However, in some cases, a majority verdict, where 11 out of 12 jurors believe the accused is guilty or not guilty, beyond reasonable doubt, is accepted by the court.

REAL WORLD EXAMPLE



Image: pablofdezr/Shutterstock.com
Figure 5 Four jurors in the UK used a Ouija Board to determine the verdict of a criminal case

Playing with spirits: How a ouija board landed four jurors in legal trouble

In a 1994 English murder case, the UK Supreme Court ordered a new trial after four jurors used a ouija board during deliberations. They made their own ouija board using paper and a glass with the intention to summon the spirit of the dead victims. They asked so-called ‘spirit’ questions, such as ‘who killed you?’. Shortly after, the accused was convicted and sentenced to imprisonment for murder.

One month later, the UK Supreme Court was alerted to the issue and ordered a retrial. The use of the ouija board acted as extraneous information and could have skewed the opinions of the four jurors. Jurors must make their decision based on the facts and evidence presented in court.

Adapted from “Who killed you?” The ouija board and other controversial times juries were discharged for misconduct’ (Orr, 2022)

Evaluating a jury’s ability to achieve the principles of justice in a criminal case



STRENGTHS

- A trial by one’s peers protects democracy, ensuring verdicts reflect society’s values. This promotes a fair trial as the views of the community are accounted for, whilst providing citizens with an insight into the legal system.
- Jurors cannot seek additional information about the case beyond the courtroom. Their decisions must only be informed by the evidence and facts submitted in the courtroom, and they are instructed to disregard any external knowledge about the case. This promotes a fair outcome.

LIMITATIONS

- Legal cases are complex and technical, making it difficult for ordinary individuals to fully understand the legal terminology and procedures. This creates the risk of an unfair verdict, and there is no guarantee that jurors have accurately understood the facts of the case as they do not need to provide a reason for their verdict. This can lead to an unfair trial for both the accused and the victim(s).
- Juries are used in a very small proportion of criminal cases and therefore, can only promote fairness in relatively few cases.
- While jurors are instructed to remain impartial, they receive little training on how to do so and may subconsciously rely on prejudice or bias to inform their decisions.



STRENGTHS

- All accused persons charged with indictable offences are entitled to a trial by jury, regardless of their wealth, race, or education promoting equality.
- A cross-section of the community is used as a decision-maker, so the accused should feel their case has been decided by their independent equals. This also helps to disperse any potential bias held by a single decision-maker, as the decision is made by a group.

LIMITATIONS

- Some individuals are ineligible or disqualified from jury service. Consequently, some accused persons may feel the jury is not a true cross-section of the community and are, therefore, not being judged equally.
- Jury trials are not available for summary offences, meaning access to a jury trial is not equal across the types of offences.

STRENGTHS

- The presence of a jury ensures less legal jargon and more plain English is used during a trial to enable the jury to have a clear understanding of its responsibilities and the court's procedures. This can also ensure the accused, if self-represented, understands the case and trial process, promoting access to justice.

LIMITATIONS

- Very few matters are tried by jury, as most criminal offences are summary offences heard in the Magistrates' Court. As such, relatively few accused persons can access a jury trial.
- The use of juries can create delays. The jury must be empanelled, evidence and legal terminology must be explained, and deliberations have to occur. In the instance of a **hung jury** or mistrial due to juror misconduct, a retrial is required. Delays can limit a party's access and contribute to a backlog of court cases. This impacts access to justice for all individuals engaging with the criminal justice system.

**USEFUL TIP**

It is a common misconception to believe the jury is responsible for determining an appropriate sanction for the accused in a criminal case. Rather, a jury only determines the guilt of the accused beyond reasonable doubt. The judge will always decide on the sanction imposed on a guilty offender.

LEGAL VOCABULARY

Hung jury a jury that cannot reach a unanimous verdict or a majority verdict as required, depending on the type of trial.

Lesson summary

The judge, magistrate, and jury play critical roles in ensuring the appropriate legal processes and procedures are followed to uphold the principles of justice.

The general role of the judge and magistrate is to:

- act as an impartial umpire
- ensure rules of evidence and procedure are followed
- decide the sentence of a guilty offender
- ensure a fair trial.

The judge has the additional role of directing the jury in criminal trials, and ensuring they understand points of law and evidence. The magistrate does not have to direct the jury, as there is no jury in the Magistrates' Court, but has the additional role of deciding the verdict.

The role of the jury is to:

- represent the interests of the broader community
- listen carefully to the court proceedings
- determine the offender's guilt beyond reasonable doubt.

2E Questions

Check your understanding

Question 1

Which of the following statements most accurately describes a judge?

- A. An impartial adjudicator in charge of deciding the verdict and overseeing all personnel.
- B. A person in charge of directing the jury as per the *Jury Direction Act 2023*.
- C. The 'umpire' of a courtroom overseeing all personnel, and evidence, whilst upholding rules and procedure.

Question 2

The jury decides the verdict and sentence of the offender.

- A. True
- B. False

Question 3

Which of the following are key responsibilities of the magistrate during a criminal trial? **(Select all that apply)**

- A. Advise the jury on the applicability of relevant law to the facts of the case before them.
- B. Ensure courtroom processes and procedures are followed by all individuals present during the trial.
- C. Question witnesses to draw out the evidence relevant to the offence being prosecuted.
- D. Act as an independent 'umpire' who oversees and adjudicates proceedings without bias, allegiances, or preconceived notions.

Question 4

Which jurors are most likely the reason a mistrial would be ordered?

Name of juror	Descriptor
Aixin	Did not disclose that she is related to the victim.
Bellamy	Made a pact with three other jurors that they would all vote the same.
Cora	Spoke privately with the accused.
Dion	Is the same age as the accused.
Ethan	Did not tell the judge that he went to school with the accused.
Fatima	Took one criminology class in University 20 years prior.

- A. Aixin.
- B. Aixin, Cora, and Ethan.
- C. Aixin, Bellamy, Cora, and Ethan.
- D. Fatima and Aixin.

Question 5

The judge is able to assist the jury with understanding areas of law and deciding on a verdict.

- A. True
- B. False

Question 6

The jury is able to conduct external research to ensure they fully understand the case.

- A. True
- B. False

Question 7

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

fairness

equality

access

Judges and magistrates rely on the parties to present all relevant evidence during a trial. If an accused person has no legal representation, this may prevent the principle of [] from being achieved.

Question 8

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

fairness

equality

access

A trial by one's peers protects democracy, ensuring decisions are based on the facts and reflect community values.

This promotes [] by engaging citizens in and informing them about the legal system.

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

(3 MARKS)

Explain **one** role of a jury in a criminal case.

Adapted from VCAA 2018 exam Section A Q1

Question 10

(3 MARKS)

Aayush is set to face trial in the County Court after pleading not guilty to aggravated burglary. He intends to represent himself despite not having any prior legal knowledge or experience.

Outline the role of the judge in Aayush's case.

Adapted from VCAA 2022 exam Section A Q1

Question 11

(4 MARKS)

Distinguish between the role of a judge and a magistrate.

Extended response

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

Question 12

Which of the following statements are roles of the judge that promote the achievement of fairness?

(Select all that apply)

- A. Judges can assist accused persons without legal representation by presenting evidence and questioning witnesses on their behalf.
- B. An independent judge ensures the trial is conducted without bias and according to the rules of evidence.
- C. Giving directions to the jury ensures jurors understand the basic elements of a criminal trial.
- D. Judges are impartial judicial officers but are still subject to personal bias and may unconsciously discriminate against certain parties.

Question 13

(5 MARKS)

Evaluate how the role of the judge in a criminal case contributes to the achievement of the principle of fairness.

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 judges and juries in a criminal case.

Statement	Strengths	Limitations
I. Juries are comprised of a cross-section of the community that represents a diverse range of views. The use of juries helps ensure the legal system is accountable to the people.	☐	☐
II. Judges have extensive legal expertise and training, which allows them to interpret complex legal concepts and apply them correctly to a criminal trial.	☐	☐
III. Jury members are ordinary and randomly selected individuals of the general public, so may not be equipped with legal reasoning skills. Consequently, the jury's verdict may be incorrectly informed or lack consideration of key legal principles.	☐	☐
IV. Jurors are likely to be influenced by personal prejudices and emotions, increasing the risk of an unfair verdict that is based on their biases as opposed to the facts of the case.	☐	☐
V. Judges are familiar with legal precedents and the principles of legal reasoning, which allows them to make justified rulings that ensure a fair trial.	☐	☐
VI. Judges have experience in setting aside their personal beliefs so as to remain impartial and unbiased in their rulings.	☐	☐
VII. Judges are government-appointed officials and may be subject to political pressure or biases.	☐	☐

Question 15

(6 MARKS)

'Juries should not determine the verdict of an accused. A judge has more legal expertise, meaning they should determine the guilt of an offender instead.'

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

Linking to previous learning

Question 16

(3 MARKS)

JURY DIRECTIONS ACT 2015 – SECT 64

- (1) In explaining the phrase 'proof beyond reasonable doubt' under section 63, the trial judge may—
- (a) refer to—
 - (i) the presumption of innocence; and
 - (ii) the prosecution's obligation to prove that the accused is guilty; or
 - (b) indicate that it is not enough for the prosecution to persuade the jury that the accused is probably guilty or very likely to be guilty; or
 - (c) indicate that—
 - (i) it is almost impossible to prove anything with absolute certainty when reconstructing past events; and
 - (ii) the prosecution does not have to do so; or
 - (d) indicate that the jury cannot be satisfied that the accused is guilty if the jury has a reasonable doubt about whether the accused is guilty; or
 - (e) indicate that a reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility.

Explain how the *Jury Directions Act 2015* (Vic) ensures the jury understands the concept of the standard of proof.

2F The parties in a criminal case

STUDY DESIGN DOT POINT

- the roles of key personnel in a criminal case, including the judge or magistrate, the jury, and the parties

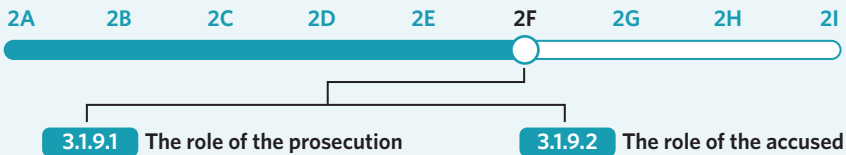


Image: Billion Photos/Shutterstock.com

A criminal case is like a game of tug of war, with the prosecution and accused acting as the teams, pulling on opposite ends of the rope. Each team is determined to win, using all their strength and strategy to convince the magistrate or jury of their story. It is a battle of wits and evidence, and the team that pulls the most convincingly towards their side will come out on top.

Lesson introduction

Each party in a criminal case has an important role to play in the conduct of the hearing. As the prosecution brings a criminal case to court on behalf of the Commonwealth or the state, its primary focus is to achieve a guilty verdict. Alternatively, the accused is the party charged with a criminal offence that may try to cast doubt in the minds of the jurors to prevent a guilty verdict being delivered.

The role of the prosecution 3.1.9.1

Throughout a criminal trial, the **prosecution** aims to convince the judge or jury that the accused is guilty beyond reasonable doubt. To do this, the prosecution presents all the relevant evidence in support of its case. Therefore, the prosecution has various roles when presenting its case.

KEY TERM

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

Table 1 The role of the prosecution in a criminal case

Role	Explanation
Give an opening and closing address	At the start of the trial, the prosecution is required to give a statement outlining the charges the accused is facing, alongside the evidence it intends to rely on at trial. At the conclusion of the trial, the prosecution is required to give a statement summarising its arguments and outlining why the accused is guilty beyond reasonable doubt.
Determine which witnesses are called to give evidence during the trial	The prosecution must call all relevant witnesses, rather than those who tend to support a guilty verdict, to allow the full truth to emerge. For example, the prosecution cannot decide against calling a witness to a crime because their evidence may lead a jury to have doubts about the accused person's guilt.
Present evidence at trial	As the prosecution has the burden of proof, it must present evidence to prove the accused is guilty beyond reasonable doubt.

Continues →

LEGAL VOCABULARY

Examination-in-chief the questioning of a witness in court by the party who called that witness to give evidence.

Cross-examination the interrogation in court of the opposing party's witness who has already testified, in order to check or discredit the witness's evidence.

LESSON LINKS

You learnt about the role of the judge and jury in a criminal case in **2E Judges, magistrates, and juries in a criminal case**.

You will learn more about legal practitioners in **2G Legal practitioners in a criminal case**.

Table 1 Continued

Role of the prosecution	Explanation
Communicate with victims of crime and other witnesses, about the trial process	Before a witness is required to give evidence at trial, it is the role of the prosecution to explain the procedural rules of the court. For example, the prosecution should communicate the process of examination-in-chief and cross-examination .
Make submissions to the court in relation to sentencing	If an accused person is found guilty, the prosecution will make submissions to the court about the appropriate sanction to impose.

USEFUL TIP

You may have noticed that in case names, the prosecution is represented in different ways. In the end-of-year exam, you should be able to identify whether a case is a criminal or civil case from this name. Examples of different ways criminal cases are presented include:

- *Chamberlain v The Queen (No 2)* (1984) 153 CLR 521 – In this case, the prosecution is referred to as 'The Queen' as the prosecution was representing the Queen in the right of the Commonwealth. Since her passing, all new cases of this kind now use 'The King'.
- *Jones vs The Crown* (1988) 12 QLCR 126– In this case, the prosecution is referred to as 'The Crown' as the prosecution is representing the King in the rights of the Commonwealth.
- *R v Bayda (No 8)* [2019] NSWSC 24 – In this case, the prosecution is referred to as 'R', which is an abbreviation of 'Rex' or 'Regina', meaning 'King' or 'Queen'.
- *Director of Public Prosecutions (DPP) v Smith* [2019] VSCA 266 – In this case, the prosecution is referred to as the 'Director of Public Prosecutions', which is the office responsible for the prosecution of criminal offenders.

LEGAL CASE

Figure 1 The judge interrupted the defence counsel for not properly presenting its opening statement

Duong v R [2017] VSCA 78**Facts**

Duong was found guilty, in the County Court, of attempting to possess a commercial quantity of cocaine and appealed against the conviction to the Court of Appeal. In the opening address to the jury of the original trial, the judge interrupted the defence counsel on a number of occasions for making points that are usually addressed in closing statements. The defence asked the judge to discharge the jury on the basis that the judge's interruptions 'infected' the jury against him, which the judge refused to do. Duong was convicted and later appealed, arguing the judge made an error in not discharging the jury.

Legal issue

The legal issue in this case was whether there was prejudice against the accused caused by the jury not being discharged.

Decision

The court affirmed that the points being made by the defence counsel in the opening statement were more appropriate for closing addresses and therefore, the judge was entitled to interrupt the defence counsel's opening address.

Significance

This case outlines the importance of the prosecution and defence engaging in and not straying from their specific roles, particularly in providing opening and closing addresses.

The role of the accused 3.1.9.2

In a criminal trial, the **accused** does not have to present any evidence and instead, may elect to exercise their right to silence. However, the accused may wish to place doubt in the jurors' minds in an attempt to prevent the prosecution from meeting the threshold of beyond reasonable doubt. To do this, the accused may disprove and deny the prosecution's arguments and evidence, or present evidence of their own that contradicts the prosecution's case. Therefore, the accused has a number of roles when presenting their case.

Table 2 The role of the accused in a criminal case

Role	Explanation
Enter into a plea of 'guilty' or 'not guilty'	The accused must either plead guilty or not guilty to the charge(s) against them. If the accused pleads guilty, the matter will proceed to a sentencing hearing. During this process, the prosecutor will read out a summary of the alleged facts, and the prior convictions of the accused, if any. Following this, the accused is provided with the opportunity to say anything, including an expression of disagreement with the facts presented by the prosecution. Finally, the judge or magistrate will announce an appropriate sentence for the offender. However, if an accused pleads not guilty, the matter will proceed to trial.
Present evidence and decide which witnesses to call	Whilst the accused is not required to present evidence, as they do not have the burden of proof, the accused may choose to do so. This can assist in disproving the prosecution's case by providing evidence, or questioning witnesses to contradict the prosecution's argument.
Decide which lawful defence(s) to put to the court	Where an accused raises a specific defence, such as self-defence, the burden to prove this defence falls upon the accused.
Be present at all court proceedings related to the case	In most criminal cases, the accused is required to be present in court throughout the criminal trial. However, when an accused is being tried for offences that can be heard in their absence, including some summary offences, they may not be required to attend.

DEEP DIVE

Lawful offences

An accused may defend a criminal charge by relying on a lawful defence, such as self-defence. The *Crimes Act 1958* (Vic) outlines the requirements for an accused relying on self-defence, including the fact that they have the burden of proving they acted in self-defence. Section 322K of the Act states:

- (1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.
- (2) A person carries out conduct in self-defence if—
 - (a) the person believes that the conduct is necessary in self-defence; and
 - (b) the conduct is a reasonable response in the circumstances as the person perceives them.
- (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

Therefore, if the elements of this defence are proven, the accused will be found not guilty of the offence.

KEY TERM

Accused the party who is charged with a criminal offence.

LESSON LINK

You learnt about an accused's right to silence in **1B Rights of an accused**.

LEGISLATION

Crimes Act 1958 (Vic)

Evaluating the parties' ability to achieve the principles of justice during a criminal case

**STRENGTHS**

- Both the prosecution and the accused are given the opportunity to present their case to the court, ensuring fair and impartial processes.
- There is no requirement for the accused to present evidence to prove their case. This ensures fairness as it is not their role to prove their innocence, but rather, the prosecution's role to prove their guilt.

LIMITATIONS

- Self-represented parties may struggle to understand how to present legal arguments and evidence in the best light, which may lead to an incorrect and unfair case outcome.
- If an accused does not present any evidence and remains silent, this may be viewed as an admission of guilt, which may lead to an unfair case outcome.

**STRENGTHS**

- Both the prosecution and the accused are given the same opportunity to present their case to the court.

LIMITATIONS

- Self-represented parties may be at a disadvantage if they do not understand court processes and are unable to present all relevant evidence to prove their case. This creates inequality between the prosecution and accused.

**STRENGTHS**

- The courts provide some general guidance regarding court procedures to parties who are representing themselves, therefore promoting access to justice.

LIMITATIONS

- Self-represented parties may struggle to understand how to present legal arguments and evidence in the best light, limiting access to justice.
- An accused may plead guilty on the basis that they do not understand their rights and do not think they will present their case in the best light possible, reducing access to justice.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing strengths and limitations in relation to each principle can help you develop this skill in evaluating the parties' ability to achieve the principles of justice.

Lesson summary

- The parties in a criminal case each have their own roles that align with their overall objective.
- The prosecution is required to present all relevant evidence to prove the accused is guilty beyond reasonable doubt.
- The accused does not have to present any evidence, but may do so to plant doubt in the minds of the jurors in an effort to ensure a not guilty verdict.
- However, both parties must complete their roles in a way that aligns with the rules and procedures of the court to ensure the principles of justice are upheld.

2F Questions

Check your understanding

Question 1

The parties involved in a criminal case include the prosecution and accused.

- True
- False

Question 2

Which of the following statements is incorrect about the parties in a criminal case?

- A. The prosecution must call all relevant witnesses to assist the emergence of the full truth, and not just those that will help secure a guilty verdict 'at all costs'.
- B. Only the prosecution is permitted to call witnesses to present evidence to the court.
- C. The accused is responsible for deciding how to plead.
- D. The prosecution will present the relevant legal principles of the offence being tried to the court.

Question 3

Which of the following are roles of the accused in a criminal case?

(Select all that apply)

- A. Prove their innocence beyond reasonable doubt.
- B. Enter a plea of 'guilty' or 'not guilty'.
- C. Decide which lawful defence(s) they wish to present in court.
- D. Talk to witnesses and bribe them so they do not give evidence at trial.

Question 4

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

examination-in-chief

cross-examination

Where a witness is questioned by the party who called them to give evidence, this is referred to

as .

Question 5

Which of the following are roles of the prosecution in a criminal case?

(Select all that apply)

- A. Give an opening and closing address.
- B. Communicate with victims of crime and other witnesses about the trial process.
- C. Present evidence at trial.
- D. Speak to jurors independently outside of the courtroom to convince them the accused is guilty.

Question 6

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of the parties in achieving the principles of justice.

Statement	Strengths	Limitations
I. Both the prosecution and the accused are given an equal opportunity to present their case to the court.	☐	☐
II. Self-represented parties may struggle to understand how to present legal arguments and evidence in the best possible light, which may lead to an incorrect case outcome.	☐	☐
III. The courts provide some guidance of a general kind to parties who are representing themselves, regarding court procedures.	☐	☐
IV. Self-represented parties may be at a disadvantage to the prosecution if they do not understand court processes and are unable to present all relevant evidence to prove their case.	☐	☐

Question 7

The prosecution's primary focus is to achieve a guilty verdict, whereas, the accused's aim is to cast doubt in the minds of the jurors to ensure a verdict of not guilty is delivered.

- A. True
- B. False

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

(2 MARKS)

Outline **one** role of the prosecution and the accused in a criminal case.

Adapted from VCAA 2018 exam Section A Q1

Question 9

(3 MARKS)

Aki has been charged with manslaughter. He has pleaded not guilty and has a witness who he wants to call to support his case.

Explain the role of Aki in his criminal case.

Question 10

(4 MARKS)

Explain how the role of the parties in a criminal case could achieve the principle of fairness.

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.

Callum has been charged with culpable driving after being involved in a collision with Lorenzo. Callum is sure he did not cause the collision and believes he has a witness to illustrate this. However, he cannot afford legal representation and is unsure about legal processes and procedures, particularly in relation to the best way to question his witness.

Question 11

Which of the following statements are correct in relation to the role of the parties if Callum's case goes to trial?

(Select all that apply)

- A. The prosecution has the role of calling witnesses to give evidence during Callum's trial. This may include calling witnesses to prove that Callum caused the collision with Lorenzo.
- B. Callum has to present evidence and call upon the witness that shows he did not cause the collision with Lorenzo, to prove his innocence.
- C. As the prosecution must call all relevant witnesses to assist the emergence of the full truth, they will be required to call the witness that alleges Callum caused the collision with Lorenzo.
- D. Callum is representing himself, as he cannot afford legal representation, therefore, he may not question the witness properly, potentially damaging his case.

Question 12

(6 MARKS)

Assuming Callum's case goes to trial, discuss the roles of both parties involved in this case.

Adapted from VCAA 2020 exam Section B Q1c

Linking to previous learning

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 role of the parties and the judge in achieving the principle of equality during a criminal case.

Statement	Strengths	Limitations
I. Whilst judges are impartial judicial officers, they are still subject to personal bias and therefore, may unconsciously discriminate against certain parties.	☐	☐
II. Both the prosecution and accused have an equal opportunity to present their case, as both parties can present evidence and call upon witnesses.	☐	☐
III. A self-represented accused may be disadvantaged if they do not understand court processes and are unable to present all relevant evidence to prove their case.	☐	☐
IV. Judges have a role in ensuring rules of evidence and procedure apply equally to both parties during a criminal trial.	☐	☐

Question 14

(5 MARKS)

Discuss the extent to which the role of the parties and the judge in a criminal case upholds the principle of equality.

2G Legal practitioners in a criminal case

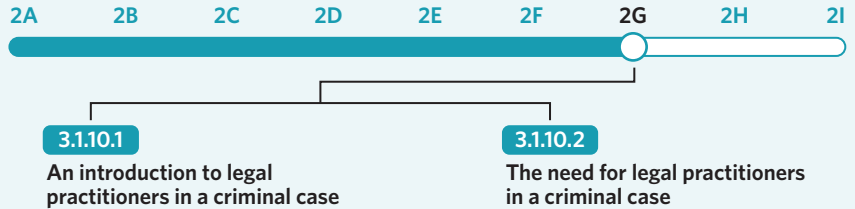


Image: engel.ac/Shutterstock.com

Legal practitioners in a criminal case are like skilled architects constructing a tower of justice. The accused's lawyer, a masterful designer, builds walls of protection for the accused, crafting a sturdy strategy to defend against criminal accusations. The prosecutor, an artful engineer, constructs a bridge of evidence, connecting guilt to the accused.

STUDY DESIGN DOT POINT

- the need for legal practitioners in a criminal case



Lesson introduction

Lawyers, also referred to as legal representatives or legal practitioners, play an important role in criminal trials as they prepare cases and bring them to court on behalf of the parties. Accused people, especially those charged with an indictable offence, should have legal representation to assist them in understanding their legal rights and how to present their case in the best light. Without legal representation, an accused would have to prepare and present their case alone, and potentially even question their own alleged victims in court. The right to legal representation is a fundamental international human right, as well as a right outlined in Victorian and Commonwealth legislation.

An introduction to legal practitioners in a criminal case 3.1.10.1

KEY TERMS

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.

Legal practitioner a lawyer with an Australian legal practising certificate.

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.

In most cases, accused individuals seek the guidance of a **solicitor** as their initial step in dealing with criminal proceedings. Solicitors are **legal practitioners** who primarily focus on assisting clients with various day-to-day legal matters and concerns out of court. They bear the responsibility of fulfilling numerous legal obligations and duties, including offering clients advice and strategies to address a wide range of legal issues. The main difference between **barristers** and solicitors is that solicitors advise clients on a broad range of legal issues outside of the courtroom or prior to a trial, whilst the barrister primarily serves as a legal representative for clients to present arguments and evidence before a judge and jury. Unlike solicitors, barristers generally operate as independent, self-employed practitioners and receive instructions from the solicitor managing the case in regard to their courtroom actions. Their professional focus is predominantly centred around courtroom proceedings, rather than the day-to-day legal matters of their clients.

DEEP DIVE

Solicitors in the courtroom

Although solicitors have the legal authority to represent their clients in court, they tend to engage barristers to handle courtroom appearances and seek guidance on legal proceedings. Traditionally, solicitors primarily appear in court for preliminary and interim hearings, leaving the formal argument stage to barristers. However, there are solicitors, especially those specialising in specific legal areas, who choose to personally appear on behalf of their clients instead of engaging a barrister.

Solicitors have the legal ability to assume all the responsibilities in court that are typically attributed to barristers if they determine it to be in the best interest of their clients.

Adapted from 'Barrister vs Solicitor: Their Different Roles in Your Legal Matter' (Owen Hodge Lawyers, 2022)



Image: Worawee Meepian/Shutterstock.com

Figure 1 Solicitors usually have a primary role outside the courtroom but, in some cases, may appear in court

The need for legal practitioners in a criminal case 3.1.10.2

Section 197 of the *Criminal Procedure Act 2009* (Vic) establishes that a court has the power to adjourn a trial until legal representation has been provided to an accused, as long as the court is satisfied the accused will be unable to:

- have a fair trial without legal representation
- afford the full cost of private legal representation.

Therefore, this right to legal representation does not extend to those who chose not to engage in private legal representation, despite having the financial means to do so. Furthermore, if an accused refuses to be represented by Victoria Legal Aid (VLA), the trial will progress with the accused voluntarily self-representing. However, this inclusion in the *Criminal Procedure Act 2009* (Vic) signifies the justice system's awareness of the need for legal representation in criminal cases.

Table 1 The reasons for needing legal practitioners in a criminal case

Reason	Explanation
Uphold the rule of law	The rule of law requires accused persons to receive a fair and impartial trial. By receiving legal advice or representation in a trial, fairer outcomes can be promoted as the accused can represent their case in the best possible light by their lawyer articulating relevant evidence and appropriate legal principles. According to the Law Council of Australia, for the rule of law to be upheld: • everyone should have access to competent and independent legal advice • the law must be both readily known and available, and certain and clear. By gaining legal advice, the law can be presented to an accused in a more certain and clear manner as legal practitioners are experts in the law. Therefore, accused persons can better understand their rights, such as the right to silence, and the legal proceedings they will be involved in. Continues →

LEGISLATION

Criminal Procedure Act 2009 (Vic)

WANT TO KNOW MORE?

You can find out more about solicitors and who can practise as a solicitor by searching 'Victorian legal services - practising law' and clicking the 'Victorian Legal Services Board and Commissioner' (2020) webpage.

LEGAL VOCABULARY

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

LESSON LINKS

You learnt about Victoria Legal Aid (VLA) in **2B Victoria Legal Aid and community legal centres**.

You learnt about an accused person's rights in **1B Rights of an accused**.

You will learn more about mitigating factors in **3C Factors considered in sentencing**.

Table 1 Continued

Reason	Explanation
Ensure an accused understands legal proceedings	The <i>Criminal Procedure Act 2009</i> (Vic) sets out the process of criminal proceedings in Victoria, explaining all aspects of this process, such as: • how a criminal proceeding is commenced • committal proceedings • directions hearings • which written pleas of the guilty may be accepted • the manner in which evidence must be presented • how to appeal a criminal conviction. Criminal proceedings may be difficult to comprehend for those with limited knowledge of the law. However, by obtaining legal advice or hiring a legal practitioner, an accused can be guided through each step of the process.
Prevent an accused from having to personally question witnesses	Where an accused has no legal representation, they will have to question witnesses themselves. Witnesses may include: • the victim of the crime • another person with direct information about the criminal matter • an expert witness who can provide their specialist opinion about an issue. To be questioned by the person who committed an offence against you can be an extremely traumatic and emotional experience for victim(s) of the crime. An accused may also struggle to question witnesses independently, as there are strict rules surrounding the scope of questions that can be asked to a witness. An accused may not understand such rules, therefore they may ask irrelevant questions to witnesses, potentially hindering their case or infringing the rules of the trial.
Provide support	Being questioned by the police during a police investigation or sitting in court as your actions are being analysed by the OPP is a daunting and high-stress experience for an accused, particularly for those who are experiencing their first interaction with the criminal justice system. Therefore, having a legal practitioner by one's side during these stressful experiences can provide comfort to an accused. In turn, an accused may be able to act more calmly and rationally when talking to the police or a court, which can assist them in presenting their case in the best possible light as they are perhaps more likely to be viewed as honest and trustworthy.
Provide objectivity	An accused person, who is personally involved in the case, may struggle to view the evidence against them objectively. However, a legal practitioner has a greater ability to look at the facts of the case from an impartial point of view, allowing them to identify weaker or stronger points in the prosecution's evidence against the accused. This can allow a stronger defence case to be built without the interference of emotions.
Help an accused to receive a fairer outcome	A criminal lawyer who is experienced with previous, similar criminal cases can build a more compelling defence against the prosecutions' accusations. By receiving a tailored defence to their case, a represented accused may be able to access fairer outcomes than a self-representing individual with limited experience in law. This can ensure: • an innocent accused is not wrongfully found guilty. • an accused found guilty receives an adequate sanction that, in some cases, may be less severe, as a lawyer can argue that certain mitigating factors apply in the case. • an accused is able to appeal their conviction or sentence if they feel they were wrongly found guilty or inappropriately sentenced, as the appeals process can be complex and an accused may be unable to navigate it themselves.

LEGAL VOCABULARY

Mitigating factors aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.

WANT TO KNOW MORE?

Say you were representing yourself in a criminal case, where would you begin? Victoria Legal Aid has a webpage dedicated to self-representing accused persons, providing information about criminal proceedings, including what an accused should wear, what behaviours they should avoid to show respect in court, and what factors they should raise in a guilty plea. You can find out more by searching 'Representing yourself in a criminal case' and clicking the 'Victoria Legal Aid' (2022) webpage.

REAL WORLD EXAMPLE

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

Prisoners' plan for prison release

In 2018, a former deputy mayor, was accused of shooting his brother in New South Wales and then travelling across the border to shoot their elderly mother, killing them both. He pleaded not guilty to murder but was put on **remand** in prison, where he remained until his trial. He could not engage private legal representation because his financial assets were frozen. He then refused to accept a lawyer from Victoria Legal Aid (VLA), therefore requiring him to self-represent.

In 2020, the accused self-represented during an application for **bail**. He informed the court he planned to plead a defence to the murders, but felt he could not attempt to argue a defence until he was able to obtain 'relevant information' from legal sources. He told the court he was experiencing difficulties in accessing legal information to present at trial from the Port Phillip Prison where he was being kept, considering he was blocked from using the prison library. The judge, during this bail application, informed the accused that he 'would be better off being represented'. His bail application was not granted.

In June 2023, the accused's trial for the murder of his mother began in the Victorian Supreme Court, where he was still self-representing after rejecting the offer to have an appointed lawyer from VLA. As of September 2023, he is yet to be found guilty of either murder.

The difficulties the accused faced in accessing legal information and understanding legal principles, including what defences he could present to a murder charge, demonstrate the need for legal representation, as lawyers can more easily access and understand legal information for the presentation of a compelling case.

Adapted from 'Murder accused Paul Cohrs applies for bail, arguing he can't mount defence from prison' (Testa, 2020) and 'Man accused of shooting mother with shotgun deemed fit for trial, despite delusional disorder' (Clark, 2023)



Image: Tapui/Shutterstock.com

Figure 2 A former deputy mayor experienced difficulties in accessing legal information to defend his murder accusations as a self-representing accused person

HYPOTHETICAL SCENARIO

The uneven scales of justice: How legal representation makes a difference in an accused's fate

Jordan and Dimitri find themselves accused of a serious crime. Jordan has a defence team, whilst Dimitri has decided to represent himself.

Jordan's defence team works tirelessly to protect their client's rights and advocate for Jordan's innocence. The solicitor gathers evidence, interviews witnesses, and uncovers relevant legal precedents. The barrister, an expert in courtroom advocacy, crafts compelling arguments, skillfully cross-examines witnesses, and challenges the prosecution's case. The combined effort of the legal practitioners results in a robust defence strategy aimed at securing Jordan's acquittal and a not guilty verdict.

In contrast, Dimitri faces an uphill battle. Representing himself, he struggles to navigate complex legal procedures, interpret the law, and understand the rules of evidence and procedure. Dimitri's lack of legal knowledge and experience puts him at a disadvantage, and he struggles to counter the prosecution's arguments.

This highlights the vital role of legal practitioners for an accused person. A defence team's expertise, knowledge of the law, and courtroom experience can provide invaluable benefits and an easier path to justice.



Figure 3 The disadvantages of self-representing in court highlights the need for legal practitioners

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. The tables showing strengths and limitations in relation to each principle can help you develop this skill in evaluating legal practitioners' ability to achieve the principles of justice.

LEGAL VOCABULARY

Remand the legal status of an accused when they are held in custody awaiting trial.

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 trial.

Evaluating legal practitioners' ability to achieve the principles of justice during a criminal case



STRENGTHS

- Legal practitioners can provide advice to their clients that allows them to participate in criminal proceedings on an informed basis where they better understand the pre-trial and court processes. This may lead to fairer outcomes as an accused can participate in certain aspects of the criminal justice process on a more informed basis, such as choosing to partake in plea negotiations.
- The use of legal practitioners can increase an accused person's chance of securing a not guilty verdict, as their case is presented in the best possible light by an expert.
- The duty of the prosecution to present all relevant evidence and legal principles to the court helps ensure the whole truth emerges. Therefore, judges and jurors can base their verdict on all of the facts, leading to more impartial outcomes.
- Legal practitioners are able to remain objective when examining the facts of an accused's case. Therefore, they can make impartial decisions on behalf of the accused, such as rejecting unjust plea negotiations or raising certain defences that they believe will be successful, to ensure a fair outcome is reached.

LIMITATIONS

- Legal practitioners for the accused are expensive, meaning they may only be able to afford either a barrister or a solicitor. Consequently an unfair outcome may occur where the Office of Public Prosecution has a whole team of expert solicitors and barristers, whilst the accused only has one.
- An accused may struggle to participate in criminal proceedings without receiving legal advice. For example, they may not understand how to appeal their conviction or sentence after a guilty verdict has been decided, limiting fairness.
- Where an accused is responsible for presenting their own evidence and questioning their own witnesses, the judge and jury may view this evidence as less reliable as it was presented by the accused as opposed to an impartial third party. Therefore, judges and jurors may disregard the accused's evidence, leading to an unfair outcome.



STRENGTHS

- When an accused has legal representation, equality can be achieved as disadvantages associated with only the prosecution having legal representation are avoided.
- VLA's strict eligibility requirements ensure those who are disadvantaged are prioritised to receive legal representation. This upholds equality as VLA takes significant action to minimise disadvantage and ensure individuals, regardless of characteristics such as their income or race, can receive legal representation in court.

LIMITATIONS

- Legal practitioners for the accused are expensive and they may only be able to hire either a barrister or solicitor. This may lead to unequal legal representation where the Office of Public Prosecution has a team of expert legal practitioners.
- VLA's strict eligibility requirements mean that not all accused persons can receive free legal representation even if they cannot afford to pay the high cost of legal representation themselves.
- Legal practitioners in Australia typically speak English. Therefore, non-English speaking accused persons may still struggle to understand the law and legal proceedings, even after seeking legal advice, if they are not able to hire a solicitor or barrister who speaks their first language.



STRENGTHS

- Legal practitioners help parties prepare and present their case, increasing access to justice as accused persons can develop a greater understanding of their legal rights and the criminal proceedings they will participate in.
- VLA provides access to legal representation for some accused persons.
- By engaging a legal practitioner, an accused may be assisted in accessing methods of reducing their sentence, such as plea negotiations or appealing their current sanction.

LIMITATIONS

- The costs of legal practitioners for an accused are high, meaning access to legal representation is less available.
- Where an accused does not engage legal representation they may struggle to understand legal processes. The legislation that sets out how criminal proceedings occur can be complex for individuals with no legal background.
- VLA's strict eligibility requirements mean that not all people can receive free legal representation, limiting access to legal practitioners.

Lesson summary

- Legal practitioners are often needed for a criminal trial as lawyers represent the prosecution and the accused amidst the intricacies of the criminal justice system.
- The presence of legal practitioners facilitates the presentation of evidence, upholds the principles of justice in the courtroom, and ensures an accused individual receives proper representation.
- Legal practitioners are necessary for an accused to engage in a criminal case as they can:
 - uphold the rule of law
 - ensure an accused understands legal proceedings
 - prevent an accused from having to personally question witnesses
 - provide support
 - provide objectivity
 - help an accused receive a fairer outcome.

2G Questions

Check your understanding

Question 1

Which of the following is incorrect regarding the need for legal practitioners in a criminal case?

(Select all that apply)

- A. Legal practitioners question witnesses on behalf of an accused, ensuring an accused does not need to personally confront and question their victim in court, which can be traumatic for the victim and difficult for the accused.
- B. Prosecution and defence barristers may be unaware of the defences they can raise, therefore an accused is often better off presenting their own case as they have more time to research their own defences when waiting for trial.
- C. Legal practitioners are necessary to determine the guilt of an accused and to decide whether a criminal matter should proceed straight to sentencing as the accused is always guilty.
- D. Legal practitioners help uphold the rule of law by ensuring an accused person has a greater understanding of legal principles and criminal proceedings.

Question 2

The rule of law can be upheld by an accused accessing legal representation as:

- A. legal practitioners can allow an accused client to clearly understand the law by providing advice about the laws they breached and the defences they can raise.
- B. legal practitioners often have personal connections to judges meaning a judge will favour them and want their case to succeed more than the average person, allowing accused persons who have a lawyer to often be found not guilty.

Question 3

If an accused chooses not to hire legal representation because they are confident in their own ability to present their defence, even though they have enough money to hire a legal practitioner, the accused's trial may be adjourned indefinitely so Victoria Legal Aid (VLA) can provide them with a lawyer.

- A. True
- B. False

Question 4

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

support

objectivity

A legal practitioner may help an accused by providing , as they have a greater ability to look at the facts of the case from an impartial point of view, allowing them to identify weaker or stronger points in the prosecution's evidence. This can enable a stronger defence case to be built.

Question 5

Tick the box to indicate whether the following statements are **strengths** or **limitations** of legal practitioners in upholding the principle of access.

Statement	Strengths	Limitations
I. Legal practitioners help parties prepare and present their case, increasing access to justice as accused persons can develop a greater understanding of their legal rights and the criminal proceedings they will participate in.	☐	☐
II. VLA's strict eligibility requirements mean that not all people can receive free legal representation, limiting access to legal practitioners.	☐	☐
III. By engaging a legal practitioner, an accused may be assisted in accessing methods of reducing their sentence, such as plea negotiations or appealing their current sanction.	☐	☐
IV. The costs of legal practitioners are high, meaning access to legal representation is reduced for many accused parties.	☐	☐

Question 6

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

fair

equal

If an accused engages legal practitioners, this ensures legal representation for both the prosecution, which will likely have a team of expert legal practitioners, and the accused.

Question 7

Parties are able to successfully represent themselves in most cases, and legal practitioners are only necessary in particularly serious or complex cases.

- A. True
B. False

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

(2 MARKS)

Outline the need for legal practitioners in a criminal case.

Question 9

(2 MARKS)

Describe **one** reason why an accused individual may seek legal representation.

Question 10

(3 MARKS)

Cindy has been charged with arson after accidentally starting a fire in her friend's house. She needs to defend her innocence in court and is considering whether or not to seek assistance from a legal practitioner.

Describe **one** reason why Cindy may need a legal practitioner if her case goes to trial.

Adapted from VCAA 2018 exam Section A Q5b

Extended response

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

Question 11

Tick the box to indicate whether each of the following statements are ways in which the principle of fairness is **upheld** or **limited** in relation to legal practitioners in a criminal case.

Statement	Upheld	Limited
I. Legal practitioners can give advice to their clients that allows them to participate in criminal proceedings on an informed basis where they better understand the pre-trial and court processes. This can lead to fairer outcomes as an accused can participate in certain aspects of the criminal justice process on a more informed basis.	☐	☐
II. An accused may struggle to participate in criminal proceedings without receiving legal advice. For example, they may not understand how to appeal their conviction or sentence after a guilty verdict has been decided, limiting fairness.	☐	☐
III. Legal practitioners are able to remain objective when looking at the facts of an accused's case. Therefore, they can make impartial decisions on behalf of the accused, such as rejecting unjust plea negotiations or raising certain defences they believe will be successful, to ensure a fair outcome is reached.	☐	☐
IV. Even if both an accused and the prosecution have legal representation, the quality of the legal representation hired by the accused may be less than that of the prosecution, considering the accused likely has fewer financial resources to hire skilled solicitors and barristers.	☐	☐

Question 12

(6 MARKS)

Discuss the extent to which fairness can be achieved if an accused does not have legal representation.

Linking to previous learning**Question 13**

(2 MARKS)

Describe how legal practitioners uphold the rights of an accused.

2H The impact of costs and time – criminal cases



Image: Wasan Tita/Shutterstock.com

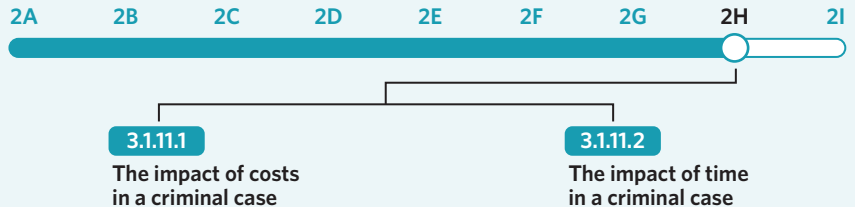
'What is justice? For different people at different times it means different things. However, for the most part in criminal law, accessing justice usually means money.'

—The Honourable Marilyn Warren AC, Former Chief Justice of the Supreme Court of Victoria (2014)

For many people, accessing justice in the criminal justice system requires money in order to afford the various expenses associated with defending a criminal accusation.

STUDY DESIGN DOT POINT

- the impact of costs, time and cultural differences on the achievement of the principles of justice



Lesson introduction

In the criminal justice system, high costs and lengthy delays are common. The court system often does not account for those of lower socioeconomic status, as there are a number of different expenses involved for an accused when defending their innocence. Individuals lacking the financial means to afford strong legal representation and other expenses are therefore often disadvantaged before the law. The frequent delays in the criminal justice system further disadvantage parties in a criminal trial, impeding the achievement of the principles of justice.

The impact of costs in a criminal case 3.1.11.1

When facing a criminal charge, an accused person will often face high costs to defend their innocence. As the **Office of Public Prosecution (OPP)** is the prosecutor for indictable offences, and Victoria Police is the prosecutor for summary offences, victims of crime usually do not incur significant costs from a criminal trial. However, victims may incur costs if they initially seek legal advice or have to take time off work to participate in the trial or recover from the crime.

LEGAL VOCABULARY

Office of Public Prosecution (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 solicitors and barristers in **2G Legal practitioners in a criminal case**.

You learnt about plea negotiations in **2C Plea negotiations**.

Table 1 Types of legal costs for an accused during a criminal case

Type of legal cost	Explanation
Solicitors' fees	A solicitor is often required for the preparation of the accused person's defence. During this preparation phase, a solicitor will: - review the prosecution's evidence. - plan which witnesses will be called if the matter goes to trial. - meet with witnesses before a trial.
Barristers' fees	Many criminal charges are resolved prior to a trial being conducted, for example, when an accused enters a guilty plea. However, when an accused pleads not guilty to the charges against them, the case must go to trial. Therefore, an accused will often require a barrister to present legal arguments and examine witnesses. Hiring a barrister is expensive.
Witness fees	If expert witnesses are required to give evidence, they often charge fees to do so. For example, if the prosecution uses a forensic scientist to explain forensic evidence, the accused may require an expert witness to challenge this presented evidence.
Appealing to a higher court	An offender seeking to appeal against a verdict, sentence, or sanction will need to pay: - the filing fee in the relevant appeal court, which is the cost paid by the party initiating court proceedings. - a solicitor to prepare written documentation for the appeal. - a barrister to present legal arguments to the judges in the appeal court.
Orders to pay a sum of money to the victim	When an offender is sentenced, the court may make an order requiring the offender to pay a sum of money to the victim, as compensation for the injury caused and/or the property stolen, damaged, or lost. Either the prosecution or the victims can apply for these orders.

An accused can recover costs in certain circumstances including when they:

- are acquitted of a crime.
- successfully appeal against a conviction.

If an accused is acquitted of a crime, they may ask the court to award costs in their favour if they are found 'not guilty'. The court may order the prosecution to meet the acquitted person's costs. If such an award is made, it may only cover some of the individual's legal costs. If Victoria Legal Aid (VLA) has represented the accused person, the funds will flow back to VLA to be reused on another client.

If the accused successfully appeals against their sentence, they can often apply to the **Appeal Costs Board** for an 'appeals costs certificate' to recover some of the costs associated with the appeal process back from the state. If VLA represents an offender in such an appeal, the money recovered flows back to VLA, not to the person they represented.

WANT TO KNOW MORE?

Do you know that a partner at a law firm may charge \$800 per hour for their work? You can find out more about the hourly rate charged by different solicitors and barristers by searching 'Solicitor and barrister prices' and clicking the 'Lawyers and Legal Services Australia' (2016) webpage.

LESSON LINK

You learnt about VLA in **2B Victoria Legal Aid and community legal centres**.

LEGAL VOCABULARY

Appeal Costs Board the public body that may partially compensate the accused if they suffer loss from legal costs associated with judicial error or circumstances that the accused was not responsible for.

REAL WORLD EXAMPLE



Image: Gorodenkoff/Shutterstock.com

Figure 1 The NSW Government may face up to \$1 million in legal expenses to cover the costs incurred by an accused after he was found not guilty of murder

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

The cost of a failed criminal trial

In 2013, a woman was seen by neighbours running from her home covered in flames. The woman passed away just a day later due to significant burns. In 2015, the Sydney coroner recommended that her husband be prosecuted for her murder. The accused was in their home with the victim at the time of the fatal event, and was therefore accused of pouring petrol on her and setting her alight. After two trials, in 2021, the jury found the husband to be not guilty.

The Supreme Court justice found there was 'physical evidence [that] overwhelmingly pointed to the victim being the one who poured the [petrol] on herself and ignited it'. As a result, the justice suggested it was unreasonable for the prosecution to commence proceedings against the accused for the alleged murder.

An estimated \$1 million may have to be paid by the state to cover the legal fees the accused amassed over the course of the two murder trials he faced in both 2019 and 2021. These fees included solicitor and barrister fees. The million-dollar cost of this murder trial demonstrates the large expense incurred by accused persons during criminal cases.

Adapted from 'NSW government ordered to pay legal fees for man accused of setting wife on fire' (Harris, 2023)

LESSON LINKS

You learnt about the jury in a criminal trial in **2E Judges, magistrates, and juries in a criminal case**.

You learnt about a victim impact statement in **1C Rights of victims**.

USEFUL TIP

The study design dot point for this lesson reads: 'the impacts of costs, time and cultural differences on the achievement of the principles of justice' which is similar to another study design dot point that you will learn about in Chapter 5. Lesson 5K is based on the study design dot point: 'the impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute'.

The questions asked on the VCAA end-of-year exam about these topics might be similar, so you need to look out for key terms, such as 'criminal' and 'civil', or key aspects of a scenario, to ascertain whether to answer the question referring to the impacts discussed in this lesson, or the impacts discussed in lesson 5K. Limit your discussions to the area of law, either criminal or civil, that the question is specifically asking you about as you will not receive full marks if you talk about aspects of the civil justice system in a question about criminal law, for example.

A victim typically incurs no costs during a criminal case as the victim's costs are usually covered by the OPP. There are systems in place to ensure a victim does not have to pay for advice before a trial. The Victims Assistance Program, for example, provides support workers or advice for victims to help them:

- understand the court process
- prepare to go to court
- write a victim impact statement.

However, a victim may incur costs when attempting to gain compensation from the offender as they may need to hire their own lawyers to seek such compensation. This is because the OPP works on behalf of the state, not the victim, to ensure offenders are found guilty, and does not function as a lawyer to achieve financial compensation for victims. Hiring their own lawyer can be a significant cost for victims. However, institutions such as the Victims of Crime Assistance Tribunal (VOCAT) can provide financial assistance to eligible victims, easing this burden for some victims.

DEEP DIVE

VLA: Cost ceilings

Although VLA provides resources to accused people of lower socioeconomic status with the aim of making legal representation more accessible, the money they can spend on an accused is limited.

If a person receives a grant of legal assistance from VLA, this person may still need to pay a portion of their legal costs based on their accessible income. For example, if a trial for an accused costs VLA more than \$6,559 due to legal representation and court expenses, a person who has \$500 of accessible income per week may be required to also pay as much as \$10,900 in legal expenses. Therefore, for accused people involved in expensive cases, as many criminal cases for serious, indictable offences are, the financial assistance an accused can gain is limited to some degree.

Adapted from 'Contributions Policy' (Victoria Legal Aid, 2022)

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing strengths and limitations in relation to each principle can help you evaluate the ability of the criminal justice system to achieve the principles of justice in relation to costs.

Evaluating the ability of the criminal justice system to achieve the principles of justice in relation to costs

STRENGTHS

- Independent judges ensure the rules of evidence and procedure are followed, promoting fairness, as even if an accused was unable to afford representation, the rules of evidence in a criminal case would still be followed.
- Juries are used as independent decision-makers in serious cases. For Commonwealth indictable offences, it is a right for an accused to receive a trial by jury, therefore the Commonwealth bears the expense of the jury, ensuring impartial processes.
- Though VLA's resources are limited, it does provide legal representation to accused persons, charged with serious offences, who have a very low socioeconomic status. Therefore, this promotes fairness by ensuring disadvantaged individuals have representation and can participate in the justice system.

LIMITATIONS

- If an accused person cannot afford legal representation, they may have to represent themselves. This may jeopardise fairness if the accused cannot present their case in the best light possible.
- Unbalanced legal representation may lead to an unfair outcome, as the accused may be unable to prepare and present a case that is equally convincing as that of the prosecution.
- The quality of the presentation of the case, usually correlated with the price of representation, may influence the outcome, not solely the facts and the law. This is unfair to the unrepresented or poorly represented party.
- Many individuals lose their employment and income if imprisoned and therefore, cannot pay compensation or restitution orders to victims, which may be seen as unfair to victims.
- An accused person may plead guilty to a criminal offence, even though they know they are not, just because they are unable to afford the expense associated with defending a criminal case in the courts. This demonstrates the criminal justice system and its processes are not always open and fair for all accused persons.

**STRENGTHS**

- Judges in the County Court and the Supreme Court have the power to order VLA to provide a lawyer to those who cannot afford legal representation, to ensure they receive some representation. This promotes equality by providing additional resources to those who need it to allow them to engage in the justice system without disparity or disadvantage.
- Victims are represented by the OPP, which is free of charge, and ensures all victims receive equal representation, regardless of their individual characteristics, for the purpose of protecting the community at large.

LIMITATIONS

- If aggrieved parties cannot initiate an appeal due to the associated costs, equality before the law is not achieved as all people cannot engage with the justice system equally.
- When a party cannot afford legal representation or does not qualify for grants to representation offered by VLA, they are at risk of not being treated equally before the law.
- If an accused is self-represented, they may be on unequal footing in court with the skilled prosecution and may not possess the same ability to present their case. This may lead to unequal and unjust outcomes.



Continues →



STRENGTHS

- VLA may provide duty lawyers or grants to assist disadvantaged accused persons facing criminal charges, better enabling them to engage with the justice system.
- If interpreters are needed in the courts, the prosecution organises and pays for this. Therefore, costs are avoided by the accused person and they are able to understand the trial process to the same degree as the prosecution. This promotes access as non-English speakers can still understand the court proceedings at no expense.

LIMITATIONS

- The high costs associated with an appeal, due to the filing fees and legal representation expenses, can discourage individuals from appealing a verdict, meaning such a review is inaccessible.
- Those who cannot afford legal representation may have difficulty understanding criminal proceedings in court and their legal rights during a trial, undermining access to justice as they cannot properly engage with the criminal justice system on an informed basis.
- The funding that VLA provides to accused persons is limited, therefore some individuals may be outside the low-income requirement to receive grants but may still be unable to afford legal representation themselves, preventing them from accessing legal representation.

The impact of time in a criminal case 3.1.11.2

The criminal justice system in Australia often encounters significant delays. The lengthy delays of certain criminal cases can have an impact on a victim, a victim's family, and the accused. Sources of delays in the criminal justice system include:

- court backlogs, as the caseload of the Victorian courts continuously grows.
- the time taken for appeal judgments and sentences to be delivered, creating a delay in the final resolution of a case.
- trial procedures, as legal practitioners' oral arguments and the question-answer process for evidence take significant time to be presented.
- the collection of evidence to put together a convincing case.
- judges giving directions to juries, ordered under the *Jury Directions Act 2015* (Vic) at the start and end of a trial for an indictable offence.
- a hung jury, in which no verdict is delivered.
- mistrials as they result in retrials being conducted, adding to delay in the resolution of criminal matters.
- jury empanelment.

There are many negative implications that delays in a criminal trial can have on those in the criminal justice system.

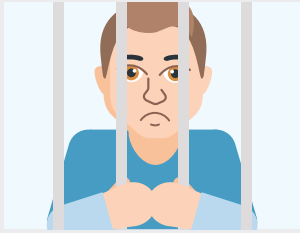
LEGISLATION

Jury Directions Act 2015 (Vic)

LESSON LINK

You learnt about jury empanelment in **2E Judges, magistrates, and juries in a criminal case**.

Table 2 The impacts of delays on members of a criminal trial

Victim	Witness	Accused	Community
 The longer the case is delayed, the longer the suffering of the victim and their family. In this period of limbo, there is no closure and no certainty that justice will be served. Criminal trials often rely on oral evidence, however, the memories of witnesses may fade over time. This limits the accuracy and reliability of witness statements, so an accused may be wrongly declared innocent or found guilty based on false evidence.	 Giving evidence in a criminal trial can be extremely stressful for witnesses and, as such, delays when awaiting this process can add to a witness' stress.	 Awaiting a trial with an outcome unresolved is stressful for an accused person and their family. Criminal trials often rely on oral evidence, however, the memories of witnesses may fade over time, limiting the accuracy and reliability of their statements. Therefore, an accused may be wrongly found guilty on the basis of false evidence.	 The community remains at risk if those charged with violent offences remain in the community prior to a trial, in the instance where an accused is not placed on remand.

DEEP DIVE

Courts 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). As a result, the Victorian Government added one additional magistrate to the Victorian Magistrates' Court in the 2022–2023 budget. The Victorian premier at the time also announced in 2022 that \$300 million had been allocated 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 which was primarily created by the pandemic as during Victoria's lockdown, jury trials were suspended for months.

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)

LEGAL VOCABULARY

Remand the legal status of an accused when they are held in custody awaiting trial.

LESSON LINK

You learnt about the Victorian court hierarchy in **2D The Victorian court hierarchy and criminal cases**.

Evaluating the ability of the criminal justice system to achieve the principles of justice, in relation to time

STRENGTHS

- The Victorian court hierarchy is structured in a way where lower courts, like the Magistrates' Court, are designed to hear high quantities of less serious matters that take less time to be decided. Contrastingly, more superior courts, such as the Supreme Court of Victoria, focus on more serious cases and therefore, hear fewer. This can increase fairness, as victims can achieve justice in a reasonable time, considering delays can be partially counteracted by this set-up of the court system.
- Plea negotiations encourage an early resolution of many criminal matters, as a verdict is determined without a trial, promoting fairness, as delays are avoided. Thus, justice can be attained in a reasonable amount of time.

LIMITATIONS

- Delays compound the suffering of victims and accused persons as they have to wait to gain closure and justice, often increasing stress and anxiety. Delays are usually due to factors beyond the control of the victim, which is unfair for such parties.
- If delays cause evidence to be lost or made unreliable due to the passage of time and memories fading, this may lead to incorrect and unjust outcomes, which is unfair.



**STRENGTHS**

- Plea negotiations may be used to ensure a resolution is reached in a timely manner, as a successful plea negotiation can allow court proceedings to be avoided. Most accused persons have the ability to enter into plea negotiations, promoting equality, as the opportunity to negotiate a plea deal is available to accused persons regardless of their personal characteristics.

LIMITATIONS

- Delays can be particularly distressing for victims and accused individuals with mental health issues or disabilities, limiting equality.
- Delays in a case could mean that elderly victims never achieve justice, limiting the achievement of equality as these individuals are disadvantaged due to their age.

**STRENGTHS**

- Relatively few matters are resolved by jury trial, so the delays associated with juries are limited to a small number of criminal cases. This increases access as non-jury trials are often quicker, freeing up the legal system and allowing other victims to access justice.
- Each court in the hierarchy specialises in certain cases and matters, therefore delays can be reduced. This increases access as judges in each of the courts are experienced in certain matters and can thus resolve cases efficiently. This allows cases to be processed faster so more cases can be resolved each year.

LIMITATIONS

- Knowing about the delays in the justice system may prevent victims from initially making complaints to the police, preventing these people from engaging in the justice system and limiting access to justice.
- The longer a criminal trial goes for, the greater the costs in terms of paying for legal representation, therefore, delays drive up costs for accused persons, making access to justice less affordable.
- The increase in delays in the justice system, as a result of the pandemic, increased the difficulty of accessing a trial, with many criminal cases put on hold for up to 12 months. This limits access to justice in a timely manner.

Lesson summary

Costs may impact the achievement of the principles of justice in a criminal case as:

- accused persons usually have to pay significant amounts to defend their innocence in a criminal case, due to legal representation and court fees.
- victims may want to seek legal advice before launching a criminal charge against an offender, which may cost money.
- Victoria Legal Aid (VLA) can only assist accused persons and victims in specific situations where a person is of very low socioeconomic status.

Delays may impact the achievement of the principles of justice in a criminal case as:

- the stress of victims, accused persons, and witnesses may increase when awaiting the verdict of a criminal case.
- witnesses may forget details of the criminal offence, due to periods of delays, resulting in their evidence being unreliable, therefore negatively affecting either party, and ultimately leading to a miscarriage of justice.
- the community's safety may be jeopardised during the period of delay if the accused is not on remand.

2H Questions

Check your understanding

Question 1

Criminal cases are not burdened by costs or delays.

- A. True
- B. False

Question 2

Which of the following is not a cost that may be incurred by an accused in a criminal case?

- A. Barrister fees
- B. Court filing fees
- C. Arrest warrant fees
- D. Solicitor fees

Question 3

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

witness

victim

An offender may incur costs when ordered to pay the [] a sum of money due to the injury caused or the loss they incurred from the property being damaged, stolen, or lost.

Question 4

The high costs associated with lodging an appeal, due to filing fees and legal representation, may discourage individuals from appealing a criminal conviction. This limits the principle of:

- A. access.
- B. fairness.
- C. equality.

Question 5

Fill in the blanks with the following terms:

access

fairness

Knowing about delays in the justice system may prevent victims from reporting a suspected crime to police as they may feel it's pointless to do so, limiting []. Delays may also cause some witnesses to produce unreliable or false evidence as their memory fades over time and they can no longer recall the exact events. This limits [] as witnesses may be unable to provide impartial and truthful information.

Question 6

A victim may be negatively affected by delays in a criminal case because:

(Select all that apply)

- A. the longer the case is delayed, the longer the victim is in a period of limbo where justice is uncertain, which can be stressful.
- B. if the accused is not on remand, they may still be present in the community, potentially inducing fear in victims if the accused committed a violent offence.
- C. awaiting trial can be stressful for a victim, as the prospect of them being imprisoned lingers until the trial occurs.
- D. delays may cause witnesses to forget key information or for their memory to distort the reality of the facts, and therefore an accused may be found 'not guilty' on the basis of incorrect information.

Question 7

Which of the following statements are sources of delays in the criminal justice system?

(Select all that apply)

- A. Court backlogs.
- B. Waiting to try alternative methods of dispute resolution, such as mediation, to see if this can resolve the case before it enters the courts.
- C. Collecting evidence to put together a convincing case.
- D. Judges giving directions.

Question 8

Due to the costs of engaging in a criminal case, and the delays that the Victorian court system is currently facing, the principles of justice cannot be achieved to any degree.

- A. True
- B. False

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

(2 MARKS)

Outline **one** impact of costs during a criminal trial.

Question 10

(2 MARKS)

Describe **one** impact of time during a criminal trial limiting the achievement of the principle of access.

Question 11

(3 MARKS)

Previn, after much deliberation, chooses to report the aggravated assault and robbery he endured at the hands of a known community member on Main Street. However, he is informed that his attacker's trial date will not be for another 18 months. He feels anxious about shopping in his own community until some course of action is taken, for fear of a second incident. The key eyewitnesses of the crime are two elderly people who are concerned about appearing in court and whose memories of the event are deteriorating.

Explain the impact of time on the principle of fairness in Previn's case.

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.

Assume in 2045, the most common type of crime in Australia is cybercrime, a summary offence that involves a person hacking, spamming, or stealing online data from a victim. In Victoria, 70% of the criminal cases heard by the Magistrates' Court are cybercrime cases. All these cases typically require witnesses to provide oral evidence about the cybercrimes. Therefore, the Magistrates' Court has an extreme backlog of cybercrime cases, with many taking more than 12 months to be processed. Currently, the Victorian Magistrates' Court hears all cybercrime cases. However, the Victorian Parliament has proposed creating an additional court that would have jurisdiction to make decisions solely on cybercrime cases, called the Cyber Court.

Question 12

Which of the following statements are correct about the impact of cybercrimes on achieving the principle of access in relation to time? **(Select all that apply)**

- A. Access to justice is currently impeded by the 12 months of delays that exist due to cybercrimes because accused persons require representation for longer periods of time, which is costly and may not be accessible by accused persons of a lower socio-economic status.
- B. Victims' access to justice is limited by the current system as they may see lengthy delays regarding cybercrime and decide against reporting cybercrimes, limiting their access to obtaining justice.
- C. The development of the Cyber Court would allow all victims and accused people to access justice, regardless of their financial means.
- D. Cybercrime cases typically require oral evidence from witnesses, however, delays may cause witnesses' evidence to weaken over time, limiting both the accused person and the victim's access to a fair trial.

Question 13

(5 MARKS)

Analyse the impact of cybercrimes on the principle of access in relation to time. In your response, consider how the Cyber Court could enhance the ability of the criminal justice system to achieve the principle of access.

Adapted from VCAA 2022 exam Section B Q2d

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 the impact of costs on the ability of the criminal justice system to achieve fairness.

Statement	Strengths	Limitations
I. VLA can provide duty lawyers or grants to accused persons with limited financial means, promoting fairness by ensuring these individuals still have representation in a criminal case.	☐	☐
II. The costs of a criminal case may mean that if an accused person is of lower socioeconomic status, they may not be able to afford representation, leading to an unfair trial.	☐	☐
III. Juries are independent decision-makers who may be used in serious criminal cases. The costs of a jury are borne by the Commonwealth for Commonwealth indictable offences, promoting a fair trial by jury for all persons accused of such offences.	☐	☐
IV. Due to the cost of a criminal case, an accused person may plead guilty to a criminal offence just because they are unable to afford to pursue a criminal case in the courts.	☐	☐
V. If the accused can only afford a relatively cheap and inexperienced lawyer, the facts of the case may not be presented in the best light for the accused, which is unfair to the poorly represented party.	☐	☐

Question 15

(6 MARKS)

Discuss **one** factor that could affect the ability of the criminal justice system to achieve fairness.

Adapted from VCAA 2021 exam Section A Q3c

Linking to previous learning**Question 16**

(2 MARKS)

Describe how plea negotiations can impact time during a criminal case.

Question 17

(3 MARKS)

Explain the role of Victoria Legal Aid (VLA) in relation to costs during a criminal case.

21 The impact of cultural differences - criminal cases

STUDY DESIGN DOT POINT

- the impact of costs, time and cultural differences on the achievement of the principles of justice

2A 2B 2C 2D 2E 2F 2G 2H 2I

3.1.12.1

The impact of cultural differences in criminal cases



'It has been important to understand that there might be cultural reasons that things can't be discussed in court.'—Julie Wager, Chief Judge of the Western Australian District Court (Parke, 2022)

Individuals that come from different cultural backgrounds in Australia may experience language barriers, intergenerational trauma, and difficulty in understanding the Australian legal system. All of these factors can impact the ability of the criminal justice system to deliver justice to these individuals.

Lesson introduction

All victims and accused are likely to be burdened by the costs and time associated with criminal cases, as legal expenses and court delays affect most people in the criminal justice system. However, depending on the cultural background of an individual, whether that be Caucasian, Asian, non-English speaking, or Aboriginal and/or Torres Strait Islander, access to or experiences in the criminal justice system may differ significantly. Language barriers, cultural misunderstandings, and the construction of the Victorian justice system, designed using Western practices and ideas, can impede the achievement of justice for victims or accused persons of different cultural backgrounds.

The impact of cultural differences in criminal cases 3.1.12.1

A number of different groups within society may have difficulty engaging with the criminal justice system due to their cultural background. Asylum seekers and refugees, migrants, and First Nations Australians are some key groups often impacted by cultural differences when involved in a criminal case, due to various factors.

WANT TO KNOW MORE?

According to the 2021 Census data, 5.8 million people reported using a language other than English at home. The top 5 languages spoken other than English were Mandarin, Arabic, Vietnamese, Cantonese, and Punjabi. You can find out more about the 2021 Census data relating to cultures, ethnicities, and language by searching 'Cultural diversity in Australia' and clicking the 'Australian Bureau of Statistics (ABS)' (2022) webpage.

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.

Top 5 most common languages other than English 2021

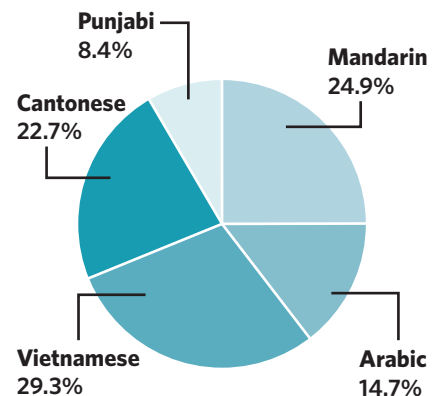


Figure 1 The five most common languages spoken in Australian homes other than English (ABS, 2022)

Table 1 The impact of cultural differences in a criminal case on asylum seekers, refugees, or recent migrants

Cultural difference	Impact of cultural difference in a criminal case
Limited 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 unfamiliarity with the Australian legal system. - As an accused, a person born outside of Australia may not know they are entitled to seek legal representation when defending a charge in the courts, or may be unaware of how to access legal information, advice, or representation through Victoria Legal Aid and/or community legal centres. - If self-representing, individuals may be unaware of their entitlement to present evidence in their own defence, or may not know how to do so.
Limited English communication skills	- If a victim or an accused speaks limited English, they may find it difficult to give evidence at trial, especially if an accused is self-representing. This may result in the court misunderstanding the circumstances relating to an offence, given the reliance on oral evidence in Victorian courts, causing incorrect and potentially unfair case outcomes. - If self-representing, the accused may have difficulty questioning evidence presented by the prosecution's witnesses or may experience difficulty when researching and preparing lawful defences to a charge. - Certain legal resources may not be properly translated, or translated at all, into the language a non-English speaking person is most proficient in, therefore preventing them from accessing certain resources.
Ingrained mistrust toward the police and 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 since arriving in Australia. Consequently, these individuals may be unwilling to report crimes to the police due to a lack of trust, making them unable to seek justice for themselves. - As a witness, victim, or accused, culturally diverse individuals may be unwilling to speak truthfully to the police or the courts due to this inherent mistrust, instead giving incomplete or inaccurate responses to questioning. - This may also prevent a person accused of a crime from engaging with the prosecution and negotiating a guilty plea via the process of plea negotiations, as they may fear the authorities they would have to talk to during this process.
Fear of the cultural repercussions associated with pursuing legal action	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 CASE

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

DPP v Natale (Ruling) [2018] VSC 339**Facts**

The accused, an Italian migrant with a limited ability to speak English, was accused of various offences including incitement to murder and threatening to kill after it was alleged he offered \$4,000 to a friend in return for killing a member of his wife's family. In a recorded police interview, the accused mainly used 'yes' and 'no' responses and demonstrated a lack of understanding during questioning, indicated by his body language.

Legal issue

The accused's defence argued the evidence collected during the interviews should not be considered admissible as the *Evidence Act 2008* (Vic) outlines that evidence can be inadmissible if, in the circumstances, it would be unfair to use. The judge had to determine whether this evidence would be submitted to the court.

Decision

Justice Bell determined that the accused had insufficient knowledge of English to be able to understand the questioning, communicate his answers, or understand his rights in the Australian legal system, such as his right to remain silent. He, therefore, concluded it would be unfair to admit the evidence.

Continues →

LEGISLATION

Evidence Act 2008 (Vic)

LESSON LINK

You learnt about Victoria Legal Aid and community legal centres in **2B Victoria Legal Aid and community legal centres**.

LEGAL CASE**DPP v Natale (Ruling) [2018] VSC 339 – Continued****Significance**

This case demonstrates some of the protections that the criminal justice system has established to ensure the provision of justice for non-English speakers is not significantly impacted by language barriers.

LEGAL VOCABULARY

Dispossession a situation in which a person is deprived of land, property or other possessions.

Table 2 The impact of cultural differences in a criminal case on First Nations peoples

Cultural difference	Impact of cultural difference in a criminal case
Over-representation in the criminal justice system and within prison systems around Australia	- Figures from 2020 indicate that the Aboriginal imprisonment rate in NSW is nearly 10 times the non-Aboriginal imprisonment rate (ABS, 2020). - A report by the United Nations Association of Australia (Temple et al., 2021) found that the rate at which First Nations peoples are incarcerated continues to increase each year. In 2020, First Nations peoples made up just 3% of the Australian population yet 29% of the adult prison population. - The Sentencing Advisory Council (2023) found that the Aboriginal and Torres Strait Islander imprisonment rates almost doubled between 2011 and 2021 in Victoria. - Due to the alarming rates of incarceration, this may cause First Nations individuals to fear they are more likely to be convicted on the basis of their race, regardless of the actual evidence against them.
Limited trust in the criminal justice system due to a history of dispossession and social exclusion by governments	- In 2020, a Gunditjmara, Dja Dja Wurrung, Wiradjuri, and Yorta Yorta woman passed away in a Victorian, maximum-security prison after being arrested on suspicion of shoplifting (Ore, 2023). Despite calling for help several times as she was experiencing significant vomiting and cramps, she received no help from prison staff, dying in custody. - Cases like that outlined above 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 they pursue it. This is also greatly influenced by the history of dispossession and social exclusion experienced by First Nations communities across Australia.
Different body language practices, compared to the dominating Western cultural practices in Australian society	Some First Nations Australians may avoid eye contact and remain silent more often than non-indigenous Australians as it can be considered respectful in some communities 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.
Different cultural practices that make it inappropriate 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 certain communities, seeing images of, hearing about, and listening to the names of deceased persons can cause sadness, distress, and offence. As a result, the accused or victim may find it uncomfortable or culturally-insensitive 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 means they feel embarrassed, intimidated, or uncomfortable. 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 present traumas act to prevent the reporting of criminal acts, particularly family violence	First Nations women, in particular, may fear reporting violence as this could result in the removal of their children by authorities.

[Continues →](#)

Table 2 Continued

Cultural difference	Impact of cultural difference in a criminal case
Aboriginal identification	- Aboriginality is not defined by skin colour. In fact, there is 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.
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 & Galloway, 2007))	- Among First Nations peoples, proficiency in speaking Standard English differs significantly. - Certain English words may have different meanings, creating miscommunications and misinterpretations when First Nations individuals are being questioned or presenting evidence as a victim or accused. For example: 'home' could mean a person's place of residence, their language group, or nation area. 'blood' could mean bodily fluid or family, said in the context of 'he is my blood', for example. - This can negatively impact the degree of understanding the jury or legal practitioners have of the statements given by the accused.
Geographical barriers	Many Aboriginal and Torres Strait Islander people live in extremely remote areas, therefore affecting their ability to access the courts and legal facilities. In rural areas, there are typically low numbers of legal practitioners providing legal aid, for example, therefore accessing justice can be limited due to these barriers.

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 altered 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.
- 'Auntie' or 'Uncle' is often used to address an older person, even when there is no familial relation to the individual.
- 'I'm gunna flog you if you don't' would typically be perceived as a threat in a plain English context, however, this is an example of hyperbolic 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)

DEEP DIVE

Royal Commission delivers a damning report

The Royal Commission into Aboriginal Deaths in Custody (RCIADIC), released in 1991, 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, however, the death rates between Indigenous and non-Indigenous prisoners did not differ. The report also determined that the deaths were caused due to a number of factors, including police and prisons failing to uphold their duty of care.

Continues →

DEEP DIVE

Royal Commission delivers a damning report - Continued

The final report delivered 339 recommendations regarding Aboriginal people in custody. These included recommending that imprisonment should be a last resort for sentencing, greater medical assistance should be provided if the condition of detainees deteriorates, and greater collaboration with Indigenous communities should be prioritised. Underlying issues propelling the high incarceration rates among First Nations peoples were all considered, including social factors, such as housing, education, and alcoholism, as well as 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% were not implemented. The review also found that since the RCIADIC Final Report was released, the Aboriginal and Torres Strait Islander incarceration rate doubled.

Therefore, although the RCIADIC was such a large-scale look into the impacts cultural differences have on criminal justice, recommendations still have not been properly implemented, and inequality remains significant 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)

DEEP DIVE

The Koori Court in Victoria

In 2002, the Magistrates' Court introduced a specialist division called the Koori Court. This has since been expanded into the Children's Court and County Court.

The Koori Court divisions of the Magistrates' Court and the County Court provide a culturally-relevant sentencing method for First Nations peoples accused of a crime under Victorian legislation or common law who plead guilty to a criminal offence and consent to the matter being referred to the Koori Court. Certain offences, such as sexual offences, contraventions of family violence intervention orders, or violations of a personal safety intervention order, for example, cannot be dealt with in the Koori Court.

The Koori Court has several features that can benefit First Nations peoples, 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 the broader Indigenous community they are part of.

Once discussions with First Nations Elders or Respected Persons have occurred, the magistrate or judge imposes a sanction. These are no more or less severe than the sanctions given using traditional sentencing methods. However, the process of discussing the sentencing in these circumstances gives it more authenticity and meaning for the accused person and for that reason has been found to reduce reoffending.

The reason for using the Koori Court is to provide culturally-relevant justice with a focus on rehabilitation rather than punishment. The Koori Court process has been shown to be effective at reducing reoffending. It is an example of the criminal justice system being modified to reflect the differences between Indigenous and non-Indigenous Australians.

Adapted from 'Koori Court' (Magistrates' Court of Victoria, 2022)



Image used with permission from YardFurniture.com.au

Figure 1 The Koori Court is a mechanism of the Victorian justice system that aims to promote equality for First Nations peoples

USEFUL TIP

An important key skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the criminal justice system to achieve the principles of justice during a criminal case'. These tables showing the strengths and limitations of the criminal justice system in being able to uphold each principle can help you evaluate the ability of the criminal justice system to achieve the principles of justice in relation to cultural differences.

Evaluating the ability of the criminal justice system to achieve the principles of justice in relation to cultural differences

**STRENGTHS**

- The prosecution must ensure all relevant facts and legal principles are presented to the court. This helps promote fairness since when there are open and impartial processes, the whole truth can emerge, thus overcoming some of the difficulties that can be caused by cultural differences.
- 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 Evidence Act 2008 (Vic)* establishes the circumstances where evidence cannot be admitted to the courts due to the accused or victim's accounts being unreliable as a result of language barriers.

LIMITATIONS

- Witnesses, victims, and accused persons from minority cultural backgrounds may face difficulties when presenting evidence. This may result in the court misinterpreting the facts in a criminal case, leading to incorrect or unjust verdicts.
- Those for whom English is not their first language, such as refugees and recent migrants, may have difficulty giving oral evidence due to language barriers, meaning courts may misunderstand the facts in particular cases, leading to unjust or incorrect outcomes.

**STRENGTHS**

- Victoria Legal Aid provides legal representation to all accused persons, including Indigenous and migrant accused persons, as long as these individuals meet specific criteria.
- Interpreters are available for all accused persons, and the onus to pay for and arrange an interpreter is on the courts, as opposed to the accused. This allows all non-English speakers to understand court proceedings without having to pay significant expenses.
- The Koori Court is an option for First Nations peoples if they plead guilty, as it can provide culturally-relevant sentencing practices that are used when determining the sentence of an offender. Therefore, this can increase equality as sentencing processes are more tailored to Aboriginal and Torres Strait Islander practices.

LIMITATIONS

- Due to cultural or language differences, some First Nations peoples or recent migrants from non-English speaking backgrounds may be less capable of presenting evidence as victims or accused persons, undermining equality.
- The high incarceration rates among First Nations peoples point towards inherent prejudices within the Australian criminal justice system. Therefore, equality is limited as these biases among members of the justice system may lead to Aboriginal and/or Torres Strait Islander peoples being prescribed harsher penalties on the basis of their race.
- Aboriginal and/or Torres Strait Islander peoples typically live in more rural areas of Australia and, therefore, their access to legal representation is more limited due to geographical barriers. Unless adequate measures are implemented to remove this disparity, equality will not be achieved as an accused person of Aboriginal or Torres Strait Islander descent may have reduced access to legal advice and resources.

STRENGTHS

- Victorian Aboriginal Legal Service is a community legal centre that better enables First Nations people to engage with the justice system, by providing advice and assistance tailored to the needs of Indigenous Victorians. Its legal services are available across rural regions in Victoria, allowing access to justice for Aboriginal peoples in remote areas and metropolitan Melbourne.
- The use of the Koori Court aims to provide more First Nations offenders with access to culturally-relevant sentencing that more effectively acts to reduce reoffending.

LIMITATIONS

- If refugees or other migrants do not trust the police, due to past, adverse experiences in their home countries, they may be reluctant to report crimes, undermining access to justice for victims.
- Migrants and refugees may be unfamiliar with the Victorian legal system and less aware of their legal rights as a victim or accused person, therefore limiting access.
- Cultural differences may result in some migrants never accessing the justice system. For example, in some cultures, female compliance is taught, therefore, women may not ever report abuse as they believe they should just accept it.
- Some migrants may be on a temporary Australian visa, relying on marriage to attain permanent citizenship. Therefore, these migrants may not report offences, fearing their visa may be taken away if they do.



Lesson summary

Asylum seekers, refugees, migrants, and First Nations Australians are some of the key groups impacted by cultural differences when involved in a criminal case due to various factors that can limit the principles of justice, including:

- language barriers
- racial prejudices of the police and other people with authority
- cultural misunderstandings or practices
- intergenerational trauma.

However, certain mechanisms, such as the Koori Courts and interpreters, exist to ensure individuals with cultural differences from Caucasian, English-speaking Australians can still access justice.

21 Questions

Check your understanding

Question 1

The cultural background of an individual involved in a criminal case will have no impact on the achievement of the principles of justice.

- A. True
- B. False

Question 2

Which of the following statements are correct about cultural differences in a criminal case?

(Select all that apply)

- A. Some Aboriginal people may have difficulty with the question-and-answer format of evidence presentation in Victorian courts.
- B. First Nations peoples have experienced a history of racial discrimination and social exclusion by governments, leading many of them to now fear members of the criminal justice system, such as the police and judges.
- C. Indigenous Australians are overrepresented in the criminal justice system.
- D. The Koori Court sentencing method results in sanctions that are less severe than those imposed in the mainstream sentencing process.

Question 3

The principle of access may not be achieved for refugees and migrants due to:

- A. the possibility of being unfamiliar with the Victorian legal system, thus making them less aware of their legal rights as a victim or an accused.
- B. Victoria Legal Aid providing legal representation for all accused people, including migrants, as long as these individuals meet relevant criteria.

Question 4

Tick the box to indicate whether each of the following statements relate to how cultural differences may limit the achievement of the principle of **fairness** or **equality**.

Statement	Fairness	Equality
I. Individuals from a non-English speaking background may be less able to present evidence, therefore preventing them from being treated the same as English speakers.	☐	☐
II. The high incarceration rates of First Nations peoples point towards inherent prejudices existing within the Australian criminal justice system. Biases among members of the justice system may lead to Aboriginal and/or Torres Strait Islander peoples being prescribed harsher penalties on the basis of their race.	☐	☐
III. For some Aboriginal and Torres Strait Islanders, cultural practices, such as avoiding eye contact, may be misunderstood. As a result, authorities could view this as an indication of guilt or evasiveness, leading to an accused unjustly being convicted.	☐	☐
IV. Language barriers may cause the courts to misunderstand or accept incorrect evidence, leading to an unjust outcome.	☐	☐

Question 5

Which of the following statements are correct about processes in the Victorian criminal justice system that aim to uphold the principles of justice despite cultural differences? **(Select all that apply)**

- A. The presumption of innocence and high standard of proof protect accused persons, as they do not need to present any evidence to prove their innocence. Thus, if an accused fears they will be unable to convincingly present evidence, they are under no obligation to do so.
- B. Victoria Legal Aid provides legal representation to all accused persons regardless of their cultural backgrounds, as long as they meet the relevant requirements.
- C. Interpreter services are available in all courtrooms, however, the accused must pay for such services.
- D. The Koori Court allows offenders that identify as First Nations peoples to access culturally-relevant sentencing that is more effective in reducing reoffending.

Question 6

The principle of access may be limited if refugee or asylum seeker victims of crime do not report crimes to the police due to traumatic experiences with authorities. The principle of equality is limited as certain non-English speakers, for example, may be unaware of available resources, like Victoria Legal Aid, and therefore do not make use of these resources. Finally, fairness may be limited if false confessions are made due to language misunderstandings.

- A. True
- B. False

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

(2 MARKS)

Outline **one** way cultural differences limit the principle of equality from being achieved in a criminal case.

Question 8

(3 MARKS)

Explain **one** way in which cultural differences impact the principle of access in a criminal case.

Question 9

(4 MARKS)

The Victorian courts, such as the Magistrates' Court, pay for interpreter services when they are required for an accused person charged with an offence. Ahmed, a migrant from Saudi Arabia, was recently accused of theft after stealing from his local supermarket. He speaks Arabic but very little English.

How do the interpreter services of the Victorian courts enhance the ability of the criminal justice system to achieve fairness for Ahmed and others like him? Justify your response.

Adapted from VCAA 2022 exam Section B Q1c

Extended response

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

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Victorian criminal justice system in achieving equality.

Statement	Strengths	Limitations
I. Individuals from migrant or refugee backgrounds may be unable to speak English proficiently, therefore limiting their ability to present evidence as either an accused person or as a victim.	☐	☐
II. Interpreters are available to all accused persons in the courts, and the courts are required to pay for such services instead of the accused.	☐	☐
III. Migrants and refugees may be unaware of the resources available to them, such as Victoria Legal Aid (VLA).	☐	☐
IV. VLA provides legal representation to all accused persons, including Aboriginal and/or Torres Strait Islanders and migrant accused persons, and provided resources online in multiple languages.	☐	☐

Question 11

(6 MARKS)

Discuss **one** cultural factor that could affect the ability of the Victorian criminal justice system to achieve equality.

Adapted from VCAA 2021 exam Section A Q3c

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

Use the following information to answer questions 12 and 13.

In Victoria, the Koori Court is a division of the Magistrates' Court and the County Court that provides culturally-relevant sentencing methods to First Nations peoples who have committed a crime in Victoria, plead guilty to certain criminal matters, and consent to the matter being sentenced in the Koori Court. It does not provide less or more severe sentences than those applied for non-First Nations offenders and has no role in determining the guilt of an offender. The process of receiving a sentence in the Koori Court involves discussions with community Elders or Respected Persons to gauge what sentence would be appropriate for the offender. It is proven to be effective in decreasing rates of recidivism. However, it has faced challenges as a lack of community awareness of this court has acted as a barrier to the participation of Community Elders.

Question 12

Tick the box to indicate whether the following are **strengths** or **limitations** of the Koori Court in relation to access.

Statement	Strengths	Limitations
I. The Koori Court allows culturally-relevant sentencing practices to be used when determining an appropriate sentence for an offender.	☐	☐
II. The Koori Court is proven to be an effective mechanism at reducing rates of recidivism. Therefore, this could result in First Nations incarceration rates declining in the future.	☐	☐
III. The Koori Court involves community Elders and Respected Persons having open discussions with offenders. Therefore, language barriers are reduced as these discussions can occur using Aboriginal English.	☐	☐
IV. Community Elders and Respected Persons, who are required for the Court to function, may be unaware of the Court and their ability to participate.	☐	☐

Question 13

(5 MARKS)

Analyse the impact of the Koori Court in relation to cultural differences. In your response, consider how the Koori Court can enhance the ability of the Victorian criminal justice system to achieve the principle of equality.

Adapted from VCAA 2022 exam Section B Q2d

Linking to previous learning**Question 14**

(4 MARKS)

Arjun has been accused of causing Freya serious injury intentionally after he allegedly shoved her on the bus trying to get a seat, causing her to trip and fall. Arjun migrated to Australia five years ago and speaks minimal English. He has also been struggling financially after moving, as he sends the majority of the money he earns in Australia back to his family in India. Arjun will need to defend himself in court in a month's time.

Describe the impact that costs and cultural differences may have on Arjun's criminal case.

3

CHAPTER 3

Sentencing

LESSONS

- 3A** Purposes of sanctions
- 3B** Types of sanctions
- 3C** Factors considered in sentencing

Image: smspsy/Shutterstock.com

KEY KNOWLEDGE

Sentencing

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

3A Purposes of sanctions



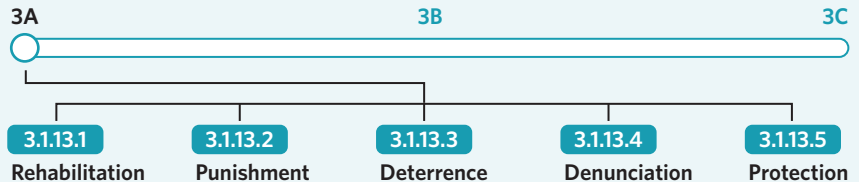
Image: Fer Gregory/Shutterstock.com

'It's funny. On the outside, I was an honest man. Straight as an arrow. I had to come to prison to be a crook.'—Andy Dufresne ('Shawshank Redemption', 1994)

Why are sanctions, such as imprisonment, imposed upon offenders? Is it to punish, rehabilitate, or for another purpose? Are all sanctions effective in achieving these purposes?

STUDY DESIGN DOT POINT

- the purposes of sanctions: rehabilitation, punishment, deterrence (general and specific), denunciation and protection



LEGISLATION

Sentencing Act 1991 (Vic)

KEY TERMS

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.

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.

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 will learn about criminal sanctions in **3B Types of sanctions**.

Lesson introduction

When sentencing an offender, the court must consider what they are aiming to accomplish by imposing a certain sanction on the offender. Whether it is to punish or rehabilitate the offender, each criminal **sanction** has different purposes it aims to achieve, and some sanctions may be better suited to particular offences. Five key purposes of sanctions are outlined in s 5 of the *Sentencing Act 1991* (Vic).



Figure 1 The five purposes of sanctions

Rehabilitation 3.1.13.1

Rehabilitation can be achieved by sanctions that seek to break the cycle of offending. When imposing a sanction, a court may consider which sanction is most appropriate in addressing the underlying reasons for offending and how it can encourage the rehabilitation of an offender. By rehabilitating an offender, the **rate of recidivism** may be reduced and future offending may be prevented.

Table 1 Examples of sanctions that prioritise rehabilitation

Sanction	How it prioritises rehabilitation
Community corrections orders (CCOs)	CCOs are sanctions served in the community, whereby the offender must follow certain conditions. The courts will usually impose a CCO rather than a term of imprisonment when the rehabilitation of the offender is a high priority. A CCO may involve alcohol exclusion, a curfew, treatment for drug addiction, or any other condition that aims to address the underlying causes of criminal behaviour.

Continues →

Table 1 Continued

Sanction	How it prioritises rehabilitation
Drug treatment orders (DTOs)	DTOs are imposed by the Drug Court, a division of the Magistrates' Court of Victoria. DTOs involve a sentence of imprisonment that is less than two years in the Magistrates' Court, or up to four years in the County Court, that is deferred while the participant receives supervised drug and/or alcohol treatment. If the participant successfully completes this treatment, they will not have to serve a term of imprisonment. DTOs focus on the rehabilitation of the offender by acknowledging the negative impact a prison environment can have on the offender, allowing them to undertake treatment in the community to keep them out of the prison environment.
Court secure treatment order	A court secure treatment order allows a person to be detained and treated at a mental health institution as opposed to a term of imprisonment. This type of order can only be imposed where imprisonment would have occurred if the offender was not mentally ill. A court may impose this sanction if the offender requires rehabilitative treatment to prevent serious deterioration of their health, harm to themselves, or another person. Therefore, these orders prioritise the rehabilitation of an offender in a manner that may have been unachieved if they were to be placed in prison.

LESSON LINKS

You learnt about the Magistrates' Court in **2D The Victorian court hierarchy and criminal cases**.

You will learn about community corrections orders (CCOs) and recidivism in **3B Types of sanctions**.

REAL WORLD EXAMPLE**Breaking the cycle of offending**

In August 2023, the Northern Territory (NT) was the first jurisdiction in Australia to pass legislation raising the age of criminal responsibility from 10 to 12 years of age. Children under the age of 12 years in the NT can no longer be deemed responsible for committing a criminal offence. The aim of raising the age of criminal responsibility is to break the cycle of youth offending by rehabilitating juveniles participating in criminal activity and addressing the root causes of their offending through therapeutic programs.

Now, when a child under the age of 12 engages in offending behaviour, they will be referred to the NT's Department of Territory Families, Housing and Communities, which will assess which intervention programs may be required for the child. This may include family engagement and support services, health services for mental health or drug and alcohol abuse, education, and youth engagement services.

This legislative change comes after the 'Royal Commission into the Protection and Detention of Children in the Northern Territory' in 2016. There is increasing pressure on other states to undertake the same steps.

Adapted from ABC News, 'Northern Territory becomes the first Australian jurisdiction to raise the minimum age of criminal responsibility from 10 to 12 years' (Perera & Abram, 2022)



Image: pjcross/Shutterstock.com

Figure 2 The Northern Territory plans to raise the age of criminal responsibility from 10 to 12

Punishment 3.1.13.2

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. Punishment also seeks to discourage victims and/or their families from enacting revenge themselves. A court aiming to punish an offender will impose a more severe sanction. For example, a larger fine or longer period of imprisonment could be imposed.

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 their victims and society as a whole.

LEGAL VOCABULARY

Principle of totality the principle that a sentence should be just and appropriate to reflect the entire impact of an offender's crimes where the offender has been convicted of multiple crimes.

Principle of proportionality the principle that a sentence should reflect the gravity of the offender's criminal behaviour.

DEEP DIVE**The principles of totality and proportionality**

Sentencing considerations
for punishment



Principle
of totality



Principle of
proportionality

Figure 3 The principles of totality and proportionality are sentencing considerations when a court is aiming to punish an offender

When considering the purpose of punishment, there are two fundamental principles of sentencing that should be accounted for, the **principle of totality** and the **principle of proportionality**.

1. The totality principle states a sentence should be just and appropriate to reflect the entire impact of an offender's crimes where the offender has been convicted of a number of crimes.
2. The proportionality principle states a sentence should reflect the gravity of the offender's criminal behaviour, that is, the degree to which the offender is punished should equate to the overall impact of the offender's crimes.

HYPOTHETICAL SCENARIO**Bejewelled bandit**

Betty was caught red-handed by police for stealing millions of dollars worth of precious jewels from a mansion after her getaway car driver left her stranded at the last minute. She was found guilty at trial. During her sentencing, the judge will need to consider an appropriate sanction that reflects the severity of her crime and its impact, whilst also adequately punishing her for the criminal activity.

KEY TERMS

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

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.

Deterrence 3.1.13.3

Deterrence aims to discourage an offender, or the general public, from reoffending or committing a crime through the imposition of a sanction. The effectiveness of deterrence can also impact the rate of recidivism and the overall likelihood of reoffending.

The two types of deterrence are:

1. **specific deterrence**, which occurs when the offender themselves is discouraged from committing offences of the same or similar nature through the imposition of a sanction.
2. **general deterrence**, which occurs when individuals other than the offender, being the general public at large, 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 deter will impose a more severe sanction, such as imprisonment rather than a community corrections order. This will usually be accompanied by comments from the court stating the more severe sanction is designed to specifically or generally discourage such offending.

HYPOTHETICAL SCENARIO

Fast and Furious fanatic faced with a fierce fine

Alistair has been fined \$786 and had his license suspended for six months after being caught speeding 45 km/h over the speed limit whilst pretending to be a fast and furious driver. This hefty fine and the inconvenience of losing his license are likely to deter Alistair from committing a similar offence in the future. Given the general public is also aware of the sanctions for speeding offences, people will generally be deterred from speeding for the safety of all road users, to avoid receiving a fine, or having their license suspended. Therefore, Alistair's sentencing can achieve both specific and general deterrence.



Figure 4 A driver is fined and has his license suspended after a high-speed adventure

Denunciation 3.1.13.4

Denunciation is a purpose of sanctions whereby the court seeks to criticise the offender's criminal behaviour publicly. Essentially, the court denounces the offender's actions to highlight the extent to which 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. Whilst the judge's comments outline the court's condemnation, denunciation does not necessarily provide a practical solution to addressing the offender's criminal behaviour, compared to the other purposes of sanctions.

KEY TERM

Denunciation the act of publicly condemning an offender's criminal behaviour.

LEGAL CASE

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

Latorre v R (2012) 226 A Crim R 319**Facts**

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

Legal issue

The court had to determine whether the man's sentence should be reduced.

Decision

Whilst he was successful in having some convictions overturned, his appeal was not entirely successful. The Court of Appeal revised his sentence down to seven years imprisonment and condemned his conduct in the following way:

'The sentencing judge was correct to denounce the applicant's offending against those complainants in the strongest possible terms...That type of conduct has no place in our society and requires a lengthy custodial sentence.'

Significance

This case demonstrates how judges can denounce offenders during their sentencing and how other purposes of sanctions, such as punishment, are also considered when sanctioning an offender.

Protection 3.1.13.5

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.

Many legal commentators state this purpose serves a 'utilitarian' benefit of criminal sanctions. Depriving one dangerous offender of their freedom to ensure the protection of wider society achieves the utilitarian principle of 'greatest amount of good for the greatest number of people'. Hence, a court aiming to reinforce protection would impose a period of imprisonment, as opposed to a community corrections order (CCO) where an offender can remain in society.

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.

HYPOTHETICAL SCENARIO

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

Protecting the people

Orla has been sentenced to life in prison without the possibility of parole after carrying out a mass shooting that led to the death of nine people and left many others injured. By removing Orla from society, citizens can be reassured that Orla is no longer posing a threat to the safety and wellbeing of the entire community.

Lesson summary

- Each sanction can achieve most, if not all, purposes of sanctions to a certain degree.
- When sentencing an offender, a court must consider which of these purposes it wishes to achieve.

Table 2 Summary of the purposes of sanctions

Purpose of sanction	Explanation
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.
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.

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
Deterrence **P**rotection **P**unishment
 – **Dr DPP**

3A Questions

Check your understanding

Question 1

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

sanction

remedy

A [] is a penalty imposed by the court on an offender when they are found guilty of a crime.

Question 2

Which of the following is **not** a purpose of a sanction?

- A. Rehabilitation
- B. Promote access to the justice system
- C. Deterrence
- D. Punishment

Question 3

Achieving the purpose of protection allows offenders who pose a significant risk to the welfare of society to remain within the community and close to their victim.

- A. True
- B. False

Question 4

Fill in the blanks with the following terms:

break

penalise

The purpose of rehabilitation is to sentence criminal offenders in a manner that aims to [] the cycle of criminal behaviour. On the other hand, the purpose of punishment is to adequately [] an offender and ensure they are held accountable for their crimes and their impact on the victims and society as a whole.

Question 5

Which of the following statements are **not** a reason for punishment? **(Select all that apply)**

- A. To reward the offender for their actions.
- B. To punish the victim for pursuing a case.
- C. To ensure retribution is sought on behalf of the victim and society as a whole.
- D. To adequately punish the offender for their offending.

Question 6

Which of the following statements refers to specific deterrence?

- A. The general public is discouraged from committing offences of the same or similar nature due to the possible sanction.
- B. The victims are encouraged to commit offences of the same or similar nature due to the possible sanction.
- C. The offender is discouraged from committing offences of the same or similar nature through the provision of a sanction.
- D. The offender is encouraged to commit offences of the same or similar nature through the provision of a sanction.

Question 7

Denunciation is the public condemnation and expression of the court's outrage towards the offender's criminal behaviour.

- A. True
- B. False

Question 8

All purposes of sanctions are achieved by any sanction the court imposes.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 9

(3 MARKS)

Distinguish between general and specific deterrence.

Question 10

(3 MARKS)

At the conclusion of a trial, the sentencing judge comments:

'Such heinous crimes are not encouraged nor tolerated by Victorian society and I intend to reflect my extreme disdain for your disgraceful conduct in the sentence I am to impose.'

With reference to the statement above, describe denunciation as a purpose of sanctions.

Question 11

(3 MARKS)

Ezra has previously been convicted multiple times for assault offences and drunken brawls. He has been charged and found guilty of another assault offence whilst under the influence of alcohol.

Explain why rehabilitation should be a consideration when imposing a sanction on Ezra.

Question 12

(4 MARKS)

'Punishment is only achieved if victims and their families can take matters into their own hands and seek revenge.'

Do you agree with this statement? Justify your answer.

Adapted from VCAA 2013 exam Q11

Question 13

(4 MARKS)

Melanie was found guilty of culpable driving causing death. During sentencing, the judge stated that the sanction imposed should address Melanie's serious mental health conditions, but also serve to protect the community as Melanie has previously been convicted of multiple dangerous driving offences.

Describe **two** purposes of sanctions that have been considered in Melanie's case.

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.

Gwyneth was convicted of multiple counts of drug trafficking and money laundering and has been sentenced to 18 years in prison. During the sentencing hearing, the judge reprimanded Gwyneth's illegal behaviour and recommended that Gwyneth undertake drug and alcohol rehabilitation programs in prison to address her substance abuse.

Question 14

Which of the following are purposes of Gwyneth's imprisonment sentence? **(Select all that apply)**

- A. Protection, as Gwyneth needs to be protected from her victims.
- B. Rehabilitation, through treatment programs available in prison where the root cause of her offending may be addressed.
- C. Denunciation, as the judge reprimanded her actions during the sentencing hearing.
- D. Punishment, as the judge is aiming to punish those who were wanting to purchase drugs from Gwyneth.
- E. Specific deterrence, as given the lengthy sentence, if Gwyneth is rehabilitated she is unlikely to commit a crime of a similar nature to avoid receiving the same, or a harsher, sanction.

Question 15

(6 MARKS)

Analyse the judge's sentencing of Gwyneth, with reference to the purposes of sanctions.

Linking to previous learning

Question 16

(2 MARKS)

Describe how plea negotiations can impact the punishment of an offender.

3B Types of sanctions

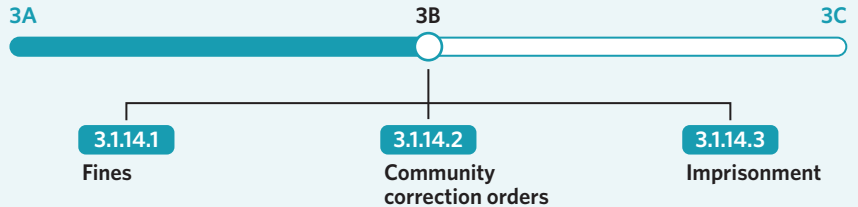


Image: Adam Gregor/Shutterstock.com

Schools have different punishments for students who disobey the rules, depending on the severity of their actions. For example, a student who forgets to do their homework might receive detention, whilst a student who is caught cheating on an exam could be suspended. Similarly, there are different types of sanctions that the court may impose, depending on the severity of the offender's actions.

STUDY DESIGN DOT POINT

- fines, community correction orders and imprisonment, and their specific purposes



LESSON LINK

You learnt about sanctions in
3A Purposes of sanctions.

Lesson introduction

There are many sanctions a court can impose on an offender, ranging from minor to severe. For example, minor sanctions may require an offender to pay a sum of money to the state, while severe sanctions may involve the offender being put in prison for a period of time. When determining an appropriate sanction for an offender, the courts consider the purpose of the sanction.

Fines 3.1.14.1

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. A fine can be imposed alone or in combination with another type of sanction. Judges have the ability to decide the appropriateness of imposing a fine and the amount the offender is required to pay. The maximum fine a court can impose depends on the offence and is normally established in the offence's relevant statute. Fines are expressed in **penalty units**, rather than dollar amounts.

KEY TERM

Fine a sanction that requires the 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.

LEGISLATION

Summary Offences Act 1966 (Vic)

DEEP DIVE

Penalty units

Penalty units are a measure of the amount payable for an offence. Fines are expressed in penalty units, as opposed to a monetary amount, as the rate of penalty units is indexed yearly to match inflation. Therefore, it is more efficient to express fines in penalty units and amend the value of a penalty unit rather than increasing fines by changing individual legislation. For example, section 23 of the *Summary Offences Act 1966 (Vic)* outlines the offence of common assault, which has a maximum penalty of 15 penalty units or three months imprisonment. From 1 July 2023 to 30 June 2024, one penalty unit in Victoria is \$192.31. Therefore, if the court imposes the maximum fine of 15 penalty units, an offender would be required to pay a total of \$2,884.65.

The size of the fine imposed is influenced by various factors, including the purposes the court wishes to achieve and any aggravating or mitigating factors. The court also considers the offender's ability to pay the fine. For example, a large fine imposed on a person with limited finances is likely to remain unpaid, meaning the imposition of the fine is an ineffective punishment. Alternatively, a small fine imposed on an offender with a high income and significant wealth may not be an effective punishment or deterrent as it has a limited impact on their life.

USEFUL TIP

An important skill in Area of Study 1 of Unit 3 VCE Legal Studies is to 'discuss the ability of sanctions to achieve their purposes'. 'Discuss' means weighing up the strengths and limitations of a sanction's ability to achieve the purposes of sanctions. Therefore, these tables showing the strengths and limitations of each sanction in relation to each purpose can assist you to develop a discussion on this topic.

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 payment of fines is usually required within a short time frame, therefore the consequence is enforced almost immediately. • The court can align the fine with the offender's ability to pay it, meaning the court can penalise offenders according to their personal or financial circumstances.	• Setting fines to reflect each offender's capacity to pay may be considered unequal, unfair, and unjust if offenders who commit the same offence are penalised differently. • 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 economic 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 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. • Offenders who do not have the financial means to pay a large fine will not be issued one by the courts. Therefore, the court's denunciation of the offence may be limited by this condition.
Rehabilitation	–	• Rehabilitation is not achieved by a fine. Any underlying causes of criminal offending, such as drug or alcohol addiction, will not be addressed by a fine.

Community correction orders 3.1.14.2

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 community correction orders that the offender must follow.

Additional conditions requirements specific to each offender that are attached to a community correction order and must be followed by an offender.

A court may impose a **community correction order (CCO)** on an offender, which requires them to serve their sanction while remaining in the community under certain conditions. A CCO may be imposed alone, alongside a fine, or with a period of imprisonment, where the CCO is completed after the offender's release if the court believes this is appropriate. A judge or magistrate may order a CCO if:

- 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.

However, CCOs cannot be imposed for very minor offences, such as speeding, or for very serious offences, such as murder and manslaughter. A judge or magistrate will also set a period for the offender to comply with the CCO. For a single offence, the maximum length of a CCO is two years, whilst for multiple offences, it can be up to five years.

A CCO will include **standard conditions** and at least one **additional condition** that the offender must follow. Breaching the conditions attached to a CCO is an offence carrying a maximum penalty of three months imprisonment. The possibility of imprisonment can act to deter the offender from breaching the conditions stated in the CCO.

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 correctional centre and regularly meet with their supervisor. • notify their supervisor if there is a change in address. • comply with any direction that the community correctional centre gives the offender.	The offender may be required to fulfil one or more additional conditions, such as: • completing 600 hours of community service work (up to 20 hours each week). • abiding by a curfew. • undertaking medical treatment or rehabilitation programs, including those for drug or alcohol addiction. • avoiding contact with a particular person, including an accomplice in the offender's offence. • staying away from a particular place, including city centres or particular suburbs. • staying home between particular hours or having a curfew. • not consume alcohol and/or attend licensed venues, including bars or nightclubs.

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 additional conditions that are attached to it. 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 very severe, such as a violent assault, a CCO may not punish an offender sufficiently, causing unjust outcomes for victims, their families, and the community. In such cases, imprisonment is a more appropriate sanction.
Deterrence	- Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans, and other aspects of a CCO, an offender may be discouraged from reoffending to avoid receiving similar sanction conditions. This may, therefore, achieve specific deterrence. - Given the inconvenience of community work and the restrictions imposed by curfews, alcohol bans, and other aspects of a CCO, members of the community may be discouraged from committing a similar offence to avoid similar sanction conditions. Thus, this can achieve general deterrence. - Specific deterrence can be achieved as judges have a lot of flexibility in setting a CCO's terms to discourage each offender. Breaching a CCO can result in the offender being imprisoned, discouraging the offender from breaching the terms of the CCO.	- A CCO is not as severe as imprisonment. Therefore, the wider community may not consider a CCO as a severe or harsh punishment. Consequently, community members may not be discouraged from criminal activity, limiting the achievement of general deterrence. - An offender may be relieved to receive a CCO instead of imprisonment, meaning they may not be deterred from committing similar offences in the future. Hence, this may limit the achievement of specific 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 imposition of curfews and alcohol bans, whilst preventing an offender from attending a licenced venue, can protect society from alcohol-driven violence.	The offender remains in the community and may not adhere to the conditions of the CCO. Therefore, community safety may not be promoted to the same extent as imprisonment as the offender's movements are not physically constrained.
Denunciation	–	Denunciation may not be achieved by a CCO as it is not as harsh 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. - Community work builds offenders' self-esteem and provides skills that may be useful in securing employment. For example, many offenders in the Victorian justice system are unemployed and/or homeless, therefore, meaningful work is an effective way to prevent criminal offending.	Though rehabilitation programs may be mandated by the conditions of the CCO, the rehabilitation of an offender is also dependent on their willingness to participate and commitment to the program. Therefore, if the offender is unwilling to engage with rehabilitative services and activities, the underlying causes of offending may not be addressed and they may continue to offend.

LEGAL CASE



Image: Aana_photo/Shutterstock.com

Figure 1 Browne received a term of imprisonment over the death of his son who died after being thrown from a two-seater buggy

CONTENT WARNING This case mentions content that is sensitive in nature, relating to the death of a child.

Director of Public Prosecutions (DPP) v Browne (2023) 103 MVR 226

Facts

On Christmas day, Christopher Browne's two-year-old son died after being thrown from a two-seater buggy, driven by Browne, following an attempt to do a 'burnout' in a rural paddock. Browne disregarded safety precautions by having his son sit on his lap without wearing a seatbelt, whilst he also overrode the mechanism that limits the maximum speed of the buggy when the seatbelt is not engaged. Browne's daughter was sitting in the passenger seat and suffered minor injuries. Browne pleaded guilty to two charges, including culpable driving causing death, and the judge sentenced him to a CCO of three years.

Legal issue

The prosecution appealed this decision on the grounds that the sentence was inadequate. The Court of Appeal was, therefore, required to determine whether a more severe sanction should be imposed based on the seriousness of the offence.

Decision

The Court of Appeal agreed with the prosecution's argument and set aside the CCO. Instead, Browne was sentenced to 15 months imprisonment with a non-parole period of six months.

Significance

Given the seriousness of the offence, the imposition of a CCO would not have adequately punished Browne for his actions that resulted in the death of his two-year-old son. The implementation of a term of imprisonment is significantly more likely to deter Browne from committing similar offences in the future, particularly in regard to his daughter.

KEY TERM

Imprisonment a sanction that removes an offender from the community and places them in a prison for a given period of time.

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.

Imprisonment 3.1.14.3

The most severe penalty that a court can impose is **imprisonment**, which involves removing the offender from society for a given period of time. 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. However, they will usually be supervised in some way, and are often subject to certain conditions. Whilst many prisoners apply for parole, some have their request rejected and therefore, serve their full sentence in prison.

DEEP DIVE

Penalty scale for imprisonment

The maximum term of imprisonment that a court can impose is dependent on the offence and is set out in the offence's relevant statute. The maximum term of imprisonment is established according to a penalty scale, which has nine levels of severity for imprisonment.

Table 4 Penalty scale for imprisonment

Level	Maximum prison term	Maximum fine	Example of offences
Level 1	Life imprisonment	n/a	- Murder - Trafficking a drug of dependence (large commercial quantity)
Level 2	25 years	3,000 penalty units	- Manslaughter - Rape
Level 3	20 years	2,400 penalty units	- Culpable driving causing death - Intentionally causing serious injury

Continues →

DEEP DIVE

Penalty scale for imprisonment - Continued

Table 4 Continued

Level	Maximum prison term	Maximum fine	Example of offences
Level 4	15 years	1,800 penalty units	- Arson - Recklessly causing serious injury
Level 5	10 years	1,200 penalty units	- Theft - Threats to kill
Level 6	Five years	600 penalty units	- Recklessly causing injury - Possession of a drug of dependence (for the purpose of trafficking)
Level 7	Two years	240 penalty units	Unauthorised access to or modification of restricted data
Level 8	One year	120 penalty units	Possession of a drug of dependence (not for the purpose of trafficking)
Level 9	Six months	60 penalty units	Concealing the birth of a child

Adapted from 'Maximum Penalties' (Sentencing Advisory Council, 2023)

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.

HYPOTHETICAL SCENARIO

CONTENT WARNING This section mentions content that is sensitive in nature, relating to violence.

How should Gabi serve her two sentences?

Gabi has been found guilty of assault and stalking in the County Court. The judge sentenced Gabi to two years imprisonment for assault and 14 months imprisonment for stalking. Therefore, the judge could either order that:

- Gabi serves the two sentences concurrently, meaning she will be in prison for a total of two years. This is because the two sentences of assault and stalking will be served at the same time.
- Gabi serves her two sentences cumulatively, meaning she will be in prison for a total of three years and two months. This is because the two sentences of assault and stalking will be served one after the other.

LEGAL VOCABULARY

Concurrent sentence a sentence of imprisonment or detention that is served at the same time as another when an offender is 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.

Table 5 The ability of imprisonment to achieve the purposes of sanctions

Purpose	Strengths	Limitations
Punishment	- The offender is placed in a harsh environment where their movement and liberty is restricted. - The offender loses most contact with family and friends. - The offender will usually lose their employment and therefore, any income whilst in prison.	–
Deterrence	- The harsh punishment of prison is likely to discourage offenders from reoffending out of fear of receiving a similar sentence. Hence, this can achieve specific deterrence. - The harsh punishment of prison 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.	Prison is not an effective deterrent for many offenders. In Victoria, the rate of recidivism is high, with approximately 43.3% of offenders reoffending within 2 years (Sentencing Advisory Council, 2023). Some crimes, where imprisonment is a possible sanction, do not ultimately result in a prison sentence due to factors that decrease the severity of an offence, including mitigating factors such as being under the influence of drugs or alcohol. Therefore, offenders may not be discouraged by a possible prison term.
Protection	The offender is removed from society and therefore, does not pose a significant risk to the welfare of the community or their victims.	Long term community protection may not be achieved if an offender reoffends upon release. There are various reasons for reoffending, including that they were not specifically deterred from reoffending by their prison sentence, or due to underlying reasons for offending were not addressed, such as mental health issues, or drug or alcohol addiction.
Rehabilitation	Prisons provide some rehabilitation programs to address issues, such as alcohol and drug dependency, that cause offenders to commit crimes.	- The need amongst prisoners for services to treat drug and alcohol addiction far exceeds those provided, as there are often very long waiting lists for access to such programs. Many prisoners leave prison without their alcohol or drug-related issues being addressed. - If an offender has mental health issues that contributed to their offending, putting them in a harsh environment away from family, friends, and meaningful work, surrounded by other criminals, can often make such issues worse. - Though rehabilitation programs are available in prison, the rehabilitation of an offender is also dependent on their willingness to participate and commitment to the program. Therefore, if the offender is unwilling to engage with rehabilitative services and activities, the underlying causes of offending may not be addressed and they may continue to offend.

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 summary

The courts must determine which type of sanction is most appropriate to impose on an offender before them. When doing so, the courts will consider the purposes that they want the sanction to achieve, and select the most suitable sanction that upholds these specific purposes in relation to the offender and the crime committed.

Table 6 The specific purposes of fines, community correction orders, and imprisonment

	Punishment	Deterrence	Protection	Denunciation	Rehabilitation
Fines					
Community correction orders					
Imprisonment					

3B Questions

Check your understanding

Question 1

Before imposing a sanction on an offender, the courts consider whether the sanction will achieve its purposes.

- A. True
- B. False

Question 2

A community correction order is suitable when:

- A. the offence is punishable by less than five penalty units.
- B. the offender has agreed to fulfil the requirements.
- C. the offence is murder.

Question 3

Fill in the blanks with the following terms:

a CCO

imprisonment

If the court imposes , the offender will be held in custody for a given period of time. Alternatively, if the court imposes , the offender can remain in the community.

Question 4

If a prisoner is released on parole, they will usually be supervised in some way, and are often subject to certain conditions.

- A. True
- B. False

Question 5

If a court imposes a term of imprisonment:

- A. it can also impose another type of sanction, such as a fine.
- B. it cannot impose another type of sanction as the court can only impose one sanction at a time.

Question 6

Which of the following statements are correct about the appropriateness of the courts imposing a fine?

(Select all that apply)

- A. A court should impose a large fine on a person with no income or wealth as this will punish them severely.
- B. Each court should analyse the income and wealth of the offender to determine the size of the fine that should be imposed for effective punishment.
- C. A court should impose a small fine on a person with a high income and significant wealth as this will punish them sufficiently.
- D. A court should impose a large fine on a person with a high income and significant wealth as this will impact their day-to-day life and effectively punish them.

Question 7

Which of the following statements are correct about the ability of types of sanctions to achieve their purposes?

(Select all that apply)

- A. Imprisonment will result in the offender losing most contact with family and friends, ensuring they are punished for their actions.
- B. The economic loss caused by a fine can discourage an offender from reoffending, achieving specific deterrence.
- C. Given the inconvenience of community work and other aspects of a CCO, society may be discouraged from committing similar offences to avoid receiving similar sanction conditions. Therefore, achieving general deterrence.
- D. A small fine being imposed on a wealthy offender will communicate the court's disapproval and condemnation of the offender's behaviour, achieving the purpose of denunciation.
- E. Imprisonment may require the offender to complete community service, which builds self-esteem and provides skills that may be useful in securing employment, therefore assisting with rehabilitating the offender.
- F. As imprisonment removes the offender from society, they do not pose a significant risk to the welfare of society or their victims, achieving the purpose of protection.

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

(2 MARKS)

Describe **one** sanction that may be imposed on an offender.

Adapted from VCAA 2017 exam Q1a

Question 9

(2 MARKS)

Wayne pleaded guilty to two charges in the County Court of Victoria. He is currently serving his sentence in the community, as he is required to complete 200 hours of community service and undertake medical treatment for his drug addiction.

Outline the type of sanction that has been imposed on Wayne.

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 purposes of fines? **(Select all that apply)**

- A. Fines may not achieve punishment if the legislated maximum penalty is not high enough to punish wealthy offenders.
- B. Fines may achieve rehabilitation because the money acquired by the state can be used to assist the offender.
- C. Fines do not achieve protection as an offender is not removed from the community, nor is their behaviour restricted or controlled.
- D. If a court imposes a large fine, this will not deter the offender or community from committing an offence, as the offender has been 'let off'.
- E. Fines may achieve denunciation if a court imposes a large fine, as this can communicate the court's disapproval and condemnation of the offender's behaviour.

Question 11

(5 MARKS)

To what extent do fines achieve **two** purposes of sanctions? Justify your response.

Adapted from VCAA 2020 exam Section A Q4

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

Use the following information to answer questions 12 and 13

Elias has been charged with culpable driving causing death, which carries a maximum of 20 years imprisonment. He has pleaded not guilty in the Supreme Court of Victoria. The prosecution alleges that Elias was under the influence of alcohol and was driving 60 km above the speed limit, causing him to crash into another car, killing the driver.

Question 12

Which of the following statements are limitations of imprisonment to both deter Elias and protect the community? **(Select all that apply)**

- A. The rate of recidivism is high, as approximately 43.6% of those released from Victorian prisons reoffend within 2 years. This suggests prison is not an effective specific deterrent for many offenders, such as Elias.
- B. Community protection in the long term may be limited as many prisoners, like Elias, who are released will reoffend.
- C. The community will be protected from Elias as he will be removed from society and therefore, does not pose a significant risk to the welfare of the public or his victims.
- D. Elias will likely be deterred from reoffending out of fear he will receive a similar sentence, particularly as the offence of culpable driving causing death carries a maximum of 20 years imprisonment.

Question 13

(6 MARKS)

Discuss the ability of imprisonment to both deter Elias and protect the community if Elias is found guilty and sentenced to a term in prison.

Adapted from VCAA 2018 exam Section B Q1d

Linking to previous learning**Question 14**

(8 MARKS)

Toby was charged with manslaughter. He was found guilty and sentenced in the Supreme Court of Victoria.

- a. Outline **one** reason why there is a court hierarchy in Victoria with reference to Toby's case.

2 MARKS

Adapted from VCAA 2016 exam Q1b

- b. Describe **one** sanction that may have been imposed on Toby.

2 MARKS

Adapted from VCAA 2017 exam Q1a

- c. To what extent does the sanction identified in **part b.** achieve the purpose of rehabilitation? Justify your response.

4 MARKS

3C Factors considered in sentencing

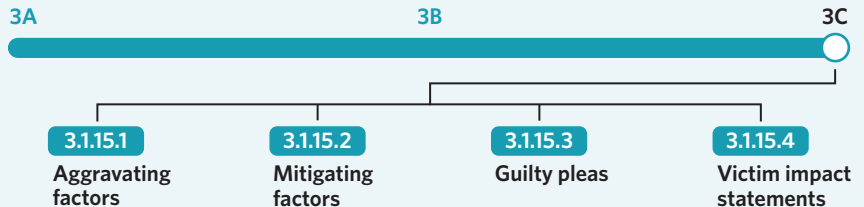


Image: MR.Yanukit/Shutterstock.com

If you had an argument with a friend, would you be more likely to forgive them if they apologised straight away? If your friend has argued with you on a number of occasions in the past, would this impact your decision to forgive them? In the same way, some factors influence your decision to forgive a friend, judges consider various factors when determining an appropriate sentence for an offender.

STUDY DESIGN DOT POINT

- factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements



LEGISLATION

Sentencing Act 1991 (Vic)

Lesson introduction

When sentencing an offender, the courts consider a wide range of factors, listed in the *Sentencing Act 1991 (Vic)*, to assist in determining an appropriate sanction for the offender. These factors may affect the seriousness of the offence, and consequently increase or decrease the severity of the sentence for the offender. The court may consider factors relating to the conduct of the offender, as well as the impact of the offence on victims and their families. Therefore, these factors ensure the offender receives a just penalty that adequately reflects their conduct, and achieves justice for all those involved.

Aggravating factors 3.1.15.1

Aggravating factors increase the seriousness of the offence and consequently, can increase the sentence a court imposes on an offender. Aggravating factors increase the **culpability** of the accused, and therefore, the degree to which they are at fault. Hence, the presence of aggravating factors can push a court toward imposing a more severe sanction. For example, the existence of aggravating factors may result in the imposition of a community correction order (CCO) rather than a fine, or a longer period of imprisonment instead of a shorter prison term.

Examples of aggravating factors include:

- the crime was planned or **premeditated**.
- a weapon was used in the course of committing a crime.
- the crime was motivated by prejudice toward or hatred of a particular group, such as a religious or ethnic group.
- the crime was committed by a group of offenders upon an 'outnumbered' victim.
- the victim of the offence is a particularly vulnerable person, such as an elderly person, a person with a disability, or a child.
- the offence took place in front of children.
- the offender has prior convictions for similar offences.

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 CCOs, fines, and imprisonment in **3B Types of sanctions**.

LEGAL CASE

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

Bava v R [2021] VSCA 34**Facts**

On 4 June 2015 at 5 am, Mr Brown was lying on the couch in his living room when three men kicked the back door, yelling 'Police! Police! Get on the ground'. The offenders taped Brown's legs, hands, and eyes whilst they proceeded to ransack his house, stealing items, such as a shotgun, television, and cash. Mr Barlow, who was also asleep in the house at the time, awoke to the various noises as a result of the robbery. When he investigated the house, he was struck on the head with a metal pole by one of the offenders. Bava was arrested in 2015, charged and found guilty of aggravated burglary, and sentenced to six years imprisonment with a non-parole period of four years. However, Bava launched an application for leave to appeal against the sentence imposed on the basis that the sentence was too severe.

Legal issue

The Supreme Court – Court of Appeal was required to determine whether there was a basis for Bava's application for leave to appeal against the severity of the sentence.

Decision

The application was rejected as the court stated that the sentence imposed was appropriate given the aggravating factors prevalent in the case.

Significance

The court specified a number of aggravating factors that appropriately increased the severity of the sentence imposed on Bava, including:

- the offender pretended to be a police officer undertaking a police raid.
- the offence occurred early in the morning when the victim was asleep.
- the offence involved some planning.

USEFUL TIP

When you aggravate someone, you are making them more irritable or annoyed and are therefore worsening their mood. In a similar way, aggravating factors worsen the circumstances of a person's crime and, consequently, increase their sentence.

Mitigating factors 3.1.15.2

Mitigating factors decrease the seriousness of an offence and consequently, can decrease the sentence a court imposes on an offender. Mitigating factors decrease the culpability of the accused, and therefore, the degree to which they are at fault. Hence, the presence of mitigating factors can push a court toward imposing a less severe sanction. For example, the existence of mitigating factors may result in the imposition of a fine rather than a CCO, or a shorter period of imprisonment instead of a longer prison term. Mitigating factors include:

- genuine remorse.
- the crime is the result of **provocation**, rather than premeditation.
- the age of the offender, as a particularly young offender may be regarded more capable of rehabilitation and therefore, can receive greater leniency.
- an offender having a particularly traumatic personal history, such as growing up surrounded by family violence, drug addiction, and/or alcoholism.
- a limited or no prior criminal history.
- an offender cooperating with police during their investigation of the offence.
- favourable prospects of rehabilitation, such as a person convicted of theft or robbery, who was offending to finance a drug addiction, commencing a rehabilitation program before being sentenced.

The courts have long established that a lack of remorse will not be considered an aggravating factor. However, if the offender shows genuine remorse, this is a mitigating factor that is considered by the courts when determining an appropriate sentence.

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.

Aggravating factors:

- increase the gravity of the offence and the offender's culpability.
- can cause the imposition of a harsher sentence.

**Mitigating factors:**

- decrease the gravity of the offence and the offender's culpability.
- can cause the imposition of a less severe sentence.

Figure 1 Judges will weigh up the impact of both mitigating factors and aggravating factors when imposing a sentence

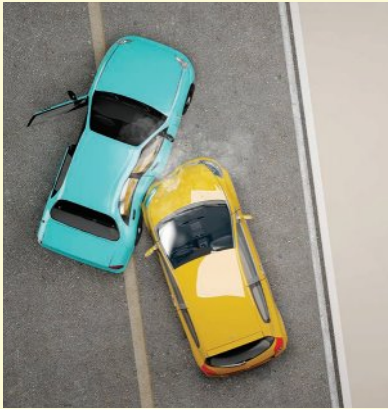
LEGAL CASE

Image: ninoon/Shutterstock.com

Figure 2 The Court of Appeal considered mitigating factors and reduced the severity of the sentence imposed on the offender

CONTENT WARNING This section mentions content that is sensitive in nature, relating to death.

Laz v The Queen* [2022] VSCA 160*Facts**

A 21-year-old female learner driver was driving up to 140 km/h in a 70 km/h zone in a stolen car. She was driving erratically and irresponsibly, speeding through red lights, swerving onto tram tracks, and using her mobile phone while driving. As a result, she collided with a scooter, killing one person and seriously injuring another. She did not stop to assist the victims and instead, drove off before being caught and arrested by police. She was charged with various offences, including theft and culpable driving causing death. Initially, she was sentenced to a jail term of 11 years and six months, however, she appealed to the Supreme Court of Appeal on the basis that this sentence was too severe.

Legal issue

In sentencing, the Court of Appeal had to determine whether the initial sentence imposed on the offender was too severe by analysing the relevant aggravating and mitigating factors.

Decision

The Court of Appeal accepted that the sentence imposed was too severe due to a number of mitigating factors that rendered the offending less serious, including:

- the offender had a disadvantaged background with a traumatic upbringing.
- the early guilty plea of the offender.
- the limited criminal history of the offender.
- the offender demonstrated prospects of rehabilitation.

Significance

As a result of these mitigating factors, the court reduced the term of imprisonment to 10 years and six months.

KEY TERM

Guilty plea a full admission of guilt by an accused person of an offence for which they have been charged.

Guilty pleas 3.1.15.3

A **guilty plea** occurs when an accused person admits they have committed an offence for which they have been charged. An accused person charged with multiple offences may choose to plead guilty to some or all charges. When an accused person pleads guilty, a trial will not be conducted. The prosecution does not need to present evidence to persuade the court the accused is guilty, instead, the court will proceed to sentence the offender. The courts regard a guilty plea as a mitigating factor, reducing the severity of the sanction imposed.

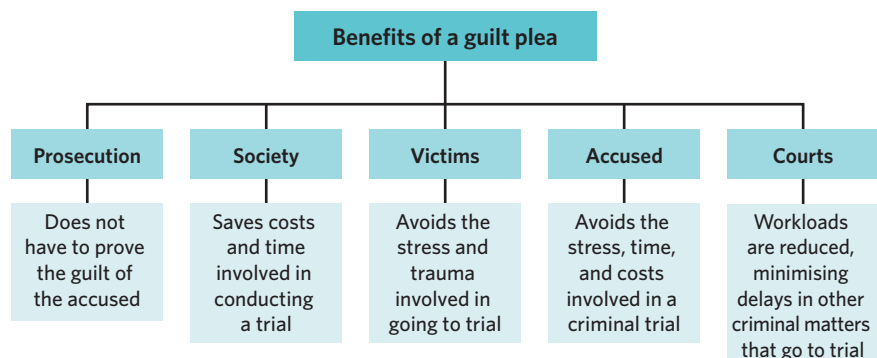


Figure 3 The benefits of a guilty plea

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

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

LEGAL VOCABULARY

Sentencing discount a reduction in an offender's sentence that they receive for pleading guilty to an offence.

LEGISLATION

Crimes Act 1958 (Vic)

HYPOTHETICAL SCENARIO

CONTENT WARNING This section mentions content that is sensitive in nature, relating to death.

An inflammatory response to enact revenge

After an argument with his girlfriend Sarah, Samarth decided to set her house on fire as revenge. At a time Sarah would normally be at work, Samarth snuck into her house using the key she had given him and covered it in gasoline. He then lit a match and threw it into the house, which was instantly covered in flames. His crime was later televised on the news and Samarth discovered that Sarah had been sleeping inside the house when he ignited the fire and had been killed. Samarth instantly regretted his actions and turned himself into the police.

Samarth was charged with arson causing death, which is punishable by a maximum of 25 years imprisonment pursuant to the *Crimes Act 1958 (Vic)*. He pleaded guilty at the first available opportunity and showed genuine remorse to the court by stating he deeply regretted his actions. When determining an appropriate sentence for Samarth, the court took into consideration mitigating factors, including his early guilty plea and his remorse. However, the court also considered aggravating factors, including the crime being premeditated.



Figure 4 The court considered Samarth's early guilty plea and remorse during sentencing

Victim impact statements 3.1.15.4

A **victim impact statement (VIS)** is a written or verbal statement that details the impact that an offence had upon the victim. A VIS may include physical, emotional, and/or financial loss caused by an offence, and can incorporate photographs to demonstrate this loss. A VIS may be given by those directly impacted by an offence, such as the person hit during an assault, as well as other individuals who are not directly impacted by the offence, including the victim's family members.

The purpose of a VIS is to inform the court of the severity of the offence. If a VIS indicates the crime had a significant impact on the victim, the court would likely increase the severity of the sanction imposed. Alternatively, if a VIS indicates the victim forgives the offender, this may result in a less severe sanction being imposed.

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

KEY TERM

Victim impact statement (VIS)

a written or verbal statement made to a court about the effect of an offence upon the victim.

LEGAL CASE

CONTENT WARNING This section discusses content that is sensitive in nature, relating to physical assault.

Packard (A Pseudonym) v R* [2021] VSCA 56*Facts**

On 17 January 2020, the accused had a heated argument with his wife which led to a domestic fight that resulted in the accused stabbing his wife five times. At the time of the offence, the accused's children were in the house and heard their mother screaming. The accused pleaded guilty to one charge of intentionally causing serious injury in the County Court of Victoria. He was sentenced to a term of imprisonment of seven years, with a non-parole period of four years and six months. However, the accused launched an application for leave to appeal against the sentence on the basis that the sentence was too severe.

Legal issue

The court was required to determine whether there was a basis for the accused's application for leave to appeal against the severity of the sentence. In particular, the accused argued the court failed to take into account his wife's victim impact statement (VIS) in which she expressed her forgiveness to her husband. In her VIS, she stated that the accused had never been violent before and that her injuries, both physical and emotional, had healed over time. As a result, she asked the court to 'give the greatest possible mercy and compassion' to her husband.

Decision

The application was rejected as the court stated that the sentence imposed was appropriate given the aggravating factors prevalent in the case. The court noted that the trial judge had considered the VIS in determining an appropriate sentence to impose on the accused.

Significance

As a result of the application for leave to appeal being rejected, the accused's sentence remained.

Lesson summary

Overall, during sentencing, the court will weigh any aggravating factors against mitigating factors to determine an appropriate sanction for the offender.

- Aggravating factors render the offender's actions more serious and increase the severity of the sentence. For example, a victim impact statement (VIS) that indicates the crime had a very significant impact on the victim will be considered an aggravating factor.
- Mitigating factors render the offender's actions less serious and decrease the severity of the sentence. For example, a guilty plea is considered a mitigating factor as this is a full admission of guilt.

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

Amarzing **M**others **G**row **V**egetables

Arnold **M**akes **G**reen **V**ehicles

3C Questions

Check your understanding

Question 1

When deciding on an appropriate sentence, the court will consider factors that render the offending more or less serious, which may increase or decrease the severity of the sentence.

- A. True
- B. False

Question 2

Which of the following are examples of aggravating factors? **(Select all that apply)**

- A. The offender grew up surrounded by family violence and drug addiction.
- B. The crime was premeditated.
- C. A weapon was used in the course of committing a crime.
- D. The victim of the offence was a young child.
- E. The offender did not show any remorse.

Question 3

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

an aggravating

a mitigating

If the offender committed a crime that was motivated by prejudice toward, or hatred of a particular group, such as a religious or ethnic group, this will be [] factor considered by the courts in sentencing.

Question 4

A victim impact statement (VIS) can be an aggravating factor or mitigating factor that the courts consider during sentencing.

- A. True
- B. False

Question 5

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

victim impact statement

guilty plea

A [] may result in the court imposing a less severe sanction by applying a sentencing discount.

Question 6

Remorse is considered a mitigating factor, whilst a lack of remorse is considered an aggravating factor.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Stavros has been charged with an indictable offence. He has pleaded not guilty despite the incriminating evidence against him. Stavros' lawyer is encouraging him to plead guilty.

Describe **one** impact that a guilty plea may have on Stavros' criminal case.

Adapted from VCAA 2019 exam Section A Q1b

Question 8

(4 MARKS)

Distinguish between mitigating factors and aggravating factors, and provide an example of each.

Adapted from VCAA 2018 exam Section B Q1b

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.

Zuri was arrested after shouting racial slurs and threatening to injure children and families with a knife in a crowded park. At the time of the offence, Zuri was under the influence of illicit substances. Zuri pleaded guilty at the first available opportunity and stated that she regretted her actions and is willing to accept the consequences.

Question 9

Which of the following statements are correct about factors that the court may consider in sentencing Zuri?

(Select all that apply)

- A. The court may consider aggravating factors, such as the fact that Zuri committed the offence in a crowded park filled with young kids and families.
- B. The court may consider mitigating factors, such as the fact that Zuri used a knife to threaten to injure people at the park, instead of a more severe weapon.
- C. The court may consider Zuri's guilty plea as she pleaded guilty at the first available opportunity.
- D. The court may consider mitigating factors, such as Zuri demonstrating remorse by stating she regrets her actions and is willing to accept the consequences.

Question 10

(6 MARKS)

Analyse the factors the court would have to consider before sentencing Zuri.

Linking to previous learning

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

Use the following information to answer Questions 11 and 12.

Whilst driving drunk, Nathan veered onto the wrong side of the road and collided head-on with Bec, who consequently suffered severe head injuries. Nathan was eventually arrested after being on the run for three days and was charged with three offences, including dangerous driving causing serious injury. He pleaded not guilty to each offence and has no prior convictions. Bec is worried about presenting evidence at trial. Nathan's lawyer is advising Nathan to enter into plea negotiations with the prosecution.

Question 11

Tick the box to indicate whether the following statements demonstrate that plea negotiations are **appropriate** or **not appropriate** in relation to Nathan.

Statement	Appropriate	Not appropriate
I. Nathan may not be prepared to plead guilty to the charges against him, particularly as he has already pleaded not guilty to each of the three offences he has been charged with.	☐	☐
II. Plea negotiations can secure a guilty verdict for the prosecution, particularly as Bec is worried about presenting evidence at trial.	☐	☐
III. Plea negotiations can allow both Nathan and the prosecution to avoid the costs and time associated with a criminal trial.	☐	☐
IV. Nathan may end up pleading guilty to a lesser charge, or fewer charges altogether.	☐	☐

Question 12

(10 MARKS)

- a. If the case proceeds to trial, describe **one** impact that aggravating factors may have, and **one** impact that mitigating factors may have on Nathan's criminal case.

4 MARKS

Adapted from VCAA 2019 exam Section A Q1b

- b. Discuss the appropriateness of plea negotiations in Nathan's case.

6 MARKS

Adapted from VCAA 2018 exam Section B Q1c

UNIT 3 AOS 2

The Victorian civil justice system

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

In this area of study, students consider the factors relevant to commencing a civil claim, examine the institutions and methods used to resolve a civil dispute and explore the purposes and types of remedies. Students consider the impact of time and costs on the ability of the civil justice

system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the civil justice system to actual and/or hypothetical scenarios.

Outcome 2

On completion of this unit the student should be able to explain the key principles in the civil justice system, discuss the ability of remedies to achieve their purposes and evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute.

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KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- compare the roles of key personnel in a criminal and civil case
- analyse factors to consider when initiating a civil claim
- justify the reasons for the Victorian court hierarchy in determining civil disputes
- discuss the appropriateness of class actions, methods and institutions used to resolve a civil dispute
- discuss the impact of costs and time on the achievement of the principles of justice
- discuss the ability of remedies to achieve their purposes
- evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute
- synthesise and apply legal principles and information to actual and/or hypothetical scenarios.

4

CHAPTER 4

Key concepts of the Victorian civil justice system

LESSONS

- 4A** Key principles of the Victorian civil justice system
- 4B** Initiating a civil claim

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KEY KNOWLEDGE

- key principles in the Victorian civil justice system, including the burden of proof and the standard of proof
- factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues.

4A Key principles of the Victorian civil justice system



Image: DCornelius/Shutterstock.com

It is another day in the Wild West. Employers are leaving employees unpaid without any consequences, cancel culture is running rampant on social media, and landlords are able to avoid any responsibility for the rat infestations in their rental properties...

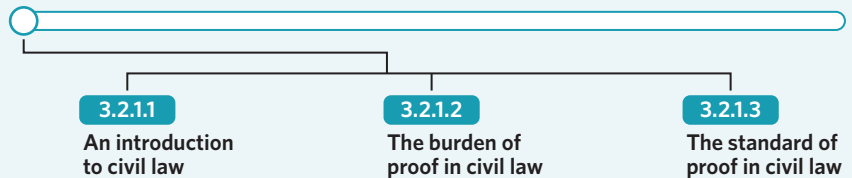
Imagine if this was actually how society operated! Fortunately, the civil justice system exists to promote social cohesion and uphold the rights of individuals when they have been breached by another party.

STUDY DESIGN DOT POINT

- key principles in the Victorian civil justice system, including the burden of proof and the standard of proof

4A

4B



Lesson introduction

The Victorian civil justice system ensures the rights of individuals, groups, and organisations are protected and aims to provide opportunities for a wronged party to have their rights restored when a breach in civil law occurs. When disputes arise between two or more parties, the civil justice system provides the mechanisms, processes, and institutions that can assist parties in resolving their grievances and restore the wronged party to their original position prior to their loss.

An introduction to civil law 3.2.1.1

The Victorian civil justice system plays an important role in enforcing **civil law** by ensuring the rights and responsibilities of individuals, entities, and organisations are upheld and protected. Unlike criminal law, which involves the state or Commonwealth prosecuting offenders in court, civil law deals with disputes between individuals, corporations, or government bodies where there has been an alleged infringement of rights.

Additionally, civil disputes may be resolved outside of a courtroom through alternate dispute resolution institutions, such as Consumer Affairs Victoria (CAV). There are also different methods of resolving a dispute, such as mediation, that encourage parties to settle their dispute outside of the courts. Furthermore, there are many different types of claims that the civil justice system deals with, therefore ensuring different rights are protected under civil law.

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.

LESSON LINKS

You will learn more about Consumer Affairs Victoria in **5H Consumer Affairs Victoria (CAV)**.

You will learn more about mediation and other dispute resolution methods in **5B Methods of resolving civil disputes**.

You will learn more about remedies in **Chapter 6 – Remedies**.

USEFUL TIP

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 is the person 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 on the plaintiff or has caused them to suffer some kind of loss.

Table 1 Types of civil claims

Type of civil claim	Explanation	Example
Negligence	Occurs when the defendant owes a duty of care to the plaintiff and breaches this duty.	An employee was physically injured for incorrectly operating hazardous equipment and is seeking compensation from their employer for failing to provide adequate training on how to operate the equipment.
Defamation	Occurs when the defendant communicates false statements to a third party about the plaintiff, which damages the plaintiff's reputation.	A celebrity had an article full of lies about their new relationship published on social media and is seeking compensation for damage to their reputation.
Breach of contract	Occurs when the defendant fails to perform their obligations arising from the terms of a contract.	A person entered into a contract with a builder to do renovations on their home. The builder failed to complete the renovations to a satisfactory standard and the person is seeking compensation.
Family law	Deals with matters relating to parents, children, and other family members. It also relates to property disputes arising from a breakdown in marital or de-facto relationships, such as those regarding the division of assets.	A couple has divorced and the wife wants sole custody of their three children.
Trespass to land	Occurs when the defendant unlawfully interferes with the land the plaintiff possesses.	A farmer is seeking compensation against a group of teenagers who entered her land without permission.
Private nuisance	Occurs when the defendant unlawfully interferes with the plaintiff's use or enjoyment of land.	An individual is seeking compensation against a next-door neighbour for playing loud music 24 hours a day.

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.

LESSON LINK

You will learn more about the courts in **5J Resolving civil disputes in the courts.**

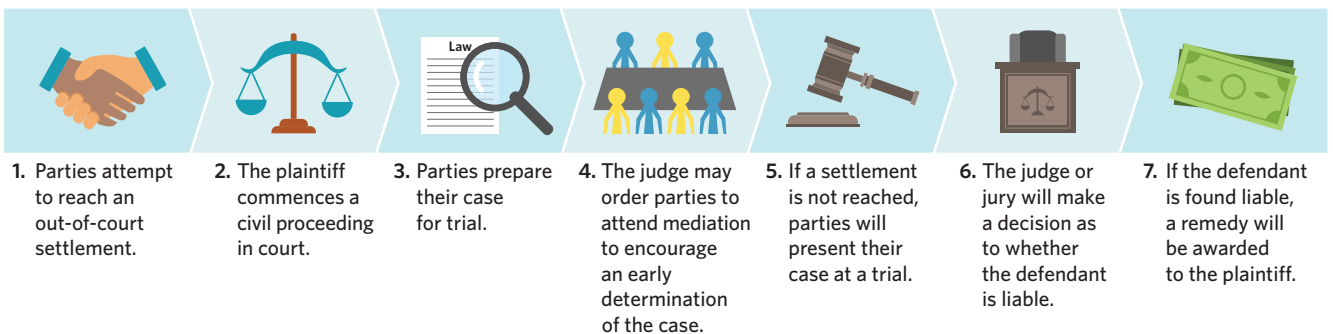


Figure 1 Common stages of a civil proceeding

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.

The burden of proof in civil law 3.2.1.2

The **burden of proof** refers to the responsibility for proving the facts of the case, which lies with the party who initiates the claim. Therefore, in a civil dispute, the burden of proof rests with the plaintiff. This means the plaintiff must prove the defendant was liable for the claim against them. However, the burden of proof in civil claims can shift from the plaintiff to the defendant if the defendant files a **counterclaim**. In this case, as the defendant is initiating a separate claim against the plaintiff, they are responsible for proving this claim.

HYPOTHETICAL SCENARIO



Morgan Price

The reporters at Martini Magazine are a bunch of idiots with no media qualifications whatsoever!

5:32 pm • 1 Sept 2022

385 Likes



Figure 2 Martini Magazine is counter-suing Morgan Price for defamation after his tweet

The defamation duel

Morgan Price is a famous actor in Hollywood. Martini Magazine, a popular gossip tabloid, published a series of articles stating Price lied about his age and background to land high-paying Hollywood roles. After reading the articles, Price wanted to sue Martini Magazine and tweeted 'The reporters at Martini Magazine are a bunch of idiots with no media qualifications whatsoever!'. He initiated proceedings in the County Court, claiming lost wages and damage to his reputation, amounting to approximately \$4 million. As Price is the plaintiff, he has the burden of proof and he must prove he has been defamed and suffered harm from the articles published by Martini Magazine.

However, Martini Magazine is counter-suing Price for defamation, claiming he has published untrue statements about the level of education its reporters have on Twitter. Martini Magazine has the responsibility of proving it has been defamed and suffered harm from Price's comments.

KEY TERMS

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

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.

The standard of proof in civil law 3.2.1.3

The **standard of proof** refers to the strength of the evidence or the degree to which the facts of the case must be proven. In a civil matter, the standard of proof is on the **balance of probabilities**, which requires the plaintiff to prove their claim is more likely to be true and it is more probable that the defendant is liable.

The civil standard of proof, on the balance of probabilities, is a lower threshold of proof than in the criminal justice system, which is beyond reasonable doubt. This is because the consequences of breaching civil law are generally not as severe as a breach of criminal law. In civil law, the defendant may be required to pay damages to the plaintiff, whilst in criminal law, the accused may be sentenced to a term of imprisonment. As the consequences of being found guilty are often more severe than being held liable, a higher standard of proof must be met in criminal cases.

LEGAL CASE

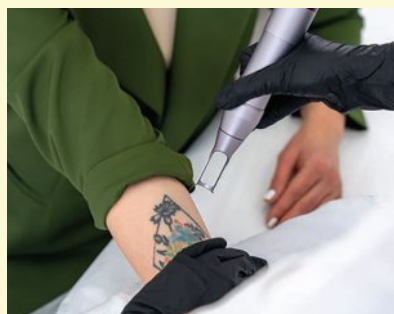


Image: mariakray/Shutterstock.com

Figure 3 Daemolzeckr successfully sued CDC Clinics for negligently removing her tattoo

CDC Clinics Pty Ltd v Daemolzeckr [2022] VSCA 54

Facts

Daemolzeckr went to CDC Clinics to have her tattoo removed via laser treatment. Following the procedure, she developed scarring where the tattoo was removed and she alleged this was caused by the clinic's negligence. The Victorian County Court found the scarring had been caused by the negligence of CDC Clinics. The court ordered the clinic to pay \$90,000 in damages to Daemolzeckr, therefore ensuring it was held accountable for its negligent actions. The clinic applied for leave to appeal against this decision.

Legal issue

The Supreme Court – Court of Appeal was required to determine whether the County Court had made an error in finding that the scarring was caused by the burns sustained during the laser treatment.

Continues →

LEGAL CASE***CDC Clinics Pty Ltd v Daemolzeke* [2022] VSCA 54 – Continued****Decision**

The Supreme Court – Court of Appeal dismissed the application, finding that the clinic was unable to demonstrate that any error had been made by the County Court in the determination of liability.

Significance

As it was found that the scarring was caused by CDC Clinic's laser treatment, this ensured the clinic was held accountable for its negligent actions.

Lesson summary

- The civil justice system enables individuals, entities, or organisations that believe their rights have been infringed to seek a remedy and restore their position.
- The burden of proof lies with the plaintiff, meaning it is their responsibility to prove the facts of the case as they initiated the claim against the defendant.
- The standard of proof is on the balance of probabilities, which requires the plaintiff to establish that their version of the facts is more likely to be correct, and that the defendant is most likely liable.

LESSON LINK

You learnt about the burden and standard of proof in **1A Key principles of the criminal justice system**.

4A Questions

Check your understanding

Question 1

The civil justice system resolves disputes between individuals, corporations, or government bodies when an infringement of rights has occurred.

- A. True
- B. False

Question 2

Which of the following are types of civil claims?

(Select all that apply)

- A. Defamation
- B. Negligence
- C. Kidnapping
- D. Family law
- E. Murder

Question 3

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

plaintiff

defendant

The [] has the burden of proof in civil cases, meaning they are responsible for proving the facts of the case.

Question 4

If a counterclaim is filed by the defendant, the plaintiff still has the burden of proof.

- A. True
- B. False

Question 5

The standard of proof in civil cases is:

- A. beyond reasonable doubt.
- B. on the balance of doubt.
- C. on the balance of probabilities.

Question 6

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

The standard of proof in civil cases is a [] threshold in comparison to the standard of proof in criminal cases.

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Describe the standard of proof in civil disputes.

Question 8

(2 MARKS)

Beatrice was an employee of Blubes, a local blueberry farm. She commenced a civil proceeding in the Magistrate's Court against Blubes for a breach of contract.

Identify who has the burden of proof and what the standard of proof is in Beatrice's case.

Adapted from VCAA 2018 exam Section A Q5a

Question 9

(4 MARKS)

Abigail, a famous soccer player, wants to initiate a defamation claim against the newspaper company, ProTimes, for publishing articles accusing her of using performance-enhancing drugs.

Distinguish between the burden of proof and the standard of proof, with reference to Abigail's claim.

Adapted from VCAA 2018 exam Section B Q1b

Question 10

(6 MARKS)

Imashi entered a contract to sell her motorbike to Martha. When Imashi delivered the motorbike, Martha said she changed her mind and no longer wanted to purchase the bike. Imashi initiated a civil claim against Martha for breaching the contract. The burden of proof rested with Martha, who had to prove the case beyond reasonable doubt. Martha was later found liable and sentenced to a term of imprisonment.

Identify **three** errors in the scenario and, for each error, explain the correct civil process or procedure that should have occurred.

Adapted from VCAA 2020 Section A Q5

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.

Sleek Financial is a large financial services company that initiated legal action in the Magistrates' Court against a customer, Hannah, who has not paid fees owed to the company. Sleek Financial wants to recover \$1,000 in fees for financial services completed in 2021. However, Hannah wishes to initiate a counterclaim as she believes Sleek Financial has been charging her fees every year since 2012, but providing no service for these fees, and wants to be compensated.

Question 11

Which of the following statements are correct about the burden of proof and the standard of proof in Sleek Financial's civil claim? **(Select all that apply)**

- A. The burden of proof rests with Sleek Financial, although, if Hannah initiates a counterclaim against Sleek Financial, she will have the burden of proving her counterclaims against Sleek Financial.
- B. The burden of proof rests with Sleek Financial as the plaintiff, even if Hannah initiates a counterclaim.
- C. Sleek Financial has to prove that Hannah owes fees to Sleek Financial that have not been paid beyond reasonable doubt.
- D. Sleek Financial must prove that it is more probable than not that Hannah owes \$1000 in fees for financial services not completed in 2021.
- E. If Hannah initiates a counterclaim, she must prove that her version of the facts, that Sleek Financial has been charging her fees every year since 2012 but providing no service for these fees, is more likely to be correct.

Question 12

(6 MARKS)

Referring to Sleek Financial's claim, analyse the burden of proof and the standard of proof in the civil justice system.

Linking to previous learning

Question 13

(3 MARKS)

Explain how the standard of proof in a criminal case differs from the standard of proof in a civil case.

VCAA 2020 exam Section B Q1b

4B Initiating a civil claim



Image: j.chizhe/Shutterstock.com

When cooking dinner, do you pick ingredients at random to see what concoction you can make? Or do you think about what dish you want to eat to determine the kinds of ingredients you need before you start cooking? Just like how you need to consider the type of dish you want to make before you start cooking, there are different factors that a potential plaintiff should consider before initiating a civil claim.

STUDY DESIGN DOT POINT

- factors to consider before initiating a civil claim, including costs, limitation of actions and enforcement issues

4A

4B

3.2.2.1

Costs

3.2.2.2

Limitation of actions

3.2.2.3

Enforcement issues

Lesson introduction

A party that has suffered a loss due to a breach of their rights, or a breach of an obligation owed to them by another party, may be able to pursue a civil action. Prior to seeking compensation for their loss, a potential plaintiff should consider a range of factors to determine whether initiating civil proceedings is an appropriate step. This is because initiating a civil claim is not only time-consuming and expensive, but also complex and may not result in the plaintiff receiving compensation.

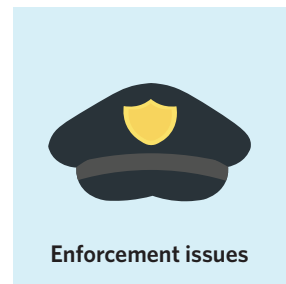


Figure 1 Factors to be considered before initiating a civil claim

Costs 3.2.2.1

KEY TERM

Costs the amount of money, including court fees and fees for legal representation, that has to be paid to resolve a legal dispute.

During a civil dispute, there are significant **costs** that each party must pay to resolve their legal dispute. Generally, the more complex a legal dispute and the longer it takes to resolve, the greater the costs to the parties. Therefore, a party commencing civil action should expect to face costs from multiple sources.

Table 1 Costs that should be considered prior to initiating a civil claim

Type of cost	Explanation
Fees for legal representation	The complexity of civil proceedings may require each party to employ legal representation, which may be expensive. Legal representatives complete a broad range of roles that significantly add to the costs of a civil dispute.
Adverse cost orders	A party planning to start legal proceedings should consider the possibility that if unsuccessful, the court may make an adverse cost order , adding to the financial burden of taking legal action as a plaintiff may have to pay for some or all of the defendant's costs. In addition, even if successful, whilst the court may order the defendant to pay their costs, such an award of costs may only cover part of the plaintiff's total legal expenses.
Mediation fees	The court may order that parties attend mediation to attempt to resolve the civil dispute, promoting an out-of-court settlement. Generally, both parties are required to share the costs for mediation. Therefore, if attempts to resolve the dispute are unsuccessful, the parties will have increased their legal expenses despite not having resolved the case.
Court fees	The courts will charge fees throughout a civil trial, such as filing fees which are charges to commence a court proceeding, and hearing fees which are charges for each day of a trial, further adding to the costs of both parties.
Appealing to a higher court	A party seeking to appeal the outcome or damages awarded will need to pay the filing fee in the appeal court, meet the costs of legal representation, along with many other fees.

LEGAL VOCABULARY

Adverse cost orders an order by the court that one party must pay for part, or all, of another party's legal costs.

LESSON LINKS

You will learn more about mediation in **5B Methods of resolving civil disputes**.

You will learn more about costs in **5K The impact of costs and time – civil disputes**.

You will learn more about the need for legal practitioners in a civil case in **5F Legal practitioners in a civil dispute**.

Limitation of actions 3.2.2.2

Before a potential plaintiff initiates a civil claim, they must ensure they do so in the legal time frame for that particular dispute. This is known as the **limitation of actions**. Having a **limitation period** ensures that civil cases are brought to court in a timely manner, and the defendant does not have to defend a civil action after a significant amount of time since the alleged civil breach occurred. It also contributes to the just resolution of a case as evidence is readily available and not misplaced or forgotten over time. As a result, the quality of evidence has usually diminished less and is more reliable and available.

The *Limitation of Actions Act 1958* (Vic) outlines the time frames within which different types of civil actions must be commenced. However, there are circumstances in which a plaintiff can commence a civil action after the limitation period. For example, applications for extensions of the limitation period can be made if the plaintiff had a disability during the relevant period. 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.

USEFUL TIP

The period in which an individual can file a civil claim is known as the limitation period, whilst the limitation of actions refers to the restriction on taking a claim to court after a specified amount of time. For example, it is correct to say an individual must file their civil claim within the limitation period. It would be incorrect to say an individual must file their claim within the limitation of actions.

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.

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.

LEGISLATION

Limitation of Actions Act 1958 (Vic)

DEEP DIVE

Limitation of actions for different civil actions

Depending on the civil action that has occurred, different limitations apply.

Table 2 Limitation period for different types of civil actions

Civil action	Limitation period
Defamation	One year
Negligence	Six years
Breach of contract	Six years
Personal injuries	Three years
Action to recover land	15 years
Action to claim the personal estate of a deceased person	15 years

LEGAL CASE

CONTENT WARNING This case mentions content that is sensitive in nature, relating to the death of a child.

Wilson v Mackay Hospital and Health Service [2021] QSC 178**Facts**

In February 1999, a two-year-old toddler was sick with what appeared to be a stomach bug. Her mother took her to Mackay Hospital which assessed the toddler and discharged her home. The toddler's sister, who was four years old at the time, witnessed the toddler vomiting large volumes of fluid. The toddler was returned to Mackay Hospital where she died on arrival, less than three hours after her initial discharge. The older girl was greatly distressed after her sister's death and suffered frequent panic attacks and flashbacks up to the age of 17. She was referred to a psychologist in 2013 to address her anxiety, PTSD, depression, and panic. The sister's psychologist indicated in 2020 that she would not cope with working full-time and would lose wages as a result. After hearing this, the sister decided that she wanted to commence court proceedings to receive compensation for her psychiatric injury.

Legal issue

As the plaintiff (the toddler's sister) was 21 at the time of commencing proceedings, the limitation period of three years had expired (for an injured child, the three-year time limit starts when they turn 18 years of age). The plaintiff applied for an extension for the limitation of actions, claiming that she had only recently learnt that she would have a claim against Mackay Hospital for her various psychiatric injuries that prevented her from working full time.

Decision

The court granted the plaintiff a time extension to the limitation of actions to sue the Mackay Hospital for her psychiatric injuries.

Significance

As a result of this decision, the plaintiff was able to sue Mackay Hospital 22 years after the passing of her sister for compensation as a result of her psychiatric injuries.

KEY TERM

Enforcement issues a problem a plaintiff may need to consider regarding the capacity of a defendant to fulfil their legal obligation to compensate the plaintiff.

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.

Enforcement issues 3.2.2.3

A potential plaintiff may not initiate a civil claim if there are **enforcement issues** caused by the defendant not being in a position to fulfil their legal obligations. Therefore, prior to initiating a civil action, the plaintiff should determine the likelihood of obtaining **damages** enforced by the court by considering whether or not the defendant will be able to, or likely to, pay this compensation.

In assessing whether or not the defendant is in a position to pay, the plaintiff may consider issues such as:

- if the defendant is bankrupt or an unemployed individual
- if the defendant is a company, it may not have any assets with which to pay damages to a successful plaintiff
- if the defendant is in prison or overseas, it may be difficult to enforce the payment
- if the defendant cannot be identified or is unknown.

If there is a high chance that the defendant will not fulfil their legal obligation to compensate the plaintiff, this may deter the plaintiff from initiating their civil claim altogether. Therefore, failure to consider enforcement issues may result in the plaintiff wasting their time and money by pursuing a civil claim.

LESSON LINK

You will learn more about damages in **6A Damages as a remedy**.

HYPOTHETICAL SCENARIO

The loud and broke neighbour

Hena, a law student, and Gustav, a DJ, have been neighbours in an apartment complex for six months. Gustav is unemployed and often hosts loud parties which continue until the early hours of the morning. Hena has asked Gustav to reduce the volume on countless occasions but has been ignored. She has been losing sleep and is therefore slipping behind at law school. As a result, Hena started seeing a psychologist as she has been suffering from anxiety. Hena is considering initiating a civil claim against Gustav to seek compensation for her anxiety, but is unsure whether this is an appropriate step.

After considering enforcement issues in this case, Hena has decided not to initiate a civil claim against Gustav. This is because if Hena is successful, it is unlikely that Gustav will be able to pay due to his current financial situation. Instead, Hena has temporarily moved in with one of her friends.



Figure 2 Hena must consider enforcement issues before initiating a civil claim against Gustav for his loud parties

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'analyse factors to consider when initiating a civil claim'. In your SAC or end-of-year exam, you may be faced with a scenario and from there, identify and examine any relevant factors (costs, limitation of actions, and enforcement issues) a potential plaintiff should consider prior to initiating a civil claim. For example, if the scenario mentions that the potential plaintiff is experiencing financial difficulties, high-scoring responses would identify costs as a factor to consider due to the financial difficulties.

Lesson summary

Before initiating a civil claim, there are three main considerations a plaintiff must put their mind to, including:

- the costs of initiating the claim, such as legal representation and court expenses
- the limitation of actions for their particular civil case, as too much time may have passed for them to bring an action against the defendant
- enforcement issues, as it may be pointless for a plaintiff to pursue a defendant to recover damages when it is unlikely the defendant will be able to fulfil their legal obligations.

4B Questions

Check your understanding

Question 1

All plaintiffs should consider costs, limitation of actions, and enforcement issues prior to initiating a civil claim.

- A. True
- B. False

Question 2

Which of the following statements indicate that the defendant may be unable to compensate the plaintiff?

(Select all that apply)

- A. The defendant is bankrupt.
- B. The defendant is unemployed.
- C. The defendant is a Supreme Court judge.
- D. The defendant is currently in jail.

Question 3

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

enforcement issues

limitation of actions

A potential plaintiff should consider [] as this may indicate that the defendant is not in a position to pay, or will unlikely pay compensation to the plaintiff.

Question 4

A plaintiff may be able to commence a civil action after the limitation of actions for the particular civil wrong they are pursuing has expired in particular circumstances.

- A. True
- B. False

Question 5

Fill in the blanks with the following terms:

costs

limitation of actions

Prior to initiating a civil claim, a potential plaintiff should consider [] due to the various expenses that are involved with a civil action, such as fees for legal representation. A potential plaintiff should also consider the [] because this may indicate that their claim falls outside the legal time frame in which they are allowed to initiate their civil action.

Question 6

Which of the following statements are correct in relation to the costs involved in a civil dispute?

(Select all that apply)

- A. A party may have to pay fees for legal representation which are often high due to the complexity of civil proceedings.
- B. If the plaintiff is unsuccessful, the court is guaranteed to make an adverse cost order whereby they will have to pay for all of the defendant's legal costs.
- C. The courts will charge fees throughout a civil trial, such as filing fees and hearing fees for each day of a trial, further adding to the costs of both parties.
- D. If the plaintiff is successful, they will still have to pay their own legal expenses as this is a rule in civil cases.

Question 7

As initiating a civil claim is risky, time-consuming, and expensive, the suitability of initiating a civil claim depends on the case's specific circumstances.

- A. True
- B. False

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

(2 MARKS)

Kehlani was involved in an armed robbery of a bank. She held an employee, Steven, at gunpoint and forced him to hand over as much money as he could. Kehlani was arrested by the police at the scene. She was charged and found guilty of various offences and is now in jail. Steve is suffering from various psychological injuries as a result of the robbery and wants to sue Kehlani for damages.

Advise Steve on **one** enforcement issue he should consider before initiating this claim.

Adapted from VCAA 2018 exam Section B Q1a

Question 9

(3 MARKS)

Explain **one** factor that should be considered before initiating a civil claim.

Question 10

(4 MARKS)

Leo and Kira contracted a builder to renovate their house. After the renovations were complete, Leo and Kira noticed a number of defects. They asked the builder to fix them, but the builder refused to do so. Leo and Kira have decided that they want to initiate a civil claim. However, they discovered that the builder had recently moved overseas.

Explain **two** factors that Leo and Kira would have to consider before initiating a civil claim against the builder.

Adapted from VCAA 2021 exam Section B Q2a

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.

Nyla was working for Healthy Foods, a company that manufactures and produces a range of nutritious snacks, such as protein bars. When making protein bars, Nyla's hand became stuck in one of the machines, resulting in a serious injury requiring hospitalisation. She was not provided with any training or protective equipment, despite being required to operate dangerous machinery. Nyla wants to sue Healthy Foods as she can no longer work as a result of her injuries, but is aware that the company has been losing money and has limited assets.

Question 11

Which of the following statements are correct in relation to the factors that Nyla should consider before initiating civil action against Healthy Foods? **(Select all that apply)**

- A. Nyla should consider enforcement issues as the company has been losing money and has limited assets thus may not be able to compensate Nyla.
- B. Nyla should consider costs as, if she is unsuccessful, the courts are guaranteed to make an adverse cost order, requiring Nyla to pay for Healthy Foods' legal costs.
- C. Nyla should consider costs as she may have to pay fees for legal representation to help in the civil case against Healthy Foods.
- D. Nyla should consider the limitation of actions as she may not be able to bring her civil claim to court if it is not within the legal time frame.

Question 12

(6 MARKS)

Analyse **two** factors that Nyla should consider before initiating civil action against Healthy Foods.

Adapted from VCAA 2020 exam Section B Q1d

Linking to previous learning**Question 13**

(6 MARKS)

Ping is a famous actress who is well known for her dangerous action scenes without a stunt double, unlike many other actors and actresses. Some time ago, Mimi, a journalist, published an article claiming that Ping is a liar and has a stunt double. Since the article was published, Ping has not been offered any acting work, and has received backlash from the public.

- a. Who has the burden of proof in Ping's case and what is the standard of proof in this case?

2 MARKS

Adapted from VCAA 2018 exam Section A Q5a

- b. Explain why Ping should consider the costs and limitation of actions before initiating a proceeding against Mimi.

4 MARKS

Adapted from VCAA sample 2018 exam Section B Q3a

5

CHAPTER 5

The principles of justice during a civil dispute

LESSONS

- 5A** The principles of justice during a civil dispute
- 5B** Methods of resolving civil disputes
- 5C** The Victorian court hierarchy and civil disputes
- 5D** Judges, magistrates, and juries in a civil dispute
- 5E** The parties in a civil dispute
- 5F** Legal practitioners in a civil dispute
- 5G** Class actions
- 5H** Consumer Affairs Victoria (CAV)
- 5I** The Victorian Civil and Administrative Tribunal (VCAT)
- 5J** Resolving civil disputes in the courts
- 5K** The impact of costs and time – civil disputes

KEY KNOWLEDGE

The principles of justice during a civil dispute

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

Image: Patrick Poendl/Shutterstock.com

5A The principles of justice during a civil dispute



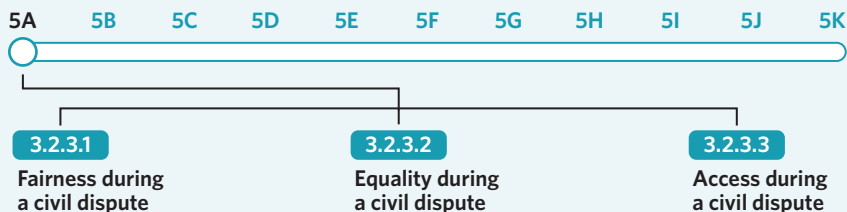
Image: Author/Shutterstock.com

'If one really wishes to know how justice is administered in a country, one does not question the policemen, the lawyers, the judges, or the protected members of the middle class. One goes to the unprotected – those, precisely, who need the law's protection most! – and listen to their testimony.'

—James Baldwin (American writer)

STUDY DESIGN DOT POINT

- the principles of justice: fairness, equality and access



Lesson introduction

The Victorian civil justice system is grounded by the principles of justice, which serve as a foundation for evaluating whether justice has been achieved in a case. These principles embody the underlying purposes of the justice system; that the system is available to everyone and that all individuals are treated equally and receive fair treatment. Processes, policies, and institutions of the civil justice system can be assessed to determine whether they uphold these principles.

Fairness during a civil dispute 3.2.3.1

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. The Victorian civil justice system aims to achieve fairness through a variety of legal principles, procedures, and institutions.

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 that the plaintiff is pursuing the case against the defendant, the onus is on them to prove the facts and claims against 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 civil standard of proof, on the balance of probabilities, is a lower threshold of proof than in the criminal justice system, which is beyond reasonable doubt. This is because the consequences for a defendant of a breach of civil law are generally not as severe as a breach of criminal law. In civil law, the defendant may be required to pay damages to the plaintiff, whilst in criminal law, the defendant may be sentenced to a term of imprisonment. As the consequences of being found guilty are more severe than being held liable, a higher standard of proof must be met in criminal cases.

Continues →



KEY TERM

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

LESSON LINK

You learnt about the presumption of innocence, the burden of proof, and the standard of proof in **4A Key principles of the civil justice system**.

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 have the opportunity to present their own evidence and witnesses if they choose.
Alternative methods of civil dispute resolution	There are alternative dispute resolution methods for civil disputes, such as mediation, conciliation, and arbitration. These methods are generally less costly, less time-consuming, and can effectively resolve disputes without the need for judicial determination.
An independent judge and/or jury adjudicate 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.
There are systems in place to reduce delays	Reducing delays in legal proceedings can alleviate the stress and anxiety experienced by the parties. Delays may be reduced in a civil justice system through: - the structure of the Victorian court hierarchy. - the use of alternative methods of resolving civil disputes. - the Victorian Civil and Administrative Tribunal (VCAT) and Consumer Affairs Victoria (CAV) which are alternative institutions used to assist with civil disputes. - judicial powers of case management.
Remedies awarded in a civil dispute	Damages allow for the plaintiff to be compensated and returned back to their original position before the civil breach occurred, and injunctions can prevent a breach of rights from occurring. However, if the defendant does not have the capacity to pay the required damages, the plaintiff will not be adequately compensated.

LESSON LINKS

You will learn about alternative dispute resolution methods in **5B Methods of resolving civil disputes**.

You will learn about the Victorian court hierarchy in **5C The Victorian court hierarchy and civil disputes**.

You will learn about case management powers in **5D Judges, magistrates, and juries in a civil dispute**.

LEGAL CASE

Bucic v Arnej Pty Ltd [2019] VSC 330

Facts

The plaintiff, aged 49, fell 4.5 metres from a raised scaffolding bay onto a pile of bricks while laying roof tiles. The plaintiff had a pre-existing degenerative back condition that caused significant pain and forced him to be off work for six months in the same year as the fall. This injury led to four surgeries and additional procedures for his back and neck.

The plaintiff also suffered from major depressive disorder with anxiety, as well as cognitive deficits affecting memory and concentration. These injuries were permanent, severely restricting his quality of life and causing financial difficulties.

Legal issue

The court had to assess pain and suffering, as well as economic loss, when determining a remedy.

Decision

The court awarded specific damages of \$743,000, such as for his medical expenses. Additionally, general damages of \$300,000 for pain and suffering were awarded to the plaintiff, taking into account the significant impact of his injuries on his life.

Continues →

LEGAL CASE

Bucic v Arnej Pty Ltd [2019] VSC 330 – Continued**Significance**

The money awarded to the plaintiff aimed to return him to his original position before the civil breach. In this instance, pain and suffering are difficult to quantify, and in severe cases, no amount of money can remedy the pain of a back injury and subsequent mental health problems. Fairness may be called into question as money can be viewed as inadequate in compensating for pain and suffering.

**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 LINK

You will learn more about the role of judges and juries in **5D Judges, magistrates, and juries in a civil dispute**.

Equality during a civil dispute 3.2.3.2

The principle of **equality** aims to ensure uniform treatment of all individuals in the civil justice system. However, equal treatment does not necessarily equate 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 preventing 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 fairness in a civil dispute

Legal principle, procedure, or institution	How it contributes to the achievement of equality
Court procedures are applied equally to anyone 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	All members of the community are identically held to the standards of behaviour set by civil law. For example, those in more powerful positions in society such as members of parliament, police officers, and affluent individuals are not entitled to preferential treatment by the courts as a plaintiff or a defendant.
An independent judge and jury adjudicate 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.
Organisational support	Organisations such as Victoria Legal Aid (VLA) and community legal centres 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 for these organisations to provide free legal advice and information, so that everyone, not just those with money, has the ability to uphold their rights in the civil justice system.

Whilst equality is often associated with equal treatment for all people, it is more accurately described as an equal result for everyone involved. Equality can be attained by ensuring that 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 disadvantaged before the law, such as people of colour, people with disabilities, or people with mental health problems, are still able to reach the same result as those who are not disadvantaged by the judicial system.

Thus, an example of an equitable mechanism in the Victorian civil justice system is the existence of alternate institutions used to assist with civil disputes, such as VCAT. VCAT provides low-cost dispute resolution services, allowing people to access civil justice for a lower cost, particularly in comparison to the courts. This is an equitable policy implemented by the government to ensure all people ultimately reach the same legal outcome regardless of socioeconomic status.

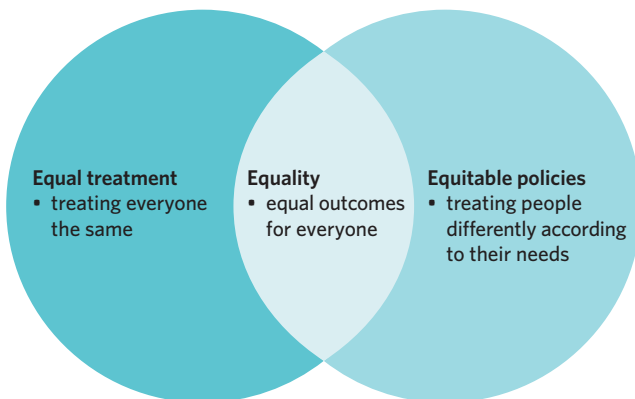


Figure 1 Understanding the relationship between equal treatment and equitable policies

This approach emphasises the importance of focusing on equal results rather than equal treatment. In order to prevent discrimination against individuals who may be disadvantaged, it is essential to establish mechanisms that acknowledge and accommodate inherent differences among people. These mechanisms aim to ensure that the law treats all individuals fairly, regardless of their personal circumstances or disadvantages. The principle of fairness is closely linked to this idea, as fairness is achieved when individuals are granted access to resources that enable them to attain equal outcomes. Consequently, access plays a vital role in ensuring equal results, which in turn promotes fairness. It is essential to recognise that these principles: equality, fairness, and access, are intricately interconnected.



Figure 2 The three principles of justice are all interrelated

LESSON LINK

You learnt about the connections between the three principles of justice in **An introduction to Legal Studies**.

Access during a civil dispute 3.2.3.3

The principle of **access** aims to ensure that 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 the plaintiffs to comprehend their legal entitlements and the different steps involved in their dispute. The Victorian civil justice system aims to achieve access through a range of legal principles and procedures.



Table 3 Legal principles, procedures, or institutions that achieve access in a civil dispute

Legal principle, procedure, or institution	How it contributes to the achievement of access
Class actions	By enabling several plaintiffs to collectively bring a lawsuit to court where expenses are covered by either the lead plaintiff or third party litigation funders, class actions promote engagement with the legal system and empower individuals to partake in a case that they might not have been able to afford individually.
There are systems in place to reduce delays	Reducing delays in legal proceedings can alleviate the stress and anxiety experienced by the parties, as well as allow efficient access to the legal system.
Consumer Affairs Victoria (CAV)	CAV is a civil complaints body that mainly provides information and advice through its website, which contains detailed guides on how consumers and businesses can seek solutions to resolve disputes. This promotes access as all people are able to access this information via CAV's website.

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.

Table 3 Continued

Legal principle, procedure, or institution	How it contributes to the achievement of access
The Victorian Civil and Administrative Tribunal (VCAT)	VCAT promotes access to civil justice as it is able to resolve certain types of civil disputes at a low cost, allowing people of low socioeconomic status to engage with the justice system.
Alternate 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, such as when compared with the courts.
Remedies awarded in a civil dispute	Damages and injunctions allow for the plaintiff to be compensated and returned back 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 an accused, particularly if English is not their first language. Therefore, each court in the Victorian court hierarchy may be able to arrange an interpreter for particular circumstances.

LESSON LINKS

You will learn more about class actions in **5G Class actions**.

You will learn more about civil dispute resolution bodies in **5H Consumer Affairs Victoria (CAV)** and **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

You will learn more about remedies in **Chapter 6: Remedies**.

You learnt about enforcement issues in **4B Initiating a civil claim**.

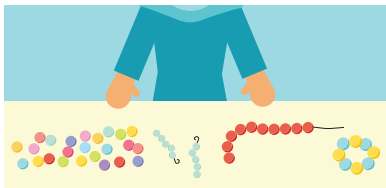
HYPOTHETICAL SCENARIO

Figure 3 Beverley was able to join a class action to gain compensation from a sneaky supplier

Beverley's bad beads leads to team takedown

Beverley, a small business owner, saved up for years to start her company, a jewellery business. However, her dream was cut short when she discovered that one of her bead suppliers had been overcharging her for years. She did not have enough money to pursue legal action against the supplier. However, when she discovered there was a class action organised by a group of people who had also been overcharged by the supplier when purchasing beads, she was able to join as a group member. The supplier was found liable for overcharging its clients and was ordered to pay a significant amount of damages. Beverley was able to receive compensation and access justice through the class action.

Lesson summary

Overall, the principles of justice are an essential aspect of the Victorian civil justice system.

- Fairness requires that all processes be impartial and open to ensure a just outcome to a civil dispute.
- 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 should be able to engage with the justice system with as few barriers as possible.

5A Questions

Check your understanding

Question 1

There are four principles of justice.

- A. True
- B. False

Question 2

Which of the following statements does **not** promote the achievement of fairness in the civil justice system?

- A. A defendant has a right to legal representation.
- B. A defendant may not understand how to present their case in the best light possible.
- C. Civil disputes can be resolved using alternative methods of dispute resolution outside of the court, involving an independent and impartial third party.
- D. A plaintiff has the burden of proof.

Question 3

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

fairness

equality

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

Question 4

Which of the following statements promotes the achievement of equality in the civil justice system?

(Select all that apply)

- A. The judge must not discriminate against either the plaintiff or the defendant based on their personal characteristics.
- B. A victim of crime contributes to the sentencing process by providing a victim impact statement.
- C. All parties are equal before the law and no individual should be treated more favourably than another.
- D. The jury in a civil case can consist of members that have a bias towards the plaintiff, such as if a juror was high school enemies with the plaintiff, as this is still an accurate reflection of society.

Question 5

Class actions contribute to the achievement of access by enabling several plaintiffs to collectively bring a lawsuit to court.

- A. True
- B. False

Question 6

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 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**

(3 MARKS)

Explain one way the civil justice system upholds the principle of fairness.

Question 9

(4 MARKS)

Baxter initiated a civil dispute in the courts. His case has been delayed multiple times and he is becoming frustrated by the lack of accessibility to the justice system.

Describe **two** ways that Baxter could gain better access to the legal system.

Question 10

(3 MARKS)

Imagine that the Commonwealth Parliament introduced a new law, the *Politician Exemption Act 2058* (Cth) that allows politicians to be exempt from liability in civil proceedings.

Explain **one** reason why the *Politician Exemption Act 2024* (Cth) may not achieve equality.

Adapted from VCAA 2022 Section B Q2b

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** or **limitations** of the Victorian civil justice system in achieving the principles of justice.

Statement	Strengths	Limitations
I. A defendant may not be able to afford legal representation which may impact their ability to present their case in the best possible light.	☐	☐
II. Both parties have the ability to present their case.	☐	☐
III. The judge and jury must remain independent and impartial, treating both parties equally.	☐	☐
IV. Judges cannot assist unrepresented parties to the extent a legal practitioner can, even if they recognise that the court proceeding is unequal.	☐	☐

Question 12

(6 MARKS)

Serena has been sued by Blair for negligence. Serena believes she does not need a lawyer and has decided to represent herself. Once in the courtroom, she realises the judge will not provide her with special treatment or legal advice, and she is now struggling to understand the court processes.

Discuss whether **two** of the principles of justice have been achieved in relation to Serena's civil case.

Linking to previous learning**Question 13**

(3 MARKS)

Explain how enforcement issues hinder the achievement of access.

5B Methods of resolving civil disputes

STUDY DESIGN DOT POINT

- the purposes and appropriateness of methods used to resolve civil disputes, including mediation, conciliation and arbitration

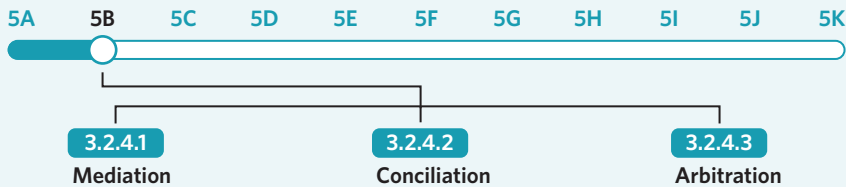


Image: Gatot Adri/Shutterstock.com

If two students are in a fight at school, a teacher will typically attempt to diffuse the conflict by discussing the situation with both students until they make amends. Just as children require mediators to facilitate productive conversations, parties in a legal battle may also require help from an external party in order to reach an agreement without entering the court system.

Lesson introduction

Whilst parties can resolve civil disputes through formal bodies, such as in the process of judicial determination that occurs with a judge or magistrate in the courts, it is also common for parties to use alternative dispute resolution methods. Alternative dispute resolution methods can include mediation, conciliation, and arbitration, all of which are less costly and formal than court proceedings. Under section 66(1) of the *Civil Procedure Act 2010* (Vic), courts can refer parties to attempt mediation, conciliation, or arbitration prior to a trial.

LEGISLATION

Civil Procedure Act 2010 (Vic)

Mediation 3.2.4.1

Mediation occurs outside of formalised court settings and involves parties attempting to resolve their dispute in the presence of an independent third party. The mediator encourages discussion between the two parties and aims to assist the parties in reaching a mutually-agreed resolution. The mediator does not provide information or make suggestions to the parties on what resolution they believe to be appropriate as they are impartial. The resolution reached in mediation is non-binding. However, a resolution can become binding if the parties sign a **deed of settlement**, or if the agreement is presented to the court and binding orders are made.

Legal representation is not often used in mediation, and the mediator ensures the negotiation is conducted in a less formal, supportive manner. The emphasis in mediation is on reaching a voluntary agreement, rather than presenting evidence and establishing who is right or wrong in the dispute.

Most commonly, mediation ordered by the court is conducted by a **judicial registrar** who is accredited by the court to mediate civil disputes under the Federal Court Mediator Accreditation Scheme (FCMAS). Parties may also choose to hire their own external mediator, however, this is paid at the parties' own expense.

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.

Judicial registrar an individual responsible for managing both the administrative and judicial aspects of a court proceeding, who can also act as a mediator in court-ordered mediation.

Table 1 Powers of different courts and tribunals to order mediation

Magistrates' Court	County Court and Supreme Court	The Victorian Civil and Administrative Tribunal (VCAT)	Consumer Affairs Victoria (CAV)
Can order parties to attend mediation.	Can order parties to attend mediation.	Can order parties to attend mediation for: - goods and services disputes between \$500 and \$10,000, which are suitable for mediation. - if the dispute can be resolved by mediation instead of a VCAT hearing.	–

Table 2 The appropriateness of mediation

Circumstances where mediation is appropriate	Circumstances where mediation is not appropriate
- A relationship needs to be maintained between the two parties, such as a manager and employee. - Parties are willing to discuss issues. - Parties prefer privacy and confidentiality and therefore, want to resolve the dispute in a less formal and publicised manner. - Both parties want lower legal fees, as the court process can often be more expensive than mediation. - A prompt resolution needs to be reached. There are often significant wait times associated with determination of civil disputes via the courts.	- Parties are highly emotional, potentially making negotiations more difficult. - Parties are unwilling to discuss issues, potentially making an agreed settlement unlikely. - There is a power imbalance that creates a risk that one party will 'give up too much' in reaching a settlement. - There is a history of violence or threats between the parties. This may cause one party to compromise out of fear of what may happen to them if they do not cooperate. - Parties want a binding result to their disputes or prefer the formalities associated with judicial determination.

LESSON LINKS

You will learn more about VCAT in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

You will learn more about court delays in a civil dispute in **5K The impact of costs and time – civil disputes**.

LEGAL VOCABULARY

Judicial determination a method of dispute resolution whereby a judge or magistrate will make a legally binding decision after the parties present their cases at a trial or hearing.

Evaluating mediation's ability to achieve the principles of justice**STRENGTHS**

- Mediation allows parties to control the outcome of their dispute, as a resolution is not reached until a compromise is achieved. This can ensure parties reach a fair outcome.
- The mediator is impartial, meaning there is no bias towards or against a party.
- Mediation can promote a fair outcome as it is faster than a trial and minimises delays associated with accessing a remedy.

LIMITATIONS

- A power imbalance between the parties may cause a forced and unfair resolution to be reached.
- The decision reached through mediation is not legally binding, unless the parties sign a deed of settlement, meaning there is a risk that a party may not follow through with the agreement. This can 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.

STRENGTHS

- As formal rules of evidence and procedure do not apply, each party in the dispute can feel supported to speak freely and present their perspective.
- Unrepresented parties are unlikely to be disadvantaged as the mediator guides the discussion and there are no formal rules of evidence and procedure to navigate.
- Legal representation is usually not required for mediation and in many cases, a mediator will only permit legal representation if both parties have a lawyer. If one party cannot find a lawyer, it is likely that both parties will need to self-represent, promoting equality.

LIMITATIONS

- If one party is more vulnerable or there is a power imbalance between the parties, a 'forced' outcome may be reached that does not equally benefit both parties.

**STRENGTHS**

- Mediation is accessible as it is less costly than the courts, making remedies easier to obtain for the parties. Furthermore, legal representation is often not required, minimising costs and enhancing a party's ability to seek justice.
- The public nature of a trial can prevent parties from taking legal action if the subject of the dispute is sensitive. As mediation is more private, it promotes access to a resolution in such cases.
- Mediation is conducted in a more supportive, non-adversarial manner compared to a trial. The intimidating nature of a trial may discourage some individuals from pursuing a case through the courts. Therefore, mediation's informal nature promotes access to justice.

LIMITATIONS

- In long-running and hostile disputes, mediation may be inappropriate as parties are unlikely to constructively communicate and reach a resolution, thus limiting access to justice as the dispute may remain unresolved.
- Given legal representation is often not used in mediation, parties may need to present their own cases. This may be intimidating for certain people and discourage them from pursuing mediation. However, this limitation is usually insignificant, given the informal and open manner in which mediation is conducted.

**REAL WORLD EXAMPLE****Pulled the 'Rugg' right under her!**

In February 2023, federal independent 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 that she was told her employment would be formally terminated on 31 January 2023 after refusing 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). Rugg said Dr Ryan performed 'hostile conduct' in the work environment.

In May 2023, Rugg and Ryan reached a settlement, with Rugg receiving \$100,000 to abandon her claim, with all sides agreeing to pay their own legal costs. When the event was reported in May 2023, it was confirmed that no deed of settlement had been signed, therefore making the settlement non-binding for both parties. It was also reported there was still no admission of fault by Ryan in relation to the accusations made by Rugg.

Adapted from 'Sally Rugg accepts \$100,000 to settle workplace dispute with MP Monique Ryan' (Karp, 2023)



Image: Benjamin Crone/Shutterstock.com

Figure 1 Federal MP, Monique Ryan, was ordered by the Federal Court to engage in mediation with her former employee after the employee claimed they were unfairly dismissed

Conciliation 3.2.4.2

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.

LESSON LINK

You will learn more about Consumer Affairs Victoria (CAV) in **5H Consumer Affairs Victoria (CAV)**.

Conciliation can be used by parties seeking to resolve their dispute outside the courts with the assistance of a conciliator. The conciliator is an independent third party who possesses specialist knowledge about the subject matter of the dispute and can therefore, assist parties in reaching a resolution. The conciliator encourages the two parties to communicate and is able to offer suggestions and resolutions, differentiating them from a mediator who does not provide advice. Similar to mediation, if the parties reach a resolution, it is non-binding unless a deed of settlement is signed, which is then enforceable by the courts. Legal representation is often not used in conciliation, and the conciliator ensures the negotiations are conducted in a less formal environment.

Table 3 Powers of different courts and tribunals to order conciliation

Magistrates' Court	County Court and Supreme Court	VCAT	CAV
Can order parties to attend conciliation.	Can order parties to attend conciliation.	Can order parties to attend compulsory conferences that use conciliation.	Utilises conciliation as its primary dispute resolution method.

REAL WORLD EXAMPLE



Image: Kapi Ng/Shutterstock.com

Figure 2 The NSW government and a train union were able to reach a binding agreement through conciliation to improve worker's safety, conditions, and pay

Trains stop in their tracks over union disagreement

In November 2022, the NSW government signed a deal with the Rail, Tram, and Bus Union (RTBU) to resolve an industrial dispute. The union argued the New Intercity Fleet (NIF), composed of Korean-made trains imported by the NSW government, was unsafe as it prohibited guards from checking that platforms were clear. Therefore, the main point of dispute was whether NSW should fund the necessary repairs to improve the train's safety. The Union also argued that unjust pay and conditions were being provided to workers. Ultimately, the settlement resulted in the government agreeing to pay up to \$300 million to repair the fleet.

The parties entered into conciliation to resolve the dispute, with a third-party conciliator from the Fair Work Commission guiding the parties to a voluntary agreement. Reaching a resolution was a time-consuming process due to a variety of factors, including the RTBU calling for its members to engage in disruptive practices and targeted strikes to protest against the fleet's implementation.

By the end of the dispute, Transport Minister, David Elliot, declared the signed deed a win for all parties, highlighting the ability of conciliation to result in a compromise for the parties.

Adapted from 'NSW government, rail union sign a deal paving way for end to rail strikes' (Tatham, 2022)

Table 4 The appropriateness of conciliation

Circumstances where conciliation is appropriate	Circumstances where conciliation is not appropriate
- A relationship needs to be maintained between parties, such as in the case of an employer and their employee. - Parties are willing to discuss issues. - Parties prefer privacy and confidentiality. - There is an admission of responsibility by one of the parties, potentially increasing the willingness of parties to negotiate.	- Parties are highly emotional. - Parties are unwilling to discuss issues. - There is a history of violence or threats between parties. - There is a power imbalance between parties. - Parties want a binding result to their dispute or prefer the formalities associated with judicial determination.

Evaluating conciliation's ability to achieve the principles of justice

STRENGTHS

- Conciliation offers parties the ability to control the outcome of their dispute, promoting the likelihood of a fair outcome.
- The conciliator acts as an unbiased, impartial opinion that favours neither party.
- 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 a forced resolution to be reached, limiting fairness.
- The decision reached through conciliation is not always legally binding, meaning there is a risk that a party may fall back on the agreement.
- 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.



STRENGTHS

- Unrepresented parties are not disadvantaged, as the conciliator guides the discussion and suggests solutions.
- As formal rules of evidence and procedure do not apply, each party in the dispute can feel equally supported to speak freely and present their perspective.
- In many cases, a conciliator will only permit legal representation if both parties have a lawyer. If one person does not have a lawyer, both parties will usually self-represent.

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

- Paying a conciliator is much cheaper than the cost of paying a court to conduct a trial. Legal representation is also rarely required for conciliation, and if it is required, this is usually for a shorter period of time, reducing costs. Thus, the process of conciliation is more accessible for parties than a trial.
- The public nature of a trial can prevent parties from taking legal action if the subject of the dispute is sensitive. Conciliation is more private and, therefore, promotes access to dispute resolution.
- Conciliation is conducted in a more supportive, non-adversarial manner than a trial. The intimidating nature of a trial may discourage some individuals from pursuing a case through the courts. Therefore, conciliation's supportive tone promotes access to justice by overcoming this issue.

LIMITATIONS

- In long-running, hostile disputes, conciliation may be inappropriate as parties are unlikely to constructively communicate and reach a resolution, thus limiting access.
- Given legal representation is often not used in conciliation, parties may need to present their own cases. This may be intimidating for certain people, perhaps discouraging them from pursuing a remedy. However, this is a minor limitation, given conciliation is usually conducted in a supportive manner where both parties are unrepresented.



USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of the Victorian court hierarchy in relation to each principle may help you evaluate how the court hierarchy can uphold the principles of justice.

KEY TERM

Arbitration 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.

Arbitration 3.2.4.3

For corporations seeking to negotiate a disagreement in a setting less formal than and without the strict rules of evidence and procedure of the courts, **arbitration** is often ideal. The independent third-party arbitrator will listen to both parties present evidence before making a legally binding decision. This differs from mediation and conciliation as the final decision is enforced by the arbitrator and is binding without the parties needing to sign a deed of settlement. Arbitration is the most formal alternative dispute resolution process below the courts. It is most commonly used by parties involved in large commercial transactions that are seeking to resolve contractual disputes outside of the courts. In some cases, commercial contracts will specifically state that arbitration must be used to resolve any arising disputes.

Table 5 Powers of different courts and tribunals to order arbitration

Magistrates' Court	County Court and Supreme Court	VCAT	CAV
Obligated to refer parties to arbitration if their civil dispute is under \$10,000.	Can order parties to partake in arbitration with consent from both parties.	Does not conduct arbitration but has the power to order parties to attend arbitration.	–

Table 6 The appropriateness of arbitration

Circumstances where arbitration is appropriate	Circumstances where arbitration is not appropriate
- Parties agree to participate in arbitration. This may include the parties having a contractual arrangement to arbitrate disputes that arise during a commercial transaction. - The dispute involves civil damages of less than \$10,000, which was issued in the Magistrates' Court. - The case requires a binding and enforceable decision.	- Parties do not agree to arbitrate. - Parties are comfortable navigating complex court rules of evidence and procedure. - Parties would like greater control over the outcome of their dispute resolution and do not want the result decided on their behalf.

HYPOTHETICAL SCENARIO

Figure 3 Large commercial business disputes are often resolved through arbitration

Building blunder!

SlayDay, a property developer, contracted RyanBuilds, a commercial construction company, to build a large apartment tower in the CBD. The contract between these two parties included terms, such as the date for when the construction must be paid, the quality of the materials used, and deadlines for completing certain stages of the building. The contract also included a clause stating that if any disputes arose between the parties, arbitration would be used to resolve them.

RyanBuilds claims SlayDay failed to make a payment for 20% of the total fee by the date they had previously agreed upon. SlayDay has refused to pay as it believes RyanBuilds has fallen behind the agreed upon building schedule. An independent arbitrator has now been engaged to hear and resolve the dispute, without the need to initiate proceedings in the courts.

Evaluating arbitration's ability to achieve the principles of justice

STRENGTHS

- There are fewer delays involved in the arbitration process compared to the courts, leading to a timely determination of the dispute.
- Parties are often able to decide on who arbitrates their dispute to ensure an appropriate arbitrator is used that both parties believe is impartial.
- The arbitrator is an independent third party that has no association with either disputing party, therefore ensuring a fair decision that is solely based on law and facts is made.

LIMITATIONS

- The rules associated with evidence are more relaxed than the courts, which may enable an arbitrator to consider evidence that would be inadmissible in a trial, potentially limiting fairness for one party.
- 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 create an unfair outcome if the other party is unrepresented.



STRENGTHS

- Arbitration is not bound by formal court procedures, meaning the parties can agree on the process themselves, including when they will meet and in what order they will speak. Consequently, arbitration is a relatively flexible process that supports each party to freely represent themselves.
- If one party is self-representing during arbitration, the arbitrator will typically assist this party to ensure they understand the issues of the dispute and the arbitration process.

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 of arbitration, creating inequality between the parties.
- The lack of publicity of the arbitration process means that outcomes of previously arbitrated disputes are difficult to access or are unknown. Therefore, consistency and equality across similar arbitration cases may be limited. Arbitrators do not base their decisions on established precedent, as judges do, but rather on their personal perception of how the dispute should be resolved based on the case presented.



STRENGTHS

- Arbitration is not bound by formal court procedures, meaning the process is more accessible to parties due to its flexibility, efficiency, and less intimidating procedures 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, which may prevent parties with limited financial means from pursuing arbitration as a viable dispute resolution method.



Lesson summary

For various reasons, it may be optimal for parties to a civil dispute to use alternative forms of dispute resolution when trying to resolve their issues, as opposed to initiating a claim via the courts. Generally, alternative methods of resolving civil disputes are appropriate when parties:

- want a more informal, less costly, and less time-consuming method of resolving their dispute.
- want greater privacy and confidentiality when resolving their dispute.

LESSON LINK

You will learn more about precedent in **8B The doctrine of precedent**.

Table 7 A comparison of mediation, conciliation, and arbitration

	Mediation	Conciliation	Arbitration
Third party name	Mediator	Conciliator	Arbitrator
Third party role	Facilitates discussions but does not provide their own suggestions or opinions on the dispute.	Facilitates discussions, has specific knowledge about the subject matter, and makes suggestions about possible resolutions to the dispute.	Listens to the evidence from parties and hands down a binding decision.
Decision-maker	Parties	Parties	Arbitrator
Resolution	Not binding (unless a deed of settlement is signed or a court order with party consent is established).	Not binding (unless a deed of settlement is signed or a court order with party consent is established).	Legally-binding.
Use by the courts	The Magistrates', County, and Supreme Courts all have the power to order parties to attend mediation as a pre-trial procedure or during the trial.	The Magistrates', County, and Supreme Courts all have the power to order parties to attend conciliation, but more commonly direct parties to attempt mediation.	The Magistrates' Court must send parties to attend arbitration for civil disputes under \$10,000. The County and Supreme Courts can order parties to attend arbitration.
Use by VCAT	VCAT has the power to order parties to attend mediation.	VCAT can order parties to attend compulsory conferences that use conciliation.	VCAT does not conduct arbitration but has the power to order parties to attend arbitration.
Use by CAV	–	CAV can direct parties to attend conciliation and use this as their primary dispute resolution method.	–

USEFUL TIP

When discussing methods of dispute resolution in previous exams, a number of common mistakes arise. In the 2016 VCAA Legal Studies Examination Report, some common misconceptions regarding mediation and arbitration were highlighted, including that:

- mediation is not always inappropriate in hostile cases.
- whilst mediation does not result in a formal, legally-binding court order, it is common for parties to sign a deed of settlement once an agreement is reached.
- arbitration is often not automatically available to parties to a civil dispute. Rather, it tends to be mainly used in commercial disputes where parties have agreed by contract to resolve disputes via arbitration, or in small claims made in the Magistrates' Court.

5B Questions

Check your understanding

Question 1

Alternative forms of resolving civil disputes, such as mediation, arbitration, and conciliation, may be optimal where:

- A. parties involved want more privacy, confidentiality, and are seeking a lower cost alternative to the courts.
- B. parties are unwilling to compromise or see each other in person due to hostilities.

Question 2

In arbitration, the independent third party facilitates discussions and suggests ideas to help parties reach an agreement regarding their dispute, but has no involvement in making the final decision about the dispute.

- A. True
- B. False

Question 3

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

access

equality

Arbitration limits the principle of justice of [] from being achieved as parties may have to self-represent, therefore the two parties may be on unequal footing and the unrepresented party is likely to be disadvantaged.

Question 4

Tick the box to indicate whether each of the following statements are characteristics of **mediation** or **arbitration**.

Statement	Mediation	Arbitration
I. A binding agreement is determined by an independent third party.	☐	☐
II. The resolution of the dispute is only binding to parties if a deed of settlement is produced or the court makes orders with the consent of the parties, otherwise, the outcome is non-binding.	☐	☐
III. This method of dispute resolution often occurs between corporations that may have a clause in their business contract establishing that any arising disputes should be resolved by this method.	☐	☐

Question 5

Which of the following statements is correct about mediation? **(Select all that apply)**

- A. This alternative dispute resolution process is ideal when parties involved in the dispute are unwilling to discuss issues, thus requiring a third party to guide the conversation.
- B. Privacy and confidentiality is preserved when parties utilise mediation as the public nature of the courts is avoided.
- C. VCAT has the power to order parties to attend mediation, however, the courts do not have such power and can only suggest this as an option to resolve their dispute.
- D. Legal representation is often not used in mediation, so parties usually self-represent.

Question 6

An advantage of mediation is that:

- A. it is far cheaper to pay for a mediator than it is to pay a court to conduct a trial, therefore increasing access to justice.
- B. it is the most formal method of dispute resolution, outside of judicial procedures, so the parties are guaranteed a resolution will be reached.

Question 7

Conciliation is a form of dispute resolution for civil matters in which:

- A. the independent third party can offer suggestions and solutions to the dispute between the two parties, and encourages communication between both sides of the issue.
- B. the independent third party facilitates communication between the parties yet does not provide information or suggestions as to how the parties can resolve their dispute.

Question 8

Conciliation would be an appropriate method of resolving civil disputes when:

(Select all that apply)

- A. parties are willing to discuss their issues.
- B. parties want privacy and confidentiality as they work to resolve their issues.
- C. parties are highly emotional.
- D. there is a power imbalance between the two parties.

Question 9

Which of the following statements is correct about conciliation?

(Select all that apply)

- A. An enforceable decision is made by the disputing parties in all cases.
- B. The third-party will ensure both parties are heard when discussing possible solutions to the dispute.
- C. It upholds the principle of access by being a low-cost alternative to a trial as a method to resolve a dispute.
- D. The third party can recommend possible solutions to the parties, who ultimately reach an agreement themselves to resolve the case.

Question 10

The only way to officially resolve a civil dispute is to attend a court hearing as other forms of dispute resolution, such as mediation and arbitration, cannot produce a resolution to an issue.

- A. True
- B. False

Preparing for exams**Standard exam-style****Question 11**

(3 MARKS)

'Not all civil disputes should be resolved in courts; at times, it may be better for parties to come to a compromise regarding their dispute, as opposed to a judge making the final determination.'

Explain **one** method that could be ordered by the courts to resolve a civil dispute.

Adapted from VCAA 2015 exam Q4b

Question 12

(3 MARKS)

Compare conciliation and arbitration as civil dispute resolution methods.

Question 13

(4 MARKS)

Describe how alternative methods of resolving civil disputes enhance the ability of the civil justice system to achieve fairness and access.

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.

Daniel asked his landlord to investigate a leak in his bathroom several times, over the phone and in writing, but nothing was done. One night, he was sitting downstairs in his lounge room, when suddenly his bath crashed through his roof from upstairs. Fortunately, no one was injured, but Daniel wishes to obtain compensation for his damaged television, which the bath fell onto, the cost of accommodation in a nearby hotel whilst his house is repaired, and the general shock caused by the falling bathtub.

Question 14

Which of the following statements are correct about why it is appropriate for Daniel to use conciliation as a dispute resolution method? **(Select all that apply)**

- A. Daniel and his landlord must both be willing to cooperate in this dispute in order to reach an agreement, without judicial determination.
- B. A third party could help Daniel and the landlord by suggesting ways of reaching a mutually-agreeable solution.
- C. Consumer Affairs Victoria (CAV) could assist conciliation as long as both parties agree to participate and the issue is within their jurisdiction.
- D. The decision is not binding unless certain arrangements are made, such as a deed of settlement. Therefore, the landlord may agree to pay compensation but then go back on his word without facing any consequences.

Question 15

(6 MARKS)

With reference to the scenario, evaluate conciliation as a dispute resolution method.

Adapted from VCAA 2012 exam Q9

Use your answer to question 16 to support your response to question 17.

Question 16

Tick the box to indicate whether the following statements are **strengths** or **limitations** of mediation.

Statement	Strengths	Limitations
I. Mediation is more informal than arbitration and thus, can be less intimidating for parties, which may allow them to openly express their honest feelings on the dispute.	☐	☐
II. Mediation is not binding if parties do not consent to creating a formalised agreement, therefore the resolution reached may not be maintained, making the process redundant.	☐	☐
III. Mediation provides parties with more control over the outcome of the dispute and the evidence shared during the process, which can allow amicable feelings to remain between parties, helping maintain their relationship.	☐	☐
IV. Mediation can be inappropriate in cases where there was domestic violence between parties of the dispute, as the perpetrating party may be in a position of higher power, potentially leading the victim to compromise out of fear.	☐	☐

Question 17

(6 MARKS)

'Mediation is a more effective method of dispute resolution as opposed to more formal methods, such as arbitration.'

Discuss this statement.

Adapted from VCAA 2016 exam Q11

Linking to previous learning

Use your answer to question 18 to support your response question 19.

Use the following information to answer questions 18 and 19.

Winter recently purchased his first house in Australia and was looking to renovate it. He decided to hire 'Summer's Shacks' for the renovations. Summer, the owner, failed to complete the job correctly, resulting in the roof caving in and injuring Winter. Winter's physical injuries prohibited him from working for the past six months and he has accumulated \$20,000 worth of medical bills.

Winter is now considering taking civil action against 'Summer Shacks' for the loss and injury that has occurred. 'Summer Shacks' has ceased operations since the incident, and Summer may be forced to file for bankruptcy. She is also now unemployed.

Question 18

Tick the box to indicate whether each of the following statements are **true** or **false** about factors Winter should consider before initiating a civil claim.

Statement	True	False
I. Winter would need to consider costs, as, if he takes the civil claim to court, it will be cheaper than using alternative methods of civil dispute resolution.	☐	☐
II. By engaging in forms of alternative methods of dispute resolution, such as mediation, both parties can express their feelings about the issue and can establish a compromise.	☐	☐
III. Winter would not need to consider enforcement issues as it is clear that Summer is in a stable financial position to award Winter any damages if he is successful in his claim against her.	☐	☐
IV. The cost of hiring a conciliator is often significantly less expensive than a court proceeding.	☐	☐

Question 19

(5 MARKS)

Identify **two** factors Winter would have to consider before initiating a civil claim against Summer. With reference to these factors, explain why Winter may choose to utilise an alternative dispute resolution method, as opposed to going to court.

Adapted from VCAA 2021 Section B Q2b

5C The Victorian court hierarchy and civil disputes

STUDY DESIGN DOT POINT

- the reasons for the Victorian court hierarchy in determining civil disputes, including administrative convenience and appeals

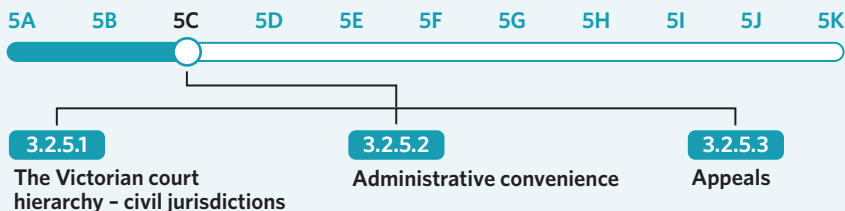


Image: Monkey Business Images/Shutterstock.com

In a school, each person is structured into a hierarchy based on their role. The students are lowest in the hierarchy and therefore do not handle complex issues facing the school. Alternatively, the principal is the highest in the hierarchy and has greater control over serious matters. This is for good reason. Prep students cannot manage a school budget and office staff do not need to relearn their times tables. A similar concept applies to the Victorian courts.

Lesson introduction

The Victorian courts are organised into a hierarchy where some courts are superior to others. Courts are ranked on their legal authority to hear different disputes, which aids in ensuring an effective civil justice system. Broadly, the lower courts deal with a high volume of less serious matters, while superior courts resolve fewer, but increasingly complex and serious disputes.

The Victorian court hierarchy - civil jurisdictions 3.2.5.1

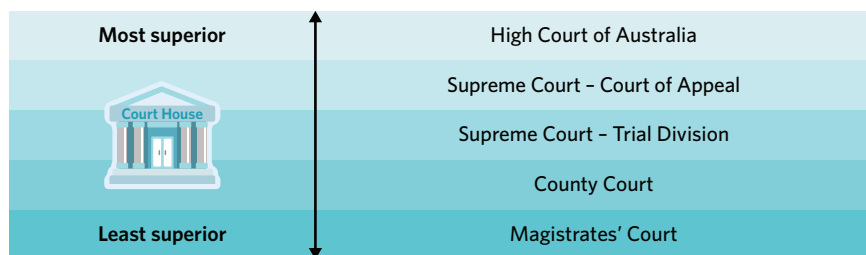


Figure 1 The Victorian courts are arranged in a hierarchy that determines each court's jurisdiction

The Victorian **court hierarchy** refers to the organisation of courts from least to most superior. Victorian legislation determines which disputes are resolved in each court, and the hierarchical organisation of the courts results in each court having its own **jurisdiction**. Some courts, such as the Magistrates' Court, only have **original jurisdiction**, meaning they only have the legal authority to hear a dispute the first time it is brought to court. Other courts, such as the Supreme Court - Court of Appeal, only have **appellate jurisdiction** meaning they have the legal authority to hear a dispute on appeal. The High Court only hears appeals in limited circumstances, such as cases involving constitutional or federal law issues. In most disputes, appeals from the lower courts will be heard in the Court of Appeal.

KEY TERM

Court hierarchy the arrangement of courts in order of superiority.

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 LINKS

You will learn about the Victorian Civil and Administrative Tribunal in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

You will learn about class actions in **5G Class actions**.

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.

KEY TERM

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

LESSON LINK

You learnt about specialisation in **2D The Victorian court hierarchy and criminal cases**.

Table 1 The civil jurisdictions of the Victorian courts

Court	Civil original jurisdiction	Civil appellate jurisdiction	Examples of civil disputes
Magistrates' Court	Civil claims under \$100,000	N/A	Debt claims
County Court	Unlimited	N/A	Workplace injury
Supreme Court – Trial Division	Unlimited	Appeals from VCAT and Magistrates' Court on a question of law	Class actions
Supreme Court – Court of Appeal	N/A	Appeals from VCAT (case heard by the VCAT President or Vice president) on a question of law	Appeals from the County and Supreme Court – Trial Division
The High Court of Australia	N/A	With permission, appeals from the Supreme Court – Court of Appeal	Appeals from the Supreme Court – Court of Appeal

Administrative convenience 3.2.5.2

The arrangement of the courts in the Victorian court hierarchy enables **administrative convenience** to be achieved.

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

DEEP DIVE**Administrative convenience**

In the last quarter of 2022, the Magistrates' Court finalised 14,526 disputes and the Supreme Court finalised 1,390 cases. Similarly, the Magistrates' Court currently has 123 magistrates in Victoria and both divisions of the Supreme Court have 29 judges in total.

This demonstrates administrative convenience in action whereby the Supreme Court has more time devoted to longer and more complex disputes while the Magistrates' Court resolves a larger volume of minor disputes. The resources of each court are divided in a way that caters for the volume of cases they hear.

Adapted from 'Courts and VCAT Caseload Data' (Court Services Victoria, 2023)

USEFUL TIP

It is important to remember that specialisation and administrative convenience are not the same thing.

- Specialisation refers to the expertise that the courts develop in hearing certain, 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.
- When discussing the reasons for the court hierarchy in civil cases in a SAC or VCAA exam, specialisation is not required. In turn, administrative convenience is not required when discussing the court hierarchy in criminal cases.

Appeals 3.2.5.3

An **appeal** is a legal avenue available for an unsatisfied party, allowing them to seek a review of a court's decision by a superior court. A party dissatisfied with the outcome of a civil dispute is not automatically entitled to have the decision reviewed on appeal. Rather, they must be granted leave to appeal, the permission to appeal a case, and have legal grounds for doing so.

Grounds for an appeal include:

- questions of law
- **questions of fact**
- the remedy awarded.

The High Court of Australia can hear appeals from the decisions of the Supreme Court – Court of Appeal due to its position in the Victorian court hierarchy. However, parties dissatisfied with the decision of the Court of Appeal do not have an automatic right to appeal to the High Court. The High Court will only grant permission to hear civil appeals if:

- there is a question of law of public importance.
- there are differing opinions on the law and it requires clarification.

KEY TERM

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

LEGAL VOCABULARY

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.

HYPOTHETICAL SCENARIO

Turning the wheels of justice: Risa's appeal triumph

Risa was involved in a car accident caused by the negligence of another driver, resulting in significant injuries and high medical bills. Seeking justice, Risa filed a civil lawsuit against the responsible party, hoping to receive compensation for her medical expenses.

The case was initially heard in the Magistrates' Court, where the magistrate ruled in favour of the defendant. Disheartened but determined, Risa decided to exercise her right to appeal the decision.

The appellate court carefully reviewed the case, acknowledging the errors made in the previous judgment. Recognising the significant impact of the defendant's negligence on Risa's life, it overturned the lower court's decision. The appellate court not only granted her the compensation she deserved for her medical expenses but also set a precedent that would help protect future victims of negligence.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of the Victorian court hierarchy in relation to each principle may help you evaluate how the court hierarchy can uphold the principles of justice.

Evaluating the Victorian court hierarchy's ability to achieve the principles of justice during a civil dispute

STRENGTHS

- In theory, 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, which is fair.
- The administrative convenience achieved by separating disputes across the hierarchy minimises delays. The hierarchy being organised in this way therefore promotes fair treatment of the parties by avoiding prolonged stress.

LIMITATIONS

- The party seeking to appeal must bear the cost of the application and legal fees. Some dissatisfied parties may be unable to afford to lodge an appeal, despite qualifying for an appeal, meaning incorrect decisions are not corrected, leading to an unfair result.
- There are still many delays, despite the arrangement of the hierarchy, causing court backlogs, which is not fair.



STRENGTHS

- Each dispute is heard in the appropriate court and similar disputes are resolved in the same way within a given court. This contributes to equality, as all people are treated the same despite characteristic differences.

LIMITATIONS

- An appeal may not be available to some parties if they can not afford the cost of application and additional legal fees. This limits equality if particular legal processes are not available to those of a low socioeconomic status.





STRENGTHS

- Parties automatically have access to the correct court for their matter. The courts in the Victorian hierarchy publicise the range of disputes within their jurisdiction on their websites, assisting plaintiffs to understand which court to commence proceedings in.
- The court hierarchy promotes transparency and accountability in the legal system, as decisions are published and subject to review and scrutiny by higher courts. This promotes access as past legal decisions are available to review allowing for predictability.

LIMITATIONS

- The party initiating an appeal is responsible for covering the expenses associated with the application and legal fees, thereby restricting accessibility to those of a low socioeconomic status.
- Grounds for appeal must exist and leave to appeal may be necessary. This may render some cases ineligible for a review by a higher court, meaning access to appeals can be limited.

Lesson summary

- The Victorian hierarchy contributes to the principles of justice being achieved as the structure of the courts from most to least superior allows administrative convenience to be achieved, and appeals to be heard.
- Administrative convenience results in the civil justice system in Victoria being more efficient, whilst appeals help dissatisfied parties seek the review of decisions.

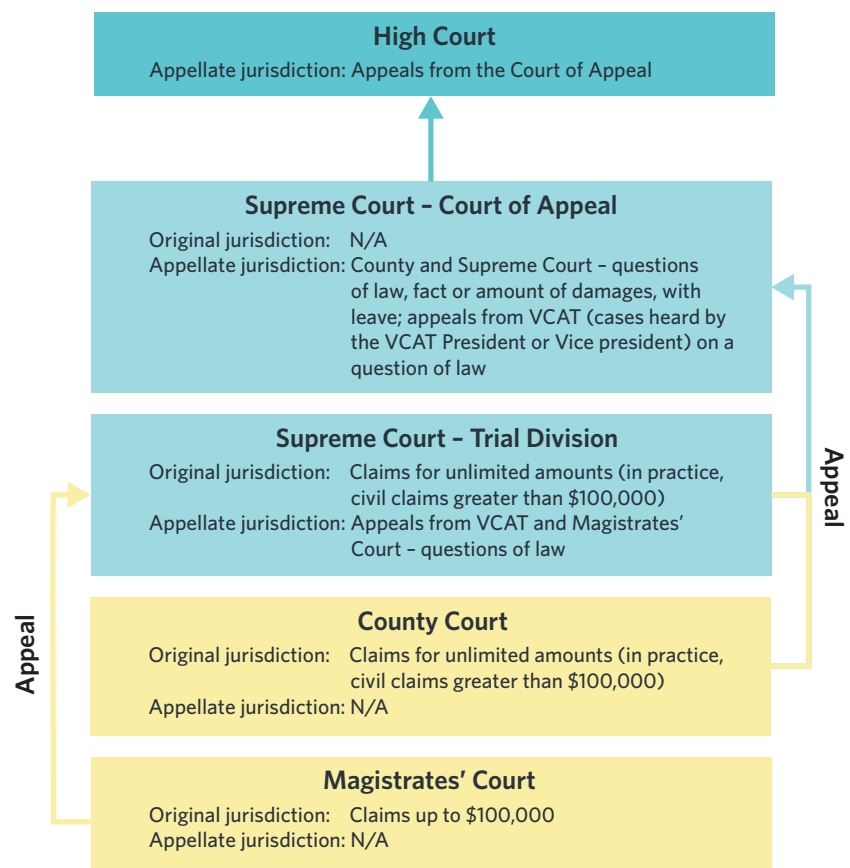


Figure 2 Different courts in the Victorian hierarchy have different jurisdictions to hear certain civil matters

5C Questions

Check your understanding

Question 1

The existence of a court hierarchy means each court in Victoria is ranked based on its legal authority to hear different disputes, which aids in ensuring an effective civil justice system.

- A. True
- B. False

Question 2

The Magistrates' and County Courts have no appellate jurisdiction for civil disputes.

- A. True
- B. False

Question 3

Fill in the blanks with the following terms:

dissatisfied

appeal

higher

A/an [] is the legal process that a/an [] party may pursue to have a court's decision reviewed by a/an [] court.

Question 4

The concept of administrative convenience refers to:

- A. the ability of lower courts to deal with a high volume of less serious matters, whilst the superior courts resolve relatively fewer disputes that are more complex and serious.
- B. a higher court being able to review the original decision of a lower court.
- C. the courts developing expertise by hearing similar cases.

Question 5

As a result of the concept of administrative convenience, the Supreme Courts can:

(Select all that apply)

- A. quickly resolve a large number of relatively minor disputes, minimising delays.
- B. spend more time resolving complex disputes and sometimes minor disputes if the Magistrates ask for help.
- C. can devote time and resources to long, complex disputes without the court being 'clogged up' by also resolving minor disputes.

Question 6

Which principle of justice is hindered by the cost of an appeal case?

- A. Fairness.
- B. Equality.
- C. Access.
- D. All of the above.

Question 7

An appellate jurisdiction refers to:

- A. the legal authority for a court to hear a case the first time.
- B. the legal authority for a court to hear a civil case.
- C. the legal authority for a court to hear a case on appeal.

Question 8

There are no flaws to the Victorian hierarchy as its presence allows for appeals and ensures administrative convenience, upholding all principles of justice.

- A. True
- B. False

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

(3 MARKS)

Other than administrative convenience, explain **one** reason why a court hierarchy is beneficial.

Adapted from VCAA 2017 exam Q1c

Question 10

(3 MARKS)

Referring to administrative convenience, explain why there is a court hierarchy in the Victorian civil justice system.

Adapted from VCAA 2016 exam Q1b

Question 11

(3 MARKS)

Referring to **one** principle of justice, justify **one** reason for the Victorian court hierarchy in the civil justice system.

Adapted from VCAA 2019 exam Section A Q5a

Question 12

(4 MARKS)

Alessio has suffered a workplace injury and is suing their employer for negligence. They are seeking \$10,000 in damages. As a result of their injury, Alessio has been unable to work and has accumulated a large sum of medical bills.

Due to COVID-19, the court system has experienced a significant backlog of cases with 45,000 civil cases still waiting to be heard by the Victorian court system. Alessio is running out of money and is hoping their dispute can be resolved quickly.

- a. Identify which court would most likely hear Alessio's dispute. 1 MARK
- b. Describe **one** reason for the existence of a court hierarchy. Refer to Alessio's dispute in your answer. 3 MARKS

Adapted from VCAA 2014 exam Q5a

Question 13

(3 MARKS)

Aliza has lost a debt claim case in the Magistrates' Court and wishes to appeal the decision.

Identify which court would hear Aliza's appeal and outline the grounds on which the appeal could be made.

Adapted from VCAA 2017 exam Q1b

Question 14

(6 MARKS)

Jimmy and Johnno are in a civil dispute over property damage. Johnno is suing Jimmy for \$50,000 in property damage and claims that the dispute will be heard in the Supreme Court – Trial Division. Jimmy believes that, even if he is found liable, he can automatically appeal the decision and have the decision reviewed in the High Court.

Identify **three** errors in the scenario above and, for each error, explain a correction should be made.

Adapted from VCAA 2020 exam Section A Q5

Extended response

Use your answer from question 15 to support your response to question 16.

Question 15

Tick the box to indicate whether the following statements refer to how fairness is **achieved** or **limited** by the Victorian court hierarchy in relation to civil disputes.

Statement	Achieved	Limited
I. 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, which is fair.	☐	☐
II. The administrative convenience achieved by separating disputes across the hierarchy minimises delays. The hierarchy being organised in this way therefore promotes fair treatment of the parties by avoiding prolonged stress.	☐	☐
III. The party seeking to appeal must bear the cost of the application and legal fees. Some dissatisfied parties may be unable to afford to lodge an appeal, despite qualifying for an appeal, meaning incorrect decisions are not corrected, leading to an unfair result.	☐	☐

Question 16

(4 MARKS)

Discuss the ability of the Victorian civil court hierarchy to achieve the principle of fairness.

Adapted from VCAA 2021 exam Section A Q3c

Linking to previous learning

Question 17

(3 MARKS)

Explain how alternative methods of dispute resolution take the pressure off the court hierarchy.

5D Judges, magistrates, and juries in a civil dispute



Image: Pixel B/Shutterstock.com

The civil justice system is like a machine. In order for the machine to run smoothly, each part needs to be performing its role correctly. For a civil hearing or trial to be conducted effectively, the judge or magistrate, the jury, and the parties involved in the dispute must all adequately perform their specific functions, whilst striving for fairness, equality, and access.

STUDY DESIGN DOT POINT

- the roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management), the jury, and the parties

5A 5B 5C 5D 5E 5F 5G 5H 5I 5J 5K

3.2.6.1

The role of the judge or magistrate in a civil dispute

- 3.2.6.1.1 The difference between the judge and the magistrate
- 3.2.6.1.2 Case management powers
- 3.2.6.1.3 A comparison of the role of judges and magistrates in criminal and civil cases

3.2.6.2

The role of the jury in a civil dispute

- 3.2.6.2.1 A comparison of the role of juries in criminal and civil cases

Lesson introduction

Although the vast majority of civil claims in Victoria are settled out of court, the courts are still an effective body for dispute resolution in some circumstances. For cases that do require a hearing or a trial, the key personnel in the case have specific roles to fulfil to ensure an efficient and effective civil proceeding. Specifically, judges, magistrates, and juries must all uphold their respective roles to promote the achievement of justice.

The role of the judge or magistrate in a civil dispute 3.2.6.1

The **judge** is the umpire of a courtroom overseeing all personnel and evidence, whilst upholding rules and procedures. A judge will usually have extensive experience as a solicitor or barrister before becoming a judge. In the Magistrates' Court, the umpire that presides over a hearing is known as the **magistrate**.

Table 1 Titles given to judges and magistrates

Court	Judge or magistrate's title	Example
Magistrates' Court	Magistrate	Magistrate Foster
County Court	Judge	Judge Clark
Supreme Court	Justice	Justice Hollingworth
High Court of Australia	Justice	Justice Kiefel

KEY TERMS

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.

LEGAL VOCABULARY

Justice a judge in a relatively superior court in the hierarchy, such as in the Supreme Court of Victoria or the High Court of Australia.

Table 2 The role of the judge or magistrate in a civil dispute

Role	Explanation
Case management	Prior to a trial or hearing, a judge or magistrate actively manages a dispute to ensure the efficient and effective use of resources in reaching a resolution. This can involve directions to parties to complete a range of pre-trial procedures.
Manage the trial or hearing	A judge or magistrate will ensure the proceedings of the trial or hearing operates efficiently and is an effective use of resources. This can involve judges using their powers to control how evidence is presented and whether it is in oral or written format. A judge can improve the efficiency of a trial by: - ensuring correct procedures are followed. - monitoring and adjusting the processes of a trial as appropriate. - limiting the number of witnesses or topics for which a witness may be questioned on. - limiting examination-in-chief, cross-examination time, and re-examination.
Apply the rules of evidence and procedures	Judges are required to make rulings relating to evidence and procedure, such as: - ensuring only admissible evidence is presented in court. - ensuring witnesses are examined and cross-examined lawfully. - giving directions on how evidence is to be presented and what documents the jury is permitted to see. - providing clarity on the rules of evidence and procedure.
Direct the jury (judge only)	A judge will instruct the jury on their role in a civil trial, if one is used. They will direct the jury by explaining who has the onus to meet the standard of proof. Prior to their deliberations, the judge may also summarise the evidence presented during the trial for the jury. This does not apply in the Magistrates' Court, as juries are never used in this court.
Remain unbiased	A judge or magistrate must remain impartial throughout the entire proceeding. They must not favour either party and will act as an umpire of the courtroom to oversee the case and ensure it is conducted fairly.
Determine the liability of a defendant (magistrates and sometimes judges)	In the absence of a jury, the judge must determine whether the plaintiff has proven, on the balance of probabilities, that the defendant caused their injury or loss. In most County Court and Supreme Court cases, the judge will determine liability as a jury is rarely used. In the Magistrates' Court, the magistrate will always decide liability, as juries are never used.
Award remedies	The judge or magistrate has the responsibility of ordering the appropriate remedy once a verdict is determined for the wronged party. This can be in the form of damages, an injunction, and/or other remedies.

LESSON LINK

You learnt about judges and magistrates in **2E Judges, magistrates, and juries in a criminal case**.

LEGAL VOCABULARY

Admissible evidence evidence that abides by the rules of procedure and is, therefore, allowed to be presented to the court.

LESSON LINKS

You will learn about remedies in **Chapter 6: Remedies**.

You learnt about the Victorian civil court hierarchy in **5C The Victorian court hierarchy and civil disputes**.

You learnt about the standard of proof in **4A Key principles of the Victorian civil justice system**.

The difference between the judge and the magistrate 3.2.6.1.1

Judges and magistrates in Victoria share similar roles, however, given they must hear and determine different civil disputes, the functions they serve slightly differ to ensure justice can be served to the community in an effective and efficient manner.

Table 3 The differences between a judge and a magistrate in a civil dispute

	Judge	Magistrate
Court 	Judges are appointed to the higher courts of Victoria, such as the Supreme Court and the County Court. Their appointment is determined by considering their expertise and understanding of the law.	Magistrates, on the other hand, preside over the lower courts in Victoria, such as the Magistrates' Court and the Children's Court. They are appointed based on their experience and knowledge of the law.
Types of disputes 	Judges deal with more serious civil claims, where parties are seeking a large amount of damages.	Magistrates deal with less serious civil claims as the Magistrates' Court's jurisdiction only covers cases where the plaintiff is seeking between \$10,000 to \$100,000. For claims below \$10,000, a magistrate will generally refer the parties to arbitration.
Award remedies 	Judges have more discretion than magistrates when it comes to awarding remedies. Judges are expected to exercise their judgement and discretion in accordance with the law and legal precedent. However, if the parties request a jury, the jury may determine the amount in damages.	Magistrates are bound by precedent as they are in the lowest court and have minimal discretion when it comes to awarding remedies. They must follow the statutory restrictions on damages as well as the decisions from previous courts.
Jury directions 	Juries are rare in civil proceedings, so in most cases the judges decide the verdict and remedy. When a jury is present, judges must direct the jury and ensure they understand the law and evidence presented. The judge does not decide the verdict when there is a jury.	There is no jury in the Magistrates' Court, thus the magistrate does not need to direct a jury and instead determines both the verdict and the remedy.

LEGAL VOCABULARY

Verdict a decision made by the jury regarding the guilt or liability of a party.

WANT TO KNOW MORE?

Magistrates also determine cases in other courts, such as the Childrens Court. You can find out more about the difference between the judge and the magistrate by searching 'An introduction to the Victorian courts' and clicking on the 'Victorian Government Solicitor's Office' (2020) webpage.

Case management powers 3.2.6.1.2

Judges and magistrates in civil cases have pre-trial **case management powers** that allow them to give orders and directions about the proceedings, such as ordering the parties to mediation, with the aim of ensuring justice is delivered efficiently. Under the *Civil Procedure Act 2010* (Vic), a judge or magistrate has the power to make orders and actively intervene in how parties conduct their disputes prior to, and during, a trial. A judge or magistrate will make directions with the goal of resolving the dispute in the most efficient and cost-effective manner. The overarching obligations outlined in the *Civil Procedure Act 2010* (Vic) are ‘to facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute’.

If a party does not comply with a judge’s directions over the course of a civil matter, the court may:

- dismiss the plaintiff’s claim.
- dismiss the defendant’s defence, and find in favour of the plaintiff.
- reject any evidence the party wishes to present to the court.
- direct one party to pay part/all of the other party’s costs (an adverse cost order).

Table 4 Judicial powers of case management

Case management power	Explanation
Direct parties to attend directions hearings	Directions hearings allow a court to take an active role in the conduct of proceedings. The function of a directions hearing is to establish a timeframe for the proceeding and includes instructions regarding the collection of evidence, any referrals to mediation, and the establishment of the final trial date.
Direct parties to attend mediation	If a judge or magistrate believes a case could be settled out of court through mediation, they have the power to order the parties to attend mediation. This often results in a less costly resolution for the parties as they do not have to incur the cost of court fees. Failure to attend judge-ordered mediation may result in a fine from the court. An out-of-court settlement also saves the court time and money, freeing up precious resources.
Give directions relating to discovery	A judge or magistrate can impose obligations on parties in relation to discovery , which is an order to provide evidence or documents, relevant to the issue in dispute, to the other party.
Determine deadlines	The judge or magistrate can set deadlines for the parties to submit documents or evidence, such as witness statements or expert reports, to ensure the trial proceeds in an organised and timely manner.
Control the trial or hearing process	The judge or magistrate can control the trial or hearing process. For example, they can direct the order and timeframe in which evidence is presented by each party. They can also issue orders to regulate the conduct of the trial or hearing, including limits on the number of witnesses and length of opening statements.

KEY TERM

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.

LEGISLATION

Civil Procedure Act 2010 (Vic)

LEGAL VOCABULARY

Directions hearing the preliminary hearings that take place before a civil trial, during which the judge or magistrate has the authority to issue orders to ensure the case is moving forward as intended.

Discovery a pre-trial process whereby each party to a civil dispute is obliged to share information and evidence they have about the case to ensure both parties are aware of the existence of documents and other evidence.

LESSON LINK

You learnt about mediation in **5B Methods of resolving civil disputes**.

HYPOTHETICAL SCENARIO



Figure 1 The judge used case management powers to order mediation for Otto and Duncan's dispute

Otto's allergic reaction disaster

Otto had a serious allergic reaction after his doctor, Duncan, prescribed him new medication. Otto took legal action, claiming Duncan did not exercise sufficient care when prescribing the medication and sought compensatory damages for his pain and suffering. In the interest of efficiency, the judge directed Otto and Duncan to attend mediation in an attempt to reach an early resolution. Duncan refused to actively participate in the mediation.

At trial, Otto was unsuccessful and not awarded damages. Usually, the losing party in a civil dispute pays some, if not all, of the opposing party's costs. However, in this case the judge did not award costs in Duncan's favour, as he failed to follow the earlier direction to participate in mediation, resulting in the dispute not being resolved as quickly as it ought to have been.

Evaluating judges and magistrates' ability to achieve the principles of justice in a civil dispute**STRENGTHS**

- Independent judges and magistrates ensure trials are conducted without bias and according to rules of evidence, thus contributing to fairness as the decisions are based on law and facts alone.

LIMITATIONS

- Judges and magistrates rely on the parties to present all of the evidence and facts of the dispute during a trial. If parties have no legal representation, this may prevent all of the relevant facts from being presented to the court, or in their best light, thus leading to an unfair trial.

**STRENGTHS**

- Judges and magistrates ensure rules of evidence and procedure apply equally to all parties during a civil dispute.

LIMITATIONS

- Whilst judges and magistrates are impartial, judicial officers, they are still subject to personal bias and may unconsciously discriminate against certain parties and personal characteristics, limiting equality.

**STRENGTHS**

- Judges and magistrates' case management powers, such as setting time limits for evidence and ordering mediation, minimise the cost of civil disputes and thereby, enhance the accessibility of the civil justice system.

LIMITATIONS

- Accessing a hearing or trial presided by a magistrate or judge can be challenging due to a range of factors, such as the associated high costs and time-consuming nature of the proceedings. As a result, the courts and the expertise of judicial officers may be inaccessible for many members of the community.

A comparison of the role of judges or magistrates in criminal and civil cases 3.2.6.1.3

Whilst there are many similarities between the role a judge or magistrate plays in a criminal case and a civil dispute, there are also some differences.

USEFUL TIP

A key skill in Unit 3 Area of Study 2 is to 'compare the roles of key personnel in a criminal and civil case'. When you are asked to 'compare', you should outline the similarities of, and differences between, two things. This is different to 'evaluate' or 'discuss', which requires an assessment of the strengths and limitations or weaknesses of something.

Table 5 Similarities and differences between the role of judges or magistrates in criminal and civil cases

Similarities	Differences
Judges and magistrates have a paramount role of acting as the independent umpire of the court and must remain impartial, regardless of whether they are presiding over a criminal or civil case.	Judges and magistrates in criminal cases do not have a role in pre-trial case management, such as ordering mediation or discovery, compared to those in civil cases who are involved in pre-trial procedures.
In both criminal and civil cases, judges and magistrates ensure correct procedures are followed and apply the rules of evidence.	A magistrate will determine the guilt of an accused in a criminal case in the Magistrates' Court, whereas in a civil case, they will be determining the liability of a defendant.
In both criminal and civil cases, if there is a jury, the judge must instruct jurors and give them directions.	In criminal cases, the judge or magistrate will impose a sanction if the accused is found guilty, whereas in civil cases they will award damages, order an injunction, or make other orders as a remedy.

The role of the jury in a civil dispute 3.2.6.2

A **jury** is a group of individuals that are chosen randomly and required to attend court and make a decision based on evidence that is presented to them. In a civil trial, the jury is composed of six individuals randomly selected from the **electoral roll** who decide questions of fact, the verdict, and in some instances the remedy. Some individuals are excluded from jury duty, including those with pre-existing relationships to the parties or who work in the legal field. It is not common for juries to be used in civil trials in Victoria as the cost must be fully paid for by the parties.

It is important to note that a jury is not a guaranteed right in a civil trial. If a party wishes to have a trial by jury, they must receive approval to do so, and be willing to fund the cost of the jury as it is not paid for by the state.

Table 6 Role of the jury in a civil dispute

Role	Explanation
Remain objective	The jury should be independent and unbiased throughout the proceeding and when determining the verdict. Potential jurors who believe they cannot remain impartial must ask to be excused during the process of jury empanelment .
Listen to evidence, judge's directions, and submissions made by legal representatives	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, take notes, and keep track of information throughout the trial. This involves listening to any directions given by the judge, and explanations of key legal concepts.
Determine liability and damages	The main role of the jury is to determine whether the defendant is responsible for the plaintiff's harm based on whether the plaintiff has proven their case on the balance of probabilities. Most of the time, the jury will need to reach a unanimous verdict. However, in some cases a majority verdict of five out of six jurors may be accepted by the court. Jurors are not required to provide a reason for their verdict. Additionally in some disputes, the jury may also have a role in calculating damages.

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.

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.



Figure 2 A civil jury is made up of six jurors, whereas a criminal jury has 12 members

LEGISLATION

*Supreme Court (General Civil Procedure)
Rules 2015 (Vic)*

LEGAL CASE**McKane v Conbar Transport Pty Ltd (2022) VSC 724****Facts**

The plaintiff, McKane, was seeking damages after being struck by a large ewe and thrown to the ground while at work. She suffered injuries to her left arm and hand, alongside other consequential injuries.

Legal issue

The defendants, the operators of the workplace, sought a trial before a jury in accordance with Order 47 of the *Supreme Court (General Civil Procedure) Rules 2015 (Vic)*. The plaintiff made an application to have the trial conducted by judge alone. She argued that the legal issues were too complex for a jury to understand, and that trial by a judge alone would result in a more just outcome.

Decision

The judges upheld the right to trial by jury and stated the legal issues were not too complex for a jury to comprehend and thus, there was no reason to deprive the first defendant of their entitlement to a trial by jury. During the trial, the judge stated the instructions to equip jurors with knowledge on the points of law necessary to make an informed decision on the liability of the operators of the workplace, Conbar Transport Pty Ltd.

Significance

The right to trial by jury was upheld, and the liability of the defendant was decided by a group of six jurors. The judge's directions to a jury during a civil case ensure legal information is digestible and comprehensible for the everyday person, meaning the jury can understand the case regardless of the complexity of the facts.



Image: Elliot Photography/Shutterstock.com

Figure 3 McKane sought damages after being struck by a ewe while at work

Evaluating a jury's ability to achieve the principles of justice in a civil dispute

**STRENGTHS**

- A randomised cross-section of the community is used to determine the verdict, so the parties to a civil dispute should feel their case has been decided by their peers and according to a diverse range of views, promoting fairness.
- Juries cannot seek additional information about the case beyond the courtroom and are instructed to disregard any prior knowledge of the dispute. This promotes fairness as it encourages jurors to remain impartial.

LIMITATIONS

- Making decisions in legal cases is a complex task, and when undertaken by people with no legal training, there is a greater risk of an unfair verdict.
- Jurors are not required to provide the rationale for their verdict, meaning there is no guarantee the law has been correctly applied based on the facts presented.

STRENGTHS

- Both parties have the capacity to request a jury trial in a civil dispute regardless of personal characteristics, therefore upholding equality.

LIMITATIONS

- A party may wish to have a jury trial, but may be unable to bear the cost. This limits equality as those of a low socioeconomic status are less likely to utilise a civil jury trial.
- Some individuals are ineligible for or disqualified from jury service, and as a consequence, parties may not feel the jury is a true cross-section of the community. This may undermine equality to a trial by one's peers.

**STRENGTHS**

- The presence of juries increases the use of plain English, instead of legal jargon, and ensures the jury understands the court's procedures and the evidence they are being asked to make a decision upon. This allows both parties to understand the processes being used to determine their case, promoting access to justice.

LIMITATIONS

- Additional fees are required for jury trials, so it may not be financially viable for some parties to request them. This financial constraint makes trial by jury inaccessible for some parties.
- Access to efficient dispute resolution may be delayed by the use of a jury as extra time is required to empanel a jury and throughout the dispute where the judge may need to spend more time explaining key legal concepts or evidence to jurors.
- Hung juries and mistrials due to juror misconduct, can require a retrial and further delay the achievement of justice. This hinders efficient and timely access to justice.

**USEFUL TIP**

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of juries in relation to each principle may help you evaluate how juries can uphold the principles of justice.

A comparison of the role of juries in criminal and civil cases 3.2.6.2.1

A jury has a similar role in both criminal and civil cases, however, there are a few key differences.

Table 7 Similarities and differences between the role of juries in criminal and civil cases

Similarities	Differences
Juries have a paramount role in remaining impartial and making a decision based on the evidence presented, regardless of whether they are taking part in a criminal or a civil case.	In a criminal case, it is the jury's role to determine the guilt or innocence of the accused. If it is determined that the accused is guilty, this must be beyond reasonable doubt. In a civil case, the jury determines the defendant's liability, and this must be on the balance of probabilities.
In both criminal and civil cases, juries are obliged to listen to instructions, directions, and evidence carefully.	Whilst the imposition of a sanction for an accused who is found guilty is never the role of a jury in a criminal case, in some civil case, the jury may play a role in determining the amount of damages to be awarded.

Lesson summary

- Judges and magistrates act as impartial adjudicators in court proceedings and have the primary duty of ensuring the principles of justice are upheld throughout the trial process.
- Whilst judges and magistrates share similar roles, magistrates are limited to hearing minor disputes in the Magistrates' Court and are bound by decisions of higher courts.
- Civil judges possess case management powers defined in the *Civil Procedure Act 2010* (Vic), which empower them to issue directions that contribute to just and efficient dispute resolution.
- Juries in civil cases are uncommon. They must be requested and funded by the parties. Civil juries consist of six individuals who must deliberately present evidence and determine a verdict, including awarding damages in certain circumstances.
- Whilst there are many similarities in the roles of judges, magistrates, and juries in criminal and civil cases, there are also some differences.

5D Questions

Check your understanding

Question 1

Judges and magistrates in civil disputes are able to give directions to the parties to facilitate the achievement of justice.

- A. True
- B. False

Question 2

A civil dispute will always require both a judge and a jury for a verdict to be determined.

- A. True
- B. False

Question 3

Which of the following describe the case management powers of a judge in a civil case?

(Select all that apply)

- A. Power to order mediation
- B. Power to direct parties to a criminal court
- C. Power to order directions hearings
- D. Power to set the timeline of the case

Question 4

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

increasing

cross-examination

limiting

A judge can improve the efficiency of a dispute by [] the time spent on [] and reducing the amount of topics that a witness may be questioned on.

Question 5

In a high profile civil trial, a number of jurors played Sudoku while key evidence was being presented. Following the delivery of the verdict, the defendant was unhappy with the outcome and claimed the jurors' behaviour led to an unjust verdict and that a few jurors admitted they were highly influenced by the media in their decision.

Which of the following roles did the jury **not** fulfil in the scenario? **(Select all that apply)**

- A. Jurors should remain alert, take notes, and keep track of information presented in court.
- B. Juries cannot seek additional information about the case beyond the courtroom and they are instructed to disregard any knowledge they may have of the dispute.
- C. The jury should be independent and unbiased when reaching decisions.
- D. The jury should decide the liability of a party on the balance of probabilities.

Question 6

Tick the box to indicate whether each of the following statements refers to the achievement of **fairness**, **equality**, or **access**.

Statement	Fairness	Equality	Access
I. Independent judges and magistrates ensure trials are conducted without bias and according to rules of evidence, thus contributing to fairness as the decisions are based on law and facts alone.	☐	☐	☐
II. Judges and magistrates' case management powers, such as setting time limits for evidence and ordering mediation, minimise the cost of civil disputes and thereby, enhance the accessibility of the civil justice system.	☐	☐	☐
III. Judges ensure rules of evidence and procedure apply equally to all parties during a civil dispute.	☐	☐	☐

Question 7

Which of the following are key responsibilities of the magistrate during a civil dispute?

(Select all that apply)

- A. Advise the jury on the application of relevant law to the facts of the case before them.
- B. Ensure courtroom processes and procedures are followed by all individuals present during the trial.
- C. Assist judges with high-profile cases upon request.
- D. Act as an independent 'umpire' who oversees and adjudicates proceedings without bias, allegiances, or preconceived notions.

Question 8

Which of the following are similarities between the role of a jury in criminal and civil cases?

(Select all that apply)

- A. The need to remain impartial
- B. The verdict delivered
- C. The requirement to listen to instructions and directions from the court
- D. The role of the jury in determining the sanctions and remedies

Question 9

Juries are an automatic right in civil disputes and are funded by the state.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 10

(2 MARKS)

Describe **one** role of the judge in a civil dispute.

Question 11

(4 MARKS)

Outline **two** roles of the jury in a civil dispute.

Adapted from VCAA 2018 exam Section A Q1

Question 12

(3 MARKS)

Explain judicial powers of case management.

Question 13

(4 MARKS)

Compare the role of a judge in a criminal case with the role of a judge in a civil case.

Question 14

(4 MARKS)

'Juries in criminal cases have an identical role to juries in a civil case.'

Do you agree with this statement? Justify your answer.

Extended response

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 juries in civil disputes.

Statement	Strengths	Limitations
I. A randomised cross-section of the community is used to determine the verdict, so the parties in a civil dispute should feel their case has been decided by their peers and according to a diverse range of views, promoting fairness.	☐	☐
II. Making decisions in legal cases is a complex task, and when undertaken by people with no legal training, there is a greater risk of an unfair verdict.	☐	☐
III. Jurors are not required to provide the rationale for their verdict, meaning there is no guarantee the law has been correctly applied based upon the facts presented.	☐	☐
IV. Jurors must remain impartial and make their decision solely on the facts and evidence presented, promoting a fair and just outcome	☐	☐

Question 16

(5 MARKS)

Discuss the extent to which the use of a jury in a civil dispute assists the justice system to achieve the principle of fairness.

Adapted from VCAA 2021 exam Section A Q8

Linking to previous learning

Question 17

(3 MARKS)

With reference to the standard of proof, explain how the role of the jury in a civil case is different to the role of a jury in a criminal case.

5E The parties in a civil dispute

STUDY DESIGN DOT POINT

- the roles of key personnel in a civil dispute, including the judge or magistrate (including the role of case management), the jury, and the parties

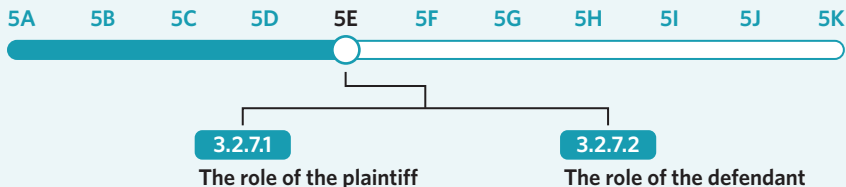


Image: ArmadilloPhotograp/Shutterstock.com

In a civil dispute, the plaintiff and the defendant are like two chess players in a strategic battle. The plaintiff, armed with a compelling argument, meticulously moves their pieces to build a strong case. Meanwhile, the defendant tries to strategically counter each move and undermine the plaintiff's case. Both players strive to outwit their opponent, hoping to secure victory on the legal chessboard.

Lesson introduction

In Australia's legal system, parties to a civil dispute control how they present their case to an impartial judge or magistrate. Each party to a civil dispute is responsible for preparing their case and bringing it before the court. This includes all the necessary pre-trial procedures, considering enforcement issues, assessing costs, and applying for an appeal if appropriate.

The role of the plaintiff 3.2.7.1

As the **plaintiff** is the party that brings a civil action against the **defendant**, their primary focus is to prove the defendant is liable. Alternatively, as the defendant is the party who is alleged to have breached the plaintiff's civil rights, they aim to convince the jurors or judge, in a trial without a jury, that they are not liable.

Table 1 The role of the plaintiff in a civil dispute

Role of the plaintiff	Explanation
Control their own case	The civil trial system in Victoria allows the plaintiff (via their legal representative if they have one) to have full control over their case, which is referred to as party control . When bringing a claim to court, they have the authority to determine their cause of action, the selection of evidence, and the choice of witnesses, with adherence to the rules of evidence and procedure. For instance, the plaintiff has the freedom to pursue multiple actions for various civil matters or focus solely on one claim they believe will be successful, even if other breaches have occurred.
Disclosure	It is the responsibility of the parties to ensure all relevant documents are presented to the court as per the <i>Civil Procedure Act 2010</i> (Vic), which states that the overarching obligation of the parties in a civil dispute is to disclose the existence of documents that are critical to the dispute.

Continues →

KEY TERMS

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.

LEGAL VOCABULARY

Party control the power parties in a civil trial hold to determine the course of proceedings.

LEGISLATION

Civil Procedure Act 2010 (Vic)

LESSON LINK

You will learn about injunctions in 6B Injunctions as a remedy.

Table 1 Continued

Role of the plaintiff	Explanation
Present evidence	The parties must present all evidence to the judge throughout the trial, as well as the jury if one had been requested. In practice, the presentation of evidence and legal arguments is conducted by legal practitioners on the plaintiff's behalf.

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 VCE Discussion Space had breached copyright laws by publishing numerous TSFX practice exams. Upon receiving the complaint, Facebook shut down VCE Discussion Space. The defendant, Trendy Rhino Pty Ltd, the creator of the original Facebook group, formed a new Facebook group called 'VCE Discussion Space Backup'. The new group administrators urged the estimated 11,000 followers to 'reclaim the group that is rightfully ours', inciting followers to criticise and blame the TSFX for taking down its page.

Legal issue

The plaintiff, TSFX, after suffering a new round of criticism at the hands of VCE Discussion Space, sought an injunction in the Supreme Court of Victoria as damages were found to be an inadequate remedy. TSFX presented the various subsequent examples of defamation and 'sneaky' tactics that VCE Discussion Space had employed against them to the court.

Decision

Justice Dixon granted an interlocutory injunction against Trendy Rhino for defamation and copyright breach.

Significance

Trendy Rhino's defence failed and it had to abide by the court-ordered interlocutory injunction. This case demonstrates the role of the plaintiff in a civil case, disclosing relevant evidence that caused them to suffer loss and ultimately securing an appropriate remedy to mitigate their loss.

The role of the defendant 3.2.7.2

The defendant is the party who is alleged to have breached the plaintiff's civil rights. They are able to defend themselves against the plaintiff's claims. Their aim is to convince the jurors, or judge in a trial without a jury, that they are not liable.

Table 2 The role of the defendant in a civil dispute

Role	Explanation
Control their own case	The civil trial system in Victoria allows the defendant to have full control over their defence case. They have the ability to raise relevant defences and call their own witnesses, with adherence to the rules of evidence and procedure. For instance, the defendant has no obligation to present defences if they believe the plaintiff has not sufficiently proven their case on the balance of probabilities. However, defendants do have the option to raise defences to protect themselves from liability. Continues →

Table 2 Continued

Role of the defendant	Explanation
Disclosure	It is the role of the parties to ensure all relevant documents are presented to the court as per the <i>Civil Procedure Act 2010</i> (Vic).
Present defences	The defendant is able to present defences to the judge throughout the trial, as well as the jury if one has been selected. Legal practitioners usually present evidence on the defendant's behalf.

LEGISLATION*Civil Procedure Act 2010* (Vic)**HYPOTHETICAL SCENARIO****Drew's cookie crisis**

Drew, owner of popular cookie business known as 'Graham Cracker', found himself at risk of serious litigation after Leila, a customer, contracted a deadly disease from eating one of his cookies.

Although Drew knew that it is not necessary for the defendant to present their case in a civil trial, he understood the gravity of the situation and recognised the importance of mounting a strong defence to protect his business and reputation.

During the trial, Drew presented the relevant documents. He argued the contaminated cookie was an unforeseen occurrence, as the business had never encountered such an issue before. He highlighted the steps taken to ensure the highest standards of cleanliness and safety, supporting this with documentation.

However, Drew's defence was not strong enough to prove he was not liable, and Leila was successful in her negligence claim.

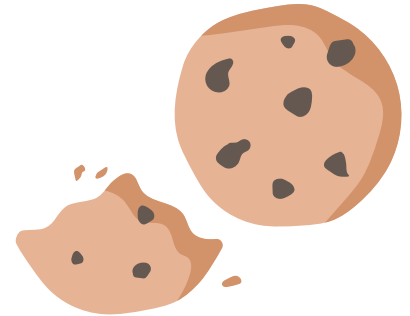


Figure 1 Drew's defence case failed and that is just how his cookies crumbled

DEEP DIVE**Overarching obligation of the parties to a civil dispute**

In Victoria, the *Civil Procedure Act 2010* (Vic) is designed to ensure all civil matters are resolved in the most timely and cost-effective manner possible. This means parties and their legal representatives have certain obligations during the trial:

- (1) Act honestly
- (2) Only make claims that have a proper basis
- (3) Only take steps to resolve or determine the dispute
- (4) Cooperate in the conduct of the civil proceeding
- (5) Not mislead or deceive
- (6) Use reasonable endeavours to resolve the dispute
- (7) Narrow the issues in dispute
- (8) Ensure costs are reasonable and proportionate
- (9) Minimise delay
- (10) Disclose the existence of documents critical to the dispute

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of the parties in relation to each principle may help you evaluate how the parties can uphold the principles of justice.

Evaluating the parties ability to achieve the principles of justice during a civil dispute**STRENGTHS**

- Parties to a civil dispute have control of their own case and are responsible for deciding what facts to present and how to present them. Therefore, party control contributes to fairness as parties can participate in, and have control over, the civil court processes.

LIMITATIONS

- Self-represented parties may not understand which documents are relevant and therefore, may fail to disclose all relevant evidence to the court. This may jeopardise the achievement of a fair outcome to the case where not all evidence has been assessed.
- Self-represented parties may struggle to understand how to present legal arguments and evidence in the best possible light, which may lead to an unjust outcome.

**STRENGTHS**

- Both parties are given equal opportunity to present their case to the court, contributing to the principle of equality.
- Both the plaintiff and defendant must abide by court processes and procedures, achieving equality as both parties are treated the same before the law.

LIMITATIONS

- Not all parties are equally equipped to present their case to a judge and jury without the assistance of legal practitioners. Therefore, some parties, such as those who are of low socioeconomic status, may not be able to defend themselves effectively, such as due to the expense of legal representation, hindering equality.

**STRENGTHS**

- Courts provide some general guidance to parties who are representing themselves, regarding court procedures, to allow them to better engage with the justice system and its processes on an informed basis, enhancing access to justice.

LIMITATIONS

- Institutions that promote access to justice for parties of low socioeconomic status in a criminal case, such as Victoria Legal Aid, are often unable to support parties in civil disputes, leaving defendants without legal representation. Parties without legal representation may struggle to understand their legal rights, and how to present legal arguments and evidence, limiting access to justice.

LESSON LINK

You learnt about Victoria Legal Aid (VLA) in **2B Victoria Legal Aid and community legal centres**.

Lesson summary

The parties to a civil trial:

- have control over their case.
- can choose which witnesses to call and what evidence to present.
- must provide all relevant documentation to the court.

The role of the plaintiff is to:

- initiate the claim and present a case to prove the defendant's liability on the balance of probabilities.

The role of the defendant is to:

- choose whether to present a defence and ensure they are not found liable.

5E Questions

Check your understanding

Question 1

The parties involved in a civil dispute are called the plaintiff and the accused.

- A. True
- B. False

Question 2

Which of the following statements is **not** correct about the parties in a civil trial?

(Select all that apply)

- A. The parties must present all relevant documents to the court.
- B. Only the plaintiff is permitted to call witnesses that present evidence to the court.
- C. The defendant must present a defence to prevent them from being found liable.
- D. The parties have control over their case, including deciding what evidence to present.

Question 3

Which of the following are the roles of the plaintiff in a civil trial? **(Select all that apply)**

- A. To initiate the claim against the defendant.
- B. To present all relevant documents to the court.
- C. To decide which lawful defence(s) they wish to present in court.
- D. To call witnesses and present evidence to the judge and the jury, if the parties choose to have one.

Question 4

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

plea negotiations

party control

Unlike a criminal trial, parties in a civil trial have a degree of control over how the proceedings play out.

This is called [] .

Question 5

Which of the following are the roles of the defendant in a civil trial? **(Select all that apply)**

- A. To decide if the plaintiff's evidence is admissible.
- B. To explain points of law to victims and other witnesses.
- C. To present all relevant documents.
- D. To decide whether to present defences at trial.

Question 6

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of parties in a civil trial in achieving the principles of justice.

Statement	Strengths	Limitations
I. Both the plaintiff and the defendant are given an equal opportunity to present their case to the court.	☐	☐
II. Self-represented parties may be disadvantaged if they do not understand court processes and are unable to present all relevant evidence to prove their case.	☐	☐
III. Self-represented parties may struggle to understand how to present legal arguments and evidence in the best possible light, which may lead to an unjust outcome.	☐	☐
IV. The courts provide some general guidance to parties who are representing themselves, regarding court procedures, to allow them to better engage with the justice system and its processes on an informed basis.	☐	☐

Question 7

The plaintiff initiates the case in civil trials and the defendant can defend themselves against the plaintiff's claims to cast doubt in the judge or jury, ensuring the plaintiff can not prove the defendant's liability beyond reasonable doubt.

- A. True
- B. False

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

(3 MARKS)

Outline the plaintiff's roles in a civil trial.

Adapted from VCAA 2022 exam Section A Q1

Question 9

(3 MARKS)

Explain **one** way in which the defendant's ability to present defences could achieve the principle of fairness.

Adapted from VCAA 2018 exam Section A Q5c

Question 10

(4 MARKS)

Fabio entered a contract when selling his car to Jade. After purchasing the car, Jade found it was faulty. Jade, the defendant, initiated a civil claim against Fabio. Fabio decided to hide documents at trial that stated the car was in fact faulty. He faced no legal repercussions for withholding these documents.

Identify **two** errors in the scenario above and, for each error, explain the correct civil process that should have occurred.

Adapted from VCAA 2020 exam Section A Q5

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.

Risharb and Adam got into a scuffle on the footy field after a heated match. Risharb required major surgery that was very costly and he is unable to work due to his injuries. Risharb initiated a civil claim against Adam but is unable to afford legal representation. Therefore, Risharb decides to represent himself at the trial.

Question 11

Which of the following statements are **true** about the roles of the parties in Risharb's case?

(Select all that apply)

- A. Both parties are subject to overarching obligations, such as the requirement to cooperate, disclose relevant documents at the earliest possible opportunity, and act honestly.
- B. Adam has the burden to present a case in his defence on the balance of probabilities.
- C. Since Risharb is representing himself, he may be disadvantaged as Adam could have a proficient lawyer who presents his case in the best possible light.
- D. Adam has the ability to cross-examine Risharb's witnesses, but Risharb cannot cross-examine Adam's.
- E. Adam and Risharb both have party control.

Question 12

(6 MARKS)

Assuming Risharb's case proceeds to trial, discuss the roles of both parties involved in this case.

Adapted from VCAA 2020 exam Section B Q1c

Linking to previous learning**Question 13**

(3 MARKS)

Distinguish between the role of the parties and the role of the judge in a civil trial.

5F Legal practitioners in a civil dispute

STUDY DESIGN DOT POINT

- the need for legal practitioners in a civil dispute

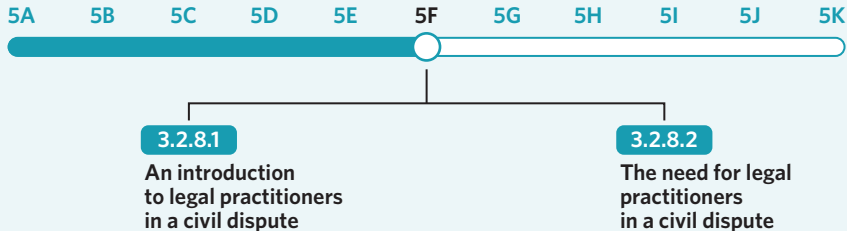


Image: Elena Nichizhenova/Shutterstock.com

Civil disputes are often considered a battle between the plaintiff and the defendant. As with any duel, a competitor should obtain all the help they can get and follow the rules. Legal practitioners in civil disputes assist in legal battles by ensuring their client's arguments are presented in the best possible light while complying with the relevant rules and procedures of the civil justice system.

Lesson introduction

The civil justice system is highly complex and difficult to navigate due to the processes, methods, and various institutions that may be involved in resolving civil disputes. Therefore, parties often engage legal practitioners to assist in resolving their civil legal matters. Whilst legal practitioners have a duty to seek the best result for their clients, they also must comply with the rules of the courts, tribunals, or other dispute resolution processes. By engaging a legal practitioner, a party in a civil dispute can gain a better understanding of their legal rights and obligations, leading to fairer outcomes. Although the courts may help a party who does not have legal representation, this assistance can only extend so far. Therefore, if a party chooses to self-represent, or is forced to due to their financial circumstances, the outcome of their dispute may be unjust and unfavourable.

An introduction to legal practitioners in a civil dispute 3.2.8.1

As an initial step in civil proceedings, both the plaintiff and defendant may seek the guidance of a **solicitor**. Solicitors are **legal practitioners** who primarily focus on assisting clients with various day-to-day legal matters and concerns. They bear the responsibility of fulfilling numerous legal obligations and duties, including offering clients advice and strategies to address a wide range of legal issues.

The main difference between **barristers** and solicitors is that solicitors advise clients on a broad range of legal issues, whilst barristers present arguments in court. Barristers primarily serve as legal representatives for clients in court, who may be involved in significant civil disputes. Barristers must present arguments and evidence before a judge, and in some circumstances, a jury. Barristers may also be utilised in presenting their client's case in out-of-court settlements such as mediation, conciliation, or arbitration. However, these out-of-court methods of resolving a dispute often require parties to be self-represented, and hence, there is often no need for legal practitioners when resolving a dispute through these avenues.

KEY TERMS

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.

Legal practitioner a lawyer with an Australian legal practising certificate.

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.

LEGAL VOCABULARY

Litigant a person involved in a civil dispute.

LESSON LINKS

You learnt about legal practitioners in **2G Legal practitioners in a criminal case**.

You learnt about mediation, conciliation, and arbitration in **5B Methods of resolving civil disputes**.

You learnt about Victoria Legal Aid (VLA) and community legal centres (CLCs) in **2B Victoria Legal Aid and community legal centres (CLCs)**.

In criminal cases, an accused person's trial may be adjourned in order for them to gain legal representation. However, this same right is not afforded to parties in a civil dispute, although judges have a duty to help self-represented **litigants** understand court processes.

Furthermore, it may be more difficult for parties of low socioeconomic status in a civil dispute to obtain representation from Victoria Legal Aid (VLA) compared to a criminal case. VLA may grant legal assistance to a plaintiff in a civil dispute if the amount of their claim is \$5,000 or more. A defendant may also be able to receive legal assistance if all of the following factors apply:

1. The civil claim is for an amount of \$5,000 or more.
2. The defendant's sole home is at immediate risk in the action.
3. There is a strong prospect that the defendant can defend the action.

Community legal centres (CLCs) may be able to provide legal advice or representation in a civil dispute, for example:

- AED Legal Centre in Melbourne assists people with a disability who have employment and education-related legal problems, such as an unfair dismissal claim.
- Disability Discrimination Legal Service (DDLs) in Melbourne specialises in disability discrimination matters.
- Eastern Community Legal Centre provides free legal advice to people in Melbourne's Eastern suburbs in civil matters relating to family law, divorce, discrimination, neighbourhood disputes, and more.

DEEP DIVE**A day in the life of a barrister**

A barrister's working life is not confined to just the courtroom. Whilst solicitors may undertake a large portion of the preparation work for their client's dispute before it reaches the courtroom, there is still work to be done while the dispute is actively being heard.

In the hours before a court sitting, a barrister will often prepare the witnesses they will call upon, conference with the client, and complete final checks of the evidence that will be presented in the sitting.

After court, barristers review the transcript of the sitting to guide their next steps with their client's case and will then likely begin preparing for what comes next.

In the days that a barrister is not required in court, there is still work to be done. Court documentation, such as affidavits, require precise completion and this is a duty that will often fall upon the barrister. They may also provide legal advice, communicate and liaise with their clients and their families, and continue general preparations for upcoming court dates.



Image: SpeedKingz/Shutterstock.com

Figure 1 A barrister has an important role for their clients both in and out of the courtroom

The need for legal practitioners in a civil dispute 3.2.8.2

Table 1 The need for legal practitioners in a civil dispute

Reason	Explanation
Advise clients on their legal rights	- Gaining legal advice from a solicitor can enable a party in a civil dispute to better understand their rights and obligations so they are able to make an informed decision about how to handle their dispute going forward. - Lawyers can read through past cases and legislation, synthesising this information into concise and easy-to-understand advice for their clients. Gaining clear and concise information can help a plaintiff determine whether to initiate a civil action against the defendant in court, or try to resolve their dispute out of court through mediation, conciliation, or arbitration.
Present evidence and cross-examine witnesses	- Unlike in criminal law cases where an accused person is able to question their victim in court, the <i>Family Law Act 1975</i> (Cth) bans parties from conducting a cross-examination of one another when engaging in family civil matters where family violence previously occurred. Therefore, a firm must be appointed by VLA to represent the party that is banned from cross-examining the witnesses. The lawyer appointed by the firm will complete the questioning on behalf of the party. - Presenting evidence and cross-examining witnesses requires procedural standards to be abided by to ensure irrelevant questions are not being asked. Therefore, a barrister who is familiar with such rules will be able to ask relevant questions to witnesses and present compelling evidence to support their client's case.
Provide objectivity	Unlike a party in the civil dispute who may be emotionally invested in the dispute's outcome, especially if the civil dispute relates to sensitive matters such as discrimination or family issues, a lawyer will be able to look at the dispute through an impartial lens as they themselves are not emotionally impacted by its outcome. Therefore, this objective lens can allow a lawyer to better perceive the strengths and weaknesses of their client's, and the other party's, case.
Ensure documents are properly drafted and handled	- In civil disputes, affidavits and subpoenas may be required to receive evidence relevant to the case. Those who are not familiar with court proceedings may struggle to ensure such documents are handled or acquired correctly. - Once a dispute has finished, a legally-binding agreement may be formed. A lawyer can ensure this agreement is binding on both parties and that the agreement is not unfair to their client.
Provide support	- Being a party to a civil dispute, such as a family civil dispute, can be an emotional experience for a party. Therefore, having a lawyer whom a party can confide in about their troubles can be comforting for an individual. - Furthermore, a party may find it difficult or traumatic to hear about the facts of their civil dispute in court. Thus, having a lawyer sitting next to them in court as they hear such facts can provide emotional support.

LEGISLATION

Family Law Act 1975 (Cth)

LEGAL VOCABULARY

Cross-examination the interrogation in court of the opposing party's witness who has already testified, in order to check or discredit the witness's evidence.

Affidavit a written record of a person's evidence that includes facts relevant to a case.

Subpoena a document issued by a government body, such as a court, that orders a person to provide information that can be used as evidence in a case.

Procedural fairness a principle of law requiring that a person be given a fair hearing and that fair procedures are followed in administrative decision making.

WANT TO KNOW MORE?

If a person decides to initiate a civil dispute without any legal representation, there are several websites they can visit to better understand the law and the legal proceedings that will occur during their dispute. You can find out more about being a self-represented litigant by searching 'Self represented litigants' and clicking the 'County Court of Victoria' (2023) webpage.

LEGAL CASE



Image: Kristin Greenwood/Shutterstock.com

Figure 2 The magistrate must uphold a duty to give sufficient information about legal proceedings to self-represented litigants in a civil dispute

CONTENT WARNING This section mentions content that is sensitive in nature, relating to family violence.

Rawle v Calvar [2022] WADC 27

Facts

In 2020, Mr Calvar and Mr Rawle appeared before a magistrate to determine whether Mr Calvar's family violence restraining order (FVRO) against Mr Rawle should be upheld. At this hearing, Mr Calvar was represented by a solicitor, Mr Barker, whilst Mr Rawle was self-represented. The magistrate concluded Mr Rawle had perpetrated family violence against Mr Calvar and granted him an FVRO against Mr Rawle. Mr Rawle then appealed this decision on several grounds, one of the grounds being that the magistrate had not upheld her duty to adequately support a self-represented litigant.

Legal issue

On appeal, it had to be determined whether the magistrate had upheld her duty to the self-represented litigant. Mr Rawle argued that he had a special disadvantage when self-representing as he was interrupted by Mr Calvar's lawyer, Mr Barker, without objection by the magistrate. Mr Rawle reported the interruptions 'really affected what [he] was doing on the day as a self-represented litigant'.

Decision

On this ground of the appeal, the court determined the magistrate had provided Mr Rawle **procedural fairness** as a self-representing litigant. Firstly, the court established the duties a judge or magistrate must uphold when adjudicating a case involving a self-represented litigant. They suggested the court has an obligation to give sufficient information about the court's practices and procedures to someone who is self-representing to ensure a fair trial. However, they noted the judge or magistrates' duty does not extend to advising self-represented litigants about how their rights should be exercised.

The court concluded the magistrate 'was very fair' towards Mr Rawle in explaining his entitlement to give evidence, the purpose of cross-examination, the order at which evidence would be given, and providing Mr Rawle the opportunity to raise anything before evidence submissions commenced. Thus, there was no merit for Mr Rawle to appeal on the grounds the magistrate treated him unfairly.

Significance

This case demonstrates how the magistrate has a duty to help self-represented litigants by providing them with information about court proceedings to ensure they understand what is going on during a dispute. Here, the self-represented litigant was given sufficient information by the magistrate about how the court proceedings would run. Therefore, even though Mr Rawle's experience likely would have been easier had he obtained a legal practitioner, the absence of a lawyer during a civil dispute will not automatically mean the self-representing party is at a major disadvantage in the civil dispute.

HYPOTHETICAL SCENARIO



Image: David Gyung/Shutterstock.com

Figure 3 A solicitor can assist a party in a civil dispute by providing advice, negotiating on their behalf, preparing their case for court, and briefing a barrister

Divorce dramas

Joyce and George decided to get divorced, so Joyce sought the services of a family law solicitor, Ali. He provided her with initial advice about her rights and obligations in the matter, which involved substantial property assets and child custody issues.

Ali also assisted Joyce in compiling relevant financial information and drafting an agreement to be negotiated with George and his solicitor. Ali negotiated on behalf of Joyce, but the parties were unable to come to an amicable agreement. Other dispute resolution methods also failed.

Ali then assisted Joyce in making an application to the Federal Circuit of the Family Court for property settlement and parenting orders. Prior to the hearing, Ali briefed a barrister, Danushka, who appeared in court to represent Joyce in the matter.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of legal practitioners in relation to each principle may help you evaluate how legal practitioners can uphold the principles of justice.

Evaluating legal practitioners' ability to achieve the principles of justice during a civil dispute

STRENGTHS

- The duty of both parties' legal representatives to present all relevant evidence and legal principles to the court helps ensure the whole truth emerges and a just outcome is produced, promoting fairness.
- Legal practitioners can help parties navigate a civil dispute by advising them about the law and legal proceedings. This helps to ensure parties to a civil dispute can participate in proceedings in an open and informed manner as they understand what is expected of them.
- When legal practitioners are representing both parties in a civil dispute, the court process may be quicker as the judge or magistrate does not have to constantly stop during proceedings to explain the processes to a party. Disputes lasting a short amount of time promote fairness as it allows more people to participate in civil disputes since the courts can hear more cases in a shorter amount of time.
- Legal practitioners have greater objectivity when making decisions in a civil dispute as they do not have a personal or emotional connection to the issues of the dispute. As a result, the evidence they collate and their questions to witnesses can allow an impartial account of events to emerge. If a self-representing litigant questions witnesses, on the other hand, their emotions and biases may skew the examination process and prevent the truth from emerging.

LIMITATIONS

- When only one party has legal representation it may lead to an unfair outcome, as each party cannot prepare and present a case of the same quality.
- Quality lawyers are often expensive, therefore a party may only be able to seek a lower-quality lawyer. The quality of the presentation of the case may influence the outcome, therefore the outcome is not solely based on the judge and/or jury's impartial assessment of the facts. This is unfair to the poorly represented party.
- A party's ability to participate in the appeals process after a civil dispute, if they are dissatisfied with the outcome, may be limited if they do not have legal representation as they may find it difficult to understand the process of filing for an appeal and going through the court process again during an appeal.

**STRENGTHS**

- All parties in a civil proceeding have the same ability to choose their own legal representation.
- Judges or magistrates in a civil dispute have a duty to assist all self-represented litigants by informing them about legal practices and proceedings involved in the dispute. This can ensure a self-representing party is not at such a significant disadvantage to a party that has legal representation, promoting equality.

LIMITATIONS

- Some financially-disadvantaged parties may be unable to afford good quality legal representation, or any at all. This may result in cases not being equally prepared and presented and can create power imbalances between parties.
- If both parties choose to self-represent during an in-court civil dispute or out-of-court settlement, one party's legal knowledge may be better than the other party's if they have studied law or worked closely with lawyers, for example. As a result, although the parties may appear to be on equal footing, one party will have greater experience and knowledge than another therefore creating an imbalance in power between parties.





STRENGTHS

- Legal practitioners help parties to prepare and present their case, increasing access to justice as a party's understanding of the law and legal proceedings is increased.
- Some law firms use a 'no win, no fee' arrangement which may encourage a plaintiff to seek justice as, where they lose the dispute, no financial burden is incurred. This improves access to justice as more people are likely to engage legal representation, preventing the cost of legal representation from acting as a barrier to justice.
- A party in a civil dispute may have improved access to the appeals process if they hire a legal practitioner as the lawyer can complete the documentation required for the appeal and prepare and present arguments for the party during the appeal.

LIMITATIONS

- The costs of legal practitioners make it less accessible for many individuals.
- Access to justice includes understanding one's legal rights. Therefore, parties without representation may not understand the procedures used in court and other dispute resolution processes, limiting their access to justice.

Lesson summary

- The presence of solicitors or barristers in a civil dispute facilitates the presentation of evidence, upholds the principles of justice in the courtroom, and ensures civil principles are correctly applied.
- Legal practitioners are needed in a civil dispute for several reasons, including to:
 - advise clients on their legal rights
 - present evidence and cross-examine witnesses
 - provide objectivity
 - ensure documents are properly drafted and handled
 - provide support.

5F Questions

Check your understanding

Question 1

Which of the following statements is a reason why legal practitioners are needed in a civil dispute?

- A. They issue a remedy to the defendant.
- B. They determine the liability of the defendant.
- C. They present evidence on behalf of their client and cross-examine witnesses.
- D. They gather evidence on the opposing party that is not relevant to the case.

Question 2

Which of the following are **not** reasons why legal practitioners are needed in a civil dispute?

(Select all that apply)

- A. They ensure the courtroom is clean and tidy before the trial.
- B. They can provide comfort and support to a party in a civil dispute.
- C. They determine the amount of damages their client is awarded.

Question 3

Fill in the blanks with the following terms:

Solicitors

Barristers

are the legal practitioners primarily responsible for the pre-trial necessities in a civil dispute.
 , on the other hand, present the facts and arguments about their client's case during the trial either in court or during other methods of civil dispute resolution, such as mediation.

Question 4

The principle of access can be upheld when parties engage legal practitioners as the advice and information provided by lawyers can enhance a party's understanding of their legal rights and the proceedings that will take place, helping parties access civil dispute resolution on an informed basis.

- A. True
- B. False

Question 5

The presence of legal practitioners in a civil dispute does not always uphold the principle of equality.

- A. True
- B. False

Question 6

High costs associated with solicitors and barristers may increase the risk that a plaintiff or defendant may forgo legal representation, upholding the principle of access.

- A. True
- B. False

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

(2 MARKS)

Outline **one** reason why legal practitioners are needed in a civil dispute.

Adapted from VCAA 2018 exam Section A Q1

Question 8

(3 MARKS)

'All parties are able to remain objective when self-representing, therefore, it is not necessary to engage legal representation.'

Do you agree with this statement? Justify your response, referring to **one** principle of justice.

Question 9

(3 MARKS)

Kendall is an international supermodel. She has commenced a civil action in the County Court of Victoria against her former manager, Kris, alleging Kris breached a contract between the pair by telling the media confidential information about Kendall's private relationship. Kris has engaged legal practitioners to defend the claim against Kendall.

Describe **one** reason why Kris may need legal practitioners at trial if Kendall's case goes to trial.

Adapted from VCAA 2018 exam Section A Q5b

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 legal practitioners demonstrate how the principles of justice are **achieved** or **not achieved**.

Statement	Achieved	Not achieved
I. Legal practitioners help parties to prepare and present their cases, increasing access to justice as a party's understanding of the law and legal proceedings is enhanced.	☐	☐
II. The costs of legal practitioners for both parties are high, meaning having legal representation is less accessible.	☐	☐
III. Some financially-disadvantaged parties may be unable to afford good quality legal representation, or any at all. This may result in cases not being equally prepared and presented.	☐	☐
IV. Judges or magistrates in a civil dispute have a duty to assist a self-represented litigant by informing them about legal practices and proceedings involved in the dispute. This can ensure a self-representing party is not at such a significant disadvantage to a party that has legal representation, upholding equality.	☐	☐
V. A party in a civil dispute may have improved access to the appeals process if they hire a legal practitioner as the lawyer can complete the paperwork for the appeal and can prepare and present arguments for the party during the appeal.	☐	☐
VI. All parties in a civil proceeding have the same ability to choose their own legal representation.	☐	☐

Question 11

(8 MARKS)

Discuss the extent to which the use of legal practitioners in civil disputes helps the justice system achieve the principles of equality and access.

Linking to previous learning

Question 12

(3 MARKS)

Distinguish between the need for legal practitioners in a civil dispute and a criminal case.

5G Class actions

STUDY DESIGN DOT POINT

- the use of class actions to resolve civil disputes

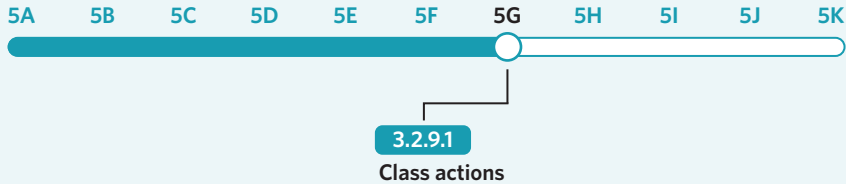


Image: Sebastian Riebolge/Shutterstock.com

In the landmark Black Saturday class action in 2009, the Victorian Supreme Court approved a \$494 million payout to victims. The ruling compensated those affected by the devastating fires, as the blaze killed 119 people, destroyed 125,000 hectares of land, and more than 1,000 homes. The action, which involved approximately 5,000 group members, was taken against power distributor SP AusNet and asset manager Utility Services Group and is one of the biggest class actions in Australian history.

Lesson introduction

Class actions provide an avenue for individuals to access remedies collectively. By enabling more people with similar claims to come together, this legal mechanism empowers the wider community to obtain justice. These group court cases not only save valuable court time and resources, but also allow for a greater number of cases to be heard, benefiting everyone involved and fostering a fairer legal system. Importantly, they serve as a means of holding companies and corporations accountable for their actions, ensuring justice is achieved.

Class actions 3.2.9.1

A **class action** occurs when a group of people with the same legal grievance come together to initiate a single, civil action. In Australia, class actions can be heard in the Federal Court and in the State Supreme Courts. There are three criterion that must be satisfied for an action to be classified as a class action. Class actions are particularly appropriate when a large number of claimants have suffered a relatively small loss.

Table 1 The criteria for a class action

Criterion 1	Criterion 2	Criterion 3
Seven or more people are claiming against the same defendant (s).	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.
		

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.

USEFUL TIP

Class actions may also be referred to as 'representative proceedings' or 'group proceedings'.

LESSON LINK

You learnt about the Supreme Court in **5C The Victorian court hierarchy and civil disputes**.

LEGAL VOCABULARY

Lead plaintiff an individual in a class action who represents an entire group of people who were allegedly harmed by a defendant’s wrongdoing.

HYPOTHETICAL SCENARIO

Flakey financial services

Assume a bank charges 5,000 customers for financial services it does not provide. Each customer is out-of-pocket \$300. For this relatively small financial loss, an individual plaintiff may deem it too expensive and time-consuming to take legal action against the bank individually. If all 5,000 customers take action together and seek to recover their loss, it is far more cost and time-effective for the court.

A **lead plaintiff** initiates proceedings on behalf of the entire group. The resolution of this plaintiff’s claim will determine the defendant’s liability for other members of the group taking action. The lead plaintiff has the same obligations as any plaintiff in individual litigation, but also has additional obligations specific to class actions. Responsibilities of the lead plaintiff include:

- assuming the risk and cost of the litigation on behalf of the entire group.
- ensuring the claim serves the interests of the group members and is not pursued solely for personal benefit.
- providing instructions to their lawyers regarding the conduct of the claim and making decisions regarding settlement offers or negotiations.
- filing the case under their own name.

Table 2 The financial impact of class actions

Financial impact	Explanation
If a class action fails	If the class action fails, the lead plaintiff is solely responsible for the costs of the proceedings and any adverse costs orders. Generally, group members are under no obligation to contribute to proceeding costs unless, or until, a successful outcome is known.
If a class action is successful	If the class action succeeds, the class members will share the costs of bringing the proceedings. The costs of winning a class action are shared among the class members. The type and amount of costs depend on how the risks of losing have been covered during proceedings.

WANT TO KNOW MORE?

As of November 2023, the class action involving AFL players with concussion-related injuries had not yet been heard by the Supreme Court of Victoria. You can find out more about this case by searching ‘AFL concussion class action’ and clicking on the latest news articles.

In Australia, class actions operate on an ‘opt-out’ system, where claims are initiated and pursued on behalf of a specific group, regardless of whether all group members are aware of the claim at the beginning. This approach ensures that even individuals who are difficult to reach or lack access to legal representation have their rights safeguarded through the claim. Once the class action reaches a stage where the disputed matters are clearly defined, the court issues orders to publicise an ‘opt-out notice’, giving group members the chance to ‘opt-out’. Group members who do not respond to the notice will remain part of the class action and will be bound by the final judgment of the case. They will benefit or face the detriment from any rulings made in the class action.

REAL WORLD EXAMPLE



Image: Neale Cousland/Shutterstock.com

Figure 1 AFL players lodged a class action in the Supreme Court of Victoria

Concussion clanger turned 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. Over 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. The lawyers representing the class action asserted that the players’ ‘personal lives have been shattered and they live with constant physical and mental pain. It’s heart-breaking and they need to be adequately cared for’.

Adapted from ‘Landmark class action chases up to \$1bn compensation for alleged long-term concussion damage to AFL players’ (Australian Associated Press, 2023)

DEEP DIVE

Third-party litigation funders

Third-party litigation funders are commercial entities that agree to meet the costs of the litigation in return for a proportion of the damages recovered if the case is successful. Third-party litigation funders are not a party to the dispute, meaning the breach or loss does not impact their company, they merely provide money to fund the litigation. The use of third-party litigation funders has been criticised as often a large percentage of the damages are given back to them, and not awarded to the group members who have suffered the injustice. However, without litigation funders, a class action may never be initiated, due to litigants lacking the funds.

Table 3 Types of class actions

Types of cases appropriate for a class action	Example
Workplace accidents	There is a chemical spill and a group of workers suffer from poisoning.
Medical malpractice	Doctors use a surgical product or prescribe a medication that is discovered to be dangerous.
Financial malpractice	A bank charges thousands of customers a small fee for financial advice that the bank did not actually provide.
Preventable natural disaster	A community has suffered a loss due to a preventable disaster, such as a fire or flood. A claim can only be brought where the disaster was a result of someone or a company's negligence or malpractice. For example, a bushfire being purposely lit, or where the government did not take precautions to prevent a flood.
Faulty or dangerous goods or services	A group of consumers buy the same product or use the same service that is later found to be faulty or dangerous.

REAL WORLD EXAMPLE

Locked up residents receive \$5 million

During the COVID-19 lockdowns, public housing towers attracted significant media attention and scrutiny due to the severe restrictions imposed on residents, including the inability to leave their apartments for any reason. A class action was initiated so that residents could claim compensation for this breach of their human rights. The legal action aimed to hold the Victorian Government accountable for the alleged breaches of human rights and the negative consequences endured by the tenants. In response to the legal action taken by residents, the Victorian Government settled the matter by agreeing to pay \$5 million in damages.

Adapted from '\$5m settlement proposed in public housing towers class action' (Croft, 2023) and 'Notice of Proposed Settlement in Towers class action' (Department of Health Victoria, 2023)



Image: Javier Catano Gonzalez/Shutterstock.com

Figure 2 Public housing tower residents were successful in their class action

LESSON LINKS

You will learn about damages in **6A Damages as a remedy**.

You learnt about the need for legal representation in **5F Legal practitioners in a civil dispute**.

You learnt about juries in a civil trial in **5D Judges, magistrates, and juries in a civil dispute**.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of class actions in relation to each principle may help you evaluate how class actions can uphold the principles of justice.

Evaluating class actions' ability to achieve the principles of justice



STRENGTHS

- Class actions may provide a remedy for those who have suffered a loss that would be too small to recover individually in the courts, enabling these individuals to participate in the justice system, thus promoting fairness.
- Class actions are managed by experienced and impartial judges, therefore ensuring the case is conducted efficiently and impartially.
- Class actions are usually supported by experienced lawyers, therefore ensuring the case is presented in the best possible light for all group members.
- Juries are available in the Supreme Court of Victoria for class actions, enabling the case to be determined by an impartial cross-section of society, achieving fairness.
- The use of litigation funders can enable more class actions to be brought in circumstances where individual litigants may lack the funds, allowing for increased participation in the justice system, therefore promoting fairness.

LIMITATIONS

- Fairness can depend on the settlement reached. If the amount of compensation received is less than anticipated, the group members may not be compensated sufficiently.
- The lead plaintiff is required to assume the risk and cost of the litigation on behalf of the entire group which may be seen as unfair.
- Group members who 'opt-out' are not bound by the settlement, meaning they will receive no benefit if the outcome is favourable for group members, limiting fairness.
- Juries are not available if a class action is commenced in the Federal Court, meaning the case will not be determined by an impartial cross-section of society, limiting fairness.



STRENGTHS

- If litigation funding is obtained, this may allow a class action to commence as the costs are covered, ensuring group members are not disadvantaged on the basis of their socioeconomic status.

LIMITATIONS

- If litigation funding is not obtained, a lead plaintiff may be unwilling or unable to bear the costs associated with bringing a class action, disadvantaging them on the basis of their socioeconomic status.
- The lead plaintiff must assume the risk and cost of the litigation on behalf of the entire group, whilst the other group members are not required to do so. This may be seen as unequal as the plaintiffs are not treated in the same way.



STRENGTHS

- Individuals who cannot afford to initiate a civil claim by themselves can still access the justice system by joining a class action.
- Class actions save the courts' time and resources by grouping together numerous claims, reducing the number of cases the court would have to hear individually and promoting access to justice for others by reducing court delays.
- Litigation funding allows some litigants to bring a class action who could otherwise not afford to.

LIMITATIONS

- Access to justice may be reduced, depending on the settlement reached and the share given to each plaintiff, particularly where a large percentage of damages is provided to litigation funders.
- Class actions can be extremely costly and, consequently, third-party funders are often required. Without these funders, some class actions may not commence, reducing access to the justice system.
- Class actions can take time to be heard, sometimes several years, thus delaying access to a potential remedy.
- Group members, other than the lead plaintiff, may not understand the processes as they are not directly involved with the legal representation, reducing their ability to engage with the justice system and its processes on an informed basis.

Lesson summary

Bringing a case as a group provides people with the opportunity to pursue a case they may have been previously unable to. Class actions have three main criterion:

1. there must be seven or more people claiming against the same defendant(s)
2. the claim must be in respect of, or arise from, the same, similar, or related circumstances
3. the claim must give rise to a common issue of law or fact, meaning the same issues must be decided by the court for all claims.

5G Questions

Check your understanding

Question 1

A class action is when a group of people come together to initiate a single criminal case.

- A. True
B. False

Question 2

Class actions are heard in the County Court only.

- A. True
B. False

Question 3

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

lead defendant

lead counsel

lead plaintiff

The person who initiates the proceedings on behalf of the entire group is known as the .

Question 4

Which of the following is **not** a type of case where a class action is often appropriate?

- A. Natural disaster, where a community has been affected by a fire.
B. Financial malpractice, where a group has been overcharged by a bank.
C. Customer malpractice, where a business sues its customers for leaving bad reviews.
D. Faulty goods or services, where a group of people get food poisoning from the same cafe.

Question 5

Tick the box to indicate whether the following statements are **strengths** or **limitations** of class actions.

Statement	Strengths	Limitations
I. Class actions may provide a remedy for those who have suffered a loss that would be too small to recover individually in the courts.	☐	☐
II. Group members are able to seek justice where they otherwise may not have been able to due to financial restraints.	☐	☐
III. Third-party litigation funders often receive a large proportion of damages before the wronged parties receive compensation.	☐	☐

Question 6

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

fairness

equality

access

Class actions save the courts' time and resources by grouping together numerous claims, reducing the number of cases the court would have to hear individually and, thus, promoting .

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Explain **one** reason for using class actions.

Adapted VCAA 2022 exam Section A Q2

Question 8

(3 MARKS)

Outline the criteria for initiating a class action.

Extended response

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

Question 9

Tick the box to indicate whether the following statements are **strengths** or **limitations** of class actions.

Statement	Strengths	Limitations
I. Class actions provide a remedy for those who have suffered a loss that would be too small to recover individually in the courts, promoting fairness.	☐	☐
II. Individuals can still access justice and the legal system without all of the costs associated with a trial.	☐	☐
III. Access to justice may be reduced depending on the settlement reached and the share given to each plaintiff.	☐	☐
IV. Fairness can depend on the settlement reached. If the amount of compensation received is less than anticipated, the group members may not be compensated sufficiently.	☐	☐
V. Class actions save time and resources for the courts by grouping numerous claims together, therefore, reducing the number of cases that would need to be heard individually	☐	☐

Question 10

(8 MARKS)

Discuss the extent to which class actions uphold the principles of access and fairness.

Linking to previous learning

Question 11

(6 MARKS)

A cruise ship, Slay on the Seas, served seafood that gave all the passengers who ate it food poisoning. The passengers decided to initiate a class action against Slay on the Seas in the Magistrates' Court. Slay on the Seas is arming itself with lawyers to ensure its case is strong, as it has the onus of proof to establish its innocence. The passengers are seeking the owners of the cruise ship to be fined for their wrongdoings.

Identify **three** errors in the scenario above and, for each error, explain the correct civil process or procedure that should have occurred.

Adapted VCAA 2020 exam Section A Q5

5H Consumer Affairs Victoria (CAV)

STUDY DESIGN DOT POINT

- the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the courts

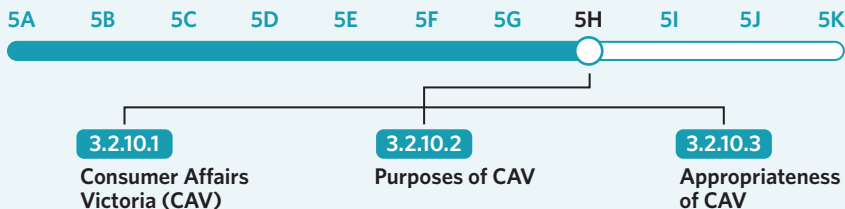


Image: cheapbooks/Shutterstock.com

If you had an argument with a school friend, would you go straight to your principal to resolve it? Or would you initially try to resolve the dispute in a less formal manner? Most of the time, you would seek the assistance of another friend to help resolve the argument before going to a higher authority.

Lesson introduction

Many civil disputes in the Victorian community are relatively minor and can be resolved without court action. For example, conflicts often arise in trade agreements when consumers and traders clash on various issues. Therefore, providing fast, low-cost, and informal mechanisms to resolve these smaller, commerce-related disputes is critical in providing Victorians with access to the justice system. Consumer Affairs Victoria (CAV) provides an avenue through which consumers and traders can resolve their disputes.

Consumer Affairs Victoria (CAV) 3.2.10.1

Rather than resolving disputes through the courts, individuals may turn to **Consumer Affairs Victoria (CAV)**, a civil complaints body that offers free dispute resolution services. Established by the *Australian Consumer Law and Fair Trading Act 2012* (Vic), CAV is part of the Department of Justice and Community Safety within the Victorian Government.

Table 1 Jurisdiction of Consumer Affairs Victoria

Type of dispute	Example
A complaint against a business by a consumer who believes the <i>Australian Consumer Law and Fair Trading Act 2012</i> (Vic) has been breached. These disputes often involve a dispute about the supply of goods and services.	- A consumer paid for a faulty product and was denied a refund. - A family paid a plumber to repair their bathroom but the quality of the work was poor. - A motorist pays for car repairs but believes these repairs were not completed correctly.
A complaint against a landlord by a tenant who believes the <i>Residential Tenancies Act 1997</i> (Vic) has been breached.	- A tenant requested property repairs but the repair work was not completed. - A landlord gave notice to vacate a property but the tenant believed the time frame in which to vacate was insufficient.

LEGISLATION

Australian Consumer Law and Fair Trading Act 2012 (Vic)
Residential Tenancies Act 1997 (Vic)

KEY TERM

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.

LESSON LINK

You will learn more about the courts in **5J Resolving civil disputes in the courts.**

USEFUL TIP

It is important to remember that CAV has limited jurisdiction compared to other dispute resolution bodies, like VCAT or the courts. It will also only assist with claims initiated by consumers and tenants, not business owners and landlords, therefore, it may not be appropriate for the scenario you are given.

LESSON LINK

You learnt about conciliation in **5B Methods of resolving civil disputes**.

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.

CAV mainly provides information and advice through its website, which contains detailed guides on how consumers and businesses can seek solutions to resolve disputes. Individuals can also access CAV's telephone-based information services where they may be referred to an alternate organisation that is better suited to deal with their matter. CAV may make these referrals as it can only assist in matters that fall within its jurisdiction.

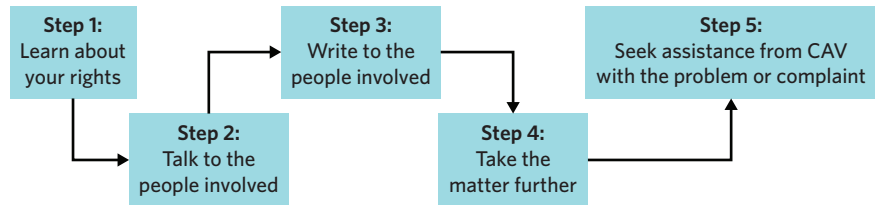


Figure 1 Consumer Affairs Victoria's step-by-step guide to resolving civil disputes

If an individual is unable to resolve a dispute alone, they may utilise CAV for dispute resolution assistance. However, as CAV only provides dispute resolution services for consumers and tenants, it will not assist with complaints from businesses or landlords. CAV directs parties to conciliation as the primary dispute resolution method to resolve disputes efficiently and constructively, as this process can occur in person or over the phone. The conciliation process encourages parties to voluntarily resolve the dispute. The final resolution 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 reached between the parties.

HYPOTHETICAL SCENARIO**The worn and torn sneakers**

Jiamba purchased a new pair of sneakers online from Sally's Sneakers for \$200. When the sneakers arrived, they appeared worn and were in poor condition. Jiamba sent Sally's Sneakers an email asking for a refund. However, Sally's Sneakers responded with 'We do not offer refunds'. Jiamba believes he is entitled to a refund and wants his \$200 back.

In this hypothetical scenario, the dispute falls within CAV's jurisdiction as the claim is from a consumer (Jiamba) against a business (Sally's Sneakers).

Purposes of CAV 3.2.10.2

Table 2 The purposes of Consumer Affairs Victoria

Purpose	How Consumer Affairs Victoria achieves its purposes
Creating a fair and competitive marketplace	CAV is responsible for registering and licensing certain businesses and occupations, while also reviewing and advising the Victorian Government on the consumer protection framework.
Providing information and advice	CAV provides information and advice to businesses, consumers, tenants, and landlords in relation to their rights and responsibilities, as well as any changes to relevant laws. CAV's resources are limited, meaning it cannot help resolve every dispute brought by an individual. Therefore, CAV's website contains a detailed step-by-step guide on how individuals should attempt to resolve their complaints before seeking dispute resolution services from CAV.
Providing accessible dispute resolution services	CAV uses conciliation services to help individuals resolve their disputes with the assistance of a third party that has specialised knowledge of disputes of that type. These services can occur in person or over the phone, making them highly accessible.

Continues →

Table 2 Continued

Purpose	How Consumer Affairs Victoria achieves its purposes
Providing an avenue to resolve minor disputes efficiently and with minimal costs	CAV provides free information and dispute resolution services to assist individuals and enforce compliance with consumer laws. It also experiences fewer delays than other dispute resolution services, such as the courts. Therefore, CAV allows individuals to use the information on its website and its conciliatory services to uphold their rights outside of the courts.

Appropriateness of CAV 3.2.10.3

Not all civil disputes are appropriate for CAV to resolve due to various factors, including its jurisdiction, purpose, and the parties involved.

Table 3 The appropriateness of Consumer Affairs Victoria

Circumstances when Consumer Affairs Victoria is appropriate	Circumstances when Consumer Affairs Victoria 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. - Parties are willing to settle, therefore increasing the likelihood of a successful resolution. - Both parties are willing to comply with the agreement reached during conciliation.	- The dispute does not fall under CAV's jurisdiction. - Parties have not attempted to resolve the dispute by 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. - 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.

USEFUL TIP

It is important for you to identify whether CAV is an appropriate institution for resolving a particular dispute. In a SAC or exam, you should be able to discuss reasons why CAV is appropriate or not appropriate in relation to a provided scenario.

LESSON LINKS

You will learn more about VCAT in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.
You learnt about class actions in **5G Class actions**.

HYPOTHETICAL SCENARIO

A time frame tango between Evan and Simone

Evan is renting an apartment in Brunswick from Simone, the landlord. Simone has given him 60 days to vacate the property for no reason. Legally, Simone must give Evan 120 days' notice. They tried to negotiate a suitable time period but were unsuccessful, and neither party wishes to pay the costs associated with VCAT or the courts.

This case is appropriate for CAV as:

- it falls within CAV's jurisdiction.
- the parties have tried to negotiate a time frame themselves.
- neither party wishes to pay the costs associated with an alternative dispute resolution institution, such as the courts or VCAT.



Figure 2 Consumer Affairs Victoria is appropriate for Evan's dispute against his landlord

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of CAV in relation to each principle may help you evaluate how CAV can uphold the principles of justice.

Evaluating CAV's ability to achieve the principles of justice



STRENGTHS

- 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, ensuring impartial processes, thereby achieving fairness.
- CAV is free, which ensures parties that who cannot afford to bring their claim through the courts or VCAT are still able to participate in the justice system and receive a just outcome to their dispute.
- CAV's conciliation process enables parties to attempt to resolve their dispute themselves with the assistance of a conciliator, potentially leading to a fair outcome where both parties reach a beneficial resolution.

LIMITATIONS

- 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.
- CAV cannot impose a legally binding resolution, meaning there is a risk of non-compliance with agreements reached during conciliation, limiting fairness.



STRENGTHS

- 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, achieving equality.

LIMITATIONS

- CAV has limited jurisdiction and is only available as a means of dispute resolution for a small proportion of civil matters. Thus, not all parties to a civil dispute have the same ability to obtain CAV's services.



STRENGTHS

- CAV provides free services to all members of the Victorian public and is therefore an accessible method of dispute resolution.
- CAV's conciliation process can be conducted over the phone, enabling individuals across Victoria to access this service.
- CAV uses the informal process of conciliation, which is conducted in a less intimidating manner than a trial, potentially encouraging individuals to willingly pursue their civil claims and engage with the justice system.
- As CAV's conciliation process is conducted in private, this promotes access to justice where parties do not wish to resolve the dispute through a public trial.

LIMITATIONS

- 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

USEFUL TIP

You may face questions that require you to evaluate CAV without needing to specifically refer to the principles of justice (POJ). However, this does not prevent you from including links to the POJ in your in your answer.

- CAV is a civil complaints body that has jurisdiction to help resolve disputes between consumers and businesses, and tenants and landlords.
- CAV is primarily concerned with assisting and educating consumers and tenants.
- CAV offers a wide range of dispute resolution services, including online information and advice.
- CAV directs parties to conciliation as a primary method of civil dispute resolution.

5H Questions

Check your understanding

Question 1

CAV is an alternate dispute resolution institution that may be used for some civil complaints.

- A. True
- B. False

Question 2

CAV will only assist with disputes:

- A. from landlords against tenants, and businesses against consumers.
- B. from tenants against landlords, and consumers against businesses.

Question 3

Which of the following statements is **not** correct about CAV?

- A. CAV is free.
- B. CAV will only assist with cases where the parties have attempted to resolve the disputes themselves.
- C. Outcomes from CAV are legally binding.
- D. CAV can advise the government about consumer affairs laws.

Question 4

In which of the following circumstances is CAV appropriate?

(Select all that apply)

- A. The dispute falls within CAV's jurisdiction.
- B. The parties have not attempted to resolve the dispute themselves.
- C. One party is willing to reach an agreement but the other party is not.
- D. Both parties wish to avoid the costs and time associated with the courts.
- E. The party with the complaint is a landlord against their tenant.

Question 5

Which of the following statements are correct about the purposes of CAV?

(Select all that apply)

- A. CAV creates a fair and competitive marketplace.
- B. CAV provides dispute resolution services that are legally binding.
- C. CAV provides information and advice to businesses, consumers, tenants, and landlords in relation to their rights and responsibilities.
- D. CAV provides free services to all Victorians as it has unlimited jurisdiction to hear all types of disputes.

Question 6

Tick the box to indicate whether the following statements are **strengths** or **limitations** of CAV in its ability to achieve the principles of justice.

Statement	Strengths	Limitations
I. CAV cannot impose a legally binding resolution, meaning there is a risk of non-compliance with agreements reached during conciliation.	☐	☐
II. CAV's conciliation process may not result in the parties agreeing on a resolution.	☐	☐
III. CAV is free, which ensures parties who cannot afford to have their case heard by the courts or VCAT are still able to resolve their dispute.	☐	☐
IV. CAV has limited jurisdiction and is only available as a means of dispute resolution for a small proportion of civil matters.	☐	☐
V. CAV uses the informal process of conciliation, which is conducted in a less intimidating manner compared to a trial.	☐	☐

Question 7

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

mediation

conciliation

arbitration

CAV predominantly uses as a method of resolving civil disputes within its jurisdiction.

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

(3 MARKS)

Jordy is a tenant who sustained a dislocated shoulder and broken leg when he was hit by a faulty railing that fell from the balcony of his rental property. He is seeking compensation for his injuries against the landlord and wants a legally binding solution.

Explain **one** reason why CAV may not be the most appropriate institution to resolve Jordy's dispute.

Adapted from VCAA 2018 exam Section A Q2

Question 9

(6 MARKS)

Atticus, an unemployed university student, is in a dispute with his landlord, Caterina, who has not attempted to fix a mould issue in the rental property. Atticus has been friends with Caterina for 10 years and has tried to speak to her about the issue, but she keeps avoiding the situation.

a. Describe **one** purpose of Consumer Affairs Victoria.

2 MARKS

b. Explain why Consumer Affairs Victoria is an appropriate institution to help Atticus resolve this dispute.

4 MARKS

Adapted from VCAA 2018 exam Section A Q2

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.

Ivy bought a white bed frame from Bedroom Bliss' online store for \$900. When the bed frame arrived, it was red instead of white. Ivy contacted Bedroom Bliss over the phone but was told the business no longer sold the bed frame and it refused to refund her money. Ivy shared her story with a local newspaper and, since then, 15 other people have come forward with similar stories. Ivy wants to claim her entitled refund but is unsure about spending her time and money doing so.

Question 10

Tick the box to indicate whether each of the following statements demonstrates CAV as an **appropriate** or **not appropriate** institution for resolving the dispute between Ivy and Bedroom Bliss.

Statement	Appropriate	Not appropriate
I. Ivy's dispute falls within CAV's jurisdiction, which provides CAV with the power to resolve disputes between consumers and businesses, like Ivy and Bedroom Bliss.	☐	☐
II. CAV is free and offers efficient dispute resolution processes, such as conciliation, whereby Ivy and Bedroom Bliss would attempt to resolve the dispute either in person or over the phone.	☐	☐
III. Ivy's dispute may become a class action as 15 other people have come forward with similar stories about Bedroom Bliss' refusal to offer refunds.	☐	☐
IV. CAV has no power to impose a legally binding decision, meaning it cannot force Bedroom Bliss to provide Ivy with a refund.	☐	☐

Question 11

(5 MARKS)

Discuss the appropriateness of Consumer Affairs Victoria (CAV) in resolving the dispute between Ivy and Bedroom Bliss.

Adapted from VCAA 2019 exam Section A Q3

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 CAV in its ability to achieve the principles of fairness and equality.

Statements	Strengths	Limitations
I. 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 access CAV's services is not given equally to all civil parties.	☐	☐
II. CAV is free, which ensures parties that are unable to afford a court hearing or VCAT are still able to receive a just outcome to their dispute.	☐	☐
III. 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 beneficial resolution.	☐	☐
IV. CAV cannot force parties to attend and participate in conciliation, which can be unfair if one party is willing to reach a resolution but the other is not.	☐	☐
V. CAV cannot impose a legally binding decision, meaning there is a risk of non-compliance with a resolution reached by CAV's conciliation.	☐	☐
VI. CAV's conciliation process enables parties to attempt to resolve the dispute themselves with the assistance of a conciliator, which may lead to a fair outcome where both parties agree on a resolution.	☐	☐

Question 13

(6 MARKS)

Discuss the extent to which CAV helps the civil justice system achieve the principles of fairness and equality.

Adapted from VCAA 2018 Sample exam Section A Q8

Linking to previous learning**Question 14**

(7 MARKS)

Daisy lives in an apartment complex and has made numerous complaints to her landlord, Max, about the broken elevator, but he has done nothing to fix it. Daisy has spoken to 10 other tenants who wish to take the matter further. Her best friend has told her to take the case to CAV.

- a. Describe **one** reason for using class actions, with reference to Daisy's situation. 3 MARKS
- b. Advise Daisy about whether CAV is an appropriate body to help her resolve this dispute. 4 MARKS

Adapted from VCAA 2018 Sample exam Section A Q5

51 The Victorian Civil and Administrative Tribunal (VCAT)

STUDY DESIGN DOT POINT

- the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the courts

5A 5B 5C 5D 5E 5F 5G 5H 5I 5J 5K

3.2.11.1

The Victorian Civil and Administrative Tribunal (VCAT)

3.2.11.2

Purposes of VCAT

3.2.11.3

Appropriateness of VCAT



Image: Rawpixel.com/Shutterstock.com

Has a business sold you a faulty product? Or provided an unsatisfactory service? When these situations arise, you may be left wondering what you can do or where you can go to get a remedy...well, never fear, VCAT is here! With the ability to hear and determine a range of different civil disputes, VCAT might just be the appropriate dispute resolution body for you!

Lesson introduction

The courts are not the only institution that have the power to provide a remedy to parties in a civil dispute. The Victorian Civil and Administrative Tribunal (VCAT) is a less formal, less costly, and more timely dispute resolution body that can also help parties resolve their civil disputes. VCAT utilises a range of different dispute resolution methods to assist disputing parties in reaching a resolution, providing both binding and non-binding outcomes.

The Victorian Civil and Administrative Tribunal (VCAT) 3.2.11.1

Established and governed by the *Victorian Civil and Administrative Tribunal Act 1988* (Vic), the **Victorian Civil and Administrative Tribunal (VCAT)** is composed of the President, who is a Supreme Court justice, Vice-Presidents, who are County Court judges, and other VCAT members. VCAT has the power to hear and resolve a wide range of civil and **administrative disputes**. However, VCAT is not suitable for complex claims, such as class actions, defamation or personal injury, or disputes claiming very large amounts of compensation. VCAT also has **exclusive jurisdiction** over some disputes, such as domestic building disputes, meaning these cases must be heard and determined by VCAT and not in the courts.

VCAT has five divisions, with each division handling similar types of cases grouped into lists. This is due to the fact that VCAT is a combination of several separate specialised tribunals, brought together as one 'super-tribunal'.

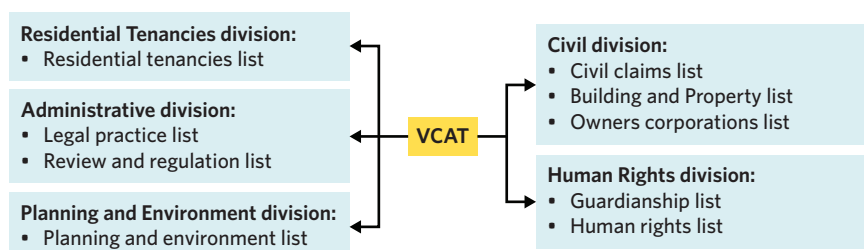


Figure 1 VCAT's five divisions and specific lists

LEGISLATION

Victorian Civil and Administrative Tribunal Act 1988 (Vic)

KEY TERM

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.

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.

LESSON LINKS

You learnt about class actions in **5G Class actions**.

You learnt about mediation and conciliation in **5B Methods of resolving civil disputes**.

Table 1 Examples of VCAT's jurisdiction

Type of disputes	Examples
Claims by residential landlords and tenants where the <i>Residential Tenancies Act 1997</i> (Vic) has been breached. These disputes are resolved in the Residential Tenancies division.	- A landlord claiming unpaid rent. - A tenant challenging the time frame in which they have been directed to vacate a rented property.
Claims of unlawful discrimination and breaches of the <i>Equal Opportunity Act 2010</i> (Vic). These disputes are resolved in the Human rights division.	- A worker claiming they were dismissed due to their religious beliefs. - A woman claiming she was refused service in a cafe because she was breastfeeding.
Claims by businesses and consumers that allege the <i>Australian Consumer Law and Fair Trading Act 2012</i> (Vic) has been breached. These disputes are resolved in the Civil division.	- A consumer seeking a remedy from a business that provided faulty goods and did not take enough care to ensure they were fit for purpose. - A consumer claiming a business deliberately misled them about the quality of a product. - A buyer claiming a car salesman made false statements about a car's maintenance history. - A business claiming another business they sold goods to has not paid the outstanding debt for these items.
Claims related to building and construction disputes. These disputes are resolved in the Civil division.	- A property owner claiming a builder has incorrectly built or constructed something. - A builder claiming a property owner has not paid them what they are owed.

Fast tracked mediation and hearing

- For goods and services claims of up to \$10,000, parties will be invited to attend mediation to try and resolve their dispute. If this is unsuccessful, a VCAT member will schedule a VCAT hearing for another day.
- The VCAT hearing will be free and operate in the same way as a final hearing.

OR

Mediation

- The parties will negotiate in the presence of a mediator in an informal environment to attempt to reach a mutually agreed resolution. The mediator does not make a decision in the case and any agreement reached is not legally binding unless a deed of settlement is entered into.
- Mediators can be a VCAT member or a mediator appointed by VCAT.

OR

Compulsory conferences

- A confidential meeting where the parties will attempt to settle the dispute before a final hearing needs to take place.
- Compulsory conferences use a conciliation process, meaning the VCAT member will make suggestions to assist the parties in resolving their dispute.

If the above methods are unsuitable or unsuccessful

Final hearing

- If the dispute has not been resolved, a final hearing will be scheduled.
- At a final hearing, both parties will present their case, ask questions and provide evidence. The VCAT member presiding over the hearing will then hand down a final order.
- Final orders can include monetary compensation, an order to undertake or restrain from partaking in a particular act, or a dismissal of the claim.
- VCAT decisions are final and can be enforced by the courts.

Appealing a VCAT decision

- VCAT decisions can only be appealed on a question of law. This means that the party believes VCAT has incorrectly interpreted and applied the law.
- VCAT appeals will be heard in the Court of Appeal if the decision was made by the VCAT president or vice president. Appeals of decisions made by any other VCAT member are heard in the Supreme Court – Trial Division.
- Parties need leave to appeal VCAT decisions.

Figure 2 Dispute resolution methods used at VCAT

DEEP DIVE

What disputes fall outside of VCAT's jurisdiction?

There are certain types of cases that VCAT cannot hear, such as:

- class actions
- cases where parties are residents from different states
- cases involving the exercise of federal jurisdiction
- cases where the Commonwealth of Australia is a party
- cases involving the Australian Constitution.

Adapted from 'What VCAT can't do' (Victorian Civil & Administrative Tribunal, n.d.)

Purposes of VCAT 3.2.11.2

VCAT is committed to providing Victorians with a low-cost, efficient, accessible, and impartial dispute resolution process. VCAT achieves its purposes by providing high-quality alternative dispute resolution processes.

Table 2 Purposes of VCAT

Purpose	How VCAT achieves this purpose
To provide low-cost dispute resolution services 	• Parties do not require legal representation and can represent themselves, avoiding the costs of legal representation. In some disputes, legal representation is not permitted at all. • As of 2022, some claims have no hearing fees, such as claims for goods and services that are less than \$15,000. • VCAT fees are low, particularly when compared with the courts. This is because some VCAT lists have no application fee and fees may be waived or postponed for those in financial hardship. • VCAT's fees are in a three-tier model whereby, depending on the party initiating the proceedings, they may pay: – standard application fees. – corporate application fees which are higher than the standard fee. – no fees for Health Care Card holders in some cases.
To provide efficient dispute resolution services 	• Hearings are shorter 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 as they are more informal and less time-consuming means of dispute resolution. • For cases that proceed to a hearing, there are fewer pre-hearing procedures compared to a court, so there is less time between initiating a claim and receiving a resolution at VCAT. • VCAT provides fast-track mediation services and hearings whereby the mediation takes less than an hour. If unsuccessful, a hearing is arranged for another day for goods and services disputes up to \$10,000.

Continues →

LEGAL VOCABULARY

Hearing fees the costs parties incur for each day of a hearing.

LEGAL VOCABULARY

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.

Table 2 Continued

Purpose	How VCAT achieves this purpose
To provide accessible dispute resolution services 	• VCAT's low costs ensure more people can access dispute resolution bodies and remedies. • There are multiple VCAT locations throughout Victoria, in both metropolitan and rural areas. • 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, especially in comparison to courts, which are more easily understandable for parties. For example, there are no strict rules of evidence and procedure during the hearing. • VCAT does not require parties to have legal representation, further lowering costs for parties. • VCAT assists parties to prepare a case, with instructions on how to lodge their application, prepare their evidence, and what to bring to a hearing available on their website, by telephone and in person.

DEEP DIVE

Fees at VCAT

Whilst VCAT aims to provide low-cost dispute resolution services, there are still fees associated with some VCAT lists. For example, the standard fees for disputes related to goods and services require parties to pay application fees, hearing fees, and additional fees.

Table 3 VCAT standard fees for disputes related to goods and services as of 1 July 2022

Type of fee	Example
Application fee	Claims between \$3,001–\$15,000 involve an application fee of \$224.80 for individuals and \$321.10 for companies and businesses.
Hearing fee	Hearing fees for day one for claims exceeding \$100,000, or with no specific dollar value, are \$374.60. There are no hearing fees for day one for claims below \$100,000, however, parties must pay \$374.60 for each following day (days two, three, and four).
Additional fees and services	Application for hearing after final orders have been made involves a fee of \$385.30. Copy of a document from a VCAT file involves a fee of \$0.60 per page.

Adapted from 'Fees at VCAT' (VCAT, n.d.)

Appropriateness of VCAT 3.2.11.3

When considering whether VCAT is an appropriate body to resolve a civil dispute, there are a range of factors the parties should consider.

Table 4 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 try 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 try and resolve their dispute, or parties have tried and failed to negotiate their dispute. - The case is a class action. - Parties want greater ability to appeal. - Parties prefer legal representation to conduct their case. - The claim is for a very large amount of damages, meaning the court may be more appropriate. - The case involves complex legal issues and it is better resolved through more formal court procedures. - There is a better way to resolve the dispute, such as through an alternate institution that is better suited to deal with the matter.

USEFUL TIP

It is important that you are able to identify whether VCAT is an appropriate institution to help resolve a particular dispute. In a SAC or the exam, you should be able to discuss reasons why VCAT is appropriate, or not appropriate, in relation to a scenario when one is provided.

HYPOTHETICAL SCENARIO

Frozen in time

Abdul, the owner of 'Time for a Watch?' sold an expensive, vintage watch to Shannon. When she tried to wind it, the dials did not work and she noticed that the watch was in fact a fake. When she contacted him about her knock-off watch, he stated that she would have to sue him to get her money back. As Shannon spent most of her savings on the watch, she wants to resolve this dispute with minimal costs. She sent Abdul an email to try and negotiate but he replied that he is not willing to negotiate a settlement.

This case may not be appropriate for VCAT because:

- Abdul is not willing to negotiate.
- the watch is expensive, Shannon will likely be seeking a large amount of damages and therefore, the court may be more appropriate.
- mediation and compulsory conferences are voluntary, however, it seems Abdul will not voluntarily attend these processes.

However, this case may be appropriate for VCAT because:

- the dispute falls within VCAT's jurisdiction, as it can hear disputes between a consumer and a business.
- VCAT provides low-cost dispute resolution services, enabling Shannon to resolve the dispute with minimal costs.
- VCAT can provide a binding order in the hearing, ensuring Abdul cannot go back on his word and not pay Shannon damages or at least refund her watch.



Figure 3 Shannon wants to resolve a dispute against Abdul after he sold her a faulty watch

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of VCAT in relation to each principle may help you evaluate how VCAT can uphold the principles of justice.

DEEP DIVE**Legal representation at VCAT**

Parties do not require legal representation at VCAT and can represent themselves as the processes and procedures are less complex than the courts. However, some people have an automatic right to be represented, meaning they do not need to seek VCAT's permission to hire legal representation. These parties, which include children, people involved in residential tenancies disputes, and the government, must organise and pay for legal representation themselves. Additionally, if one party in a case has the automatic right to legal representation, the other party also has the right to choose to be represented.

On the other hand, parties who do not have an automatic right to legal representation are required to seek permission from VCAT to be represented by legal representation. The party must explain why they want to hire legal representation, although, if VCAT rejects their request, they must be ready to represent themselves. Having representation, or not, does not preclude a party from seeking advice prior to coming to VCAT. Whether advice is sought prior to coming to VCAT or representation is used at VCAT, this is a cost that the parties must bear. VCAT rarely makes an order for one party to pay another's legal costs, even when a party is successful at a hearing, unlike in court proceedings.

Adapted from 'Legal and professional representation' (VCAT, n.d.)

Evaluating VCAT's ability to achieve the principles of justice**STRENGTHS**

- Outcomes at VCAT hearings are legally binding, promoting fairness as it ensures the parties abide by VCAT's decisions.
- VCAT encourages parties to resolve matters through methods such as mediation which allows parties to have control over the outcome. This may lead to an agreement that parties perceive as more fair as they have mutually agreed on the outcome.
- Cases at VCAT are resolved in a quick and efficient manner, promoting fairness because parties are able to participate in the justice system within a reasonable time frame.
- VCAT members are impartial and independent, ensuring procedures are conducted in an unbiased manner, promoting a just outcome to the dispute.

LIMITATIONS

- VCAT does not utilise juries and, therefore, does not allow parties to have a trial by their peers. This may seem unfair as the case is not determined by those who represent a cross-section of society.
- VCAT does not require legal representation, although some parties may choose to be legally represented. This may result in an unfair outcome where one party is unable to represent their case in the best possible light.
- There is a limited right to appeal VCAT decisions, which may be seen as unfair to parties dissatisfied with the outcome of their case.
- VCAT does not have strict rules of evidence and procedure like the courts, and as such, its processes may not be as rigorous, which may be perceived as unfair.

**STRENGTHS**

- During a hearing, a VCAT member may take special measures to allow those with significant social, cultural, or physical disadvantages to participate fully, ensuring equitable processes and therefore, promoting equality.
- Both sides have equal opportunity to present their case during mediation, a compulsory conference, and a final hearing.
- VCAT members are impartial and independent, ensuring procedures are conducted in an unbiased manner, upholding equality.

LIMITATIONS

- VCAT has limited jurisdiction and cannot resolve large and complex disputes, such as class actions or defamation. Thus, it is not equally available for all civil disputes.
- If a party is self-represented, they may be at a disadvantage as a result of being unable to present all relevant evidence to prove their case. This creates an inequality between the parties.
- VCAT members cannot act as an advocate for, or give legal advice to, self-represented parties which may result in one party being at a disadvantage to another.



STRENGTHS

- VCAT provides low-cost dispute resolution services, allowing more people to be able to afford to bring their civil claims to VCAT and engage with the justice system, which promotes access to justice.
- VCAT's processes and procedures are less formal than the courts, which promotes access to justice as parties are more likely to understand proceedings and engage with processes on an informed basis.
- VCAT aims to be accessible to all Victorians by using phone and video conferences for some hearings, mediations, and compulsory conferences.
- VCAT does not require parties to obtain legal representation, remaining accessible to those who cannot afford legal representation.
- VCAT provides interpreting and translation services free of charge, allowing those who do not speak English to engage with the justice system on an informed basis, promoting access.

LIMITATIONS

- VCAT can only resolve matters within its jurisdiction, meaning some civil matters must proceed to the courts, reducing access to justice for some, such as if they cannot afford to take the matter to court.
- Some fees for certain types of claims at VCAT remain high, such as application and hearing fees, which may make VCAT inaccessible for some people.
- Access to appeals is limited as appeals can only be made on a question of law.
- As legal representation is not required, or in some circumstances not permitted, this may limit the accessibility of proceedings to those whose first language is not English or those of low literacy.

Lesson summary

- VCAT is a dispute resolution body offering low-cost, efficient, and less formal dispute resolution services.
- The tribunal has jurisdiction to hear certain types of disputes, such as disputes about residential tenancies, breaches in consumer law, and unlawful discrimination.
- VCAT refers parties to attend mediation or a compulsory conference to resolve the dispute themselves in the presence of an independent third party. However, if an agreement is not reached, the matter will go to a VCAT hearing where a legally binding decision will be imposed.
- VCAT is not appropriate in all cases, for example, where it does not fall within VCAT's jurisdiction or where the case involves highly complex legal issues.

51 Questions

Check your understanding

Question 1

VCAT is a dispute resolution body that has the power to hear all types of disputes.

- A. True
- B. False

Question 2

Which of the following types of cases is outside of VCAT's jurisdiction?

- A. Residential tenancies
- B. Discrimination
- C. Personal injury
- D. Goods and services

Question 3

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

- A. VCAT does not have the power to impose a legally binding decision on parties at a hearing.
- B. VCAT's compulsory conferences involve a conciliator who has specialised knowledge of the type of dispute in question.
- C. VCAT may direct parties to attend mediation to come to a non-legally binding agreement.

Question 4

Which of the following statements are correct about the purposes of VCAT? **(Select all that apply)**

- A. To provide low-cost dispute resolution services.
- B. To remain accessible to all Victorians, for every kind of civil dispute that arises.
- C. To provide efficient dispute resolution services with minimal delays.
- D. To protect consumer rights by ensuring businesses are always held accountable.

Question 5

Tick the box to indicate whether the following statements are **strengths** or **limitations** of VCAT's ability to achieve the principles of justice.

Statement	Strengths	Limitations
I. VCAT encourages parties to resolve matters through methods such as mediation, which allows them to have control over the outcome. Parties may therefore regard the outcome as fair considering they have mutually agreed on the outcome.	☐	☐
II. VCAT has limited jurisdiction and cannot resolve large and complex disputes, such as class actions or defamation. Thus, it is not equally available for all civil disputes.	☐	☐
III. VCAT members cannot act as an advocate for, or give legal advice to, self-represented parties which may result in one party being at a disadvantage to another.	☐	☐
IV. VCAT provides low-cost dispute resolution services, allowing more people to be able to afford to bring their civil claims to VCAT and engage with the justice system.	☐	☐
V. If a party is self-represented, the VCAT member can assist the party to give them a reasonable opportunity to present their case, enabling parties to be on more equal footing.	☐	☐

Question 6

VCAT is appropriate for:

- A. class action lawsuits.
- B. parties who wish to attempt to resolve the disputes themselves.
- C. cases involving highly complex legal issues.

Question 7

VCAT has the power to hear certain types of civil and criminal disputes.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(3 MARKS)

Describe how **one** purpose of the Victorian Civil and Administrative Tribunal aims to uphold the principle of access.

Question 9

(3 MARKS)

Kerry paid Michael \$3,000 to repair her car. She was unsatisfied with the work and when she complained to Michael, he shouted at her and said it was not his problem. Michael has been ignoring Kerry's emails and phone calls.

Explain **one** reason why the Victorian Civil and Administrative Tribunal may not be an appropriate institution to resolve Kerry's dispute.

Adapted from VCAA 2018 exam Section A Q2

Question 10

(4 MARKS)

SuperHeroes R Us is a business that rents superhero-themed costumes to the public. Henry rented 10 costumes from SuperHeroes R Us. When he returned them, all the costumes were torn and damaged. The business wrote an email to Henry who said he would be willing to negotiate a settlement. Both parties would prefer the matter to be resolved in an informal setting.

Outline **two** methods of dispute resolution that the Victorian Civil and Administrative Tribunal may use to help SuperHeroes R Us and Henry resolve their 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.

Brisa leased an apartment building and has recently noticed various serious cracks in the walls of her apartment. She has raised the issue with Tony, her landlord, but he has been inconsistent with his communication and has failed to take action. Brisa is unsure what to do as she cannot afford to initiate her claim through the courts.

Question 11

Tick the box to indicate whether each of the following statements demonstrates why VCAT is **appropriate** or **not appropriate** in resolving the dispute between Brisa and Tony?

Statement	Appropriate	Not appropriate
I. If Brisa and Tony fail to negotiate a resolution themselves, a hearing will be conducted whereby a VCAT member will impose a legally binding solution on the parties. Therefore, if Brisa is successful, Tony cannot go back on his word and must fix the cracks in the wall.	☐	☐
II. VCAT offers low-cost dispute resolution services which is ideal for Brisa as she cannot afford to initiate her claim through the courts.	☐	☐
III. Some fees for certain types of claims at VCAT remain high due to application and hearing fees. This may make VCAT inaccessible for Brisa who may not be able to afford VCAT.	☐	☐
IV. The dispute falls within VCAT's jurisdiction as Brisa is a tenant complaining about cracks in the wall to Tony, her landlord.	☐	☐

Question 12

(5 MARKS)

Discuss the appropriateness of the Victorian Civil and Administrative Tribunal in resolving the dispute between Brisa and Tony.

Adapted from VCAA 2019 exam Section A Q3

Linking to previous learning

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

Use the following information to answer question 13 and 14.

Hazel contracted Kabir, a builder, to complete renovations of her kitchen. When the renovations were completed, Hazel noticed that Kabir had made a number of errors, such as painting the cupboards the wrong colour. Kabir and Hazel attended conciliation through Domestic Building Dispute Resolution Victoria (DBDRV) but this failed as Kabir did not take the negotiations seriously. Hazel wants to resolve the dispute as soon as possible.

Question 13

Which of the following statements are correct about the appropriateness of VCAT and CAV to resolve the dispute between Hazel and Kabir? **(Select all that apply)**

- A. CAV is more appropriate as Hazel and Kabir have already tried conciliation through the Domestic Building Dispute Resolution Victoria (DBDRV) which failed.
- B. VCAT is more appropriate as it can offer Hazel and Kabir a legally binding solution to their dispute through a hearing process.
- C. VCAT is more appropriate as the processes and procedures are more formal compared to CAV, which is suitable as Kabir failed to take the conciliation seriously.
- D. CAV is more appropriate as it can impose an order, such as for Kabir to pay Hazel a sum of money for the number of errors, whereas VCAT cannot.

Question 14

(8 MARKS)

'The Victorian Civil and Administrative Tribunal (VCAT) is a more appropriate body than Consumer Affairs Victoria (CAV) to resolve this dispute.'

With reference to Hazel and Kabir's dispute, discuss the extent to which you agree with this statement and justify your response.

Adapted from VCAA 2021 exam Section B Q2b

5J Resolving civil disputes in the courts

STUDY DESIGN DOT POINT

- the purposes and appropriateness of institutions used to resolve disputes, including Consumer Affairs Victoria, the Victorian Civil and Administrative Tribunal and the courts

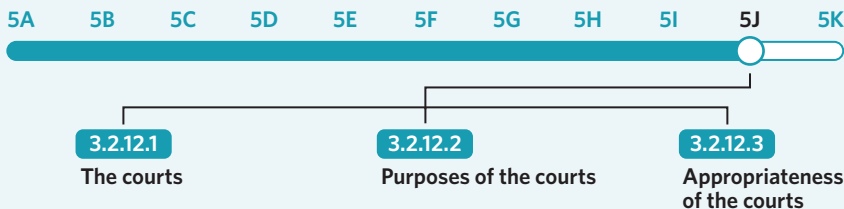


Image: Mod X/Shutterstock.com

♪ Row, row, row... a breach, the plaintiff's unhappy! If your case is not resolved, a court's the place to be! ♪

Though the courts may not be as jovial as a nursery rhyme, they do provide a legitimate means of seeking a remedy when a civil dispute arises between two parties.

Lesson introduction

The courts are a central component of the civil justice system and perform various roles to ensure the smooth and efficient delivery of dispute resolution. Though there are alternative civil dispute resolution bodies, such as VCAT and CAV, that are also fundamental in the resolution of many civil disputes, the courts possess the highest level of authority and jurisdiction, making them more appropriate for some disputes.



Figure 1 The courts can resolve a wide range of civil disputes

LESSON LINKS

You learnt about VCAT and CAV in **5I The Victorian Civil and Administrative Tribunal (VCAT)** and **5H Consumer Affairs Victoria (CAV)**.

You learnt about the civil jurisdiction of the courts in **5C The Victorian court hierarchy and civil disputes**.

The courts 3.2.12.1

From pre-trial procedures to final hearings and trials, the courts facilitate multiple processes involved in resolving a civil claim. Usually, parties are first advised to attempt to resolve their disputes through other bodies, such as VCAT and CAV, or methods, like mediation, conciliation, and arbitration, only using the courts as a last resort. This is due to the significant cost and time factors associated with resolving a civil dispute via a court hearing or trial.

Like other dispute resolution bodies, the courts employ a range of different dispute resolution methods when resolving a civil case, though the main method utilised by the courts is **judicial determination**. As judicial determination occurs during a final hearing or trial, judges can utilise their case management powers to order mediation in an attempt to encourage the early determination of a case. Courts, such as the Magistrates' Court, will also refer parties to arbitration when resolving civil claims under \$10,000.

KEY TERM

Judicial determination a method of dispute resolution whereby a judge or magistrate will make a legally binding decision after the parties present their cases at a trial or hearing.

DEEP DIVE

The process of a civil dispute being heard in a court

1. A civil proceeding is initiated by filing a writ, a document commencing the proceedings, and a statement of claim.
- ↓
2. Documents, including the writ and statement of claim, must be served to the defendant to provide information about the case and why they are involved.
- ↓
3. The defendant may respond to the documents and file a defence, outlining how they intend to defend the claims against them.
- ↓
4. If the defendant has lodged a defence, the court will hold a directions hearing to establish the timeline of the proceedings, including what needs to occur, by who, and by what date.
- ↓
5. The court will inform the parties of what is needed to prepare a case for the judge, including the different documents required and when they need to be filed.
- ↓
6. Each of the parties will present their case and the evidence before the judge at a trial.
- ↓
7. The judge will hand down their judgment at a later date after considering the parties' submissions. If the plaintiff loses the case, the judge can order them to pay the defendant's legal costs. The party who loses the case may also have the option of appealing the final decision.

Figure 2 The process of a civil court proceeding

LESSON LINK

You learnt about case management powers in **5D Judges, magistrates, and juries in a civil dispute**.

Purposes of the courts 3.2.12.2

The main purpose of the courts in the civil justice system is to interpret the law, determine whether a party is liable, and provide an order if the rights of the plaintiff have been breached.

Table 1 Purposes of the courts

Purpose	How the courts achieve their purposes
Provide access to an independent, experienced, and knowledgeable judicial officer	Magistrates and judges who preside over civil cases are experienced and knowledgeable about the law, court rules and procedures, and relevant subject matters. Parties can be assured their civil dispute is being determined by an impartial, unbiased, and competent judicial officer who can provide a fair and just outcome to the case.
Enforce procedural fairness	Court processes are formal and structured, allowing procedural fairness to occur as such rules and directions equally apply to both parties. Furthermore, each party has the right to present their case and examine and cross-examine witnesses. Judges must ensure rules of evidence are applied appropriately to facilitate the administration of justice.
Provide access to a trial by jury	Civil trials can be determined by a jury if a party wishes to use jurors and is willing to pay for the costs of engaging a jury. By using a jury, parties can have their case determined by a cross-section of the community that reflects the wider views and values of society.

Continues →

Table 1 Continued

Purpose	How the courts achieve their purposes
Provide a dispute resolution avenue for class actions	Given the complex nature of class actions, such civil disputes can only be heard by the courts, specifically the Supreme Court – Trial Division. Justices in the Supreme Court – Trial Division specialise in, and are familiar with, the rules and procedures involved with determining civil class actions. This enables claims with multiple group members and a lead plaintiff to initiate a civil claim against a defendant when the claims arise out of similar or the same circumstances, and the same matter needs to be decided by the courts.
Provide a legally binding outcome	Unlike other dispute resolution bodies and methods where an outcome may not be legally binding, the courts will hand down a final and binding decision. This means the outcome of the case is legally enforceable if a party fails to comply with the remedy ordered.
Order a remedy	Courts resolve civil grievances by ordering a remedy for the disputing parties. This may come in the form of damages, which is monetary compensation, or an injunction, which is a court order to do or not to do something. Both of these remedies seek to restore a plaintiff, successful in proving their claim, to the position they were in prior to the wrong occurring.
Provide an opportunity to appeal the outcome of a case	If a party is unsatisfied with the outcome of a case, it has the opportunity to apply for leave to appeal and have the original decision reviewed by a judge in a higher court, as a result of the Victorian court hierarchy.
Set precedent for future cases	Though the main role of the courts is to interpret and apply the law, they also play a role in developing laws, known as common law, and do so 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. By establishing precedents, the courts seek to uphold the plaintiff's rights and ensure future cases of a similar nature are determined in a consistent manner, and hold the defendant accountable for their actions if they are liable. Conversely, precedent can also protect the defendant's rights against unmeritorious claims and support their defence if existing precedent outlines the same or a similar circumstance where a defendant was not found to be liable.

LESSON LINKS

You will learn about damages and injunction in **Chapter 6: remedies**.

You learnt about class actions in **5G Class actions**.

You learnt about appeals in **5C The Victorian court hierarchy and civil disputes**.

You will learn about precedent in **8B The doctrine of precedent**.

HYPOTHETICAL SCENARIO**Huffin', puffin', blowing your house down!**

The Three Little Pigs are property developers who have decided to sue Mr Wolf for property damage after he huffed and puffed and blew down their eco-friendly straw houses that were set to be sold. The Three Little Pigs are seeking an injunction to stop Mr Wolf from attempting to blow down their houses in future, and \$1 million in damages to compensate for the costs of rebuilding the houses and the emotional and mental harm suffered as a result of Mr Wolf's actions. Mr Wolf is unwilling to negotiate and wants to have a trial by jury to prove he is not liable and rather, it is the Three Little Pigs' fault for building 'silly straw houses that are unable to survive the slightest gush of wind'.

The courts can effectively facilitate the delivery of justice in this case. The fact that Mr Wolf wishes to have a trial by jury, and is unwilling to negotiate, indicates that other less formal methods of dispute resolution would be unsuccessful. Moreover, the courts would be able to impose a legally binding remedy for the disputing parties and ensure further damage does not occur.



Image: Four-leaf/Shutterstock.com

Figure 3 The courts can be used to resolve the dispute between the Three Little Pigs and Mr Wolf

Appropriateness of the courts 3.2.12.3

Before choosing the courts as the body to hear and determine a civil dispute, the parties should consider the appropriateness of a court's proceedings in resolving disputes.

Table 2 The appropriateness of the courts

Circumstances where the courts are appropriate	Circumstances where the courts are not appropriate
- The claim falls within the courts' jurisdiction and does not fall under VCAT's exclusive jurisdiction. - If the parties prefer to have an independent and experienced judge or magistrate impose a legally binding decision. - It is a large and complex civil claim, such as a class action. - When parties prefer the formalities and procedures of a court proceeding. - When both parties have access to and can afford legal representation. - When the parties have considered the cost, time, and possible delays associated with a court proceeding. - If the parties wish to have a broad range of avenues to appeal the outcome of a case. - If the parties prefer the application of precedent in determining their dispute, or they believe the application of a specific precedent would support the success of their case.	- If the parties want to negotiate and resolve the dispute themselves. - If the parties do not want to deal with the formalities and complexities of a court proceeding. - If the parties prefer less costly and time-consuming dispute resolution methods, like mediation or conciliation. - If it is more effective to have the matter resolved through CAV or VCAT, due to their jurisdictions and less timely processes. - If the parties wish to self-represent or not engage legal representation, other informal dispute resolution bodies may be more appropriate. - If the parties prefer to have greater influence over the final resolution, more flexible dispute resolution methods, such as mediation, may be more appropriate as opposed to judicial determination.

USEFUL TIP

It is important for you to identify whether a court is an appropriate institution for resolving a particular dispute. In a SAC or exam, you should be able to discuss reasons why a court is appropriate or not appropriate in relation to a provided scenario.

LESSON LINKS

You learnt about VCAT's exclusive jurisdiction in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

You learnt about mediation and conciliation in **5B Methods of resolving civil disputes**.

REAL WORLD EXAMPLE



Image: kailim/Shutterstock.com

Figure 4 Optus was at the centre of a data breach scandal that left millions of customers exposed to the dark web and criminal activity

Optus data breach

In September 2022, Optus announced it had been the victim of a cyberattack that 'resulted in unlawful access to the personal information of millions of current and former customers'. The data breach affected around 9.8 million customers, with the leaked information including identity documents, such as driver's licences, proof of age documents, passport details, and Medicare card numbers. Since then, the law firm Slater and Gordon filed a class action lawsuit in the Federal Court with the central claim that Optus 'failed to protect, or take reasonable steps to protect, the personal information of its current and former customers'.

Under these circumstances, the courts are the most appropriate body to resolve the dispute as they have the capacity, jurisdiction, and expertise to deal with complex class action lawsuits. The courts can ensure justice is delivered to those who have been impacted by the breach if Optus is found liable.

Adapted from 'Optus Data Breach Class Action' (Slater and Gordon Lawyers, 2023)

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing the strengths and limitations of the courts in relation to each principle may help you evaluate how courts can uphold the principles of justice.

Lesson summary

The Victorian courts seek to provide parties with an effective means of resolving their disputes by imposing legally binding remedies where necessary. When contemplating the appropriateness of the courts for civil dispute resolution, parties should consider:

- whether the purposes of the courts match their needs and the remedy they are seeking.
- if judicial determination is the most appropriate manner to resolve the case and if there are other dispute resolution bodies that may be more efficient and effective at delivering justice to the parties.

Evaluating the courts' ability to achieve the principles of justice in civil disputes

STRENGTHS

- Judges are independent, impartial, and knowledgeable decision-makers, meaning they can objectively listen to the evidence presented and produce a just outcome.
- Jurors, if used, can encourage a fair outcome that reflects the views and values of a cross-section of society.
- Both parties are entitled to present their side of events, meaning the facts of the case are clearly established and understood by both sides.
- Procedural fairness can be achieved through court proceedings. This is achieved through a judge's power to give directions and responsibility, which ensures the laws and rules of evidence are applied appropriately.

LIMITATIONS

- Court trials are often time consuming and can face delays due to their complex processes. This can prolong the achievement of justice and increase the risk of an unfair trial.
- If a jury is used, there could be a risk of an unfair outcome as jurors, who are ordinary citizens, may hold subconscious biases or have no legal knowledge. Jurors may also find it difficult to understand the complex evidence and could be easily influenced by skilled lawyers, which can impact the outcome of the case. Moreover, they do not need to disclose a reason for their verdict.
- If a party is self-represented, the possibility of an unfair trial is increased as legal processes and proceedings are difficult to navigate without legal experts.



STRENGTHS

- The court procedures and laws apply equally to both parties. The plaintiff and defendant must follow the same rules, laws, and procedures.
- Parties have an equal opportunity to present their case before the court.

LIMITATIONS

- If only one party has legal representation, the self-represented party may not be on equal footing, due to their inexperience and lack of legal knowledge. Judges have a responsibility to assist self-represented parties but they can only explain the legal processes and cannot provide any further legal advice.
- The cost of using the courts to resolve a civil dispute can disproportionately impact individuals of lower socioeconomic status, placing them in a disadvantaged position to seek justice.
- The quality of legal representation can be unequal. Even if a party engages legal representation, their experience and ability to present a party's case in the best light can vary. This can put a party in a disadvantageous position and impact the delivery of a just outcome.



STRENGTHS

- Court hearings and trials enable parties to access a binding resolution that is legally enforceable.
- The courts' jurisdiction covers a range of civil matters, making it easier for parties to access a dispute resolution body that can resolve their dispute and provide a remedy.

LIMITATIONS

- The high cost of court proceedings and legal representation can make the courts inaccessible to parties.
- A jury is paid for by the parties in civil law. This may limit the ability of parties to have their case determined by a cross-section of the community, due to the associated costs.
- Without legal representation, the court system can be difficult and complex to understand, limiting a party's ability to access justice via the courts.

USEFUL TIP

Although there is a focus on informal dispute resolution methods, such as mediation, conciliation, and arbitration, you must remember that judicial determination is also considered a dispute resolution method that is utilised by the courts.

Table 3 Comparing CAV, VCAT, and the courts as dispute resolution bodies

	CAV	VCAT	The courts
Jurisdiction and types of disputes heard	Mainly disputes between tenants and landlords, and consumers and traders.	Varied jurisdiction, including an exclusive VCAT jurisdiction.	Hears and determines all types of civil disputes, aside from matters covered under VCAT's exclusive jurisdiction.
Dispute resolution methods	• Conciliation	• Mediation • Conciliation • Final hearings	• Mediation • Arbitration (Magistrates' Court for claims under \$10,000) • Judicial determination
The role of the third party	A conciliator has specialist knowledge about the subject matter and facilitates conversation between the two disputing parties, whilst also providing suggestions for possible resolutions.	Dependent on which process is utilised. For example, during mediation, mediators will facilitate negotiations between the parties but do not provide any suggestions or advice. However, in a final hearing, the VCAT member will listen to the evidence and impose a binding order.	A magistrate or judge will listen to the evidence and facts of the case before imposing a legally binding decision. If a jury is used, the judge will also manage the jury and can impose a remedy if the jury finds the defendant liable.
Rules of evidence and procedure	–	In a final hearing, rules of evidence and procedure are enforced, but in a more flexible and informal manner.	Rules of evidence and procedure are applicable to all hearings and trials.
Use of legal representation	–	In most cases, legal representation is not necessary.	It is highly advisable that parties engage legal representation.
Use of a jury	–	–	Can be utilised if a party requests one and is willing to pay for a jury.
Final outcome	Not binding unless a terms of settlement is signed.	VCAT orders given at the final hearing are binding.	Court orders are legally binding and enforceable.
Appeals	–	To the Supreme Court – Trial Division on a point of law after a final hearing.	Available on a range of grounds, pending leave to appeal.

5J Questions

Check your understanding

Question 1

The main dispute resolution method used by the courts is judicial determination.

- A. True
B. False

Question 2

Purposes of the courts include:

(Select all that apply)

- A. providing the parties access to a trial by jury.
B. providing access to a judge who awards remedies based on which party they favour.
C. ordering a legally binding remedy.
D. providing an opportunity for parties to appeal the outcome of a case.

Question 3

In which of the following circumstances are the courts **not** appropriate?

- A. A party wishes to resolve the dispute via the application of a precedent set in a similar case prior.
- B. The parties wish to have the option of a trial by jury.
- C. The parties wish to have greater control over the outcome of the dispute and would like the opportunity to negotiate the resolution.
- D. The parties wish to have an avenue to appeal the outcome of the case.

Question 4

Fill in the blanks with the following terms:

damages

an injunction

One purpose of the courts is to provide the disputing parties with a remedy. This can come in the form

of , which is monetary compensation, or , which is a court order

to do or not do something. Both are legally binding and enforceable.

Question 5

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the courts' ability to achieve the principles of justice.

Statement	Strengths	Limitations
I. Judges are independent, impartial, and knowledgeable decision-makers. This means they make decisions based on the evidence presented and can produce a just outcome.	☐	☐
II. Parties have an equal opportunity to present their case before the court.	☐	☐
III. The quality of legal representation can be unequal. Even if a party engages legal representation, their experience and ability to present a party's case in the best light can vary. This can put a party in a disadvantageous position and impact the achievement of a just outcome.	☐	☐
IV. The cost of court proceedings and legal representation can make the courts inaccessible to parties.	☐	☐
V. Court procedures and laws apply equally to both parties. The plaintiff and defendant must follow the same rules, laws, and procedures.	☐	☐

Question 6

Which of the following statements is **not** correct about the courts as a dispute resolution body?

- A. The courts are a free and time-efficient way to determine civil disputes.
- B. The courts can order parties to attend mediation to encourage an early determination of a case.
- C. Magistrates will refer parties to arbitration for civil claims under \$10,000.
- D. Courts are used for a range of purposes in addition to final hearings and trials, including pre-trial procedures.

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

(2 MARKS)

Outline **one** purpose of the courts in resolving civil disputes.

Question 8

(3 MARKS)

Randy and his tenant, Jeanie, are currently in a dispute over Jeanie's recent decision to foster pet raccoons. Randy wishes to resolve this dispute using a low-cost dispute resolution body and would prefer the opportunity to negotiate with Jeanie and reach a mutual agreement, as opposed to having a legally binding outcome imposed.

Explain **one** reason why the courts may **not** be the most appropriate institution to resolve Randy and Jeanie's dispute.

Adapted from VCAA 2018 exam Section A Q2

Question 9

(6 MARKS)

Hiroshi is considering commencing a class action with nine other consumers after they all fell violently ill from eating at Gistro's Greek Gastronomy.

a. Explain **one** way the courts can assist in resolving this civil dispute.

3 MARKS

b. Justify why the courts would be the most appropriate body to oversee Hiroshi's class action.

3 MARKS

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.

The owners of two beachside mansions are locked in a tense dispute. Kapua claims their neighbour, Jessie, blasts party rock anthems 24 hours a day and is constantly throwing 'ridiculous and raucous' house parties where guests have no courtesy and throw empty bottles into his 'pristine and professionally manicured lawn'. Jessie sees no issues with his raging house parties and believes it is his right to use his property as he pleases. Both parties to the dispute have attempted to negotiate but Jessie has not taken their discussions seriously and refuses to admit liability for nuisance.

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the courts' ability to achieve fairness in Kapua and Jessie's dispute.

Statement	Strengths	Limitations
I. Judges are independent, impartial, and knowledgeable decision-makers. This means they will objectively listen to evidence presented by both Kapua and Jessie to deliver a fair and just outcome.	☐	☐
II. The court procedures and laws apply equally to both parties. Kapua and Jessie must follow the same rules, laws, and procedures where appropriate.	☐	☐
III. If a jury is used, there could be a risk of an unfair outcome as jurors may be easily influenced by subconscious biases or have little legal knowledge. Jurors may also find it difficult to understand complex evidence and could be easily influenced by skilled lawyers.	☐	☐
IV. Court trials are often time consuming and can face delays due to their complex processes. This can prolong the achievement of justice and increase the risk of an unfair trial.	☐	☐

Question 11

(8 MARKS)

With reference to Kapua and Jessie's dispute, discuss the extent to which fairness can be achieved if this case is heard and determined in the courts.

Linking to previous learning

Question 12

(3 MARKS)

Distinguish between **one** purpose of the courts and **one** purpose of CAV as dispute resolution bodies.

Question 13

(8 MARKS)

'Courts are the most appropriate body to resolve all civil disputes, compared to other bodies like the Victorian Civil and Administrative Tribunal and Consumer Affairs Victoria.'

Discuss the extent to which you agree with this statement and justify your response.

Adapted from VCAA 2021 exam Section B Q2b

5K The impact of costs and time – civil disputes

STUDY DESIGN DOT POINT

- the impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute

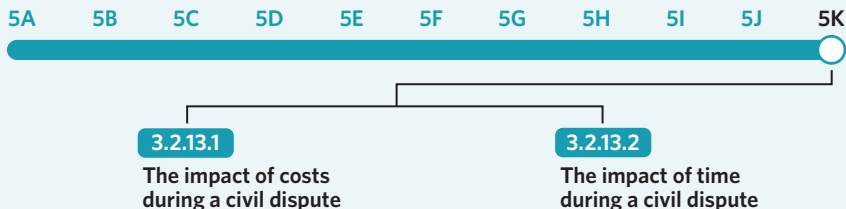


Image: BongkarnGraphic/Shutterstock.com

Going once for \$650, going twice for \$650, sold! At a rate of between \$200 to \$700 per hour, an individual can engage a barrister to help prepare and present their civil case (Olling, 2023). Yet, with a full day in court costing eight to 10 times this amount, legal representation quickly becomes inaccessible to many people. So to what extent do costs and time impact one's access to justice?

Lesson introduction

The costly and time-consuming nature of civil disputes must be considered by parties before initiating a civil claim, as it can be a significant factor that shapes the case and its outcome once civil proceedings have started. From the high cost of legal representation to the extensive amount of time that may be required to hear and determine the case, the achievement of the principles of justice can be limited by these factors in the civil justice system.

The impact of costs during a civil dispute 3.2.13.1

Parties often incur high costs when resolving civil disputes, whether it be court fees, engaging expert witnesses, or using legal representation. For complex claims that need to be resolved in the courts, legal representation is often necessary and the associated fees can discourage or prevent individuals from pursuing a civil claim and accessing justice. Court fees also vary between the courts, and significant court delays can increase the overall cost of resolving a civil dispute.

Additionally, given the costly nature of court proceedings, some parties are forced to settle out of court. When parties agree to settle out of court, the plaintiff may receive some form of compensation but it may be of a lesser amount than what a court would have ordered. This is particularly disadvantageous for parties of low socio-economic status who do not have the capacity to pursue a full court proceeding and must compromise on the outcome of their dispute. Consequently, justice may not be delivered to its fullest extent, as access to a trial and equality within the civil justice system are denied. Conversely, plaintiffs with greater financial resources have the ability to proceed to trial and may ultimately achieve a better outcome than those forced to settle.

Finally, at the conclusion of a civil dispute, courts may make **adverse cost orders**. Usually, a court will order the losing party to pay their own costs, as well as some or all of the other party's costs.

LEGAL VOCABULARY

Adverse cost orders an order by a court that one party must pay for part, or all, of another party's legal costs.

LESSON LINKS

You learnt about solicitors and barristers in **5F Legal practitioners in a civil dispute**.

You learnt about adverse costs orders in **4B Initiating a civil claim**.

You learnt about mediation and other methods of dispute resolution in **5B Methods of resolving civil disputes**.

LEGAL VOCABULARY

Writ a legal document that orders a person or entity to perform or stop performing a specific act.

Table 1 Types of legal costs incurred during a civil dispute

Type of legal cost	Explanation
Barristers' fees	Whilst most civil claims initiated in the court settle prior to a trial, such as via mediation, cases that must go to trial will often require a barrister to present legal arguments and examine witnesses. Depending on the level of experience of a barrister, the costs of a full day in court can range from \$3,000 to \$5,000 (Lawyers and Legal Services Australia, 2016).
Solicitors' fees	A solicitor is often required to help parties prepare their case, 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 expert witnesses are to be called to give evidence, they will often charge fees. Examples of expert witnesses include doctors, psychiatrists, and other professionals with expertise in a particular subject area.
Court fees	To commence and progress a court proceeding, parties will need to pay fees to the court. Court fees vary between the courts and are set at corporate, standard, and concession rates.
Fees for filing court documents	Filing documents for each stage of a civil proceeding, such as a writ , attracts a fee.
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. 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 to almost double the daily cost (County Court of Victoria, 2023).
Appeals	A party seeking to appeal the outcome or damages awarded will need to pay the filing fee in the appeal court, fees involved in having a solicitor draft court or other documentation, and the expense of the barrister to present their legal arguments to the judges in the appeal court.

DEEP DIVE**Court fees for civil disputes**

There is a wide range of court fees that can significantly add to the costs involved in a civil dispute. As of 2023:

- filing fees in the Magistrates' Court can amount to between \$156 and \$743.10.
- court hearing fees in the Magistrates' Court of Victoria, after the first day, are \$637.60
- standard court hearing fees for a trial or appeal for the first day in the Supreme Court of Victoria are \$740.

Adapted from 'Magistrates' Court of Victoria Fees and Costs Ready Reckoner' (Magistrates' Court of Victoria, 2023) and 'Fees' (Supreme Court of Victoria, 2023)

LESSON LINKS

You learnt about Victoria Legal Aid (VLA) in **2B Victoria Legal Aid and community legal centres**.

You learnt about the Victorian Civil and Administrative Tribunal (VCAT) in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

Victoria Legal Aid (VLA) is available for financially disadvantaged parties in civil cases, though only to a limited degree. For example, VLA can provide some assistance for parties with migration matters, Centrelink payments, and parties with cognitive disabilities. However, VLA's resources are limited and it can usually only provide legal representation in court for persons charged with serious indictable offences, rather than for civil proceedings.

Furthermore, whilst other dispute resolution bodies, like the Victorian Civil and Administrative Tribunal (VCAT), are a low-cost alternative to the courts, there can still be costs associated with pursuing such a case. Specifically, VCAT fees are tiered, with individual and corporate claim costs varying, whilst legal representation may still be required in a final hearing.

REAL WORLD EXAMPLE

Tip-offs to trials

In 2013, former Police Association of Victoria boss, Paul Mullett, commenced proceedings against former Victoria Police chief, Christine Nixon, and others. Mullett claimed he was the victim of malicious prosecution following his suspension from Victoria Police by Nixon, after allegedly tipping off a detective who was the subject of a murder investigation. Mullett's proceeding was dismissed by the Supreme Court of Victoria following a trial in 2016. In 2021, Mullett filed an application for leave to acquire new evidence and to appeal, which was later rejected in 2022 by the High Court. Following this decision, the High Court of Australia ordered Mullett to pay approximately \$2 million in legal fees that had accumulated since 2013.

Adapted from "It's only half-time": Ex-police union boss refuses to concede defeat after High Court blow' (Houston & Juanola, 2022)



Image: Henk Vrieselaar/Shutterstock.com

Figure 1 Former Police Association of Victoria boss, Paul Mullett, was ordered to pay \$2 million in legal fees by the High Court of Australia

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is to 'evaluate the ability of the civil justice system to achieve the principles of justice during a civil dispute'. These tables showing strengths and limitations in relation to each principle can help you evaluate the ability of the civil justice system to achieve the principles of justice in relation to costs.

Evaluating the ability of the civil justice system to achieve the principles of justice in relation to costs

STRENGTHS

- Court fees and VCAT fees are tiered and the fees individuals must pay are in accordance with distinct categories, including corporate, standard, and concession or healthcare.
- 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.

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.
- The high costs associated with pursuing a civil claim may encourage some plaintiffs to accept a settlement that is unfair, or less than what they may be awarded by a court.
- 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.



STRENGTHS

- Parties that are eligible for VLA can 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 equally present their version of events and mutually reach a resolution.
- The court and VCAT's three-tiered system promotes equality by allowing those with less financial resources to still engage with the justice system and not be disadvantaged by their financial situation.

LIMITATIONS

- Parties do not equally have the opportunity to have their civil disputes resolved, due to the costs associated with pursuing a civil claim.
- Even if both parties have legal representation, the quality of legal representation can vary drastically, impacting how the case is presented and whether it is 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 vulnerable populations and lead to unequal and unjust outcomes.





STRENGTHS

- Judicial powers of case management that allow judges to order parties to attend mediation can reduce legal costs as the matter can be promptly resolved, enabling the civil justice system to remain accessible to more individuals.
- The use of alternative dispute resolution methods, such as mediation, prior to trial promotes access, if successful, as they are low cost and relatively informal.

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 associated with pursuing a civil claim may encourage some plaintiffs to accept a settlement that is unfair, or less than what they may be awarded by a court, limiting their ability to engage with the justice system and access justice.
- Access to a jury in a civil proceeding may be limited by its associated high costs.
- 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.

The impact of time during a civil dispute 3.2.13.2

LESSON LINK

You learnt about case management in **5D Judges, magistrates, and juries in a civil dispute**.

There are often delays in the resolution of civil disputes, which can discourage or prevent individuals or businesses from pursuing a civil claim. Delays are undesirable for an injured party seeking compensation for loss or injury, as they hinder access to justice in a timely manner and compound suffering. Furthermore, as trials rely on oral evidence, court delays may impact the accuracy and reliability of evidence.

Table 2 Types of delays incurred during a civil dispute

Type of delay	Explanation
Court backlogs	Backlogs are caused by the courts' caseload growing more rapidly than the available resources needed to resolve a court case.
VCAT delays	Whilst VCAT generally has lower waiting times than the courts, some lists and divisions may still experience delays depending on demand and resource availability.
Gathering evidence and preparation for a trial	It takes time for each party in a civil dispute to gather relevant evidence and prepare arguments for their case. This significantly adds to the time it takes for a case to be heard.
Trial procedures	Court procedures, such as the legal practitioners' oral arguments and the examination of witnesses, can be a lengthy and time-consuming process, possibly leading to a delay in the resolution of the dispute.

The use of case management powers is imperative in reducing the impact of time delays in civil disputes. Judges, magistrates, and VCAT members can seek to resolve disputes in a more cost and time-efficient manner through various orders. For example, the courts may order parties to participate in alternative dispute resolution methods to encourage the early resolution of a case or restrict the number of witnesses and length of submissions permitted at trial.

REAL WORLD EXAMPLE

Scrambling to solve COVID-19 setbacks

Throughout the COVID-19 pandemic, VCAT experienced increased delays in determining cases. During the first 18 months of the pandemic, VCAT's ability to work remotely was restricted, forcing the tribunal to only focus on hearing 'urgent and priority cases'. In addition, VCAT experienced a number of staff shortages, with a significant number of experienced staff members retiring whilst restrictions were in force. As a result of being under-resourced, the VCAT system continues to be backlogged with a number of individuals and businesses still waiting to have their cases heard. In particular, the Residential Tenancies List remains severely delayed as a result of VCAT receiving 10 applications a day for urgent repairs. The State Government is calling for increased funding for VCAT to enable it to allocate more resources to reduce delays.

Adapted from "It's taken all my savings: Tribunal delays blow out to years" (Hirst, 2023)



Image: TZIDO SUN/Shutterstock.com

Figure 2 VCAT has experienced continual delays in the aftermath of the COVID-19 pandemic

Evaluating the ability of the civil justice system to achieve the principles of justice in relation to time

STRENGTHS

- Dispute resolution bodies, like VCAT, that have lower waiting times than the courts, can enable disputes to be heard and determined in a timely manner, encouraging a just and fair outcome. The credibility of evidence can also be preserved if there is an early or prompt determination of the case.
- Case management powers can reduce the time taken to resolve a dispute, and encourage procedural fairness, by directing parties to abide by certain rules and procedures that support a swift resolution of the case.

LIMITATIONS

- Delays can compromise the application of procedural fairness and increase stress for all parties, particularly more vulnerable populations.
- Delays can negatively impact the credibility of evidence, which inadvertently increases the risk of an unfair outcome.



STRENGTHS

- Orders and directions given by a dispute resolution body to reduce delays apply equally to both parties and the directions given attempt to ensure equality is achieved between the parties.

LIMITATIONS

- The use of case management powers can differ between judges, creating the potential for unequal treatment of parties in the courts. Whilst proactive judges can encourage equality in cases, inequalities may be heightened in cases where case management powers are not used to their full extent.
- Delays are likely to disproportionately affect parties that are unfamiliar with court proceedings and those in vulnerable circumstances, such as individuals with low socioeconomic status. Larger corporations or businesses may not be impacted to the same extent due to their available resources.



STRENGTHS

- The range of dispute resolution bodies available to parties can ensure justice is accessible and delivered in an efficient manner.
- Judicial powers of case management, such as ordering parties to attend mediation, can encourage the early determination of a case and provide parties with a resolution in a more timely manner.
- The use of alternative dispute resolution methods, such as mediation, can promote access as they may result in the prompt resolution of a case. Overall, this can relieve delays in the civil justice system and provide more people with access to justice.

LIMITATIONS

- The delays in the justice system may discourage a prospective plaintiff from initiating legal action in the first place, limiting access to a remedy.
- Parties may be forced to withdraw or settle their case due to limited financial resources, reducing access to justice.



USEFUL TIP

In school SACs and the VCE exam, you are likely to be asked to discuss the impact of costs and time during civil disputes in relation to the principles of justice. Therefore, it is important that you are able to identify the impacts of costs and time factors and evaluate their relationship with the relevant principles of justice. Furthermore, the impacts of costs and time are often interrelated and should be considered in conjunction, rather than as separate categories.

Lesson summary

The achievement of the principles of justice in civil disputes may be impacted by:

- the high costs associated with resolving a civil case, such as fees for legal representation and court fees.
- the time involved in resolving a civil case, whether that be due to the nature of the dispute or delays within dispute resolution bodies.

5K Questions

Check your understanding

Question 1

The costs and time associated with initiating a civil claim can prevent the principles of justice from being achieved.

- A. True
- B. False

Question 2

Which of the following are sources of delays in the courts?

(Select all that apply)

- A. Court backlogs
- B. Gathering evidence and preparing for trial
- C. Witness fees
- D. Lengthy trial procedures

Question 3

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

low

high

VCAT

the courts

Parties incur [] legal costs when resolving civil disputes, such as barristers' fees for the presentation of a civil case at trial. Therefore, parties might consider pursuing their civil matter through [], which provides less costly dispute resolution methods.

Question 4

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the civil justice system in achieving the principles of justice in relation to costs.

Statement	Strengths	Limitations
I. The high costs associated with proceedings, such as court fees and costs of legal representation, can discourage individuals from initiating civil proceedings.	☐	☐
II. Parties that are eligible for Victoria Legal Aid may better understand legal processes or procedures, enabling them to properly present their case.	☐	☐
III. There may be unequal footing if one party in a trial does not have legal representation, preventing parties from being able to prepare and present a case of equal quality.	☐	☐
IV. Dispute resolution methods, such as mediation, are low-cost and relatively informal.	☐	☐

Question 5

Which of the following statements are true about the impact of costs and time on civil disputes?

(Select all that apply)

- A. Judges have the ability to actively manage civil proceedings, such as setting time limits for the examination of witnesses. This reduces the time it takes for a case to be heard and ensures evidence remains credible.
- B. A majority of the population can afford legal representation and relatively few people need to consider the cost of pursuing a civil dispute.
- C. The delays in the civil justice system may force a prospective plaintiff to withdraw or settle their case due to limited financial resources.
- D. Most court cases are heard within one week of being initiated.
- E. VCAT generally has lower waiting times than the courts, providing disputing parties with another avenue to resolve their case in a more time-efficient manner.

Question 6

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

expenses

delays

As trials rely on oral evidence, court [] may impact the accuracy and reliability of evidence, increasing the chances of an unjust outcome.

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

(2 MARKS)

Describe **one** impact of costs during a civil dispute.

Question 8

(4 MARKS)

Outline **two** reasons why there may be delays in having a case heard in the civil justice system.

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.

Cleopatra is a well-known activist in the legal community and has recently started a 'Reduce Court Costs' campaign. The campaign advocates for court fees, such as court filing and mediation fees, to be reduced by 20% to make the civil justice system more accessible and affordable.

Question 9

Which of the following statements are correct about the impact of Cleopatra's 'Reduce Court Costs' campaign on the principle of access in relation to costs? **(Select all that apply)**

- A. If successful, Cleopatra's 'Reduce Court Costs' campaign will significantly decrease the costs associated with the civil justice system, allowing more individuals to access justice.
- B. The campaign will encourage equal access to the justice system as more individuals will have the opportunity to pursue a case and not be obstructed by cost barriers.
- C. The campaign does not address the significant costs of legal representation, meaning individuals may still be unable to afford it, limiting access to justice.
- D. Self-represented parties will automatically be given first preference and not face any delays in reaching trial.

Question 10

(5 MARKS)

Analyse the impact of Cleopatra's 'Reduce Court Costs' campaign on the civil justice system in relation to costs. In your response, consider how the campaign could enhance the ability of the civil justice system to achieve the principle of access.

Adapted from VCAA 2022 exam Section B Q2d

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** or **limitations** of the civil justice system in achieving the principles of justice in relation to time.

Statement	Strengths	Limitations
I. Case management powers can reduce the time taken to resolve a dispute and encourage procedural fairness by directing parties to abide by certain rules and procedures that encourage a swift resolution of the case.	☐	☐
II. Delays can negatively impact the reliability of evidence, which inadvertently increases the risk of an unfair outcome.	☐	☐
III. Judicial powers of case management, such as ordering parties to attend mediation, can encourage the early determination of a case and provide parties with a resolution in a more timely manner.	☐	☐
IV. Parties may be forced to withdraw or settle their case due to limited financial resources.	☐	☐
V. Delays can compromise the application of procedural fairness and increase stress for all parties, particularly those from vulnerable populations.	☐	☐

Question 12

(8 MARKS)

'The time it takes for a civil dispute to be heard in court will greatly impact the achievement of the principles of fairness and access.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2021 exam Section A Q6

Linking to previous learning**Question 13**

(3 MARKS)

Explain how class actions aim to uphold the principle of access in relation to costs.

Adapted from VCAA 2018 exam Section A Q4b

6

CHAPTER 6

Remedies

LESSONS

- 6A** Damages as a remedy
- 6B** Injunctions as a remedy

KEY KNOWLEDGE

Remedies

- damages and injunctions, and their specific purposes.

Image: Billion Photos/Shutterstock.com

6A Damages as a remedy

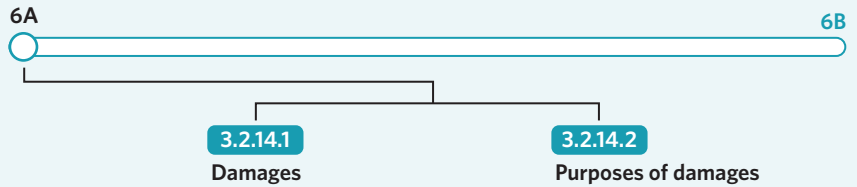


Image: Wasan Tita/Shutterstock.com

An appropriate remedy for a headache is paracetamol. However, paracetamol would not be appropriate to relieve the pain of a broken leg. A remedy in the legal sense serves the same purpose; to relieve or cure the person who has been harmed. Although, the harm can only be relieved if a suitable remedy is used.

STUDY DESIGN DOT POINT

- damages and injunctions, and their specific purposes



LESSON LINKS

You learnt about the concept of a civil breach in **4A Key principles of the Victorian civil justice system**.

You learnt about VCAT in **5I The Victorian Civil and Administrative Tribunal (VCAT)**.

You will learn more about injunctions in **6B injunctions as a remedy**.

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

Compensatory damages monetary damages that aim to restore the plaintiff to their original position had the breach not been committed.

Lesson introduction

A party initiating civil proceedings seeks to have their physical, emotional, and financial loss compensated in some way. Whilst the loss suffered cannot be undone, at the conclusion of a civil dispute, the court aims to return the plaintiff to the position they were in prior to the civil breach and compensate for their suffering.

Damages 3.2.14.1

Remedies aim to correct a civil wrong and return the plaintiff to the position they were in prior to the defendant's actions. Remedies awarded by courts and the Victorian Civil and Administrative Tribunal (VCAT) for civil breaches include damages and injunctions.

Damages compensate a plaintiff in a civil case for the loss caused by the civil breach, including replacing the value of property and covering expenses, loss, pain, and suffering relating to a victim's injury or death. Different types of damages cater to different types of loss by compensating for the negative tangible and intangible consequences of a civil breach.

Damages can be classified into different categories:

- compensatory damages.
- exemplary damages.
- nominal damages.
- contemptuous damages.

Compensatory damages aim to restore the plaintiff to their original position. There are three types of compensatory damages, which all aim to compensate the plaintiff and account for different types of loss:

- specific
- general
- aggravated.

Table 1 Types of compensatory damages

Type of compensatory 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 further compensate the plaintiff for humiliation suffered or where they have been insulted.	In cases 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.

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 a 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.

LEGAL CASE

CONTENT WARNING This example mentions content that is sensitive in nature, relating to sexual assault.

Lucy Orchard v Frayne Higgins [2020] TASADT 11**Facts**

Over four years, a Toll transport worker, Higgins, continuously sexually harassed Orchard while she was at work. After three years, the area manager was made aware of the inappropriate conduct and initiated a claim. However, Orchard felt unsafe and did not want to pursue the claim, so it was dropped. Higgins, the Toll transport worker, then filed a defamation claim against Orchard, alleging the accusations were false and had damaged his reputation. He demanded a written apology from Orchard with an admittance of defamation, publication of the apology, and to receive \$30,000 in compensatory damages. In response, Orchard decided to pursue the sexual harassment claim.

Legal issue

The Tasmanian Anti-Discrimination Tribunal (TADT) was required to consider whether Higgins' actions constituted sexual harassment and if so, an appropriate remedy to award Orchard.

Decision

The TADT determined Higgins' actions constituted sexual harassment. Therefore, appropriate damages for Higgins to pay Orchard needed to be determined. The primary aggravating factor in the Orchard's case against Higgins was that Higgins had filed a defamation claim, thus denying his actions entirely. Therefore, the judge considered awarding aggravated damages. The court accepted Orchard's evidence, and Higgins was ordered to pay \$25,000 in general damages and \$20,000 in aggravated damages. The defamation claim was subsequently dropped.

Significance

The TADT's decision to award Orchard aggravated damages demonstrates that filing a defamation claim to deny sexual harassment allegations can exacerbate the harm caused to the victim. This case highlights the importance of taking sexual harassment claims seriously and underscores the consequences that perpetrators can face for their actions.

It should be noted this case was later appealed and the total damages were reduced to \$22,500.

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.

LEGAL VOCABULARY

Exemplary damages damages that aim to punish the defendant and are usually a large monetary amount.

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 aim to punish the defendant. They usually require a defendant to pay a plaintiff large amounts of money, whilst they serve 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.

Nominal damages require an extremely small amount of money to be paid to a plaintiff, usually valued at \$1. These damages are used to ensure the plaintiff's rights are upheld without providing compensation. Nominal damages are often 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 wants to fight for moral reason with minimal monetary gain.

REAL WORLD EXAMPLE

Image: Brian Friedman/Shutterstock.com

Figure 1 Taylor Swift sues Mueller for nominal damages valued at \$1

CONTENT WARNING This example mentions content that is sensitive in nature, relating to sexual assault.

Taylor Swift's \$1 victory – a symbolic win for women's rights and bodily autonomy

Taylor Swift brought a civil claim against David Mueller for assault and battery after he lifted her dress and groped her at a meet-and-greet in 2013. She sued him for \$1 in damages, illustrating that the lawsuit was not about monetary profit, but to send a message that 'no means no' and victims have control over their bodies.

Swift's claim was successful, and Mueller was ordered to pay \$1 in damages.

After the trial, Swift made a statement:

'I acknowledge the privilege that I benefit from in life, in society, and in my ability to shoulder the enormous cost of defending myself in a trial like this. My hope is to help those whose voices should also be heard. Therefore, I will be making donations in the near future to multiple organisations that help sexual assault victims defend themselves.'

She acknowledged that seeking nominal damages is a privilege, as not everyone can afford legal representation.

Adapted from 'Jury says Taylor Swift was groped by radio DJ, awards her a symbolic \$1 verdict' (Yahr, 2017)

LEGAL VOCABULARY**Contemptuous damages**

a small monetary amount awarded to acknowledge that the plaintiff had a legal right but not a moral right to the claim brought before the court, and therefore should not be compensated.

Contemptuous damages acknowledge that the plaintiff had a legal right but not a moral right to make a civil claim against the defendant. To condemn the immorality of the claim, minimal compensation is awarded. When these damages are awarded, the judge must believe the claim should not have been brought to court. An award of these damages indicates a 'technical victory', but not a moral victory.

USEFUL TIP

To differentiate contemptuous damages and nominal damages, recall that for contemptuous damages, the plaintiff may be seeking a large sum of money, but the judge disapproves and reduces the compensation. However, in the case of nominal damages, the plaintiff chooses to seek a low amount of damages.

HYPOTHETICAL SCENARIO**Fashion faux pas**

Abrielle is a well-known fashion designer, and John is a freelance journalist who writes articles about fashion trends. John publishes an article on a popular fashion blog, where he criticises Abrielle's latest collection as 'uninspired and outdated'. Abrielle is outraged by the article and believes John's comments have damaged her reputation in the fashion industry.

Abrielle decides to file a defamation lawsuit against John, claiming his comments were false and caused her to suffer financial losses. However, during the trial, John's defence team argues that Abrielle's reputation was already damaged before the article was published, due to a previous fashion show that received negative reviews. The court agrees with John's defence, and whilst they acknowledge that John's comments were defamatory, they believe they did not cause any further damage to Abrielle's reputation. Therefore, the court awarded minimal damages to Abrielle, in recognition of the limited impact of the defamatory comments.



Figure 2 Contemptuous damages were awarded to Abrielle, indicating a technical victory

Similar to the way crimes have maximum penalties, there are statutory restrictions on damages that are 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 \$660,970 in the 2022-2023 financial year (Fernando, 2023).

LEGISLATION*Wrongs Act 1958* (Vic)

Purposes of damages 3.2.14.2

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 civil rights is remedied, as opposed to in criminal law, where the focus is on the offender and changing their behaviour through imposing sanctions. If a defendant cannot pay the sum of 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 limited assets.

Different types of damages aim to achieve different objectives by assigning monetary value to tangible and intangible consequences of a civil breach.

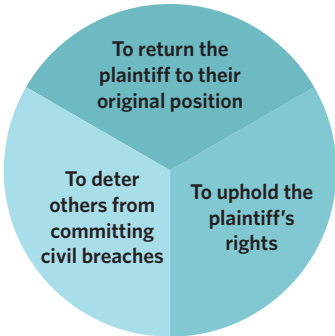


Figure 3 Purposes of damages

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 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 prior to the breach. • 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.

LESSON LINK

You learnt about jurors in **5D Judges, magistrates, and juries in a civil dispute**.

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 damages acknowledges the plaintiff's right to a legal remedy and upholds their right to seek justice for a violation of their 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 plaintiffs' 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 civil wrongs 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.	- Whilst damages can be awarded to deter future harmful conduct, there is no guarantee that this will be effective if others perceive the potential risk of wrongful actions to be outweighed by the benefits of completing that action. Additionally, deterrence cannot be achieved if a possible defendant is 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 may be unable to deter that defendant effectively.

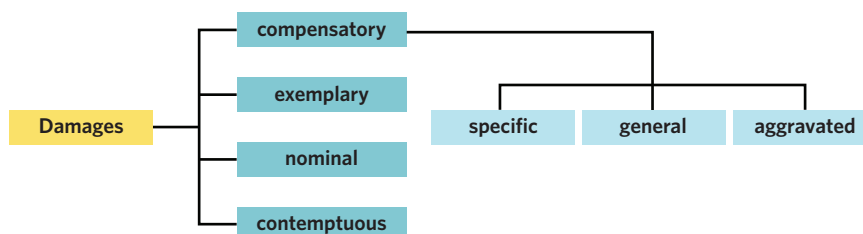
USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is 'discuss the ability of remedies to achieve their purposes'. The tables in this lesson showing strengths and limitations of damages in relation to each purpose can help you to discuss the ability of remedies to achieve their purposes.

Lesson summary

The main purposes of damages are:

- to return the plaintiff to their original position.
- to uphold the plaintiff's rights.
- to deter others from committing civil breaches.


Figure 4 Summary of the types of damages applicable in civil cases

6A Questions

Check your understanding

Question 1

Remedies are court orders that punish offenders once they are found guilty of criminal behaviour.

- True
- False

Question 2

Which of the following are types of compensatory damages? **(Select all that apply)**

- Aggravated damages
- Nominal damages
- General damages
- Specific damages

Question 3

General damages can be calculated exactly.

- True
- 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:

medical expenses

pain and suffering

humiliation

loss of quality of life

Aggravated damages aim to compensate for .

Question 6

Tick the box to indicate whether each of the following statements refers to **nominal damages** or **contemptuous damages**.

Statement	Nominal damages	Contemptuous damages
I. The plaintiff is seeking monetary compensation.	☐	☐
II. The plaintiff is not seeking monetary compensation.	☐	☐
III. The judge is indicating a legal victory regardless of the value of the compensation.	☐	☐
IV. The judge is indicating a technical and legal victory, but not a moral victory.	☐	☐

Question 7

Which of the following statements most accurately describes the overarching purpose of damages?

- A. The main purpose of damages is to punish the defendant.
- B. The main purpose of damages is to reward the plaintiff for bringing a civil action to court.
- C. The main purpose of damages is to return the plaintiff to their original position before the civil breach occurred.

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

(2 MARKS)

Outline **one** purpose of damages.

Adapted from VCAA 2016 exam Q1a

Question 9

(3 MARKS)

Describe **one** reason why a plaintiff may seek general damages.

Adapted from VCAA 2018 exam Section B Q2b

Question 10

(3 MARKS)

Sarala brought a residential tenancy claim against tenant Hayley. She is seeking \$5 in damages.

Explain **one** reason Sarala might be seeking \$5 in damages.

Question 11

(3 MARKS)

Distinguish between compensatory and exemplary damages.

Question 12

(4 MARKS)

Niamh has been working with Desiree for five years and has decided to write a book about her life. When Desiree finds out she is horrified and asks Niamh to not publish the book, however, she disregards Desiree's concerns and publishes the book anyway.

Desiree sues Niamh for misusing her private information. The judge at trial states 'the defendant's actions caused the plaintiff great humiliation, whilst they demonstrated malicious intent in their behaviour.'

Identify **two** types of damages the judge is likely to award Desiree. Justify why each is appropriate in this 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.

Valerie is a sports coach who loves her job but slipped over a puddle of water in a shopping centre and injured her back. She spent significant time in hospital and is no longer able to walk. Consequently, Valerie sued the shopping centre stating that her injury was caused by its negligent cleaning practices. She can no longer coach sports and has been diagnosed with depression.

Question 13

Tick the box to indicate whether each of the following statements refers to the ways in which the purposes of damages are **achieved** or **not achieved**.

Statement	Achieved	Not achieved
I. Damages may not be able to fully restore non-monetary losses, such as pain and suffering or emotional distress.	☐	☐
II. Monetary compensation can restore the plaintiff to their original, financial position.	☐	☐
III. Valerie may view the compensation provided by damages as insufficient. Court proceedings are very costly and the damages may only cover the court filing fees and the cost of legal representation.	☐	☐

Question 14

(6 MARKS)

To what extent can damages achieve the purposes of remedies in Valerie's case?

Adapted from VCAA 2020 Section A Q4

Linking to previous learning**Question 15**

(4 MARKS)

Explain how class actions could affect the ability of damages to achieve their purposes.

6B Injunctions as a remedy

STUDY DESIGN DOT POINT

- damages and injunctions, and their specific purposes

6A

6B

3.2.15.1
Injunctions

3.2.15.2
Purposes
of injunctions

3.2.15.3
A comparison
of damages
and injunctions



Image: Tero Vesalainen/Shutterstock.com

As you are studying for your next legal SAC, your neighbour is blasting music very loudly, making it difficult to focus. You fail your SAC as a result and want to take legal action. An award of damages would not prevent him from playing music while you're studying for another SAC. So what would be a more appropriate remedy for you to seek for some peace?

Lesson introduction

If a civil wrong has not yet occurred, damages would not be the most appropriate remedy as they aim to compensate for the loss suffered by the plaintiff. In the case where a civil wrong can be prevented, or a past breach needs to be prevented from occurring again, a party may initiate a civil action in order to compel a party to do an act, or prevent them from doing an act.

LESSON LINK

You learnt about damages in **6A Damages as a remedy**.

Injunctions 3.2.15.1

Injunctions are legal 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 1 Types of injunctions

Type of injunction	Explanation	Example
Mandatory injunction	Forces parties to do something.	Ordering a party to demolish a wall that they built on someone else's land.
Restrictive injunction	Prevents parties from doing something.	Preventing a property from being sold.
Interlocutory injunction	Only lasts for a short time and is often awarded in urgent circumstances.	Preventing the demolition of a house for a short period, 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

Injunctions 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



Image: kailim/Shutterstock.com

Figure 1 An injunction was ordered as a remedy to protect Boost Mobile from Optus’ trademark infringement

Boosting its reputation – Boost Mobile’s trademark triumph

Boost Mobile brought a case against Optus for trademark infringement following the release of a new feature called ‘Moblle Boost’. Justice Tom Thawley found in favour of Boost Mobile and ordered a mandatory injunction, giving Optus 72 hours to remove the term ‘Mobile Boost’ from their website and other marketing platforms. Thawley stated that the potential confusion would cause damage to Boost Mobile, and that Optus should no longer be able to promote their Mobile Boost features in the media.

Adapted from Nine News, ‘Optus suffers court blow against Boost Mobile over ‘Mobile Boost’ feature’ (Long, 2023)

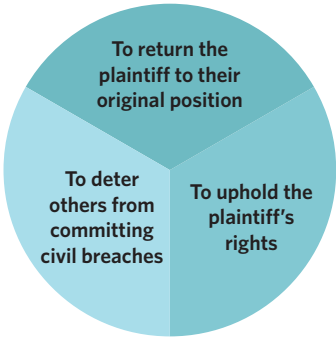


Figure 2 Purposes of damages

Purposes of injunctions 3.1.15.2

The main purpose of remedies is to return the plaintiff to their original position before the civil wrong occurred. Injunctions achieve this purpose 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.

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 civil rights, rather than in criminal law, where the focus lies on the offender and modifying their conduct by imposing penalties.

Table 2 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 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 merely 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 that 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 require certain actions from the defendant, effectively safeguarding their rights.

Table 3 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 that people of high socioeconomic status can protect their civil rights more readily. 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 will be ordered to do a specific action or be prevented from doing a specific action, showing that such behaviour will not be tolerated. This helps to deter potential wrongdoers from engaging in similar conduct and promotes a safer and more just society.

Table 4 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 that 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.

LEGAL CASE

Gippsland Environment Group Inc v VicForests [2022] VSC 296

Facts

VicForests is a government-owned company that harvests timber in state forests. Gippsland Environment Group (GEG) is an association that aims to preserve the state forests of Gippsland, including the flora and fauna. VicForests was harvesting timber in areas inhabited by greater gliders and yellow-bellied gliders.

Legal issue

GEG sought a restrictive injunction to prevent VicForests from harvesting timber in certain areas where greater gliders and yellow-bellied gliders inhabit. VicForests must comply with the *Sustainable Forests (Timber) Act 2004* (Vic) which outlines their obligations and relevant code of practice.

Decision

The restrictive injunction was granted as the judge found that preventing harvesting in those areas would not negatively affect the timber industry. VicForests had the resources and expertise to identify other suitable areas to harvest timber from, while not harming the greater gliders and yellow-bellied gliders.

Significance

The defendant was forced to stop harvesting timber in specific areas to prevent further harm to the plaintiff, whose aim was to protect Victorian wildlife.



Image: Anom Harya/Shutterstock.com

Figure 3 Gippsland Environment Group sought an injunction against VicForests to prevent them from harvesting Timber in areas containing gliders

USEFUL TIP

An important key skill in Area of Study 2 of Unit 3 VCE Legal Studies is 'discuss the ability of remedies to achieve their purposes'. The tables in this lesson showing strengths and limitations of injunctions in relation to each purpose can help you to discuss the ability of remedies to achieve their purposes.

LEGISLATION

Sustainable Forests (Timber) Act 2004 (Vic)

A comparison of damages and injunctions 3.1.15.3

Table 5 Comparison of injunctions and damages

	Damages	Injunctions
Explanation	Damages are an award of monetary compensation to the plaintiff. They aim to compensate for the loss caused by the civil breach. This can include replacing the value of property and covering expenses, loss, pain, and suffering relating to a plaintiff's injury or death.	Injunctions are court orders compelling a party to do something, or preventing a party from doing something.
Purpose	The main purpose of damages is to restore the plaintiff to their original position before the civil breach occurred.	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.

Lesson summary

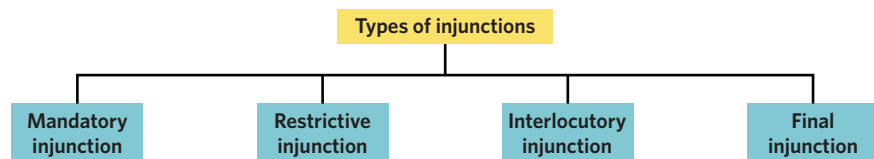


Figure 4 The types of injunctions

Table 6 The purposes of injunctions

Purpose	Description
Return the plaintiff to their original position	Injunctions aim to return the plaintiff to their original position by forcing the defendant to take action to prevent further harm to the plaintiff.
Uphold the plaintiffs' rights	By obtaining an injunction, the plaintiff can seek a court order to prohibit or require certain actions from the defendant, effectively safeguarding their rights.
Change the behaviour of the defendant	The defendant will be ordered to do a specific action or be prevented from doing a specific action, showing that such behaviour is not tolerated.

6B Questions

Check your understanding

Question 1

Injunctions aim to either remedy a past civil breach or prevent a potential civil breach from occurring.

- A. True
- B. False

Question 2

Preventing a book from being published is an example of:

- A. a mandatory injunction.
- B. exemplary damages.
- C. a restrictive injunction.
- D. contemptuous damages.

Question 3

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

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 4

Which statement does **not** describe an interlocutory injunction?

- A. Temporarily restricts the parties from breaching civil rights.
- B. They are temporary, meaning that further legal proceedings must take place for the injunction to become final or for the plaintiff to be awarded damages.
- C. Only lasts for a short period of time and is often awarded in urgent circumstances.
- D. Forces a party to start or complete an action to prevent further harm to the plaintiff.

Question 5

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

injunctions prevent the defendant from acting in a way that would further the harm, for a specified time frame only.

Question 6

Tick the box to indicate whether each of the following statements refers to **damages** or **injunctions**.

Statement	Damages	Injunctions
I. Prevents the defendant from acting in a way that would further the harm.	☐	☐
II. An award of monetary compensation to the plaintiff.	☐	☐
III. Can be mandatory or restrictive.	☐	☐
IV. Can be compensatory or nominal.	☐	☐

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Describe what an injunction is and outline **one** of its purposes.

Adapted from VCAA 2018 Sample exam Section A Q1b

Question 8

(2 MARKS)

Describe the purposes of remedies.

Adapted from VCAA 2020 exam Section B Q1e

Question 9

(3 MARKS)

Edward plans to build an extension onto his house. If it goes ahead, the extension will block the natural light from Digby's window, his neighbour. Digby wants to know what he can do about this situation.

Advise Digby as to the most appropriate civil remedy to seek in this case.

Extended response

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

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of injunctions for a plaintiff.

Statement	Strengths	Limitations
I. Injunctions prevent the defendant from acting in a way that would further the harm.	☐	☐
II. Injunctions do not account for financial loss.	☐	☐
III. Interlocutory injunctions are only temporary, meaning further legal action may be necessary.	☐	☐
IV. The defendant is legally bound by an injunction and legal consequences apply if they do not fulfil the terms of the injunction.	☐	☐

Question 11

(5 MARKS)

Discuss the ability of injunctions to achieve their purpose.

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

Use the following information to answer questions 12 and 13.

After false information about Rebel Wilson was published in an Australian magazine, Women's Day, Wilson brought a claim of defamation against Bauer Media. She was awarded \$4.5 million in specific damages, compensating for her loss of acting roles. This decision has since been appealed.

Source: Adapted from 'Rebel Wilson's legal battle ends as High Court rejects appeal over defamation payout' (Byrne, 2018)

Question 12

Tick the box to indicate whether each of the following statements are **true** or **false** in relation to Wilson's case.

Statements	True	False
I. Given the damage had already been done and the false information had already been widely disseminated, an injunction would not have been an effective remedy to address the harm already suffered by Wilson.	☐	☐
II. Wilson is already a famous actress, and thus would not require a civil remedy as she is already wealthy.	☐	☐
III. Specific damages would compensate Wilson for her loss of acting roles as a result of the defamatory publication. This loss could be calculated and quantified.	☐	☐
IV. An injunction would be effective in Wilson's case as it could prohibit all publications from publishing further defamatory information about her.	☐	☐

Question 13

(5 MARKS)

Referring to the purposes of remedies, analyse why damages are more appropriate than an injunction in Wilson's case.

Linking to previous learning**Question 14**

(6 MARKS)

The purpose of sanctions is to restore the plaintiff to their original position and punish the defendant. Injunctions fulfil this purpose as they force a party to do something, such as pay money or write an apology. Damages fulfil this purpose as they financially compensate the plaintiff, however, they cannot compensate for pain and suffering.

Identify **three** errors in the statement and, for each error, explain the correct civil process or procedure that should have occurred.

Adapted from VCAA 2020 exam Section A Q5

Use your answer to questions 15 and 16 to support your response to question 17.

Question 15

Tick the box to indicate whether the following statements are **strengths** or **limitations** of civil remedies in achieving their purposes.

Statement	Strengths	Limitations
I. Specific damages are effective in restoring the plaintiff to their original position before the civil breach occurred as they have a precise value and are easily quantifiable.	☐	☐
II. General damages do not have a precise value and are not easily quantifiable. For this reason, their ability to achieve their purpose of restoring the plaintiff to their original position is limited.	☐	☐
III. By obtaining an injunction, the plaintiff can seek a court order to prohibit or require certain actions from the defendant, effectively safeguarding their rights.	☐	☐
IV. Initiating a civil action in order to gain an injunction against a defendant comes with high costs for a plaintiff, so not all plaintiffs will be able to apply for this relief.	☐	☐
V. The court has a limited ability to monitor and ensure that 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.	☐	☐

Question 16

Tick the box to indicate whether the following statements are **strengths** or **limitations** of criminal sanctions in achieving their purposes.

Statement	Strengths	Limitations
I. Fines can achieve the purposes of punishment and deterrence quite effectively as the fear of receiving a significant crime is likely to discourage a potential offender from committing a criminal act in the first place.	☐	☐
II. Fines are not effective in achieving purposes such as rehabilitation and protection of the community. This is because if a criminal receives a fine, they are not removed from the community and therefore could still pose a threat to society.	☐	☐
III. Imprisonment allows the purpose of protection to be achieved for the duration of the offender's period of imprisonment.	☐	☐
IV. Many prisoners who are released from prison after their period of imprisonment will reoffend, so the purpose of community protection is not achieved in the long term.	☐	☐

Question 17

(10 MARKS)

'Civil remedies are always able to achieve their purposes, unlike criminal sanctions, which rarely achieve their purposes.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2021 exam Section A Q6



4

UNIT 4

The people, the law and reform

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

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Image: r.classen/Shutterstock.com



UNIT 4 AOS 1

The people and the law-makers

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. Parliament is the supreme law-making body, and courts have a complementary role to parliament in making laws. Courts can make laws through the doctrine of precedent and through statutory interpretation when determining cases.

In this area of study, students examine the ways in which the Australian Constitution acts as a check on parliament in law-making, and factors that affect the ability of parliament and courts to make law. They explore the relationship between parliament and courts in law-making and consider the capacity of both institutions to make law.

Outcome 1

On completion of this unit the student should be able to discuss the ability of parliament and courts to make law and evaluate the means by which the Australian Constitution acts as a check on parliament in law-making.

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KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the law-making powers of the state and Commonwealth parliaments, using examples
- analyse the relationship between parliament and courts
- explain the significance of section 109 of the Australian Constitution
- discuss the significance of one High Court case which has had an impact on state and Commonwealth law-making powers
- discuss the ability of parliament and the courts to make law
- evaluate the means by which the Australian Constitution acts as a check on parliament in law-making
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

CHAPTER 7

Parliament and the Australian Constitution

LESSONS

- 7A** The Commonwealth Parliament and the Crown in law-making
- 7B** The Victorian Parliament and the Crown in law-making
- 7C** The division of powers
- 7D** Section 109 of the Australian Constitution
- 7E** High Court cases and their impact on law-making powers
- 7F** Parliament's ability to make law
 - the bicameral structure
- 7G** Parliament's ability to make law
 - international pressures
- 7H** Parliament's ability to make law
 - representative nature
- 7I** The Constitution as a check on parliament
 - representative government
- 7J** The Constitution as a check on parliament
 - the separation of powers
- 7K** The Constitution as a check on parliament
 - express protection of rights

KEY KNOWLEDGE

Parliament and the Australian Constitution

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

7A The Commonwealth Parliament and the Crown in law-making

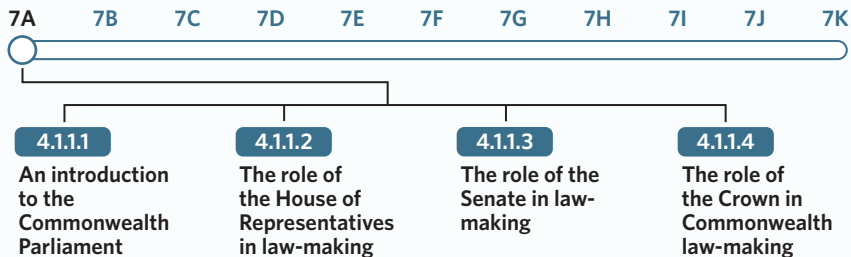


Image: Natali _ Mis/Shutterstock.com

The heart's ability to pump blood relies on the coordinated effort of all its chambers, each contracting in turn. Similarly, the two chambers of parliament are essential in enacting laws. Both houses (or chambers) play distinct roles in the legislative process, working in harmony in order for legislation to be passed.

STUDY DESIGN DOT POINT

- the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making



Lesson introduction

Australia is a **constitutional monarchy** in which King Charles III is the Head of State and has the final say in regard to all legislation passed by the Commonwealth Parliament.

The Australian Constitution gives Commonwealth and state parliaments the power to make laws on particular matters, whilst also placing restrictions on these powers. This legislation also establishes the High Court of Australia, which ensures parliament produces law in accordance with the Constitution by invalidating laws created by parliament if they breach the Constitution.

An introduction to the Commonwealth Parliament 4.1.1.1

Australia is a representative, **democratic society**, meaning the laws that govern Australians' day-to-day lives are created by elected politicians. Regular **elections** allow members of the community to either re-elect law-makers who are representing the community's needs or replace them with different law-makers who offer new promises and variation in governing society. These elected representatives are members of a **bicameral parliament**, a law-making body with two houses or chambers that must collaboratively approve new bills.

The federal, bicameral parliament in Australia is known as the Commonwealth Parliament, and has existed since 1901. Today, Parliament House is home to the Commonwealth Parliament, and is in Australia's capital city, Canberra.

LEGAL VOCABULARY

Constitutional monarchy a system of government in which the Crown is the Head of State, but elected representatives have the power to create laws.

Democratic society an organised system of people living in a community, in which the laws and processes that govern people's 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 new bills or amendments to laws.

LESSON LINKS

You will learn more about the bicameral structure in **7F Parliament's ability to make law – the bicameral structure**.

You learnt about the High Court in **2D The Victorian court hierarchy and criminal cases** and **5C The Victorian court hierarchy and civil disputes**.

The role of the House of Representatives in law-making 4.1.1.2

The **House of Representatives** is the Commonwealth Parliament's lower house and has 151 elected members from across Australia. The House of Representatives is also referred to as the 'house of the people' as this is where the **government** of the day sits and is, therefore, representative of the Australian population.

The House of Representatives is composed of 151 members who serve a term of at most three years before re-election. Each of these 151 members represents and serves an **electorate**. At an election, voters elect one person to represent their electorate in the House of Representatives. Given how Australia's population is distributed, larger states, like NSW and Victoria, have substantially more electoral divisions than smaller states, such as Tasmania and South Australia. This means the more populous states elect more members of the House of Representatives.

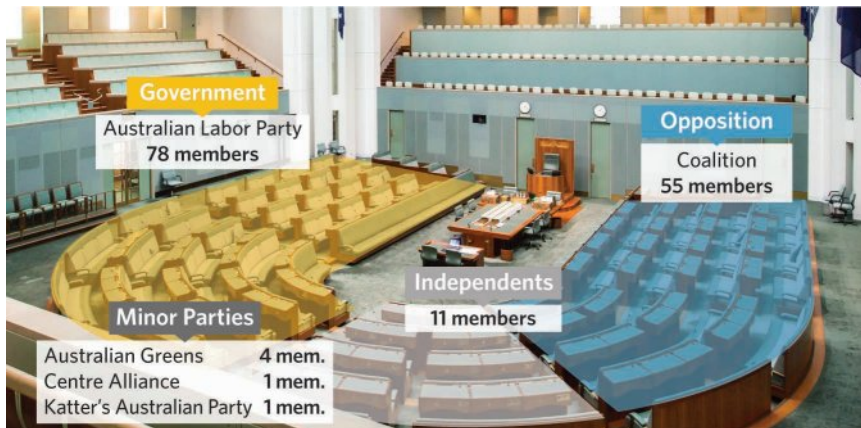


Image: FiledIMAGE/Shutterstock.com

Figure 1 In the 47th House of Representatives, elected in 2022, the Labor government won the majority of seats with 78 seats, whilst the Coalition and minor and independent parties won 56 and 17 seats respectively

Almost all members of the House of Representatives are members of political parties, such as the Liberal Party of Australia and the Australian Labor Party. Each party represents different political views. **Political parties** are organisations that gather members of similar ideologies and values to contend in elections.



Figure 2 Anthony Albanese is the 31st Prime Minister of Australia and the leader of the Australian Labor Party

The political party that has the majority of seats in the House of Representatives forms government. The leader of this party becomes the **prime minister**. Some members of the House of Representatives, who are also members of the governing party (or **coalition** of parties), will be appointed as ministers. Ministers are responsible for running government portfolios that provide essential services, such as defence, education, social services, and finance.

The political party with the second highest number of seats in the House of Representatives will form the opposition, and those in neither the government nor the opposition will form the **crossbench**.

KEY TERM

House of Representatives the lower house of the Commonwealth Parliament, which is comprised of 151 members of parliament representing the electorates across Australia.

LEGAL VOCABULARY

Government a group of people that work, with authority, to rule and manage a community of people, such as a country, state, or local area.

Electorate a geographical area comprised of approximately 110,000 voters represented by a member of the Commonwealth Parliament.

Political party an organisation comprised of members of similar ethos and worldviews with the primary aim to compete in elections to achieve societal and political goals.

Prime minister the most senior minister in a government who acts as the leader of the government and their own political party.

Coalition an alliance between two or more political parties with the aim of working together to form a government.

Crossbench the members of parliament who do not belong to the major political parties, who are either independents or members of minor political parties.

CONSTITUTION

Section 53

LEGAL VOCABULARY

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

Table 1 The role of the House of Representatives

Role	Explanation
Initiate new legislation 	Most legislation is introduced by ministers, who are usually usually members of the House of Representatives. As a consequence, a majority of new laws and proposed changes to existing laws begin in the House of Representatives. Although ministers initiate most legislation, this role is shared with all the members of the Commonwealth Parliament.
Initiate money bills 	Section 53 of the Australian Constitution requires that all bills in relation to government expenditure must be initiated in the House of Representatives. For example, laws on taxation and appropriation bills.
Represent the people in law-making 	Members of the House of Representatives are directly chosen by the people in their community and will often receive correspondence from those living within their electorate. As representatives of that community, they should reflect the opinions and perspectives of those within their electorate when introducing, debating, or suggesting amendments to legislation. If they fail to do so, they risk being voted out of office at the next election.
Review legislation and propose amendments 	As Australian society changes, it is necessary that law reform occurs to existing Acts. The House of Representatives is equipped with members of parliament who directly represent and understand the real issues affecting their electorates and can therefore, propose meaningful amendments. This process ensures laws are as effective as possible.
Scrutinise legislation 	In the less common instances where bills are introduced in the Senate, the House of Representatives will act as a house of review. Members will debate and scrutinise the proposed legislation, making amendments if necessary, and then potentially passing the bill to the Governor-General for royal assent.

The role of the Senate in law-making 4.1.1.3

KEY TERM

Senate the upper house of the Commonwealth Parliament, which is comprised of 76 senators who represent the six states and two territories across Australia.

The **Senate** is the upper house of the Commonwealth Parliament. It has 76 elected members from across Australia. The Senate is also referred to as ‘states’ house’, given each of the six states has 12 senators. Each of the two mainland territories has two senators.

The Senate is composed of 76 members who serve a term of six years before requiring re-election. Each of these 76 members represents and serves a state or territory. At an election, voters elect 12 people to represent their state in the Senate, or two for voters in either of the territories. Unlike the House of Representatives, the Senate is organised in such a way that ensures equal representation for every state. Small states like Tasmania have 12 senators, identical to New South Wales, despite NSW’s population being around 15 times the size of Tasmania’s.

Table 2 The role of the Senate in law-making

Role	Explanation
Scrutinise legislation 	The Senate's primary role is to debate and scrutinise bills introduced by the House of Representatives. This can ensure new laws are appropriate and will achieve their purpose. As the Senate is usually composed of more independents and smaller political parties, this allows for a wider range of perspectives to be considered when debating new bills. To assist with their scrutinisation, the Senate forms committees to review areas of law-making interest. The Senate's review function often results in new bills being amended.
Act as a states' house 	The Constitution guarantees that all states have equal representation in the Senate to ensure legislation is not passed that favours the larger states at the expense of the smaller states.
Initiate legislation 	Legislation can originate from the Senate. However, most legislation is introduced in the House of Representatives. Money bills specifically can only originate in the lower house.

LESSON LINK

You will learn more about parliamentary committees in **9F Parliamentary committees**.

REAL WORLD EXAMPLE
Growing Greens

Janet Rice MP is an Australian Greens senator for Victoria. The Australian Greens are considered a minor party in Australia.

For minor parties, the Senate offers a unique opportunity for bills to be introduced with a greater chance of being passed, as there is a more diverse composition of members, compared to the lower house.

In early 2023, Janet Rice introduced the Ending Native Forest Logging Bill 2023, which sought to repeal the *Regional Forest Agreements Act 2002* (Cth) and to amend the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). The Australian Greens are one of the leading environmental, progressive political parties in Australia. Therefore, members of this political party take hard stances on national ecological undertakings, such as logging and deforestation. To give themselves the best chance of their bills being successful, the Greens often introduce them into the Senate as they have more representation in the Senate with 11 members, compared to just four in the House of Representatives.

A bill that is introduced initially into the Senate will be debated and read at least twice before it is put to a vote within the chamber.

Adapted from 'End Native Forest Logging' (The Greens, n.d.)



Figure 3 Janet Rice is the Australian Greens Senator for Victoria

LEGISLATION

Regional Forest Agreements Act 2002 (Cth)

Biodiversity Conservation Act 1999 (Cth)

REAL WORLD EXAMPLE



Image: surasak jailak/Shutterstock.com

Figure 4 The Economics Legislation Committee of the Senate inquired into the National Energy Transition Authority Bill 2022 between late 2022 and early 2023

Energy and economics before the Senate

The Economics Legislation Committee is one of the Senate's many committees tasked with inquiring into various matters across Australia. This particular committee, composed primarily of six senators, investigates the economic impact of proposed legislation and amendments on areas, such as industry, science and resources, and treasury.

In September 2022, the National Energy Transition Authority Bill 2022 was referred to the committee for inquiry with a report due in March 2023. Over the six-month period, the committee held one public inquiry and received 34 written submissions regarding the bill. In the final report, the committee reported on the various impacts of the National Energy Transition Authority Bill in relation to areas including economics, human rights, and regulatory impacts.

This report was tabled on 23 March 2023 and will be used by members of the Senate when considering whether to vote in favour or against the proposed legislation.

These reports produced by the Senate's committees are useful for providing context and detail during the law-making process as all Senators are provided with this information which they are unlikely to access on their own.

Adapted from 'National Energy Transition Authority Bill 2022' (Economics Legislation Committee, 2023)

The role of the Crown in Commonwealth law-making 4.1.1.4

The **Governor-General** is the Crown's representative in the Commonwealth Parliament. They are appointed by the King on the advice of the prime minister of the day. The primary role of the Governor-General in the law-making process is to grant **royal assent**, the highest form of approval for a piece of legislation moving through the parliament, which allows a bill to become law.

Table 3 The role of the Governor-General in law-making

Role	Explanation
Grant royal assent 	The Governor-General will sign a bill on behalf of the Crown after it has been approved by both Houses of the Commonwealth Parliament. This is a necessary final step for a bill to become law and usually happens on the advice of the prime minister.
Withhold royal assent if appropriate to do so 	Under s 58 of the Australian Constitution, the Governor-General can refuse to grant royal assent to a bill. However, this has never happened in practice.
Suggest amendments to legislation after it has passed both houses of parliament 	If a mistake is found in the bill after it has been passed through both houses, a minister would advise the Governor-General to return the bill to parliament with the suggested change, whilst the Governor-General would also suggest required amendments. This power is granted to the Governor-General in s 58 of the Constitution but has been used very scarcely since parliament first sat in 1901.
Summon the Executive Council 	The Governor-General is responsible for selecting and appointing the Executive Council who advise the Governor-General on government matters, while also seeking approval for various modifications to particular laws.

KEY TERM

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

LEGAL VOCABULARY

Royal assent the formal and final approval granted by the monarchy, or a representative of the monarchy, for a proposed piece of legislation.



Image: MirasWonderland/Shutterstock.com

Figure 5 Due to Australia's monarchical ties to the United Kingdom, there are key processes in the parliamentary system that involve a royal representative

CONSTITUTION

Section 58

LEGAL VOCABULARY

Executive Council a group of senior government ministers with the role of advising the Crown's representative on government matters.

DEEP DIVE

Who is Australia's Governor-General?

His Excellency General the Honourable David John Hurley AC DSC (Retd) is the 27th Governor-General of the Commonwealth of Australia. Prior to being sworn in as Governor-General on 1 July 2019, he served as the Governor of New South Wales from 2014 to 2019.

Most of Hurley's life, prior to his service as a royal representative, was dedicated to Australian military service. There, his 42-year career culminated in an appointment as Chief of the Defence Force.

He is also one of five Governor-Generals to have served two monarchs.

Adapted from 'The Governor General's biography' (The Governor General of the Commonwealth of Australia, 2020)



Figure 6 The 27th Governor-General, David John Hurley, has been the Crown's representative in the Commonwealth since 2019

Lesson summary

Australia is a democratic society in which citizens elect their own representatives in the Commonwealth Parliament.

The Commonwealth Parliament is split into three main branches in the law-making process.

- The House of Representatives (the lower house) is where the Australian Government is formed and is where the prime minister sits.
- The Senate (the upper house) acts as a house of review for legislation primarily.
- The Governor-General is the representative of the Crown and approves all legislation.

Table 4 The roles of the Commonwealth Parliament and the Crown in law-making

Component of the Commonwealth Parliament	Role
The House of Representatives	• Initiate new legislation • Initiate all legislation that imposes taxation or spends Commonwealth revenue • Represent the people in law-making • Review legislation and propose amendments • Scrutinise legislation
The Senate	• Scrutinise legislation • Act as a states' house • Initiate new legislation
The Crown	• Grant royal assent to legislation • Withhold royal assent • Suggest amendments to legislation after it has passed both Houses of Parliament • Summon the Executive Council

7A Questions

Check your understanding

Question 1

Australia operates under a constitutional monarchy.

- A. True
B. False

Question 2

The person responsible for granting royal assent to bills that have successfully passed through both Houses of the Commonwealth Parliament is:

- A. the Governor.
- B. the Attorney-Governor.
- C. the Attorney-General.
- D. the Governor-General.

Question 3

The primary function of the Senate is to:

- A. act as a house of review.
- B. act as the 'territories' house'.
- C. introduce new legislation that imposes taxation.
- D. form and house the government of the day.

Question 4

The prime minister is a member of parliament who sits in the Senate.

- A. True
- B. False

Question 5

Which of the following statements is incorrect about the role of the Crown in the Commonwealth Parliament?

- A. The Governor-General has the ability to withhold royal assent.
- B. The Governor-General has the sole responsibility of selecting the prime minister on the advice of the King.
- C. The Governor-General gives royal assent to bills passed through parliament.
- D. The Governor-General may suggest amendments to legislation after it has passed through the House of Representatives and the Senate.

Question 6

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

The political party that holds the [] in the House of Representatives will form the government of the day.

Question 7

Which of the following are roles of the House of Representatives in law-making?

(Select all that apply)

- A. Grant royal assent to bills
- B. Represent the people in law-making
- C. Initiate legislation
- D. Review legislation
- E. Initiate money bills

Preparing for exams

Standard exam-style

Question 8

(3 MARKS)

A bill introduced by the Commonwealth Government successfully passed both the House of Representatives and the Senate after debate and amendments. The bill is ready to be enacted into law and the prime minister is eager for the bill's policy to take effect.

Explain the role of the Governor-General in this scenario.

Adapted from VCAA 2022 exam Section B Q2a

Question 9

(3 MARKS)

Describe **one** role of the House of Representatives in law-making.

Question 10

(3 MARKS)

Explain the law-making role of the Commonwealth Parliament.

Adapted from VCAA 2016 exam Q9b

Question 11

(3 MARKS)

Describe the role of the Senate in the law-making process.

Adapted from VCAA 2013 exam Q2

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.

Suppose the government of the day has faced ongoing pressure from the public to address price rises on household goods. Therefore, its master plan is to penalise supermarket corporations by taxing them for every dollar increase in the price of their products, whilst simultaneously raising public funds. The government of the day, which does not hold a majority in the Senate, introduces the Cheaper Groceries Bill 2050.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Commonwealth Parliament's law-making in relation to the Cheaper Groceries Bill.

Statement	Strengths	Limitations
I. The government of the day does not hold a majority in the upper house and therefore, the legislation will not automatically pass through the Senate, prompting a careful and thorough review.	☐	☐
II. A diverse Senate and extra scrutiny may slow the progress of legislation passing through the Commonwealth Parliament.	☐	☐
III. It is essential for the government and elected representatives to respond to the conditions and needs of people in the electorates across the country.	☐	☐
IV. In the planning of the bill, the specific needs of the larger states, with more representation in the House of Representatives, may outshine those of smaller states.	☐	☐

Question 13

(6 MARKS)

Analyse **two** roles of the Commonwealth Parliament in making the Cheaper Groceries Bill 2050.

7B The Victorian Parliament and the Crown in law-making



Image: Corona Borealis Studio/Shutterstock.com

During the COVID-19 pandemic, each state and territory in Australia had different lockdown laws. For example, Melbourne was locked down for 245 days, compared to Sydney, which was locked down for 107 days. Do you know why states and territories were all able to make different lockdown laws?

STUDY DESIGN DOT POINT

- the roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making



Lesson introduction

Similar to the Commonwealth Parliament, the Victorian Parliament is composed of two houses and a representative of the Crown. The Legislative Assembly is the lower house, which houses the Victorian Government and is led by the premier. This house primarily acts to introduce new legislation. The Legislative Council is the upper house which acts as a house of review for the bills from the Legislative Assembly. Finally, the Governor, acting on behalf of the Crown, provides the final approval for any proposed Victorian legislation.

The role of the Legislative Assembly in law-making 4.1.2.1

KEY TERM

Legislative Assembly the lower house of the Victorian Parliament, which is comprised of 88 members of parliament representing the electoral districts across Victoria.

LEGAL VOCABULARY

Electoral district a geographical area comprised of approximately 50,000 voters represented by a member of the Victorian Parliament.

The **Legislative Assembly** is the Victorian Parliament's lower house that has 88 elected members of parliament (MPs) from across Victoria. Each of these 88 members serves a four-year term and represents an **electoral district**. At an election, voters elect one person to represent their district in the Legislative Assembly. Each electoral district is determined based on the number of voters within the district, rather than land area, with each district containing between 46,000 - 56,000 eligible voters. This method of distribution means that vast, regional areas are represented by a singular MP, whereas inner-city areas may have multiple MPs in a relatively small radius.

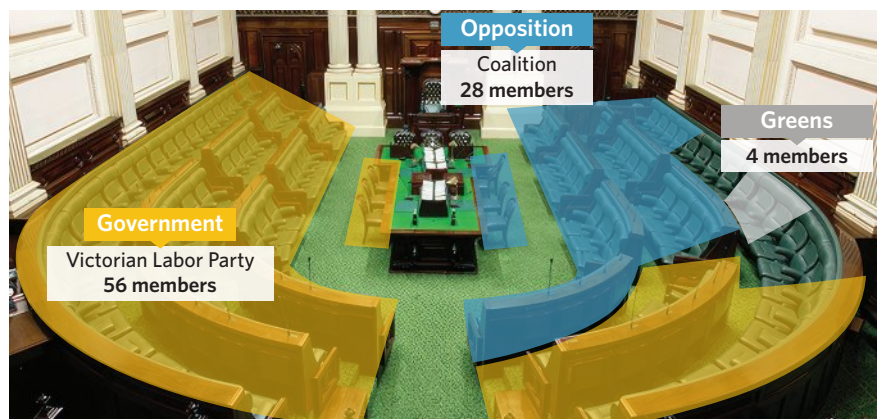


Figure 1 The composition of the 60th Legislative Assembly of Victoria, elected in 2022

The political party that has the majority of seats in the Legislative Assembly forms the government. The leader of this party becomes the **premier**. Similar to the Commonwealth Government, some of the members of parliament that belong to the party of the government of the day will also be appointed as ministers.

Table 1 The role of the Legislative Assembly

Role	Explanation
Initiate new legislation 	Most legislation is introduced by ministers, who are usually members of the Legislative Assembly. As a consequence, the majority of new laws and proposed changes to laws begin in the Legislative Assembly. Although ministers initiate most legislation, this role is shared with all the members of the Legislative Assembly.
Initiate financial spending legislation 	The Legislative Council is prevented from introducing legislation concerned with spending government funds. Therefore, the Legislative Assembly decides how government money is to be spent, and enacts these spending plans through legislation. This is better known as the Victorian Budget.
Represent the people in law-making 	Members of the Legislative Assembly are directly chosen by voters in their community and will often receive correspondence from those living within their district. As representatives of that community, they should reflect the opinions and perspectives of a majority of those within their electorate when introducing, debating, or suggesting amendments to legislation. If they fail to do so, they risk being voted out of office at the next election.
Review legislation and propose amendments to laws 	As the government and the Victorian community changes, existing Acts may need to change. The Legislative Assembly is comprised of members of parliament who directly represent and understand the real issues affecting their districts and can, therefore, propose meaningful amendments.
Scrutinise legislation 	Bills are rarely introduced by the Legislative Council, however, when they are, the Legislative Assembly must act as a house of review. The members will debate and scrutinise the proposed legislation, making amendments if necessary. Then, if the Legislative Assembly approves of the proposed legislation or reform, it must pass the bill to the Governor for royal assent.

LEGAL VOCABULARY

Premier the leader of an Australian state government.

LESSON LINK

You learnt about ministers in **7A The Commonwealth Parliament and the Crown in law-making**.

REAL WORLD EXAMPLE



Image used with permission from DannyPearson.com.au

Figure 2 Danny Pearson, MP for Essendon, secured funding for an upgrade to a local library in 2022

MP to modernise library

In February 2022, Danny Pearson, the Labor MP for Essendon, announced that the Ascot Vale Library would be receiving \$1.5 million in funding to ‘almost triple the floorspace’ of the existing library.

Ascot Vale, and its library, fall into Pearson’s electoral district of Essendon. Therefore, he is able to directly advocate for specific, local upgrades, like these library improvements, and funding as a part of his role in the Legislative Assembly.

MPs who are considered by voters as not actively seeking to improve their district through law-making and policy may face backlash and may even lose their seat in the Victorian Parliament at the next state election.

Adapted from ‘Funding for major expansion of Ascot Vale library’ (Pearson, 2022)

The role of the Legislative Council in law-making 4.1.2.2

KEY TERM

Legislative Council the upper house of the Victorian Parliament which is comprised of 40 members of Parliament who represent eight regions across Victoria.

LEGAL VOCABULARY

Region one of the eight, larger divisions of Victoria that Legislative Council members are elected to represent.

The **Legislative Council** is the upper house of the Victorian Parliament. It has 40 elected members from across Victoria who serve a four-year term. It is often referred to as the ‘house of review’. Each of these 40 members represents and serves a region. Legislative Council members can also be nominated as ministers to serve a government portfolio. At an election, voters elect five people to represent their **region** in the Legislative Council. There are eight regions in Victoria, five of them covering metropolitan areas, and the remaining include three regional areas.

WANT TO KNOW MORE?

Every home in Victoria is included in an electoral district and therefore, also a region. You can find your own district and region by searching ‘Find my electorate’ and clicking the ‘Australian Electoral Commission’ (2023) webpage.

LESSON LINK

You will learn more about the upper house in **7F Parliament’s ability to make law – the bicameral structure**.

Table 2 The role of the Legislative Council in law-making

Role	Explanation
Scrutinise legislation 	The Legislative Council’s primary role is to debate and scrutinise bills introduced by the Legislative Assembly. As the Legislative Council more commonly includes independents and members from smaller political parties, this allows for a wider range of perspectives to be considered when debating new bills or amendments to legislation. The Legislative Council’s review function will often result in new bills being amended before they become part of Victoria’s legislation.
Initiate legislation 	Legislation can originate from the Legislative Council. However, most legislation is introduced in the Legislative Assembly. Bills regarding the expenditure of Victorian public money cannot be introduced in the Legislative Council.

REAL WORLD EXAMPLE**Careful crossbench**

Following the 2022 state election, the Victorian Labor Government requires six extra votes in the Legislative Council to pass any proposed legislation as it currently holds a minority in the Victorian Parliament. This means the opposition, the Victorian Greens Party, and the crossbench, hold the balance of power.

In early-2023, the Victorian Government reintroduced the Health Legislation Amendment (Information Sharing) Bill, which alters the policy in regard to the mandatory collection of medical information from Victorian patients.

The opposition, led by Southern Metropolitan Liberal MP, Georgie Crozier, proposed a number of amendments in regard to privacy. These amendments were considered by the Legislative Council and, following a round of amendments to the bill, it passed with the support of the Victorian Greens Party and the Animal Justice Party.

The Legislative Council is crucial as a house of review in the law-making process, and its composition often allows for a variety of political perspectives to weigh in on proposed legislation.

Adapted from 'Crossbenchers claim credit for 'more transparent' state parliament' (Hall, 2023)

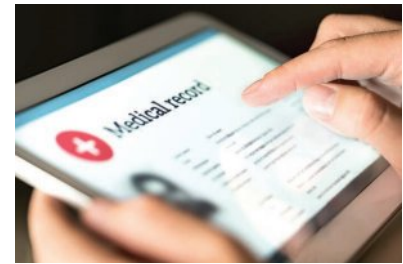


Image: Tero Vesalainen/Shutterstock.com

Figure 3 The newly expanded crossbench in the 60th Legislative Council pushed for amendments regarding medical records

The role of the Crown in Victorian law-making 4.1.2.3

The **Governor** is the Crown's representative in the Victorian Parliament. They are appointed by the King on the advice of the Victorian premier of the day. The primary role of the Governor in the law-making process is to grant royal assent, which is the final approval for a piece of legislation moving through the Victorian Parliament and which allows the bill to become state legislation.

Table 3 The role of the Governor in law-making

Role	Explanation
Grant royal assent 	The Governor will sign a bill on behalf of the Crown after it has been approved by both houses of the Victorian Parliament. This is a necessary final step for a bill to become law and usually happens on the advice of the premier. The Governor can also choose to withhold royal assent, however, this is very rare.
Act as a Head of State 	The Governor acts as the Head of State for Victoria, meaning they hold the ultimate monarchical state powers and are the supreme representative of Victoria. This power is held without the oversight of the King or the monarchy.
Chair the Executive Council 	The Governor acts on the advice of the Executive Council and often meets with these ministers of the Victorian Government to discuss any legislative matter that comes before the Governor's office.

LESSON LINK

You learnt about the Executive Council in **7A The Commonwealth Parliament and the Crown in law-making**.

KEY TERM

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

DEEP DIVE



Image used with permission from State of Victoria

Figure 4 The 30th Governor of Victoria, Margaret Gardner, has been the Crown's representative in Victoria since 2023

Who is Victoria's Governor?

Her Excellency Professor the Honourable Margaret Gardner AC is the 30th Governor of Victoria after being sworn in on 9 August 2023. She is the second female to hold the title, succeeding Linda Dessau.

Prior to her service as Governor, Gardner served as President and Vice-Chancellor to Monash University as well as RMIT. In 2007, she was recognised for her service to tertiary education through an appointment to an Officer of the Order of Australia.

Despite serving as a representative of the King and the monarchy, Gardner has expressed her support for Australia becoming a republic.

Adapted from 'About the Governor' (Governor of Victoria, 2023)

LESSON LINK

You will learn more about the debate on Australia becoming a republic in **10E Possible future constitutional reform**.

Lesson summary

The Victorian Parliament is split into three main branches in the law-making process.

- The Legislative Assembly (the lower house) is where the Victorian Government is formed and where the Victorian premier sits.
- The Legislative Council (the upper house) acts primarily as a house of review for proposed legislation.
- The Governor of Victoria is the representative of the Crown and provides final approval for all bills.

Table 4 The roles of the Victorian Parliament and the Crown in law-making

Component of the Victorian Parliament	Role
The Legislative Assembly	• Initiate new legislation • Initiate financial spending legislation • Represent the people in law-making • Review legislation and propose amendments • Scrutinise legislation
The Legislative Council	• Scrutinise legislation • Initiate new legislation
The Crown	• Grant royal assent to legislation • Act as a Head of State • Chair the Executive Council

USEFUL TIP

An easy way to remember the difference between the Legislative Assembly and Legislative Council is to think about your school assemblies in which all students gather, much like the larger Legislative Assembly (the lower house). On the other hand, the Legislative Council is like a school council or staff meeting; there are fewer members, much like the Legislative Council (upper house).

7B Questions

Check your understanding

Question 1

The Victorian Parliament has four key branches.

- A. True
- B. False

Question 2

Which of the following statements are correct about the Victorian Parliament and the Crown in law-making?

(Select all that apply)

- A. The Governor gives royal assent to legislation passed through the Legislative Council and the Legislative Assembly.
- B. The Governor is appointed on the advice of the Victorian premier.
- C. The Crown at the Victorian level is appointed on the advice of the prime minister.

Question 3

The final step for a bill to become law is for it to receive royal assent. A bill can be granted royal assent on behalf of the Crown by the:

- A. Premier of Victoria.
- B. Governor of Victoria.
- C. Governor-General.
- D. Legislative Council.

Question 4

The Victorian premier is the leader of the party, or coalition, that has the support of a majority of members in the:

- A. Legislative Assembly.
- B. Legislative Council.
- C. Senate.
- D. House of Representatives.

Question 5

Which of the following are features of the Legislative Assembly? **(Select all that apply)**

- A. There are 88 members in the Legislative Assembly.
- B. Each member of the Legislative Assembly is elected for a term of four years.
- C. A maximum of six members of the Legislative Assembly can be appointed as ministers.
- D. Most new bills or proposed changes to existing laws are introduced in the Legislative Assembly.

Question 6

Fill in the blanks with the following terms:

Legislative Assembly

Legislative Council

The Victorian Parliament consists of two houses. The is the upper house of the Victorian Parliament and is comprised of 40 elected law-makers across Victoria whilst the is the lower House of Parliament.

Question 7

The Legislative Council is made up of 88 members chosen from eight regions in Victoria. These members all face re-election every four years.

- A. True
B. False

Question 8

Tick the box to indicate whether each of the following statements are a role of the **Legislative Assembly**, the **Legislative Council**, or the **Crown** in law-making in Victoria.

Statement	Legislative Assembly	Legislative Council	Crown
I. Initiate legislation	☐	☐	☐
II. Review and scrutinise legislation	☐	☐	☐
III. Provide royal assent	☐	☐	☐
IV. Initiate financial spending legislation	☐	☐	☐

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

(3 MARKS)

Explain **one** role of the Victorian lower house.

Adapted from VCAA 2022 exam Section B Q1a

Question 10

(3 MARKS)

Explain the role of the Legislative Council in the law-making process.

Adapted from VCAA 2013 exam Q2

Question 11

(4 MARKS)

Describe **two** roles of the Governor in law-making.

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 are roles or features of the **Legislative Assembly**, **Legislative Council**, or the **Crown** in the Victorian Parliament's law-making.

Statement	Legislative Assembly	Legislative Council	Crown
I. The composition of this house more commonly includes independents and members from smaller political parties. This allows for a wider range of perspectives to be considered when debating new bills.	☐	☐	☐
II. This branch of the law-making process signs off on all bills after they have been approved by both houses of the Victorian Parliament.	☐	☐	☐
III. The 88 members are directly chosen by the people in their electoral district and, therefore, should reflect society's values in law-making.	☐	☐	☐
IV. A majority of new laws and proposed changes to existing laws begin in this house. Although ministers initiate most legislation, this role is shared with all the members.	☐	☐	☐

Question 13

(5 MARKS)

Analyse the roles of the Victorian Parliament in creating new legislation.

Linking to previous learning

Question 14

(3 MARKS)

Distinguish between the Commonwealth Parliament and Victorian Parliament.

7C The division of powers



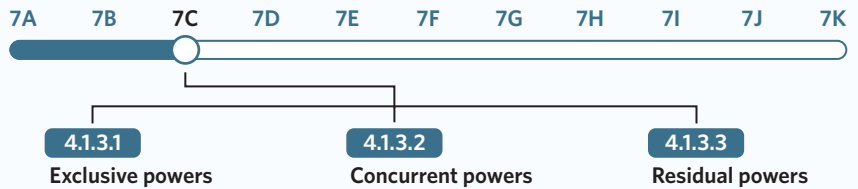
Image: Yuganov Konstantin/Shutterstock.com

'You have power. And with great power, there must also come great responsibility.'
—Uncle Parker (Spider-Man)

When thinking about law-making, it is important to consider who has the power to make different laws, where this power comes from, and how it impacts the lives of everyday citizens.

STUDY DESIGN DOT POINT

- the law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers



KEY TERM

Division of powers the constitutional division of law-making powers between the Commonwealth and state parliaments.

LESSON LINKS

You learnt about the Commonwealth Parliament in law-making in **7A The Commonwealth Parliament and the Crown in law-making**.

You learnt about the Victorian Parliament in law-making in **7B The Victorian Parliament and the Crown in law-making**.

Lesson introduction

The Australian Constitution establishes and divides law-making powers into three categories; exclusive, concurrent, and residual. Specifically, these powers are split and shared between the Commonwealth Parliament and each state parliament. It is important to have a **division of powers** to avoid any abuses of power and to share the responsibility of law-making amongst different law-making bodies.

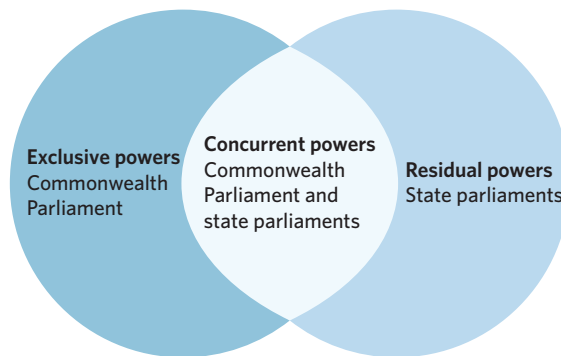


Figure 1 The division of powers

Exclusive powers 4.1.3.1

Exclusive powers can only be exercised by the Commonwealth Parliament in law-making, as per ss 51 and 52 of the Australian Constitution. State parliaments are not permitted to pass legislation on these matters. There are few Commonwealth law-making powers that are exclusive powers.

Exclusive powers permit the Commonwealth Parliament to legislate in areas such as:

- customs and border protection
- the control of the armed forces
- currency
- foreign affairs
- Medicare
- overseas trade.

KEY TERM

Exclusive powers law-making powers granted only to the Commonwealth Parliament by s 51 and s 52 of the Australian Constitution.

CONSTITUTION

Section 51
Section 52

REAL WORLD EXAMPLE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to refugee detention.

Asylum seekers detained again after being released following legislative amendments

With the constitutionally vested power to legislate on migration, the Commonwealth Parliament amended the *Migration Act 1958* (Cth) to state that an aggregate sentence of imprisonment (a single sentence imposed for multiple offences) can be used as grounds for visa cancellation. Previously, a High Court ruling stated aggregate sentences could not be used as a reason for automatic visa cancellation, and around 160 people were released from detention. However, as a result of the amended legislation, a number of people were detained again and can no longer live in their communities. This has led to outcry from asylum seeker advocates and detainees, who denounced the Commonwealth Parliament for its decision.

Adapted from 'Australian government urged to 'stop playing with people's lives' as people returned to detention' (Doherty et al., 2023)

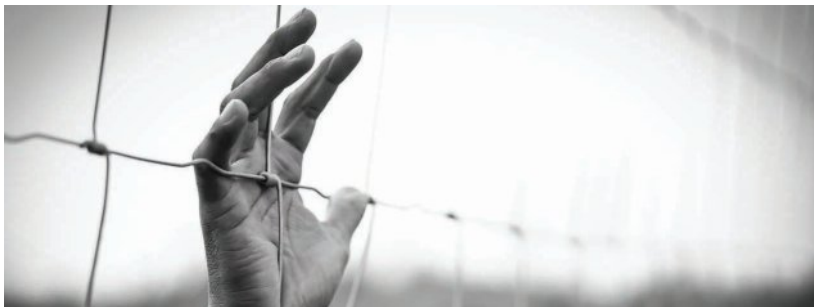


Image: woraatep suppavas/Shutterstock.com

Figure 2 Asylum seekers who were once allowed to live freely in Australia have been detained again following amendments to migration legislation

LEGISLATION

Migration Act 1958 (Cth)

Concurrent powers 4.1.3.2

Concurrent powers are shared between the Commonwealth and state parliaments, meaning both parliaments can pass legislation in areas requiring the use of concurrent law-making powers. Most powers granted to the Commonwealth Parliament by s 51 of the Constitution are classified as concurrent powers as they are shared with the states. As both the Commonwealth and states can exercise concurrent powers, situations may arise where state and federal laws conflict. In such circumstances, the Constitution outlines the necessary processes to resolve the conflict.

Concurrent powers permit the Commonwealth and state parliaments to legislate in areas such as:

- marriage and divorce
- taxation
- banking
- railway construction
- trade and commerce between the states of Australia.

KEY TERM

Concurrent powers law-making powers granted to both the Commonwealth and state parliaments.

LESSON LINK

You will learn more about how the Constitution resolves conflicts between state and federal legislation in **7D Section 109 of the Australian Constitution**.

DEEP DIVE

Going to the chapel and we're gonna get married!

An example of concurrent law-making power is marriage, which means there are both Commonwealth and state laws about marriage. For example, the Commonwealth *Marriage Act 1961* (Cth) defines 'marriage' as 'the union of two people to the exclusion of all others, voluntarily entered into for life'. On the other hand, the Victorian Parliament has also passed laws on marriage, with s 31 of the *Births, Deaths and Marriages Registration Act 1996* (Vic) requiring all marriages in Victoria to be listed on the register of marriages.

LEGISLATION

Marriage Act 1961 (Cth)

Births, Deaths and Marriages Registration Act 1996 (Vic)

Residual powers 4.1.3.3

Whilst the Commonwealth Parliament requires a 'head of power' to create legislation, states have the power to make laws on any subject matter, except in areas over which the Commonwealth Parliament has exclusive power. A 'head of power' means that the Commonwealth Parliament can only create legislation on subject matter that is explicitly mentioned in the Constitution. For example, the Commonwealth Parliament can make laws about currency because s 51(xii) of the Australian Constitution explicitly states it can do so, and therefore provides the Commonwealth with a 'head of power' to legislate over currency. On the other hand, state parliaments require no 'head of power' in order to create legislation. **Residual powers** belong solely to the state parliaments and they are not explicitly stated in the Australian or state constitutions. This also means that laws within the area of residual law-making are likely to differ between states, as each state has the ability to pass laws specific to their state's needs and interests.

Residual powers permit state parliaments to legislate in areas such as:

- education
- agriculture
- police
- prisons
- criminal law.

CONSTITUTION

Section 51(xii)

KEY TERM

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

When describing any three of the law-making powers, try to avoid using the name in the definition. For example, if you need to explain what 'exclusive powers' are, avoid reusing the term 'exclusive'. Instead, describe it as the law-making powers that only the Commonwealth can exercise.

REAL WORLD EXAMPLE

Toot, toot, chugga chugga, Big Red P plates

As road laws are legislated using residual powers, this means each state has different laws regarding when individuals can get their learner permits and P1 licences. For example, in Victoria you must be at least 18 years old before applying for your P1 licence. On the other hand, in New South Wales, the minimum age for applying for your P1 licence is 17 years old.

Adapted from 'How to get your Ps' (VicRoads, 2023) and 'Provisional P1 licence' (NSW Government, 2023)

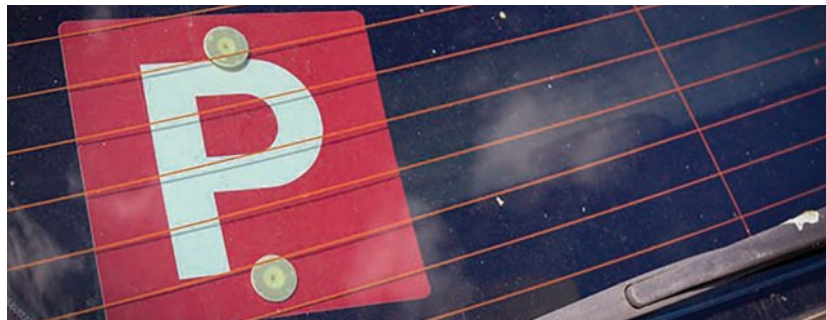


Image: Rusty Todaro/Shutterstock.com

Figure 3 The minimum age required to get a P1 licence differs between states

WANT TO KNOW MORE?

Upon graduating year 12, NSW students receive a HSC certificate, whilst Victorian students are awarded a VCE certificate. This is because education is a residual area of law-making, meaning each state parliament has passed different legislation to govern its own school system. You can find out more about the Australian education system by searching 'Australian school systems across different states and territories' and clicking the relevant webpage (australiaeducation.info, 2023).

Lesson summary

- The Australian Constitution outlines which law-making powers belong specifically to the Commonwealth Parliament and which are shared between the Commonwealth and state parliaments.
- Residual powers are not explicitly mentioned in the Constitution and are exercised by the state parliaments.
- The division of powers ensures law-making responsibilities are distributed between the Commonwealth and state parliaments, and acts as a safeguard against abuses of powers in law-making.

WANT TO KNOW MORE?

This lesson has provided some examples of different areas of law each law-making power can legislate in. You can find out more about how exclusive, concurrent, and residual powers are exercised in law-making by searching 'Three levels of government: governing Australia' and clicking the 'Parliamentary Education Office' (2022) webpage.

Table 1 Summary of the division of powers

Power	Parliament	Relevant section(s) of the Constitution	Examples
Exclusive powers	Commonwealth Parliament	ss 51 and 52	• Currency • Foreign affairs • Defence
Concurrent powers	Commonwealth and state parliaments	s 51	• Marriage • Taxation • Banking
Residual powers	State parliaments	n/a	• Health • Education

7C Questions

Check your understanding

Question 1

Law-making powers are divided into:

- exclusive, currents, and residents.
- Commonwealth Parliament and local government offices.
- executive, legislative, and judiciary powers.
- exclusive, concurrent, and residual powers.

Question 2

A Federal Labor MP and Victorian Liberal MP both want to pass different laws about taxation in their respective parliaments. This is possible because concurrent law-making powers are shared between the Commonwealth and state parliaments.

- True
- False

Question 3

Which of the following is the section of the Constitution that residual powers are contained in?

- Section 109 of the Constitution.
- Section 128 of the Constitution.
- Section 90 of the Constitution.
- None of the above.

Question 4

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

Commonwealth Parliament

state parliaments

Exclusive powers are law-making powers granted only to the , through ss 51 and 52 of the Australian Constitution.

Question 5

Tick the box to indicate whether the following subject matters fall within **concurrent powers** or **residual powers** of law-making.

Subject matter	Concurrent powers	Residual powers
I. Railway construction	☐	☐
II. Police	☐	☐
III. Taxation	☐	☐
IV. Marriage and divorce	☐	☐
V. Agriculture	☐	☐

Question 6

Laws regarding foreign affairs can only be initiated and passed by the Commonwealth Parliament as this subject matter is an exclusive power.

- A. True
B. False

Question 7

The division of powers ensures that: **(Select all that apply)**

- A. law-making bodies share the responsibilities of law-making.
B. there is a safeguard against abuse of law-making powers.
C. only the Commonwealth Parliament has the power to pass legislation.
D. the state parliaments can override Commonwealth legislation.

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Calliope is a member of the Legislative Assembly and wishes to introduce a bill about currency into the Victorian Parliament.

Would this bill be valid? Justify your response.

Adapted from VCAA 2017 exam Q3

Question 9

(2 MARKS)

Describe **one** way the Australian Constitution acts as a restriction on the law-making powers of the state parliaments.

Adapted from VCAA 2013 exam Q3a

Question 10

(3 MARKS)

With reference to **one** example, explain exclusive powers.

Question 11

(3 MARKS)

'Parliaments in different states can make different laws in the same area of law'.

Do you agree with this statement? Justify your response.

Adapted from VCAA 2013 exam Q11

Question 12

(3 MARKS)

Distinguish between exclusive and concurrent powers.

Adapted from VCAA 2011 exam Q1

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 law-making powers of the Commonwealth and state parliaments.

Statement	True	False
I. A state parliament can only make law about areas that fall within the residual law-making powers.	☐	☐
II. The Commonwealth Parliament can make laws about areas that fall within the exclusive law-making powers and concurrent law-making powers.	☐	☐
III. The Commonwealth Parliament can make laws about any area for which the states have not already made law.	☐	☐
IV. A state parliament can make laws about any subject matter that is not within the Commonwealth Parliament's exclusive law-making powers.	☐	☐

Question 14

(5 MARKS)

'State parliaments cannot make laws about any area for which the Commonwealth parliament has the power to make laws.'

Do you agree with this statement? Justify your answer by explaining the different types of law-making powers of the Commonwealth and state parliaments.

Linking to previous learning**Question 15**

(6 MARKS)

Dario is a Federal MP who wants to introduce a bill into the House of Representatives regarding the improvement of healthcare access for prisoners in state correctional facilities. He has been informed that his bill is unlikely to be successful or could potentially be deemed invalid in the future.

- a. Explain **one** role of the House of Representatives in this scenario.

3 MARKS

Adapted from VCAA 2022 exam Section B Q1a

- b. Explain why Dario's bill is unlikely to be successful. Justify your answer.

3 MARKS

7D Section 109 of the Australian Constitution

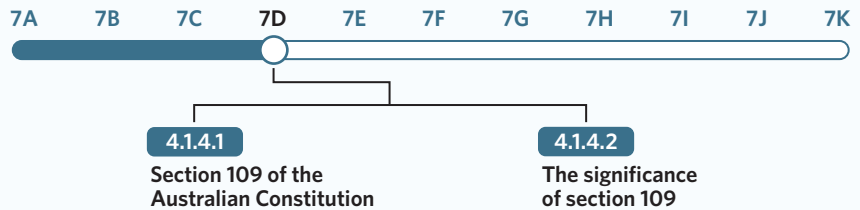


Image: Featureflash Photo Agency/Shutterstock.com

To play for the Wildcats or to live out his true desires on stage? Just as Troy, in *High School Musical*, had two conflicting dreams, sometimes laws can also be conflicting. Yet, Troy had to make a choice. In a similar way, a choice must be made as to which law, or which sections of legislation, can remain valid when there are conflicting laws.

STUDY DESIGN DOT POINT

- the significance of section 109 of the Australian Constitution



LESSON LINK

You learnt about exclusive, concurrent, and residual powers in **7C The division of powers**.

CONSTITUTION

Section 109

Lesson introduction

The Australian Constitution establishes and divides the law-making powers of the Commonwealth and state parliaments into exclusive, concurrent, and residual powers. However, as concurrent law-making powers are shared between the Commonwealth and state parliaments, conflicts between state and Commonwealth legislation can arise. That is, there is a possibility that two laws on the same topic will be inconsistent. The Australian Constitution resolves this issue in section 109.

Section 109 of the Australian Constitution 4.1.4.1

The Commonwealth and state parliaments share concurrent powers of law-making, and in practice, this can result in conflicting legislation. For example, the Commonwealth Parliament may pass legislation for taxation, and the states could also make laws about taxation that directly contradict this Commonwealth legislation. In such situations where the laws are inconsistent, section 109 of the Australian Constitution states:

‘When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.’

In other words, the Commonwealth law will remain valid and the inconsistent part of the state legislation will no longer be applicable.

The Commonwealth law will prevail

If an inconsistency arises between state and Commonwealth legislation, the timing of each law's creation is irrelevant. It does not matter whether the Commonwealth or state law was passed first. If they conflict with one another, the Commonwealth law will prevail to the extent of the inconsistency.

‘To the extent of the inconsistency’

The words ‘to the extent of the inconsistency’ are important here. Only the sections of state law that are inconsistent with Commonwealth law will be declared invalid. The remaining sections of the state law, that are not in conflict with Commonwealth law, will continue to operate.

States can still make laws on the topic

Section 109 does not change the areas of law the states and the Commonwealth can legislate in. The effect of s 109 is to render invalid any section of state law that is inconsistent with Commonwealth law. Therefore, states retain the ability to make laws on concurrent law-making topics, they are only limited in some circumstances where their state law conflicts with federal laws.

Figure 1 Key points regarding the operation of s 109 of the Australian Constitution

The significance of section 109 4.1.4.2

Section 109 of the Australian Constitution is significant for various reasons. Whilst it provides a way to resolve inconsistencies between state and Commonwealth legislation, it can also impact state law-making abilities.

Table 1 The significance of s 109

Significance of s 109	Explanation
Resolves inconsistencies 	Section 109 provides a method to resolve inconsistencies between state and Commonwealth legislation. Once the law has been challenged before the courts, the Commonwealth law will prevail and the inconsistent section of the state law will be declared invalid.
Restricts the law-making powers of the states 	Section 109 restricts the law-making powers of a state in regard to its concurrent powers. Whilst states retain the ability to pass laws on these matters, their ability to maintain these laws can be limited. This is because any part of state law that is inconsistent with federal law, will be declared invalid when challenged in the courts.
Requires a case to be brought forward in the courts for an inconsistent state law to be considered invalid 	A state law will only be declared invalid by the courts, according to s 109, when the validity of the law has been challenged, usually by the Commonwealth. In other words, s 109 will not automatically deem an inconsistent state law invalid.
Allows state laws previously deemed invalid to come into force if the Commonwealth law is changed or removed 	If part of a state law was previously deemed invalid and inconsistent with Commonwealth law, and the conflicting Commonwealth law is changed or removed so that the inconsistency no longer exists, the inconsistent part of the state legislation can come into effect again.

USEFUL TIP

It is important to understand that section 109 does not automatically guarantee inconsistent state laws will be deemed invalid. The application of section 109 only occurs once the legislation has been challenged in court, where it can then be deemed invalid. In practice, this means contradictory state and Commonwealth laws may be operating at the same time until legal action occurs.

LEGAL CASE

***McBain v State of Victoria* (2000) 99 FCR 116**

Facts

Dr John McBain, a Melbourne doctor, consulted a single woman, Lisa Meldrum, who wished to conceive through IVF using a sperm donor. However, Meldrum was informed that it was illegal under Victorian legislation to administer IVF treatment because she was single. Under s 8(1) of the *Infertility Treatment Act 1995* (Vic), a woman was only eligible for IVF treatment if she was either married or living in a de facto relationship. However, s 22 of the *Sex Discrimination Act 1984* (Cth) states it is unlawful for a person who provides goods or services, or makes facilities available, to discriminate against another person on a range of grounds, including sex, gender, and marital or relationship status.

Continues →

LEGISLATION*Sex Discrimination Act 1984 (Cth)***LEGAL CASE*****McBain v State of Victoria (2000) 99 FCR 116 – Continued*****Legal issue**

The court needed to decide whether the Victorian Act was discriminatory for prohibiting IVF treatment based on one's marital or relationship status.

Decision

Justice Sundberg found that the Victorian legislation violated s 22 of the Commonwealth's *Sex Discrimination Act 1984* (Cth), and was therefore invalid under s 109 of the Constitution. Thus, it was determined that a woman does not need to be married or in a de facto relationship in order to receive IVF treatment.

Significance

This case deemed s 8(1) of the *Infertility Treatment Act 1995* (Vic) invalid, demonstrating that state and Commonwealth laws must remain consistent.

Lesson summary

- Section 109 of the Australian Constitution resolves inconsistencies that may arise between state and Commonwealth laws in areas of concurrent law-making powers.
- State laws are not automatically deemed invalid, they must first be challenged in the courts. If a state law is deemed invalid, only the part of the state law that is inconsistent with the Commonwealth law is invalid, not the entire Act.
- Section 109 is significant for multiple reasons. Not only does it provide a means of resolving inconsistent legislation, but it can also restrict state law-making abilities to a certain extent.

7D Questions

Check your understanding

Question 1

Section 109 applies to conflicts between:

- A. concurrent and exclusive powers.
- B. the prime minister and the opposition.
- C. state and Commonwealth laws.

Question 2

If a state law is deemed inconsistent with Commonwealth law, the entirety of the state law is invalid.

- A. True
- B. False

Question 3

Fill in the blanks with the following terms:

challenged

not

invalid

A state law that is inconsistent with a Commonwealth law is [] automatically deemed

[] unless it is [] in the courts.

Question 4

If a state law is deemed invalid by section 109, the state can no longer legislate in the area of law in which the invalid section was made.

- A. True
- B. False

Question 5

Section 109 is significant because: **(Select all that apply)**

- A. it provides a way to resolve inconsistencies between state and Commonwealth laws.
- B. the Constitution was written a long time ago.
- C. it only allows the Commonwealth Parliament to make laws.
- D. it can restrict the states' concurrent law-making powers as they cannot maintain laws that are inconsistent with Commonwealth legislation if the courts have invalidated them.
- E. the invalid part of state legislation may come into effect if the Commonwealth law is removed or amended in the future.

Preparing for exams

Standard exam-style

Question 6

(2 MARKS)

Outline the purpose of section 109 of the Australian Constitution.

Question 7

(4 MARKS)

If the Victorian Parliament was to pass legislation making it easier for companies to access personal online banking data, whilst existing Commonwealth laws protect consumer data and privacy, how might section 109 of the Constitution be relevant?

Adapted from VCAA 2018 exam Section B Q2d

Question 8

(4 MARKS)

The Commonwealth Parliament recently passed the Complementary Coffee Act 2213 (Cth), which requires all companies to provide free coffee to their employees in the morning. However, the Victorian Parliament had previously passed the Cancel Caffeine Act 2212 (Vic), which prohibited employees from consuming caffeine before 12 pm.

With reference to the scenario, describe **two** reasons why section 109 of the Australian Constitution is significant.

Extended response

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

Question 9

Which of the following statements are limitations to states' law-making powers as a result of section 109?

(Select all that apply)

- A. If an inconsistent state law is challenged in the courts, it will be deemed invalid and the Commonwealth law will prevail over the inconsistent section of the state law.
- B. Inconsistent state laws are not automatically deemed invalid unless they are challenged in the courts.
- C. Invalid components of state legislation may come into effect if the conflicting Commonwealth law is changed or removed in the future.
- D. The ability of the states to exercise concurrent law-making powers can be limited by section 109 and the courts.

Question 10

(6 MARKS)

'Section 109 of the Australian Constitution restricts the law-making abilities of the state parliaments.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2012 exam Q4b

Linking to previous learning**Question 11**

(4 MARKS)

Fern is a politician in the Legislative Council and is looking to introduce a bill that would restrict Victorian matrimony to certain hours on a Wednesday. This contradicts the existing Commonwealth *Marriage Act 1961* (Cth), which states that 'marriages may be solemnised on any day at any time'.

- a. With reference to law-making powers, outline whether Fern is allowed to introduce bills regarding marriage. 2 MARKS
- b. If this bill were to be passed, describe why it would likely be deemed invalid. 2 MARKS

7E

High Court cases and their impact on law-making powers

STUDY DESIGN DOT POINT

- one High Court case which has had an impact on state and Commonwealth law-making powers

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.5.1

The High Court's impact on state and Commonwealth law-making powers

4.1.5.2

***Commonwealth v Tasmania* (1983) 158 CLR 1**

4.1.5.2.1 The impact of the Tasmanian Dam case

4.1.5.3

***R v Brislan; Ex parte Williams* (1935) 54 CLR 262**

4.1.5.3.1 The impact of the Brislan case



Image: Stefano Buttafoco/Shutterstock.com

Just like the Jedi Council was the highest authority of the Jedi Order and determined Anakin should not be granted the rank of Master, the High Court is the highest authority in the Australian court system and possesses the power to interpret and hear cases involving the Constitution. Similar to when the Jedi Council's decision led to Anakin becoming Darth Vader, having wide-ranging effects on the galaxy, the decisions of the High Court also have wide-ranging effects on law-making powers.

Lesson introduction

The Australian Constitution establishes the division of law-making powers between the Commonwealth Parliament and the state parliaments. However, there are circumstances where the power of the Commonwealth or a state parliament to legislate in a particular area is contested. Therefore, when conflict arises and matters of the Constitution are brought before the High Court, its determination and the outcome of the case can shape and influence the division of law-making powers, thus altering the subject matter over which the different parliaments can legislate.

LESSON LINK

You learnt about the division of law-making powers in **7C The division of powers**.

The High Court's impact on state and Commonwealth law-making powers 4.1.5.1

The Australian Constitution divides law-making powers into three categories: exclusive, concurrent, and residual. Each power enables the relevant parliament to legislate and create new laws in certain areas. For example, only the Commonwealth Parliament can exercise exclusive powers, such as the power to make laws about currency, whilst the Commonwealth Parliament is unable to make laws in areas where state parliaments have residual powers, such as in relation to education. Both the Commonwealth and state parliaments can legislate in areas concerning concurrent law-making powers, for instance, taxation, where the Commonwealth legislates in regard to nationwide taxes, such as the goods and service tax (GST), and the states legislate in regard to state-specific taxes, such as land tax.

USEFUL TIP

The VCE Legal Studies Study Design requires you to learn 'one High Court case which has had an impact on state and Commonwealth law-making powers'. This lesson provides an in-depth analysis of two different cases, but it is suggested that you only focus on learning about one of these cases in detail.

LEGAL VOCABULARY

Ultra vires a Latin term meaning 'beyond the powers'; used in law to describe an act by a government body or corporation that requires legal authority but is done without it.

LEGAL VOCABULARY

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.

CONSTITUTION

Section 61

Section 51(xxix)



Image: Tawunap159/Shutterstock.com

Figure 1 The High Court of Australia, located in Canberra

Circumstances may arise where there is a dispute between a state parliament and the Commonwealth Parliament regarding the division of law-making powers and whether laws that have been passed go beyond the scope of the constitutionally outlined divisions of power. In these situations, the High Court will hear and determine the dispute, handing down a final and binding outcome. Decisions made by the High Court regarding the division of law-making powers set a precedent, which can only ever be changed if the wording of the Constitution is altered by a referendum, or if a subsequent case on the same issue leads to a different High Court determination, setting a new precedent (as the High Court is not bound by its own decisions). In carrying out its role, the High Court may declare a law, or part of a law, **ultra vires** if it determines the legislation was enacted beyond the law-making powers of parliament, meaning the Act becomes invalid and cannot be legally enforced.

Justice O'Connor reiterated in *Junburnna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309 that the Constitution must be interpreted in 'broad and general ... terms... where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should... always lean to the broader interpretation'. That is, the attitude of the High Court is that the powers of the Commonwealth will always be interpreted broadly, as was intended when the Constitution was first drafted.

Commonwealth v Tasmania (1983)

158 CLR 1 4.1.5.2

Background information

Australia is a party to numerous **international treaties**, which are agreements between international actors, such as countries and international organisations, confirming they will uphold certain obligations. The executive branch of the Commonwealth government has the power to enter into these agreements as per s 61 of the Constitution. Australia is bound to uphold these obligations by international law once the treaty receives **ratification**. Commonwealth legislation must be created

or amended to give effect to Australia's obligations under international law, at which point they become part of Australian domestic law.

Section 51(xxix) of the Constitution states:

'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs.'

This means the Commonwealth Parliament has the law-making power to legislate on matters considered 'external affairs'. However, the Constitution does not explicitly state the meaning of 'external affairs', so the High Court has needed to interpret these words in relation to a number of cases over the years, such as in *Commonwealth v Tasmania* (1983) 158 CLR 1 (Tasmanian Dam case).

Facts

- In 1945, Australia signed and ratified an international treaty called the *Convention Concerning the Protection of the World Cultural and Natural Heritage* (now known as the *World Heritage Convention*). The treaty created an international obligation to protect and conserve sites listed on the 'World Heritage List'.
- The Tasmanian government intended to dam the Franklin River to create a source of hydroelectricity in 1978, which would mean the flooding of the river. Subsequently, the Tasmanian parliament passed the *Gordon River Hydro-Electric Power Development Act 1982* (Tas).
- The construction of dams is not an exclusive power of the Commonwealth as it is not stated within the Constitution, therefore states have the residual law-making power to legislate with respect to dam construction. As a result, Tasmania was able to create this dam construction legislation.
- Following public outcry against the construction of the dam, the Franklin area was listed on the World Heritage List by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) in November 1982. This meant Australia was now obliged to protect and conserve the Franklin River under international law.
- In 1983, the newly elected Labor government passed the *World Heritage Properties Conservation Act 1983* (Cth), giving legislative effect to Australia's obligations under the *World Heritage Convention*.
- Sections 6 and 9 of the *World Heritage Properties Conservation Act 1983* (Cth), in conjunction with s 69 of the *National Parks and Wildlife Conservation Act 1975* (Cth) prohibited excavation, clearing, and other activities within the Tasmanian Wilderness World Heritage Area.
- Consequently, these sections prevented the construction of the Franklin River dam.

Legal issues

- The Tasmanian Government challenged the *World Heritage Properties Conservation Act 1983* (Cth), claiming the Act was in breach of the Constitution as the construction of dams is not listed as an area that the Commonwealth can legislate on using either their exclusive or concurrent law-making powers. The Tasmanian Government therefore claimed the Commonwealth had no constitutional power to create this legislation, meaning the legislation was invalid.
- In contrast, the Commonwealth government claimed it had the power to legislate in relation to the construction of the dam because prohibiting the dam's construction had the effect of upholding Australia's international obligations outlined in the *World Heritage Convention*. Therefore, they argued laws seeking to uphold treaty obligations could validly be created according to the external affairs power, as per s 51 (xxix) of the Constitution.
- The High Court was required to determine whether ss 6 and 9 of the *World Heritage Act 1983* (Cth) and s 69 of the *National Parks and Wildlife Conservation Act 1975* (Cth), including the *World Heritage (Western Tasmania Wilderness) Regulations* were valid, or beyond the powers of the Commonwealth.

Decision

- In a 4:3 majority, the High Court found that the external affairs power allowed the Commonwealth to legislate in areas of residual power if the Commonwealth was upholding its international obligations.
- The High Court determined s 69 of the *National Parks and Wildlife Conservation Act* (Cth) was wholly invalid, as well as other operative provisions of the *World Heritage Properties Conservation Act 1983* (Cth). However, importantly, the High Court determined s 9 of the *World Heritage Properties Conservation Act 1983* (Cth), among some of the other regulations established by the Commonwealth, were valid. This meant that it was unlawful for the dam to be constructed, as the construction of the dam breached the Commonwealth legislation, which was giving effect to Australia's international obligations.

LESSON LINK

You will learn about international treaties and ratification in **7G Parliament's ability to make law - international pressures.**

LEGISLATION

Gordon River Hydro-Electric Power Development Act 1982 (Tas)

LEGISLATION

World Heritage Properties Conservation Act 1983 (Cth)

National Parks and Wildlife Conservation Act 1975 (Cth)

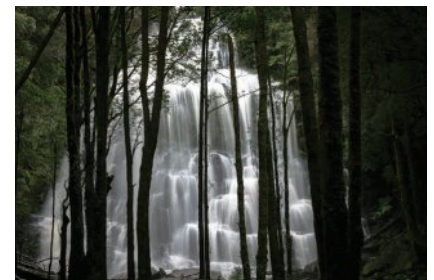


Figure 2 The Nelson Falls, situated in the Franklin-Gordon Rivers National Park in Tasmania

LESSON LINK

You learnt about s 109 of the Constitution in **7D Section 109 of the Australian Constitution**.

LEGISLATION

Environmental Protection and Biodiversity Conservation Act 1999 (Cth)

CONSTITUTION

Section 109
Section 92

- Justices Mason, Murphy, and Brennan agreed that international agreements entered into must be genuine and not created solely for the purpose of acquiring legislative power.
- Justices Mason, Murphy, Brennan, and Deane determined that, once a genuine international treaty has been entered into, the Commonwealth has the ability to implement the obligations of the treaty into Australian law, even if doing so means the Commonwealth is legislating in an area of residual power.
- The effect of this decision was to render the state legislation, the *Gordon River Hydro-Electric Power Development Act 1982* (Tas), invalid to the extent that it was inconsistent with the *National Parks and Wildlife Conservation Act 1975* (Cth), in accordance with s 109 of the Constitution.
- Overall, the law-making powers of the Commonwealth were expanded as the four-person majority found the Commonwealth could make legislation under the external affairs power as long as this legislation genuinely gave effect to a treaty.

The impact of the Tasmanian Dam case 4.5.1.2.1

Table 1 The impact of the Tasmanian Dam case on law-making powers

Significant effects on law-making powers	Limitations of the case's impact on law-making powers
- The 'external affairs' power was interpreted to allow the Commonwealth Parliament to enact laws in areas covered by international treaties. The court held that the Commonwealth Parliament is vested with the power to make laws in any area 'capable of being reasonably considered to be appropriate in achieving the obligations of the Commonwealth with respect to international affairs'. As a result, the Commonwealth's law-making power was further expanded, given the Commonwealth could legislate in areas of residual power, as long as they were giving genuine effect to international obligations. - The High Court's interpretation created the potential for any state legislation to be overruled by Commonwealth legislation in matters concerning external affairs. At the time, some commentators had concerns that the decision gave the Commonwealth unlimited law-making ability as there are international treaties about so many different issues, including education, discrimination, civil rights, and more. Therefore, since the Commonwealth Parliament could enact laws to implement a treaty's subject matter, as long as the executive had ratified this treaty, it could make laws about a wide range of subject matter that it would otherwise have no power to make laws about by relying on the external affairs power. - Pieces of Commonwealth legislation now rely on the High Court's broad interpretation of the external affairs power in the Tasmanian Dam case, which has been affirmed in other cases since the decision, such as the <i>Environmental Protection and Biodiversity Conservation Act 1999</i> (Cth).	- The external affairs power is subject to constitutional limitations, such as express and implied rights, which can restrict the Commonwealth's law-making power. For instance, the Commonwealth Parliament could not introduce a law infringing upon the implied freedom of political communication which the High Court has inferred to be a freedom protected by the Constitution, even if an international obligation encouraged the Commonwealth Parliament to introduce such a law. - Justices Mason, Murphy, and Brennan agreed that international agreements entered into must be genuine and not created solely for the purpose of acquiring legislative power. Therefore, the Commonwealth cannot manipulate an international obligation in order to override state legislation by relying on the external affairs power.

R v Brislan; Ex parte Williams (1935) 54 CLR 262 4.1.5.3

Background information

As technology is constantly changing and evolving, law reform is regularly required to ensure the law can remain up-to-date. Given the Australian Constitution was first drafted at the end of the 19th century, some of the wording may not be applicable to technologies in the 21st century. However, the Australian Constitution cannot be changed without a successful referendum. Therefore, High Court interpretations of the Constitution are, to this day, required to determine whether certain phrasing of the Constitution provides the Commonwealth Parliament with the power to legislate in relation to new technology.

Section 51(v) of the Constitution states:

‘The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to postal, telegraphic, telephonic, and other like services.’

This means the Commonwealth has the power to legislate on matters concerning postal, telegraphic, telephonic, and other like services. However, the Constitution does not explicitly state the meaning of ‘other like services’. Therefore, the High Court has needed to interpret these words in relation to a number of cases over the years, such as in *R v Brislan; Ex parte Williams* (1935) 54 CLR 262 (Brislan case).

Facts

- In 1905, the Commonwealth Parliament passed the *Wireless Telegraphy Act 1905* (Cth). Section 6(1) of the Act required that ‘except as authorised...no person shall establish, erect, maintain, or use any station...for the purpose of transmitting or receiving messages by wireless telegraphy’. The effect of this provision was that radio devices were not allowed to be used without a licence, given they were a relatively new invention.
- The Postmaster-General’s Department was a government department which oversaw telegraphy services.
- Roy Vincent Brislan, an inspector employed by the Postmaster-General’s Department, visited Dulcie Williams’ home in 1934 and found a wireless broadcast receiving set (radio).
- The following day, Williams admitted to officers she owned the wireless receiving set which had been installed for a week, and she did not have a current wireless listener’s licence. Consequently, she was fined one pound with eight shillings costs (roughly \$150 AUD today), or given the option to serve three days of imprisonment.
- Williams challenged the validity of the Commonwealth legislation in the High Court on the basis that the legislation in relation to radio broadcasting was outside of the scope of the Commonwealth’s law-making powers outlined in the Constitution.

Legal issues

- Williams argued that since radio broadcasting was not explicitly mentioned in the Constitution as an area over which the Commonwealth had law-making powers, the power to legislate on issues concerning wireless broadcast receiving sets was a residual area of law-making, not an exclusive or concurrent one.
- Williams contended that radio broadcasting did not fit in any of the four categories outlined in s 51(v) of the Constitution as areas of Commonwealth law-making power: ‘postal, telegraphic, telephonic, and other like services’. It was argued that since the post, telegraphs, and telephones were used as one-to-one communication services where people communicated with each other, as opposed to radio broadcasting which was a one-to-many service, radio broadcasting was not a ‘like service’.
- The High Court was required to determine whether radio broadcasting was classified as a ‘postal, telegraphic, telephonic, or other like service’, and therefore rule on whether the Commonwealth had the authority to legislate in regard to radio broadcasting.

LESSON LINKS

You will learn more about the law and advances in technology in **9A Reasons for law reform**.

You will learn more about referendums in **10B Referendums**.

CONSTITUTION

Section 51 (v)

LEGAL VOCABULARY

Ex parte a Latin term meaning ‘on behalf of’.



Image: elRoce/Shutterstock.com

Figure 3 The 1930 radio set which required a license to possess

USEFUL TIP

The case is called *R v Brislan; ex parte Williams*. This means the case was the Crown against Brislan (on behalf of Williams). Williams was the defendant in these proceedings. Therefore, when discussing this case, refer to Williams as the individual who challenged the validity of the relevant legislation, not Brislan.

LEGAL VOCABULARY

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

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'discuss the significance of one High Court case which has had an impact on state and Commonwealth law-making powers'. Table 1 and Table 2 both show the significance of each case on law-making powers as well as the limitations of each case's impact on law-making powers. Therefore, these tables can help you answer higher-mark questions that require a discussion of the significance of one High Court case.

Decision

- The High Court determined that s 51(v) includes a power to regulate radio broadcasting.
- Whilst the High Court came to a majority 5:1 conclusion that law-making in relation to wireless set broadcasting was within the Commonwealth's law-making power, there was no single **ratio decidendi** shared by the majority.
- Chief Justice Latham and Justices Rich and Evatt determined that radio broadcasting was a form of wireless telephony. They determined radio broadcasting could also be classified as a 'like service' as it is used to communicate information, just as post, telegraphs, and telephones do.
- Conversely, Justice Starke stated the Commonwealth had 'full authority to legislate with respect to wireless telegraphy, including radio broadcasting', and hence, classified radio broadcasting as a telegraphic as opposed to telephonic service.
- Contrastingly, Justice McTiernan determined broadcasting was in fact a 'like service' similar to telephones and telegraphs.
- The only justice in dissent, Justice Dixon, argued that broadcasting fit none of the four categories and that it was therefore a residual power of the states.
- In considering the application of the term 'other like services', the court commented that the words were inserted into the Constitution 'to provide for future developments and inventions' and 'used to embrace all unknown future discoveries which might deal with the conveyance of intelligence by electricity'.

DEEP DIVE**Dissenting decision**

Interestingly, in 1967, Melbourne University professor Geoffrey Sawer contended the dissenting view expressed by Justice Dixon in *Brislan* was an 'overwhelmingly more probable construction of what the Founders [of the Australian Constitution] intended'. Thus, the interpretation of the High Court was ultimately not an interpretation the founders intended (Sawer, 1987, p. 87). That is, Sawer suggests that, whilst the role of the High Court is to broadly interpret the Constitution, the justices in *Brislan* interpreted the Constitution too broadly. However, this is just one perspective on the ultimate decision of the justices in *Brislan*.

Adapted from 'Australian federalism in the courts' (Sawer, 1967)

The impact of the *Brislan* case 4.5.1.3.1

Table 2 The impact of the *Brislan* case on law-making powers

Significant effects on law-making powers	Limitations of the case's impact on law-making powers
• The case confirmed the power of the Commonwealth Parliament to legislate on the subject matter of wireless sets and broadened its legislative powers to make laws on 'other like services'. For instance, the establishment of the Australian Broadcasting Corporation (ABC) in 1932 was created on the basis that s 51(v) allowed the Commonwealth to control broadcasting. If the High Court did not affirm the ability of the Commonwealth to control broadcasting in <i>Brislan</i>, then the establishment of the ABC and other government broadcasting services could be deemed beyond the law-making powers of the Commonwealth. • <i>Brislan</i> suggested that the Commonwealth could make laws in relation to new communication technologies, as they could be considered 'other like services'. Therefore, this means there is potential for the Commonwealth to assume the power to legislate in regard to the Internet and other future technologies not invented yet.	• Whilst the decision in <i>Brislan</i> demonstrated there could be further expansion of the Commonwealth's law-making power in the area of 'postal, telegraphic, telephonic, and other like services', another case considering these words of the Constitution would need to be brought before the High Court to confirm its expansion to other types of services. The High Court can only rule on and create precedent in relation to cases before it, so further expansion of the Commonwealth's law-making power in this area may be limited during periods where cases concerning the extent of s 51(v) rarely arise. • Where the Commonwealth has legislated in relation to 'other like services' in reliance on the <i>Brislan</i> decision, it is still possible for the validity of that legislation to be challenged in the High Court, and there is potential that such legislation may be declared invalid if the service under consideration is not as similar to those services listed in s 51(v).

Continues →

Table 2 Continued

Significant effects on law-making powers	Limitations of the case's impact on law-making powers
The decision was thought by some to give the Commonwealth too much power to regulate in relation to any and all new communication technology. For example, the Commonwealth has legislated in relation to the National Broadband Network (NBN) on the assumption that the internet falls into the category of 'other like services'.	Parliament cannot overrule High Court decisions. Therefore, if the High Court makes a decision limiting the law-making power of the Commonwealth in relation to broadcasting services, the decision remains final. Thus, the Commonwealth would no longer be able to legislate in this area until another case comes before the court which alters the precedent and once again, expands the Commonwealth's law-making powers.

LEGAL CASE

Jones v The Commonwealth (No 2) (1965) 112 CLR 206

Facts

Louisa Jones sued the Commonwealth of Australia and the Australian Broadcasting Commission, now known as the Australian Broadcasting Corporation (ABC). She sought a declaration that the acquisition of her land for the creation of ABC offices for public purposes was invalid. Jones claimed, among other reasons, that the establishment of the ABC was invalid, as the Constitution did not explicitly make reference to television services and hence, the power to legislate in this area was residual, not exclusive.

Legal issue

The High Court was required to determine whether the Commonwealth Parliament had the ability to establish a national television service.

Decision

The High Court determined that the creation of the ABC was within the law-making powers of the Commonwealth. Referencing *Brislan*, Justice Owen held that television broadcasting was no different to the broadcast of words and sounds in radio and that to construe the words of the Constitution any other way would be 'unduly narrow'.

Significance

The power of the Commonwealth Parliament to legislate in regard to 'postal, telegraphic, telephonic and other like services' received a broad interpretation, reinforcing the decision in *Brislan*. Although the High Court is yet to hear a case concerning the law-making powers of the Commonwealth Parliament over the internet, as of 2023, it is quite possible that the High Court would consider it a 'like service' as a result of this case and the *Brislan* case.



Image: STRINGER Image/Shutterstock.com

Figure 4 Jones sued the ABC, claiming the Constitution does not establish television as an area the Commonwealth Parliament can make laws over

REAL WORLD EXAMPLE

The National Broadband Network (NBN)

The NBN is a nationwide upgrade to Australia's existing internet and phone infrastructure. The main focus of the NBN is to create a replacement of the existing copper network with more advanced fibre-optic cable and wireless technology to create a faster and more reliable internet.

It is assumed by some that, because of the High Court's tendency to provide a broad interpretation of constitutional law-making powers as seen in *Brislan*, the High Court will categorise the internet as a 'like service' to telegraphic and telephonic services (Gamertsfelder, 1999). A similar example of legislation passed regarding the internet is the *Electronic Transactions Act 1999* (Cth), which also operated on the assumption that the internet is a 'like service' under s 51(v), an assumption that has been widely accepted since.

Adapted from 'Everything you need to know about Australia's broadband network' (*The NBN Project*, 2015) and 'Will the internet be the catalyst for an expansion of Commonwealth Constitutional Powers?' (Gamertsfelder, 1999)



Image: STRINGER Image/Shutterstock.com

Figure 5 The NBN initiative was announced in 2007 and is yet to be completed

LEGISLATION

Electronic Transactions Act 1999 (Cth)

Lesson summary

There were significant effects of the Tasmanian Dam case on law-making powers:

- The 'external affairs' law-making power of the Commonwealth was interpreted to allow the Commonwealth Parliament to legislate in any area covered by international treaties as long as the parliament was given a genuine effect to the treaty.
- The High Court's interpretation created the potential that any state legislation can be essentially overruled by Commonwealth legislation, providing the Commonwealth legislation gives effect to international obligations and it is related to the exercise of the external affairs power.
- The Commonwealth has relied on the High Court's interpretation of the external affairs power under s 51(xxix) of the Constitution for other purposes, such as for the creation of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).

There were significant effects of the Brislan case on law-making powers:

- The Commonwealth has relied on the High Court's broad interpretation of the 'like services' under s 51(v) of the Constitution to legislate on a number of broadcasting matters, such as for the creation of the ABC.
- New technology advancements may fall under 'like services', such as the internet.
- The decision was thought by some to give the Commonwealth too much law-making power in relation to any and all new communications technology. Consequently, this has led the Commonwealth to assume the power to legislate in certain areas without cases going before the High Court to confirm the Commonwealth's law-making power.

7E Questions

Check your understanding

Question 1

Parliament can overrule a High Court decision regarding changes to law-making powers.

- A. True
- B. False

Question 2

The Brislan case was significant because the Commonwealth Parliament is now relying on this decision to assume law-making powers in which area of law?

- A. The internet
- B. Public housing
- C. State police
- D. Roads and infrastructure

Question 3

Which of the following are ways the *Brislan* case limited the expansion of the Commonwealth's law-making powers? **(Select all that apply)**

- A. *Brislan* suggested the Commonwealth Parliament has the ability to make laws in relation to new, related, communication technologies if such technologies can be considered 'other like services'.
- B. The decision was thought by some to give the Commonwealth Parliament too much legislative power in relation to any and all new communication technologies.
- C. Where the Commonwealth Parliament has legislated in relation to 'other like services' in reliance on the *Brislan* decision, it is still possible for the validity of that legislation to be challenged in the High Court.
- D. Parliament cannot overrule High Court decisions on constitutional principles, such as the law-making powers of the Constitution.

Question 4

In the *Tasmanian Dam* case, the Tasmanian government contended the *World Heritage Properties Conservation Act 1983* (Cth) was invalid because:

- A. the Commonwealth was attempting to legislate in an area where they did not have a concurrent or exclusive power to do so.
- B. the UNESCO World Heritage listing of the Tasmanian wilderness was invalid.
- C. the Commonwealth's legislation was in breach of s 109.

Question 5

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

The *Tasmanian Dam* case created the opportunity for any state legislation to be overruled by Commonwealth legislation as long as it is for the purposes of upholding genuine, international treaty obligations under the [] affairs power.

Question 6

Which of the following is an example of the Commonwealth relying on the High Court's broad interpretation of the Constitution following *Brislan*'s case?

- A. The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth).
- B. The *Communist Party Dissolution Act 1950* (Cth).
- C. The *National Parks and Wildlife Conservation Act 1975* (Cth).
- D. The creation of the ABC.

Question 7

The High Court has no impact on the law-making powers of the state and Commonwealth parliaments as the distribution of law-making powers is decided by the Constitution.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Referring to **one** High Court case, outline **one** effect the case had on state and Commonwealth law-making powers.

Question 9

(4 MARKS)

Explain the significance of **one** High Court case that has impacted the division of law-making powers.

Adapted from VCAA 2015 exam Q8

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 **true** or **false** about the Tasmanian Dam case.

Statement	True	False
I. The court determined that the 'external affairs' power should be interpreted as allowing the Commonwealth Parliament to make laws in relation to any subject matter covered by an international treaty Australia has ratified, essentially broadening the states' law-making powers.	☐	☐
II. As s 109 of the Constitution has the effect of rendering state legislation invalid if it is inconsistent with Commonwealth legislation, the decision in the Tasmanian Dam case had the effect of broadening the law-making power of the Commonwealth, at the expense of the states' powers.	☐	☐
III. The decision in the case means that areas of law-making that are residual powers of the states, such as the development of state infrastructure, can never become areas where law-making is shared by the Commonwealth and the states concurrently.	☐	☐
IV. The High Court was required to determine whether s 51 (xxix) of the Constitution, which enabled the Commonwealth Parliament to make laws in relation to 'external affairs', extended to law-making to give effect to international treaties, even if by giving effect to such treaties, the Commonwealth is essentially legislating in an area where the states have residual law-making power.	☐	☐
V. The court held that, in regard to the external affairs power, the Commonwealth can enact legislation that is giving a genuine effect to Australia's obligations under international treaties.	☐	☐
VI. The interpretation of the external affairs power in the case created the potential for any Commonwealth legislation to essentially be overruled by state legislation, providing the Commonwealth legislation gives effect to international obligations under the external affairs power.	☐	☐

Question 11

(6 MARKS)

Using **one** High Court case, analyse the impact of the High Court's interpretation of the Australian Constitution on state and Commonwealth law-making powers.

Adapted from VCAA 2013 exam Q12

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

Question 12

Tick the box to indicate whether the following statements demonstrate the **significance** or a **limitation** of the impact of the *Brislan* case decision on the Commonwealth's law-making powers.

Statement	Significance	Limitation
I. For further expansion of the Commonwealth's law-making power under s 51(v) to include more types of 'like services', there would need to be another case considering the words of this section of the Constitution to be brought before the High Court.	☐	☐
II. <i>Brislan</i> 's interpretation of the term 'other like services' in s 51(v) suggests the ability of the Commonwealth to legislate in relation to new, related, communication technologies, such as the internet and other future technologies not invented yet. The Commonwealth can likely rely on the <i>Brislan</i> decision, and subsequent decisions that have also considered s 51(v), to legislate in relation to the internet, even though a case has not been brought before the High Court to confirm this.	☐	☐
III. The establishment of the Australian Broadcasting Corporation (ABC) in 1932 was created on the basis that <i>Brislan</i> 's interpretation of s 51(v) allowed the Commonwealth to legislate on and control the subject matter of broadcasting.	☐	☐
IV. The decision in <i>Brislan</i> does not confirm that all other communications technologies will definitely be interpreted to fall in the s 51(v) category of Commonwealth law-making power.	☐	☐
V. Where the Commonwealth Parliament has legislated in relation to 'other like services' in reliance on the <i>Brislan</i> decision, it is still possible for the validity of that legislation to be challenged in the High Court. Therefore, there is potential that such legislation may be declared invalid if the service under consideration is not as similar to those services listed in s 51(v).	☐	☐
VI. The <i>Brislan</i> decision suggests that the phrase 'other like services' should be given a broad interpretation, which means that areas of law-making that were considered as residual law-making powers of the states could be areas for which the Commonwealth has concurrent law-making powers. <i>Brislan</i> therefore reduced the state's law-making power.	☐	☐

Question 13

(10 MARKS)

Discuss the impact of **one** High Court case on the state and Commonwealth law-making powers.

Linking to previous learning

Question 14

(3 MARKS)

Explain the relevance of section 109 of the Australian Constitution when a High Court interpretation of the Constitution has the effect of broadening the Commonwealth's law-making powers.

7F Parliament's ability to make law – the bicameral structure



Image: Phovoir/Shutterstock.com

As you leave high school, you may choose to move into a sharehouse. You would likely come to an agreement with your housemates on the rules of the house. If this agreement is not reached, and one housemate is able to dictate the 'laws' of the house without unanimity from the others, this is likely to result in house rules that are not satisfactory. Luckily, in parliament, all proposed laws have to be checked by all present members, in both the upper and lower house. However, despite this additional check on the laws created, they may still be unsatisfactory for some.

STUDY DESIGN DOT POINT

- factors that affect the ability of parliament to make law, including:
 - the bicameral structure of parliament
 - international pressures
 - the representative nature of parliament

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.6.1

The bicameral structure of parliament

4.1.6.1.1 The law-making process

4.1.6.1.2 The composition of the upper house

Lesson introduction

Without proper review, legislation could be made arbitrarily and parliament could abuse its power. Therefore, the bicameral structure ensures that each house is responsible to the other. With this structure, utilised in both the Commonwealth and Victorian Parliaments, the law-making power of each house is reviewed by its counterpart and there is more scope for bill amendments, ultimately aiming to improve the overall quality of new laws.

The bicameral structure of parliament 4.1.6.1

The modern-day, **bicameral parliament** is still reminiscent of the Westminster system, a parliamentary system developed over centuries, originating in the 1200s at the Palace of Westminster in Britain. Today, many countries that underwent British colonisation have Westminster-style parliaments, including Australia, Canada, and New Zealand. Bicameral parliaments share common features, such as having two houses, a Head of State, elected representatives, and a vested **legislative power**.

KEY TERM

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

LEGAL VOCABULARY

Colonisation the action of forcefully settling in another country already inhabited by Indigenous populations.

Legislative power the power vested in parliament that enables it to make laws.



Image: Jason Benz Bennee/Shutterstock.com

Figure 1 The Commonwealth Parliament, located in Canberra

The requirement for a bicameral structure is laid out in the respective constitutions of the Victorian and Commonwealth Parliaments. In Victoria, the requirement for a bicameral structure is included in the Victorian Constitution, established by s 15 of the *Constitution Act 1975* (Vic). In the Australian Constitution, the requirement of a bicameral legislature is included in s 1. This means a majority of proposed Commonwealth and Victorian **bills** are approved by two Houses of Parliament before becoming legislation. The only exception to this rule in Victoria is for the state budget bill, whereby only the Legislative Assembly approves the yearly budget, not the Legislative Council.



Image: FiledIMAGE/Shutterstock.com

Figure 2 The Victorian Parliament, located in Melbourne CBD

In the Commonwealth Parliament, the upper house is the Senate and the lower house is the House of Representatives. In the Victorian Parliament, the upper house is the Legislative Council and the lower house is the Legislative Assembly.

WANT TO KNOW MORE?

There are three parliaments in Australia that are unicameral, meaning they have only one house for law-making. These are the Queensland, the Northern Territory (NT), and the Australian Capital Territory (ACT) Parliaments. Queensland is the only state in Australia with a unicameral parliament, as the ACT and NT are territories, making its structure unique to all other states. Queensland chose to abolish its upper house in 1922.

You can find out more about Queensland's unicameral law-making process by searching 'System of government - Queensland' and clicking the 'Queensland Government' (2020) webpage.

The law-making process 4.1.6.1.1

The parliamentary law-making process is a direct result of the bicameral structure and requires proposed bills to pass certain steps in each House of Parliament to ensure all potential legislation goes through sufficient checks and balances before being implemented.

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 who are present. It is then reviewed, scrutinised, and approved by the other House of Parliament, before receiving royal assent from the **Governor**, if it is state legislation, or the **Governor-General**, if it is Commonwealth legislation. A bill may transition between both houses several times when amendments are being made or suggested until it is finally approved. 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 largely similar to that of the Commonwealth Parliament.

Parliament is also limited in the speed at which this law-making process can occur by the number of sitting weeks of parliament each year. On average, the Commonwealth Parliament will sit for 18–20 weeks of the year whilst the Victorian Parliament will sit for around 16–18 weeks. Whilst this is designed to allow MPs to conduct activities outside of parliament, such as connecting with their community and preparing for future sitting days, bills can only be progressed when parliament is sitting. Therefore, a lack of sitting weeks for a long period can significantly slow the parliamentary law-making process.

LEGISLATION

Constitution Act 1975 (Vic)

CONSTITUTION

Section 1

LEGAL VOCABULARY

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

LESSON LINKS

You learnt about the Commonwealth Parliament in **7A The Commonwealth Parliament and the Crown in law-making**.

You learnt about the Victorian Parliament in **7B The Victorian Parliament and the Crown in law-making**.

LEGAL VOCABULARY

Member of parliament (MP)

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

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

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

WANT TO KNOW MORE?

You can access the specific details of both the Victorian and Commonwealth Parliament's sitting weeks through their respective websites. Parliament sitting days are mostly public and can be viewed either in person or online.

You can find out more about these dates by accessing the Parliament of Australia or Parliament of Victoria websites and navigating to the 'Sitting Calendar' pages.

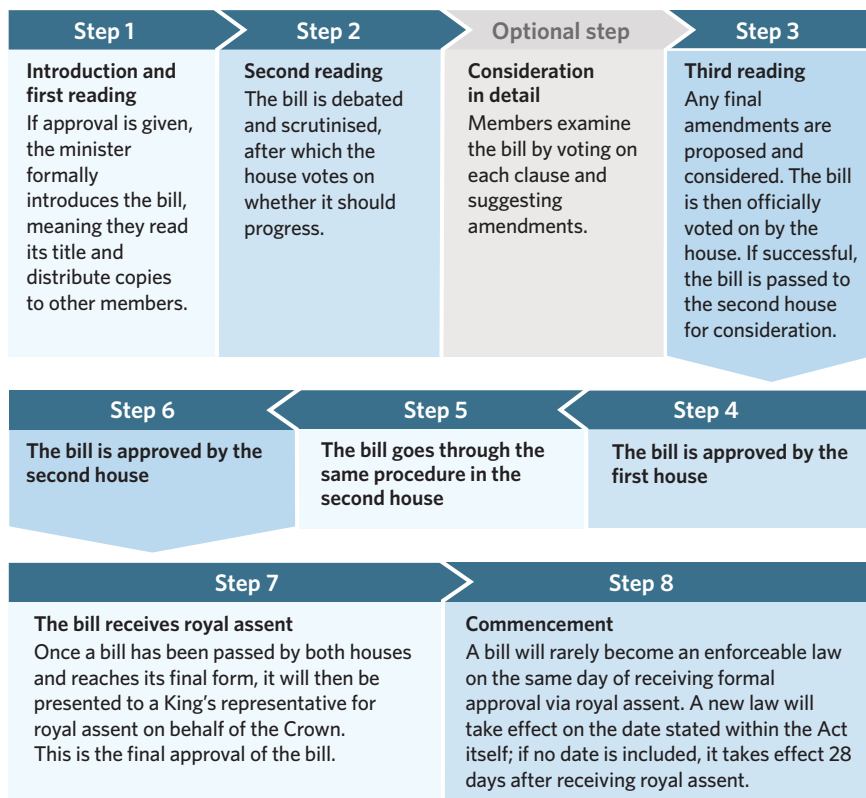


Figure 3 The legislative process in Australia's bicameral parliaments

REAL WORLD EXAMPLE

CONTENT WARNING This section mentions content that is sensitive in nature, relating to drug use.

Safer streets

On Lennox Street in North Richmond, a safe injecting room has existed since 2018 as a harm reduction measure for drug users in the area. From 2018 to 2023, it successfully managed more than 6,300 overdoses in the surrounding community and saved approximately 63 lives. In 2023, the Labor Government proposed legislation that would make the current North Richmond location permanent through the *Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act 2023* (Vic).

After passing the Legislative Assembly, the Act was moved to the Legislative Council where a number of parties, such as the Greens and the Liberal Democrats, made submissions for amendments. After lengthy debates that ended in a 'late-night vote', the bill passed the upper house and became an Act. This is just one example of the law-making process that parliament undertakes, and the avenues of opportunity for review and change at each stage in a bill's life.

Adapted from 'Richmond safe injecting room made permanent after late night vote' (Eddie, 2023)



Image: David MG/Shutterstock.com

Figure 4 North Richmond's safe injecting room was made permanent by the Victorian Parliament

LEGISLATION

Drugs, Poisons and Controlled Substances Amendment (Medically Supervised Injecting Centre) Act 2023 (Vic)

The composition of the upper house 4.1.6.1.2

The upper house, whether that be the Senate at the federal level or the Legislative Council at the Victorian state level, plays a significant role in parliamentary law-making. As the **government of the day** is formed in the lower house, the **political party** or **coalition** that wins government will usually hold a majority of seats in this house. Consequently, the majority of new legislation, generally introduced by **cabinet**, originates from the lower house. The level of debate on proposed legislation in the lower house is usually reduced if there is a majority government, as members of the government will often vote in the same way in order to pass bills. This is referred to as voting 'along party lines'. Whilst they risk losing the support of their political party, MPs will often vote along party lines even if the vote does not necessarily best represent the views of their **constituents**.

There are two compositions of the upper house that can affect law-making in parliament, being:

1. a **hostile upper house**
2. an upper house acting as a '**rubber stamp**'.

A hostile upper house occurs when the government of the day does not hold a majority in the upper house and, therefore, the **balance of power** is held by a combination of the opposition, minor parties, and independents. In these situations, the members of the government of the day in the upper house cannot rely on their votes alone to pass proposed legislation, instead being forced to gather support from the opposition or the crossbench, by making amendments and compromises.

This increases the level of scrutiny on bills and ensures adequate levels of debate and consideration are undertaken before a law passes through the house. However, in instances where deciding votes may fall to a few minor parties or independents, the law-making process of the upper house, and parliament as a whole, can be slowed and skewed as the specific interests of these parties need to be catered to in order for the bill to gain approval.

DEEP DIVE

The current hostility

At both a state and federal level, the Victorian and Commonwealth Labor Governments face a hostile upper house in their respective parliaments. These exact numbers may change over the course of the MP's sitting terms due to resignations, however it is unlikely to see either upper house become a 'rubber stamp'.

Table 1 The composition of the hostile, 47th Senate of Australia, sitting from 2022–2028

Australian Labor Party	26
Coalition	31
Australian Greens	11
Pauline Hanson's One Nation	2
Jacqui Lambie Network	2
United Australia Party	1
Independents	3

Table 2 The composition of the hostile 60th Victorian Legislative Council, sitting from 2022–2026

Victorian Labor Party	15
Coalition	13
Victorian Greens	4
Legalise Cannabis Victoria	2
Shooters, Fishers, Farmers	1
Animal Justice Party	1
Pauline Hanson's One Nation	1
Democratic Labour Party	1
Liberal Democrats	1
Independent Liberal	1

LESSON LINK

You will learn more about the composition of parliament in **7H Parliament's ability to make law - representative nature**.

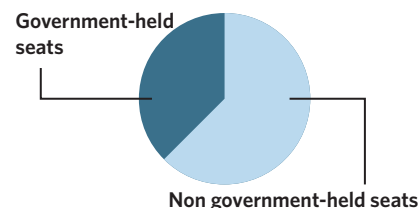


Figure 5 The composition of a hostile upper house

LEGAL VOCABULARY

Government of the day the political party or coalition with a majority in the lower house of parliament.

Political party an organisation comprised of members of similar ethos and worldviews with the primary aim of competing in elections to achieve societal and political goals.

Coalition an alliance between two or more political parties with the aim of working together to form a government.

Cabinet a central decision-making body consisting of the prime minister, in the federal context, and the premier, in the state context, alongside senior members of government, including ministers, who are responsible for developing government policy and addressing issues of concern.

Constituent a person who votes for, and is then represented in government by, an elected official.

Hostile upper house a situation in which the government of the day does not hold a majority in the upper house.

Rubber stamp a group of elected representatives that approves the government's decisions with little oversight

Balance of power the support of minor parties or independents in a house of parliament that enable the government to form a majority and enact their law-making.

Crossbench the members who do not belong to the major political parties in a chamber of parliament, specifically Independents and members of minor parties.

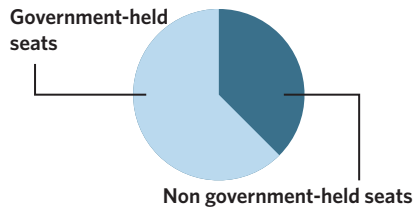


Figure 6 The composition of a ‘rubber stamp’ upper house

When the upper house acts as a rubber stamp, a majority of seats are held by the same party in the upper and lower house, meaning bills may not be scrutinised properly. If the majority in both Houses of Parliament share the same political views, bills introduced in the lower house are unlikely to be contested by the upper house, leading to potential misuse of law-making power and limiting the upper house’s ability to execute its primary role as the ‘house of review’. However, some view this composition of the upper house as efficient, as law-making tends to occur quicker in the absence of conflicting interests that may intrude on the legislative plans of the elected government.

REAL WORLD EXAMPLE



Figure 7 Jacqui Lambie, a minor party leader, has held the balance of power in the past

Not a stamp in sight

The 47th Senate of Australia was formed following the 2022 federal election and will continue sitting until 2028. Despite the majority Labor Government formed in the House of Representatives, Labor does not hold a majority in the upper house. The composition of the upper house, as seen in Table 1, includes a diverse number of independents and minor parties.

Jacqui Lambie, a Tasmanian senator who leads her own minor party, the Lambie Network, has experience holding the balance of power, having sat on the **crossbench** in the Senate since 2013.

Towards the end of 2022, with only two sitting weeks remaining in the year for the Commonwealth Parliament, Senator Lambie, who was considered a ‘key Senate player’ in passing certain Labor Government workforce legislation, made her stance clear in that she did not ‘want to be rushed’ on her decision in case the government was ‘trying to hide or rush stuff through’.

Despite the bill being drafted and supported by the government of the day, the ability of members of the crossbench to deliberately push for amendments significantly slows the law-making process. In this case, the government’s workplace relations minister claimed that certain workers had been ‘kept waiting for 10 years’ for the changes that would be produced by the proposed law. However, the speed in which the bill was passed relied on a handful of Senators, including Lambie. Ultimately, the bill was passed and the industrial relations reform occurred as another independent senator voted in favour of the bill.

Adapted from ‘Jacqui Lambie and David Pocock oppose Labor ‘rushing through’ workplace bill’ (Karp & Cox, 2022)

HYPOTHETICAL SCENARIO



Figure 8 An upper house’s provision of a ‘rubber stamp’ may be quick, but not always considerate

Speedy stamping

Suppose the Coalition (Liberal and National Parties) formed the Victorian Government in the Legislative Assembly, where they would hold a majority and their leader would be the Victorian premier. Imagine this particular government has also been successful in winning 23 of the 40 Legislative Council seats, which is quite rare.

This government has stated that it places a high priority on reducing traffic and, therefore, begins to introduce controversial legislation relating to roads and other infrastructure in the Legislative Assembly. These bills pass with ease as the government votes together and hold a majority. Once the bills reach the upper house, minor parties raise concerns. The Animal Justice Party suggests that higher speed limits will increase levels of roadkill, as an example. However, as the Coalition also holds a majority in this house, it is under no obligation to adopt these concerns or amendments and rather, chooses to pass these bills through the house.

In the media, political reporters remark on the speed at which the government has passed bills and changed the road laws of Victoria. However, they also comment on the fact that many conflicting community interests have not been considered in the new legislation, potentially impacting social cohesion and support of the government of the day.

This hypothetical situation of a political party occupying a majority of seats in both Houses of Parliament demonstrates that, although such a situation may result in laws being passed more efficiently, it also may result in laws not being adequately considered before being passed, causing negative side effects when such laws are not adequately debated before enactment.

Lesson summary

- Both the Victorian and Commonwealth Parliaments have a bicameral structure that ensures all proposed legislation moves through two houses of elected representatives before becoming law, with the exception of Victoria's state budget legislation.
- Bills must be read and approved by both houses before becoming law, however, this can be delayed by a limited number of sitting days.
- The composition of the upper house is particularly relevant as its political makeup can determine the speed at which bills pass as well as the quality and level of review and amendment undertaken.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is to 'discuss the ability of parliament and the courts to make law'. This table evaluating the effect of the bicameral structure on the ability of parliament to make law, along with summary tables in Lessons 7G and 7H, can assist you in discussing parliament's ability to make law. 'Strengths' of the effect of the bicameral structure refer to factors that can strongly influence parliament's ability to make law and/or the effectiveness of that law-making, whereas 'limitations' are factors that limit the influence of the bicameral structure on law-making by parliament, or its effectiveness in law-making.

Table 3 Evaluating the effect of the bicameral structure on the ability of parliament to make law

Strengths	Limitations
• If the parliament consisted of only one house, the government could pass legislation that aligns solely with its political agenda rather than the views and values of constituents. The inclusion of a second house can prevent this from happening. • The inclusion of a second house of parliament ensures all bills are reviewed and debated, to ensure the government of the day does not alter the law dramatically without appropriate scrutiny. • When the government holds a majority in both houses, it may be able to pass bills with few barriers from conflicting parties, therefore increasing the speed at which new laws can be passed. This can help overcome the challenge posed by the limited sitting weeks of parliament. • An upper house, in which the government does not have a majority, will conduct a higher level of review on proposed legislation, assisting in improving the quality of parliamentary law-making.	• A hostile upper house can delay the speed at which bills are passed by the parliament. • If particularly stubborn MPs hold the balance of power in the upper house, they may force the government to alter bills for specific interests that may not represent the views of the broader population. • In a situation where the government holds a majority in both houses, the upper house may 'rubber stamp' bills and therefore, the bill may undergo little to no consideration. • The law-making process undertaken by parliament, which involves passing the bill through both houses, is generally lengthy and must be carried out for every bill. • MPs are only required to be in parliament for less than half of the year. Therefore, as the law-making process can only occur when the parliament is 'sitting', there can be weeks where no law-making is carried out by parliament.

7F Questions

Check your understanding

Question 1

In most Australian jurisdictions, including in the Victorian and Commonwealth Parliament, proposed legislation only needs to pass through one House of Parliament before becoming a law.

- True
- False

Question 2

Which of the following may occur in the upper house when the government of the day holds a majority?

(Select all that apply)

- A. Legislation will tend to pass with ease.
- B. The upper house will act as a 'rubber cross'.
- C. Some interests of minority groups in the population may be missed in law-making.
- D. The level of debate on bills is likely to be lower than usual.

Question 3

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

majority

minority

helpful

hostile

When the government of the day has a in the upper house, this is known as a upper house.

Question 4

Parliament's law-making capacity can be physically limited by the:

- A. cost of fuel.
- B. number of sitting weeks.
- C. location of parliament house.
- D. distance of MPs from each other.

Question 5

Which of the following parliamentary chamber compositions may limit the effectiveness of parliament's law-making? (Select all that apply)

- A. Hostile Senate
- B. Hostile Legislative Council
- C. 'Rubber stamp' Senate
- D. 'Rubber stamp' Legislative Council

Question 6

The effectiveness of law-making by parliament depends on both houses working in cooperation.

- A. True
- B. False

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

(2 MARKS)

Outline the makeup and function of a bicameral parliament.

Question 8

(4 MARKS)

Describe **two** ways the bicameral structure of parliament improves the ability of parliament to make law.

Extended response

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

Question 9

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the effect of the bicameral structure on the ability of parliament to make law.

Statement	Strengths	Limitations
I. In a situation where the government holds a majority in both houses, the upper house may 'rubber stamp' bills. Therefore, the bill may undergo little to no consideration.	☐	☐
II. When the government holds a majority in both houses, it may be able to pass bills with few barriers from opposing parties, therefore increasing the speed at which new laws can be passed.	☐	☐
III. The inclusion of a second house can prevent the government from passing legislation that aligns solely with its political agenda.	☐	☐
IV. If particularly stubborn MPs hold the balance of power in the upper house, they may force the government to alter bills for specific interests that may not represent the views of the broader population.	☐	☐
V. An upper house in which the government does not have a majority will usually conduct a higher level of review on proposed legislation, potentially improving the quality of parliamentary law-making.	☐	☐

Question 10

(5 MARKS)

Discuss the effect of the bicameral structure of parliament on parliament's ability to change the law.

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

Use the following information to answer questions 11 and 12.

Following the 2031 federal election, the composition of the Senate was as follows:

Government-held seats	Non-government-held seats
30	46

Question 11

Which of the following statements are correct about ways the bicameral structure improves the law-making ability of parliament? **(Select all that apply)**

- A. Bills that are passed through a hostile Senate may have undergone a higher level of review and scrutiny.
- B. When the government does not hold a majority in the upper house, it must consider a broader range of perspectives, leading to more inclusive law-making.
- C. In a situation where there is a 'rubber stamp' upper house, it is difficult for the government to implement its legislative plans.
- D. Minor parties and independents in the upper house often act to speed up the law-making process of the parliament.

Question 12

(5 MARKS)

To what extent does the composition of this Commonwealth Parliament affect its law-making ability? Justify your answer with reference to the table.

Adapted from VCAA 2019 Section A Q2

Linking to previous learning**Question 13**

(5 MARKS)

Imagine the Minister for Agriculture, Hay Plough MP, introduced a bill to the Legislative Assembly after a growing number of suburban homes began cultivating large quantities of crops in their backyards. This resulted in increased pests, such as rodents and foxes, in suburban areas, which many people have found to be dangerous. A few months after, the Suburban Agriculture Bill 2056 (Vic) was introduced and passed through the Legislative Assembly. The bill is not yet an Act and now faces a hostile Legislative Council.

- a. Outline **one** role of the Governor in passing the Suburban Agriculture Bill 2056 (Vic).

2 MARKS

Adapted from VCAA 2019 exam Section B Q2b

- b. Describe **one** limitation of the parliament's law-making ability in this scenario.

3 MARKS

7G Parliament's ability to make law - international pressures



Image: Alisusha/Shutterstock.com

'To deny people their human rights is to challenge their very humanity.'
—Nelson Mandela (Former President of South Africa, 1990)

Many human rights protections in Australia can be attributed to the influence of international pressures. International bodies, such as the United Nations (UN), encourage states to adopt laws that aim to achieve global peace by upholding human rights.

STUDY DESIGN DOT POINT

- factors that affect the ability of Parliament to make law, including:
 - the bicameral structure of Parliament
 - international pressures
 - the representative nature of Parliament

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.7.1

International pressures

- 4.1.7.1.1 International treaties
- 4.1.7.1.2 International declarations
- 4.1.7.1.3 The United Nations (UN)
- 4.1.7.1.4 Other international organisations

Lesson introduction

Australia has made a broad range of international commitments to comply with certain standards across the globe because it is signatory to a number of international treaties and declarations. These relate to areas such as human rights, economic trade, environmental protection, and upholding peace. Parliaments may face pressure from other countries and international organisations to create or amend its laws to comply with international obligations set out in these treaties and declarations. Alternatively, if parliament attempts to pass laws that breach international obligations, international forces may fight against the legislation from being passed.

International pressures 4.1.7.1

KEY TERM

International pressures the influence that other countries and international organisations exert on parliaments to ensure the laws created comply with international standards.

LEGAL VOCABULARY

International law a set of rules and principles that regulate the conduct of countries and international organisations.

Parliament may face **international pressures** from other countries and international organisations if it fails to comply with international human rights standards or international obligations. These pressures may result in parliament creating or amending laws to uphold international standards. Alternatively, international pressures may encourage parliament to not pass legislation that breaches **international law**. Therefore, Australia's desire to comply with international forces directly impacts its ability to amend current and create future laws. Failure to uphold international law may result in scrutiny from other countries and international organisations. However, international laws do not apply like domestic laws as they are created and enforced in different ways.

REAL WORLD EXAMPLE

Covid Crisis

The COVID-19 pandemic was the largest global health crisis in the last century, causing over six million deaths as of September 2023. Originating in China in 2019, the coronavirus spread internationally, forcing governments across the globe to take action. As other countries began entering into periods of lockdown to reduce the spread of the virus and limit the number of Covid-related deaths, Australia was expected to follow. On 23 January 2020, China became the first country to impose a lockdown in parts of Hubei. On 12 March 2020, Australia entered its first lockdown period, after international pressures compelled the nation to take similar precautionary actions. By the end of March 2020, over 100 countries had entered into full or partial lockdowns.

Furthermore, the Commonwealth Parliament passed laws in response to the COVID-19 pandemic. For example, the *Coronavirus Economic Response Package Omnibus Act 2020* (Cth) was passed, which authorised a series of economic support payments to Australians. This was passed in an attempt to reduce the devastating economic impacts the pandemic had on individuals who were unable to work due to the pandemic.

Adapted from 'The true death toll of COVID 19: estimating global excess mortality' (World Health Organisation, 2023) and 'Lawmaking during the Covid 19 Pandemic' (Australian Law Reform Commission, 2022)



Image: Sebastian Reategui/Shutterstock.com

Figure 1 The global COVID-19 pandemic forced Australia to enter into lockdowns and create legislation in response to the crisis

International treaties 4.1.7.1.1

An **international treaty**, also referred to as a 'covenant' or 'convention', is an agreement between two or more countries or international organisations in which international rights and obligations are created. International treaties may be bilateral, meaning they involve an agreement between two parties, or multilateral, meaning they involve more than two parties. A country can become a party to a treaty by signing it, which is the first step of the treaty-making process and indicates the signatory intends to be bound by the treaty's terms. The next step is **ratification**, which is a more formal undertaking to be bound by the terms of the treaty. Once a treaty is signed and ratified, this does not automatically mean the agreement forms part of domestic law. Parliaments must pass legislation to give effect to the promises it has made by signing the treaty. The Commonwealth Parliament is able to give effect to treaties through domestic legislation under the external affairs power in s 51(xxix) of the Constitution.

Table 1 Examples of international treaties Australia has signed and ratified, and legislation enacted to incorporate some or all of the international obligations into domestic law

International treaty	Legislation enacted under Australian law
<i>International Convention on the Elimination of all Forms of Racial Discrimination (ICERD)</i> , ratified in 1975.	The following Acts give effect to some provisions in ICERD: • <i>Racial Discrimination Act 1975</i> (Cth) • <i>Age Discrimination Act 2004</i> (Cth) • <i>Disability Discrimination Act 1992</i> (Cth) • <i>Sex Discrimination Act 1984</i> (Cth)
<i>International Covenant on Civil and Political Rights (ICCPR)</i> , ratified in 1980.	The following Act gives legislative effect to obligations Australia has under the ICCPR: • <i>Australian Human Rights Commission Act 1986</i> (Cth)
<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Torture Convention or CAT)</i> , ratified in 1989.	The following Acts give effect to some provisions in CAT: • <i>Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010</i> (Cth) • <i>Criminal Code Act 1995</i> (Cth)

KEY TERM

International treaty an agreement between two or more countries or international organisations, that creates international rights and obligations.

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.

CONSTITUTION

Section 51(xxix)

LEGISLATION

Racial Discrimination Act 1975 (Cth)
Age Discrimination Act 2004 (Cth)
Disability Discrimination Act 1992 (Cth)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Crimes Legislation Amendment (Torture Prohibition and Death Penalty Abolition) Act 2010 (Cth)
Criminal Code Act 1995 (Cth)

LEGAL VOCABULARY

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.

Australia is a signatory to, and has ratified, many international treaties. Once a treaty is ratified, it becomes binding under international law, meaning Australia is obliged to fulfil its commitments as outlined by international law. However, there are limited mechanisms by which UN **Member States** and international organisations can enforce compliance with international law. Despite this, where a Member State, such as Australia, breaches international law, it will likely face criticism from other Member States for failing to uphold obligations set out in international treaties, such as those relating to human rights. As a result, this puts pressure on parliament to create or amend laws based on recommendations made by other countries and international bodies.

HYPOTHETICAL SCENARIO



Figure 2 For international treaties to come into effect in Australia, the Commonwealth Parliament must pass legislation that gives effect to provisions of the covenant

From treaty to law: The process

Assume the Australian government signs a treaty with New Zealand in which both nations commit to lowering the voting age to 16 for federal elections. Merely signing this treaty means it has no impact on the voting age in Australia. The commitment made in the treaty only takes effect under international law once ratified. In order for the change to come into effect in Australia, the Commonwealth Parliament must pass legislation lowering the voting age to 16 for federal elections.

REAL WORLD EXAMPLE



Image: STRINGER Image/Shutterstock.com

Figure 3 Australia has faced criticism for its treatment of asylum seekers, which has breached international law

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

Australia's asylum seeker crisis

Australia has faced criticism from various countries and the United Nations (UN) for its treatment of asylum seekers. In particular, Australia's continued use of offshore processing and prolonged detention for asylum seekers has been condemned. 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). 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.

It has been found that Australia has breached various international treaties, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, due to the harsh conditions on the island. 12 asylum seekers have died on the island, 'mainly as a result of inadequate healthcare and suicide'. In response to pressures faced by Australia to uphold international treaties, the 2021 government of Scott Morrison decided to end Australia's offshore processing agreement with PNG in 2021. However, as of February 2023, there were still 61 asylum seekers held in Nauru. Consequently, Australia continues to face international criticism, with 47 countries condemning the Australian Government's detention policies in 2023.

Adapted from 'UN member states challenge Australia's refugee and asylum policies' (Refugee Council Australia, 2023) and 'Offshore processing statistics' (Refugee Council Australia, 2023)

KEY TERM

International 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.

International declarations 4.1.7.1.2

A nation may sign an **international declaration** to recognise a universal set of principles that it is not bound to follow. Unlike international treaties, declarations are not subject to ratification by countries. However, the principles set out in international declarations may overlap with international treaties to which Australia is legally bound. For example, Australia has signed the *Universal Declaration of Human Rights* (UDHR), which sets out many human rights and freedoms. Whilst Australia is not bound to uphold the human rights established in this declaration, there is significant overlap between this declaration and the treaties Australia has ratified, such as the ICCPR.

Despite not being legally bound, parliament may face international criticism for failing to uphold the principles set out in an international declaration that it has signed. As a result, this often encourages parliament to make laws that reflect these basic standards of human rights to align Australian law with international standards.

REAL WORLD EXAMPLE

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, inappropriate terms, or distressing events.

The Australian government's treatment of First Nations peoples falls below international standards

In September 2007, the United Nations General Assembly, the main body of the United Nations (UN) that makes policies, adopted the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). This declaration was adopted by a vote of 143 countries in favour, four against (one of which was Australia), and 11 **abstentions**. The declaration outlines the individual and collective rights of Indigenous peoples, including to live in dignity and to maintain and strengthen their own institutions, cultures, and traditions.

Australia has faced, and continues to face, heavy criticism from various countries for its treatment of Aboriginal and Torres Strait Islander peoples. In September 2022, the United Nations Human Rights Committee found that Australia violated First Nations peoples' ability to enjoy their culture by failing to adequately protect them against the impacts of climate change. As a result, Australia reversed its 'against' decision and took steps to formally adopt the UNDRIP into Australian law, as demonstrated by the United Nations Declaration on the Rights of Indigenous Peoples Bill 2022 (Cth).

Adapted from 'United Nations Declaration on the Rights of Indigenous Peoples Bill 2022' (Parliament of Australia, 2022) and 'United Nations Declaration On The Rights Of Indigenous Peoples' (United Nations, 2007)



Image: patrice6000/Shutterstock.com

Figure 4 Australia faced international pressure to adopt the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)

The United Nations (UN) 4.1.7.1.3

Australia is a founding Member State of the **United Nations (UN)**, an international organisation formed in 1945 that is composed of 193 Member State as of 2023. The UN aims to promote international peace, strengthen human rights, and achieve international cooperation for problems affecting the global community. The UN was founded by the *Charter of the United Nations*, which grants it the power to take action on a broad range of issues. The *UN Charter* is considered an international treaty and is, therefore, an instrument of international law. Australia is bound by the *UN Charter* since it was ratified in 1945, which gives rise to commitments that may impact the ability of parliament to make law.

The Universal Periodic Review (UPR) is a process that takes place every four years, and is used by the UN to ensure each Member State, such as Australia, is upholding its commitments under international law. During each UPR cycle, Australia is required to present a report and appear at the UN in Geneva to answer questions from other Member States. This provides an opportunity for Member States to recommend the need for law reform in different areas of human rights. Whilst these recommendations are not legally binding, they are often highly influential as they are made by other countries, are public in nature, and are regularly reported on in the media.

KEY TERM

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.

LEGAL VOCABULARY

Abstention when a participant in a vote does not vote in favour of, or against a proposal or motion, deciding not to participate in the vote at all.

REAL WORLD EXAMPLE

Should children as young as 10 be locked up?

As of 2023, the age of criminal responsibility, which refers to the age a child can face criminal charges, is 10 years old and older for Commonwealth offences in Australia. Each state and territory is responsible for establishing its own age of criminal responsibility, with this age being unanimously set at 10 years old Australia-wide prior to 2023.

Australia faced international pressure at the UPR in 2021, with 31 countries recommending that Australia raise the age of criminal responsibility to 14 years old. Various countries condemned Australia for being well below international standards.

After receiving this criticism, the Victorian Government announced in April 2023 that it would raise the age of criminal responsibility from 10 to 12, doing so by the end of 2024. The government also announced the long-term aim of raising the age to 14 by 2027. As of 1 August 2023, the Northern Territory reformed the existing law and changed the age of criminal responsibility to 12 years.

Adapted from 'More than 30 countries condemn Australia at UN over high rates of child incarceration' (Hurst, 2021)



Image: Tinnakorn jorruang/Shutterstock.com

Figure 5 Australia faced international pressure at the UPR to raise the age of criminal responsibility

REAL WORLD EXAMPLE



Image: Christie Cooper/Shutterstock.com

Figure 6 Australia faces international pressures to take climate action

Climate crisis

On 20 September 2023, a Climate Action Summit was held by the UN at its headquarters in New York. The summit was attended by world leaders, business giants, and experts in an attempt to 'accelerate action by governments, business, finance, local authorities and civil society'. According to the Intergovernmental Panel on Climate Change's latest assessment, the climate crisis has already caused extensive damage. Therefore, immediate action is needed. Whilst there have been many climate change meetings, this only permits 'leaders who have responded to the Secretary-General's call for accelerated action to tackle the climate crisis'.

Prior to the summit taking place, government leaders were informed they would be expected to deliver report cards on their stance on honouring their past commitments to treaties related to climate change, such as the *Paris Climate Agreement*. Australia is a party to this treaty, which aims to tackle climate change. In March 2023, the Australia Institute published a statement calling on the government to halt 'over 100 new coal and gas projects in the pipeline'. Additionally, an open letter, signed by over 200 experts and scientists, called on Australia to 'accelerate climate action, not climate annihilation'. Therefore, Australia has been called on by the UN, as well as climate experts and scientists, other countries, organisations, and groups to do more to help cut emissions.

Adapted from "No nonsense' Climate Ambition Summit: What you need to know' (UN News, 2023) and 'Climate scientists and Pacific activists call on Australia to ramp up ambitions ahead of UN summit' (Hodge, 2023)

LESSON LINK

You will learn more about the need for law reform in **9A Reasons for law reform**.

Other international organisations 4.1.7.1.4

International organisations, which can comprise many Member States, can place pressure on parliaments to make or change the law. These organisations may be able to enforce international treaties that their Members have entered. Alternatively, some organisations may not have the power to impose legal obligations to directly influence parliaments to change the law. However, these organisations can still be highly influential in sparking public interest in particular human rights issues that countries, such as Australia, are failing to uphold. Consequently, this may pressure parliament to establish or amend laws to reflect societal values.

Table 2 International organisations and their impact on parliament's ability to make law in Australia

International organisation	Explanation
The Group of Twenty (G20)	An intergovernmental forum comprising 19 countries, including Australia and the European Union, that meets annually to strengthen international economic cooperation. Initially focused on discussing macroeconomic issues, the G20 is now a forum to discuss other global issues, such as climate change and anti-corruption. Australia has entered into treaties with other countries as a result of the issues discussed at the G20 Summit. For example, within the forum, Australia actively promotes a rules-based multilateral trading system.
World Trade Organisation (WTO)	An international body comprising 164 nations that determines international trade rules. The WTO is involved in the negotiation, monitoring, and enforcement of international trade agreements that are reached through negotiations among its Member countries. For example, Australia is bound to follow the <i>Information Technology Agreement</i>, which removes tariffs on IT products. If a Member country believes Australia is violating this agreement, it can file a complaint with the WTO's Dispute Settlement Body, which will investigate the matter and, if necessary, authorise sanctions against the offending country.
Amnesty International	A non-governmental organisation that advocates for human rights across the globe. Amnesty International is a global movement, active in more than 150 countries. Amnesty International pressures parliaments around the world, including the Commonwealth Parliament, to change laws that violate human rights. This can be achieved by exposing countries that are breaching international law and lobbying governments to respect international law.

Continues →

Table 2 Continued

International organisation	Explanation
Greenpeace	An independent campaigning organisation operating in 55 countries across the globe to expose environmental problems through peaceful protests and creative confrontation. Greenpeace puts pressure on parliaments around the world, including in Australia, by influencing international treaties on environmental protection. Greenpeace attends international forums in order to encourage countries to protect the environment.

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 distressing events and injustice.

Amnesty International's fight for Indigenous Justice

Amnesty International's 'Indigenous Justice' campaign aimed to raise awareness about the overrepresentation of First Nations children in detention centres. During its campaign, Amnesty International condemned Australia's treatment of Aboriginal and Torres Strait Islanders. In particular, the organisation claimed the reason Aboriginal and Torres Strait Islander children have 'more contact with police, courts and prisons' is due to racism, over-policing, unfair policies, and discriminatory laws in Australia.

The Indigenous Justice campaign has two main goals that aim to reduce the overrepresentation of First Nations children in detention centres. Firstly, Amnesty International has sought to encourage Australia's Federal Parliament to raise the age of criminal responsibility from 10 to 14. In August 2022, the organisation placed pressure on the Australian Parliament to raise the age by obtaining approximately 210,000 signatures from everyday Australians in support of raising the age. Secondly, the campaign aims to increase government funding of First Nations-led community diversion programs that enable offenders to deal with criminal matters, when they are relatively minor, outside of the court system, doing so to allow the offender to avoid a criminal record. The Australian Government listened and announced that it would be allocating \$81.5 million towards initiatives that address the root cause of the incarceration of Indigenous peoples.

Adapted from 'Wins: Australia steps up to fight climate change, refugees no longer in TPVS limbo, Yasman and Monireh are free, and more' (Amnesty International, 2023) and 'Indigenous Justice' (Amnesty International, n.d.)



Image: paintings/Shutterstock.com

Figure 7 Amnesty International undertook campaigns for Indigenous Justice

Lesson summary

- International pressures affect the ability of parliament to make law, as all current and future laws should comply with the international law to which Australia is committed to.
- Where parliament is not bound by international law, failure to comply with international obligations may result in parliament facing criticism from other countries, the UN, and other organisations.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is to 'discuss the ability of parliament and the courts to make law'. The table on the next page evaluating the effect of international pressures on the ability of parliament to make law, along with summary tables in Lessons 7F and 7H, can assist you in discussing parliament's ability to make law.

'Strengths' of the effect of international pressures refer to factors that can strongly influence parliament's ability to make law and/or the effectiveness of that law-making, whereas 'limitations' are factors that limit the influence of international pressures on law-making by parliament, or its effectiveness in law-making.

Table 3 Evaluating the effect of international pressures on the ability of parliament to make law

Strengths	Limitations
• If Australia is found to be in breach of the obligations within international treaties to which it is a signatory and has ratified, Australia will likely face criticism from other countries, and potentially other consequences, for failing to comply with the obligations, such as failing to uphold fundamental human rights set out in international treaties. This may influence parliament to change the law to avoid further criticism. • International organisations may be influential in sparking public interest in relation to particular issues, such as those relating to human rights and climate change, that countries, such as Australia, fail to uphold. This may place pressure on parliament to create or amend laws to reflect societal values and international standards as, by doing so, members of parliament (MPs) can increase their chance of re-election by better reflecting the views of their constituents. • Whilst international declarations are not legally binding, parliament may face criticism for failing to uphold the principles set out in declarations, such as the <i>Universal Declaration of Human Rights</i>. • International treaties can be implemented by enacting legislation into domestic law, for example, by enshrining human rights protections in statute law. • International organisations, such as the UN and the WTO, have the power to impose sanctions on countries for breaching international treaties. Only the organisation has the power to remove these sanctions, placing pressure on a country, and more specifically their parliament, to comply with international law by not passing legislation that contravenes treaties. • The UPR provides an opportunity for Member States to recommend the need for law reform in different human rights areas, which may be highly influential as they are made by other countries and are public in nature.	• There are limited mechanisms by which UN Member States and international organisations can enforce compliance with international law. • Unless Australia is a member of an international organisation or has ratified an international treaty, the Commonwealth Parliament is under no legal obligation to comply with international expectations and standards. • Pressures from international organisations may limit the ability of parliaments to make laws that are tailored to the unique needs and circumstances of a population. • International declarations are not legally binding, meaning parliament will not face legal consequences for failing to uphold the principles set out in a declaration. • Recommendations for law reform made by UN Member States at the UPR are not legally binding, meaning Parliament does not have to adopt these recommendations. • International society may have conflicting views and opinions on certain issues. For example, transnational mining corporations may encourage Australia to trade coal and iron as doing so boosts their profits. The pressure from these corporations may, therefore, conflict with pressures from other organisations, such as Greenpeace, that may compel Australia to reduce coal emissions to combat climate change. Therefore, parliament has to decide which pressures to accept and which to ignore.

7G Questions

Check your understanding

Question 1

International pressures may result in parliament creating or amending laws to uphold international standards.

- A. True
- B. False

Question 2

Once signed, an international treaty:

- A. is binding under international law.
- B. does not automatically become binding under international law until the treaty is ratified.

Question 3

Fill in the blanks with the following terms:

treaties

declarations

International [] are not legally binding and are a statement of principles that a nation may sign.

Alternatively, international [] are agreements that become legally binding under international law upon ratification.

Question 4

Which of the following statements are correct about international organisations pressuring parliament to change or make laws? **(Select all that apply)**

- A. International organisations may be able to enforce international agreements their Member States have entered into, placing pressure on parliament to uphold their international commitments.
- B. International organisations may create laws on behalf of parliament which must be followed and cannot be changed.
- C. International organisations may be influential in sparking debate and public interest in particular issues, placing pressure on parliament to create or amend laws that reflect society's values as MPs will try to create laws their constituents would support in order to be re-elected.

Question 5

The United Nations (UN) can pressure the Australian Parliament to make laws by:

- A. creating international declarations that all Member States, including Australia, are legally bound to follow.
- B. holding Universal Periodic Reviews (UPRs) that provide an opportunity for Member States to scrutinise Australia's human rights laws and recommend changes to the law.

Question 6

Whilst the provisions of international treaties and declarations are not directly incorporated into Australia's domestic laws, they can be a large influence on the legislation enacted by parliament.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Describe **one** impact that international pressures may have on the ability of parliament to make law.

Question 8

(3 MARKS)

More than 156 countries have signed the *International Convention on the Elimination of All Forms of Racial Discrimination 1966* (ICERD), including Australia. Parliament then ratified the international treaty and passed the *Racial Discrimination Act 1975* (Cth), which incorporated some provisions of the ICERD into domestic law.

Explain how international pressures may protect the Australian people in relation to discrimination.

Question 9

(4 MARKS)

In your view, to what extent do international pressures affect the ability of parliament to make law? Justify your answer.

Adapted from VCAA 2019 exam Section A Q2

Extended response

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

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the effect of international pressures on the ability of parliament to make or change law.

Statement	Strengths	Limitations
I. Pressures from international organisations may limit the ability of parliaments to make laws that are tailored to the unique needs and circumstances of a population.	☐	☐
II. If Australia is found to be in breach of the obligations within international treaties to which it is a signatory and has ratified, Australia will likely face criticism from other countries, and potentially other consequences, for failing to uphold the obligations.	☐	☐
III. International organisations may be influential in sparking public interest in particular issues, such as those relating to human rights and climate change, that countries fail to uphold.	☐	☐
IV. Australia is a signatory to a broad range of international declarations which, if not upheld, may cause Australia to face criticism, such as for failing to uphold the basic human rights set out in a declaration.	☐	☐
V. International declarations are not legally binding, meaning the Australian Parliament will not face legal consequences for failing to enact legislation to uphold the principles set out in a declaration.	☐	☐
VI. International organisations, such as the UN and the WTO, have the power to impose sanctions on countries for breaching international treaties. Only the organisation has the power to remove these sanctions, placing pressure on a country, and more specifically its parliament, to comply with international law by not passing legislation that contravenes treaties.	☐	☐

Question 11

(7 MARKS)

'International pressures are effective at influencing parliament to change laws.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2020 exam Section B Q2c

Linking to previous learning

Question 12

(3 MARKS)

Imagine that, hypothetically, the House of Representatives wants to initiate legislation to return refugees who enter Australia to their country. However, Australia is a party to the *Convention Relating to the Status of Refugees (1967)*, which aims to prevent refugees from being expelled or returned to places where they would face persecution.

Explain **one** reason why parliament may not change the law in this case.

Adapted from VCAA 2018 Sample exam Section B Q3c

Question 13

(3 MARKS)

Explain the relationship between the role of the Commonwealth Parliament and international pressures.

7H Parliament's ability to make law – representative nature

STUDY DESIGN DOT POINT

- factors that affect the ability of parliament to make law, including:
 - the bicameral structure of parliament
 - international pressures
 - the representative nature of parliament

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.8.1

The representative nature of parliament

- 4.1.8.1.1 Reflecting the community
- 4.1.8.1.2 Regular elections



Image: julian meehan/Shutterstock.com

Across Victoria, many primary and secondary schools have a Student Representative Council (SRC) program that allows students to become representatives of their class or year. If you have participated in voting for one of these representatives, you may remember election promises such as 'pizza every Friday', whilst also pledging to listen to and represent their voters. As many of you now are reaching voting age, you may have realised there are many similarities between SRC elections and Australian politics. MPs seek to represent the interests of their voters, with a constant reminder that failing to do so, may cause them to be voted out.

Lesson introduction

Through its various elected members, parliament has a duty to voters and the broader community to represent their interests through its law-making. As voters have regular opportunities to change their representatives at elections, members of parliament (MPs) have the incentive to continue serving their constituents. However, representative law-making is not always possible if electoral candidates and the parliament are not an accurate reflection of the community and their views and values.

The representative nature of parliament 4.1.8.1

Parliament is the supreme law-making body, and therefore, has a duty to utilise its power to represent the interests of the Australian people. The principle and process that underpins this duty to represent is Australia's election system, being a **democratic society**. The Australian Constitution establishes Australia as a representative democracy, as sections 7 and 24 of the Australian Constitution outline that both Houses of Parliament must be directly elected by the people. Similarly, the Victorian Constitution, the *Constitution Act 1975* (Vic), states that the members of the Legislative Assembly and Legislative Council must be elected by the people from their respective districts.

The **members of parliament (MPs)**, at a state or Commonwealth level, are the most popular candidates in their local community. Therefore, parliament aims to represent the people, as each MP is elected by the people, for the people.

KEY TERM

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

LEGAL VOCABULARY

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

CONSTITUTION

Section 7
Section 24

LEGISLATION

Constitution Act 1975 (Vic)

LESSON LINK

You will learn more about sections 7 and 24 of the Constitution in **71 The Constitution as a check on parliament – representative government**.

LEGAL VOCABULARY

Electorate a geographical area with approximately 100,000–120,000 voters residing within the area.

Electoral district a geographical area with a given population of individuals residing within the area that vote to elect one member to represent them in Parliament.

The effectiveness of parliament in creating laws is not solely determined by how quickly legislation is enacted. It also relates to the quality of the bills, particularly in terms of how well they address the current and future needs of society.

Reflecting the community 4.1.8.1.1

Whilst each MP is elected in a manner that is considered democratic, the representative nature of each parliament, whether that be the Commonwealth or state/territory parliaments, can also depend on who is nominated for each **electorate** or **electoral district** respectively.

The Victorian Parliament published a research note in 2022 outlining that the average MP was ‘male, university educated, born in Australia and turning 45–64 during the election year’ (Parliament of Victoria, 2022). Additionally, the same study found that ‘those aged 18–44 and 65 and above are underrepresented in parliament’. Similarly, women and migrant Australians are consistently disproportionately reflected in the compositions of both Victorian and Commonwealth Parliaments. This demonstrates that the extent to which diverse populations and minority groups are represented in law-making is limited. Even for an MP with the best intentions of representing a community, if they lack the lived experience of certain demographics, they will likely not be able to fully represent their community in law-making. There is also no requirement for MPs to actually reside in the community they are elected to represent, which can also affect their ability to meaningfully represent their constituency as they may lack specific local knowledge on key issues.

WANT TO KNOW MORE?

You can find out more about the composition of the Commonwealth Parliament by searching ‘The Parliament: Traits and trends’ and clicking the ‘Australian Parliament House’ (Parliament of Australia, 2013) webpage.

Women in Australian parliaments 2001 to 2022 (%)

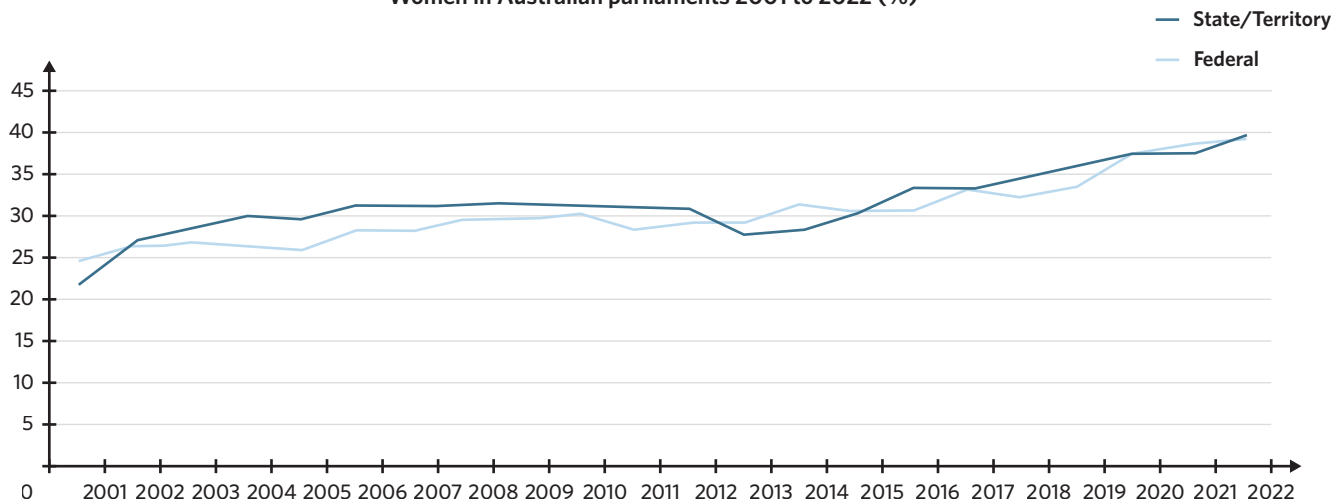


Figure 1 The closing gender divide in the parliaments of Australia

REAL WORLD EXAMPLE



Figure 2 In the 47th Commonwealth Parliament, elected in 2022, Aboriginal and Torres Strait Islander representation is above the national population percentage

First Nations' representation in the Commonwealth Parliament

The 47th Commonwealth Parliament, elected in 2022, consists of 11 members across the House of Representatives and the Senate, who identify as First Nations. This is the highest level of representation in the Commonwealth Parliament's history and has been regarded as a step in the right direction for a truly representative parliament, considering the years of systematic under-representation of First Nations peoples in law-making. With these 11 members, they now compose 4.8% of the Commonwealth Parliament, whilst Aboriginal and Torres Strait Islander peoples make up around 4% of the national population. This demonstrates how Australian society may be moving towards parliament being a more accurate representation of the Australian people.

Adapted from 'Indigenous Voice to Parliament' (Australian National University, n.d.)

REAL WORLD EXAMPLE

Shifting tides of gender equality

The 60th Victorian Parliament, elected in 2022, is the most gender-diverse in its history. For the first time, in the Victorian Parliament upper house, the Legislative Council, women outnumbered men 22 to 18. This has been considered a milestone for the representative nature of parliament and demonstrates remarkable progress over the century since 1923, when women were first permitted to be elected as MPs.

Newly elected members, such as Member for Mildura, Jade Benham, speak of positive experiences as women in parliament and how they are ready to show up and lead on behalf of their communities.

Whilst the gap in the Legislative Assembly is slowly closing, in the 60th Parliament, women made up 44% of MPs, despite 50.8% of Victorians identifying as women in the 2021 Census.

Adapted from 'Leading in more ways than one' (van Zaanen, 2023)



Image used with permission from Jade Benham

Figure 3 MP for Mildura, Jade Benham, is one of the many newly-elected female MPs to the 60th Victorian Parliament

The demographic composition of parliament can affect its law-making ability as it means that a particular set of interests by a group of individuals may be, with or without intent, overrepresented and catered for in legislation. This inequality could cause groups in the community to be disregarded by parliament and therefore, parliament's ability to enact legislation in a representative manner is reduced.

Moreover, the ability of parliament to remain representative is also dependent on its ability to respond to the needs of law reform. Members of the community can influence law reform through various means, such as protests or petitions. Therefore, parliament should be willing to respond to such community activity if it wishes to reflect and represent the diverse voices of the community. In these circumstances, parliament may be able to overcome diversity issues in-house by remaining proactive and responsive to the community, allowing it to retain some level of representativeness.

Regular elections 4.1.8.1.2

In order to achieve representative government, regular elections are held, enabling the Australian people to elect members to represent them in parliament. Regular elections ensure the government is mindful to act in the best interests of the people, as failure to do so may increase the risk of being voted out of office at the next election. The *Commonwealth Electoral Act 1918* (Cth) mandates that voting is compulsory for all Australian citizens 18 years or older enrolled on the **electoral roll**.

At the state level in Victoria, the Victorian Constitution outlines that elections are held on the last Saturday of November every four years. In contrast, at the Commonwealth level, elections are required to occur every three years for the House of Representatives but can be called earlier. Senators, on the other hand, are elected for a term of six years. If the Commonwealth's **government of the day** wanted to extend its term of office, this would require a **referendum** as this term of office is explicitly stated in and protected by section 28 of the Australian Constitution.

Compulsory voting, despite ensuring a certain level of participation in Australian democracy, can also be perceived as forcing those who do not wish to be politically engaged to cast a vote, which may be uninformed and not representative of their law-making desires and values. On the other hand, as everyone on the electoral roll is required to vote in state and federal elections, political parties are compelled to improve their policies to appeal to the entire population.

LEGISLATION

Commonwealth Electoral Act 1918 (Cth)

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.

CONSTITUTION

Section 28

LEGAL VOCABULARY

Government of the day the political party or coalition with a majority in the lower house.

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

LEGAL VOCABULARY

Constituent a person who votes for, and is then represented in government by, an elected official.

This relatively short period in office places constant pressure on the government of the day to swiftly enact legislation and make its intended improvements to society. This duty to serve **constituents** out of fear of losing office is one of the critical benefits of the representative nature of parliament. By design, MPs are required to not only represent those who elect them, but also actively contribute to the improvement of their communities through law-making. The level of commitment to election promises can also determine a government's chance of re-election. If MPs cannot deliver on their promises, they may not be voted back in as they have betrayed the trust of constituents.

REAL WORLD EXAMPLE

Image: Benjamin Crone/Shutterstock.com

Figure 4 Dr Monique Ryan replaced the former Treasurer of Australia, Josh Frydenberg in the 2022 federal election

Teal Wave: How independent Dr Monique Ryan shook up a conservative stronghold

In the May 2022 federal election, Dr Monique Ryan successfully challenged high-profile Liberal Party MP, Josh Frydenberg. Frydenberg had held the lower-house seat of Kooyong in Melbourne's inner-east for the 12 years prior to this election and also served as Australia's treasurer for the last 4 of those years.

Running on a platform of climate action, a stronger economy, and better integrity in politics, Ryan gathered the support of over 2000 community volunteers, who successfully 'door-knocked' every house in the electorate. In the final distribution of results, Ryan gathered 53% of the votes, compared to Frydenberg's 47%.

Ryan is the first female and independent MP for Kooyong, traditionally a Liberal seat that covers Melbourne suburbs, such as Kew, Hawthorn, and Camberwell. Her election win, alongside two other 'teal' independents in Victoria, four in NSW, and one in WA, signified a shift in the voter mindset of more affluent and traditionally Liberal electorates.

Independents in the Commonwealth Parliament do not hold a political affiliation to any party and therefore, are thought to act in the best interests of their electorate, as opposed to basing their votes for bills on party ideologies and values. The level of influence that independents have on the law-making process in the Commonwealth Parliament can be strong. They can be the determining vote on bills passing through a house and therefore, can push for amendments and policies from the major parties.

Adapted from 'Former treasurer Josh Frydenberg concedes defeat in inner Melbourne seat of Kooyong' (ABC News, 2022)

LEGAL VOCABULARY

Coalition an alliance between two or more political parties with the aim of working together to form a government.

Political party an organisation comprised of members of similar ethos and worldviews with the primary aim of competing in elections to achieve societal and political goals.

For some time, elections at a federal and state level are usually a contest between the Labor Party and the Liberal-National **Coalition**. These **political parties** are part of the foundation of the representative nature of parliament as their ideologies, opposing in many aspects, offer voters a choice of what change and general values they wish their community to be led by. They are an important element of the representative nature of parliament as they simplify the ideals of society into collective groups and make it easier for voters to align and make an informed choice on their representative.

DEEP DIVE

Image: ymgerman/Shutterstock.com

Figure 5 A 2023 study found that those born after 1996 are one of Australia's most progressive cohorts in its parliamentary history

Progressive and proud

Recent studies have found that Gen Z, on average, is 25.3% less likely to vote for the Coalition than the average voter. This shift places the relevancy of this right-wing party into question as the report, conducted by the Centre for Independent Studies, found that the current generation was also less likely to politically shift to the right as they age.

The Liberal-National Coalition has for some time been the 'centre-right' choice in Australia's political landscape. This study proposes that as young people continue to become of voting age, the Labor and Greens vote will likely continue to increase whilst the Coalition's vote will decline, as both the Labor and Greens represent more left-wing, progressive values.

Adapted from 'Young Australians far less likely than parents to shift to right as they age, report finds' (Convery, 2023)

However, there are times where a disconnect between the views of an MP's community and their political party may arise. This can affect the level of representation that parliament can offer in law-making. In both the lower and upper houses of the Victorian and Commonwealth Parliaments, when voting on bills, MPs will usually vote with their political party. This is known as 'voting along party lines', and MPs in a party may experience a level of pressure to keep this consistency in party voting patterns. If an MP does wish to vote against the views of their party, they may **cross the floor** or, if permitted, perform a **conscience vote**. Crossing the floor is an indication that an MP does not agree with their party's stance on a particular matter and/or wishes to represent their own constituents' values.

LEGAL VOCABULARY

Cross the floor an act whereby a member of parliament defects from their political party for a vote in parliament. This physically occurs in parliamentary chambers as the member will move to the opposing side of the room.

Conscience vote a parliamentary vote in which MPs are officially permitted to disregard all party allegiances and vote based on their own beliefs.

REAL WORLD EXAMPLE

Crossing the floor for climate change

In August 2022, Tasmanian Liberal MP Bridget Archer performed a conscious vote on Labor's proposed Climate Change Bill in regard to creating an emissions reduction target of 43% by 2030.

Whilst she raised some issues with proposed amendments, she moved to support the Bill itself, despite the rest of the Coalition choosing to vote against the entire Bill. This is attributed to the fact that residents in Archer's Tasmanian electorate of Bass informed her of their desire for action on climate change. Archer told parliament that 'it's important to me that when I'm back in my own community, I'm able to sincerely say that I used the opportunity afforded to me with the power of my vote to stand up for what they want and need'.

Crossing the floor for such a reason demonstrates the juggle between the potentially conflicting interests of an MP's political party and their own community. Although, whilst MPs like Archer act proactively to preserve the representative nature of parliament's law-making, others may not be so courageous.

Adapted from 'Liberal Bridget Archer crosses floor to vote for Labor's climate bill' (Hislop, 2022)



Source: AUSPIC Collection. Photographer: David Foote. Copyright © 2023 Commonwealth of Australia

Figure 6 In 2022, Tasmanian Liberal MP Bridget Archer crossed the floor to support Labor's climate bill

Lesson summary

- Parliament is representative in nature and must make laws that reflect and represent the views of society.
- Elected representatives are supported by the majority of a particular community, however, they may not reflect diverse populations and minority groups.
- Regular elections compel elected representatives and governments to act in the interests of the public for fear of being voted out in the next election.
- MPs may have to choose between representing their constituents or the interests of their political party.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is to 'discuss the ability of parliament and the courts to make law'. This table evaluating the effect of the representative nature of parliament on the ability of parliament to make law, along with summary tables in Lessons 7F and 7G, can assist you in discussing parliament's ability to make law.

LESSON LINK

You learnt about the two Houses of Parliament in **7A The Commonwealth Parliament and the Crown in law-making**.

Table 1 Evaluating the effect of the representative nature of parliament on the ability of parliament to make law

Strengths	Limitations
• The representative nature of parliament influences MPs to enact laws that represent the views and values of the people.	• Australia's compulsory voting system may result in people casting uninformed votes, thus, the elected party may not be truly representative of the people's views.

Continues →

Table 1 Continued

Strengths	Limitations
- Regular elections place pressure on MPs to represent the views of their constituents as failure to do so could put them at risk of being voted out at the next election. - Over recent times, an increasing number of women have been elected into parliament at both the Commonwealth and Victorian levels, closing the gender divide and improving the ability of parliament to reflect the composition of society in its law-making. - As of 2023, the Commonwealth Parliament comprises a level of First Nations representation proportionate to the First Nations population in Australia. - An MP is able to cross the floor when voting on legislation if they wish to deviate from the views of their political party. This is often done by an MP in order to vote in line with the views of their constituency, so it can ensure law-making is representative of the community's views. - Compulsory voting ensures a large proportion of individuals in Australia participate in elections and that parliaments are comprised of MPs elected by the majority of people. Therefore, if MPs truly represent their constituents' views, law-making can be reflective of the majority's views and values. - The representative nature of parliament, whilst at times may limit the speed at which legislation is introduced, ensures a large number of community values are considered in the law-making process. This improves the quality of law-making and can, therefore, improve society.	- Members of parliament may not vote for law reform in areas where vocal minority groups are against the law, out of fear of not being re-elected, even if the law reform is needed to improve society as a whole. - Historically, in relation to minority cultural groups and women, Australian parliaments have exhibited long-standing disparities in representation, affecting the parliaments' ability to fully account for these demographics in law-making. As of 2023, parliaments in Australia do not adequately represent minority groups in a way that is proportionate to the population of these groups. - As of 2023, First Nations peoples are not adequately represented in the majority of state parliaments, with few parliaments comprising a level of First Nations members proportionate to the population. - MPs may feel compelled to vote with their political party, rather than in line with the desires of their electorate or electoral district, reducing the representation of the constituents' views in parliament's law-making. - A political term of three or four years may not be long enough for productive legislative activity and reform to occur. This may mean parties can make shallow election promises to remain elected, whilst never actually implementing promised law reform. - In an effort to retain voters, parliament may pass legislation to appeal to the majority of society and gain voter support as opposed to legislating for the entire community. - The diversity and therefore, representative nature of parliament can rely upon the characteristics of those people who nominate and run for parliament. Even though communities choose their MP, they can only vote for those who are nominated, so may not even have the option to vote for someone who fully represents them.

7H Questions

Check your understanding

Question 1

The representative nature of parliament ensures the views of all voters are always considered in parliament's law-making.

- A. True
B. False

Question 2

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

voted out

compulsory diversity

regular elections

re-elected

The representative nature of parliament is assisted through [], meaning politicians must act to represent their constituents or else risk being [].

Question 3

Which of the following statements refers to factors that can impact the diversity of parliament?

(Select all that apply)

- A. Voters' preferences.
- B. Those who nominate to be an MP.
- C. The ability of MPs to cross the floor.
- D. The time between elections.

Question 4

Tick the box to indicate whether the following scenarios demonstrate **strengths** or **limitations** of the representative nature of a given parliament.

Scenario	Strengths	Limitations
I. An MP is not willing to cross the floor in the House of Representatives despite feedback to do so from their community.	☐	☐
II. The proportion of men and women in the Legislative Assembly is identical to that of the Victorian population.	☐	☐
III. There are no Aboriginal or Torres Strait Islander MPs in the Senate.	☐	☐
IV. An MP from the Legislative Council introduces legislation that only benefits those who would re-elect them.	☐	☐

Question 5

Which of the following statements is a limitation of the representative nature of parliament?

- A. The diversity, and therefore, representative nature of parliament relies upon those who nominate and run for parliament. Even though communities choose their MP, they may not have the option to vote for someone who fully represents them.
- B. Compulsory voting ensures a large proportion of individuals in Australia participate in elections and parliament is comprised of MPs elected by the majority of Australians.
- C. Regular elections place pressure on parliament to represent the views of the majority of society in law-making or risk being voted out at the next election.
- D. The representative nature of parliament, whilst at times may limit the speed at which legislation is introduced, ensures a large number of community values are considered in the law-making process.

Question 6

The level of representation in parliament's law-making does not depend on diversity, but rather the ability of the MP to listen to their community.

- A. True
- B. False

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

(2 MARKS)

Outline **one** way in which parliament may represent the community in law-making.

Question 8

(3 MARKS)

Describe **one** way the representative nature of parliament may affect its ability to make law.

Question 9

(4 MARKS)

In July 2022, the composition of the Commonwealth Parliament was as follows:

Proportion of women representatives	
Senate	57%
House of Representatives	38%

Ancestry in the Commonwealth Parliament v Australian population		
Non-European	6.6%	23%
Asian	4.4%	18%

Source: 'The 47th parliament is the most diverse ever but still doesn't reflect Australia', The Guardian (Remeikis, 2022)

In your view, to what extent does the composition of the Commonwealth Parliament affect its ability to be representative in law-making? Justify your answer with reference to the table above.

Adapted from VCAA 2019 exam Section A Q2

Extended response

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

Question 10

Which of the following statements are strengths of the representative nature of parliament in improving law-making? **(Select all that apply)**

- A. Regular elections place pressure on MPs to represent their constituents or risk being voted out at the next election.
- B. A political term of three or four years may not be long enough for productive legislative activity and reform to occur. This may mean parties can make shallow election promises to remain elected, whilst never actually implementing promised law reform.
- C. An MP is able to cross the floor when voting on legislation if they wish to deviate from the views of their political party. This is often done by an MP in order to vote in line with the views of their constituency, so it can ensure law-making is representative of the community's views.
- D. MPs may feel compelled to vote with their political party, rather than in line with the desires of their electorate, reducing the representation of their views in parliament's law-making.
- E. Compulsory voting ensures a large proportion of individuals in Australia participate in elections and that parliaments are comprised of MPs elected by the majority of people. Therefore, if MPs truly represent their constituents' views, law-making can be reflective of the majority's views and values.

Question 11

(5 MARKS)

Discuss how the representative nature of parliament affects its ability to make law.

Linking to previous learning**Question 12**

(6 MARKS)

In 2050, Victoria's government of the day proposes to implement free public transport as a part of an initiative to reduce the use of motor vehicles. This government holds a majority in the Legislative Council, whilst the 2050 Victorian Parliament is composed of 79% men.

Explain why the 2050 Victorian Parliament may not be effective in its ability to make law.

71 The Constitution as a check on parliament – representative government

STUDY DESIGN DOT POINT

- the means by which the Australian Constitution acts as a check on parliament in law-making, including:
 - the role of the High Court in protecting the principle of representative government
 - the separation of the legislative, executive and judicial powers
 - the express protection of rights

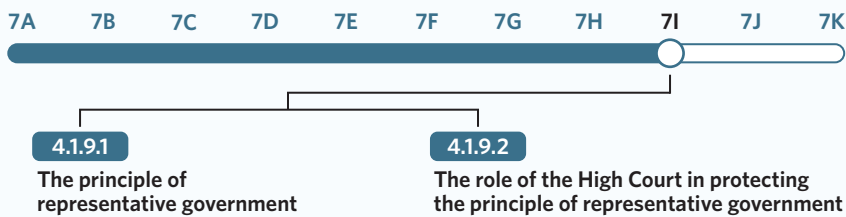


Image: Stock Up/Shutterstock.com

Most schools allow students to vote for their school captain, as this ensures the elected individual represents the views and values of the majority of students. How would you feel if your school principal created a new rule that allowed the principal alone to elect the school captain?

Lesson introduction

The Australian Constitution establishes a system whereby the Australian people elect members of parliament to represent them and make laws on their behalf. In order to uphold and protect this fundamental principle, the High Court is given the power to interpret the Constitution and can declare laws invalid if they are found to be unconstitutional. Therefore, the Constitution acts as a check on parliament to prevent laws that infringe upon the representative nature of government from being made.

The principle of representative government 4.1.9.1

The principle of **representative government** is established and protected by sections 7 and 24 of the Australian Constitution, giving the people the power to elect members of the Houses of Parliament to represent their views. 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 enforces the principle of representative government, often resulting in parliament establishing laws that reflect the views and values of society.

KEY TERM

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 representative nature of parliament in **7H** **Parliament's ability to make law** – representative nature.

CONSTITUTION

Section 7
Section 24

USEFUL TIP

It is important to remember ss 7 and 24 of the Constitution as citing these particular sections in your responses can demonstrate an enhanced understanding of the representative government principle. You can remember these sections, and their corresponding House of Parliament, by using the following alliteration and rhyme:

- section seven senate
- section 24, knockin' on the house's door, where representatives introduce the law

LEGISLATION

Commonwealth Electoral Act 1918 (Cth)

DEEP DIVE**Sections 7 and 24 of the Constitution**

Sections 7 and 24 of the Australian Constitution require members of the Senate and House of Representatives to be 'directly chosen by the people', respectively. However, these sections also outline other requirements that must be upheld to protect the principle of representative government. Sections 7 and 24 of the Australian Constitution are shown below.

Section 7

'The Senate shall be composed of senators for each State, directly chosen by the people of the State, voting, until the Parliament otherwise provides, as one electorate. But until the Parliament of the Commonwealth otherwise provides, the Parliament of the State of Queensland, if that State be an Original State, may make laws dividing the State into divisions and determining the number of senators to be chosen for each division, and in the absence of such provision the State shall be one electorate.

Until the Parliament otherwise provides there shall be six senators for each Original State. The Parliament may make laws increasing or diminishing the number of senators for each State, but so that equal representation of the several Original States shall be maintained and that no Original State shall have less than six senators.

The senators shall be chosen for a term of six years, and the names of the senators chosen for each State shall be certified by the Governor to the Governor-General.'

Section 24

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

The number of members chosen in the several States shall be in proportion to the respective numbers of their people, and shall, until the Parliament otherwise provides, be determined, whenever necessary, in the following manner:

- A quota shall be ascertained by dividing the number of the people of the Commonwealth, as shown by the latest statistics of the Commonwealth, by twice the number of the senators:
- The number of members to be chosen in each State shall be determined by dividing the number of the people of the State, as shown by the latest statistics of the Commonwealth, by the quota; and if on such division there is a remainder greater than one-half of the quota, one more member shall be chosen in the State.

But notwithstanding anything in this section, five members at least shall be chosen in each Original State.'

LEGAL CASE***Roach v Electoral Commissioner* (2007) 233 CLR 162****Facts**

In 2006, the Commonwealth amended the *Commonwealth Electoral Act 1918* (Cth) to ban all prisoners from voting in Commonwealth elections. Before this new law was passed, the law prevented those serving a prison term over three years from voting. At the time the legislation was passed, Roach was serving a six-year prison term.

Legal issue

Roach challenged the validity of the law, arguing the Australian Constitution guaranteed her the right to vote under ss 7 and 24 of the Constitution.

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 under ss 7 and 24 of the Constitution. 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.

Continues →

LEGAL CASE

Roach v Electoral Commissioner (2007) 233 CLR 162 – Continued

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 a significant reason and therefore, 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 is needed to distinguish between those who seriously violate the law and serve long prison sentences, and the majority of prisoners who have committed less serious offences, or are on remand, and are only in prison for a short time, being three years or less.

Furthermore, the Court found that a person who is imprisoned is still a member of the community and usually maintains 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 ban to vote on those serving a prison term over three years 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 term longer than three years. However, prisoners serving shorter prison terms of three years or less, and those on remand, had their ability to vote reinstated.

The Commonwealth retained the ability to pass laws about who may vote. However, this decision is significant as the interpretation of ss 7 and 24 restricted the Commonwealth's ability to pass laws regarding who may vote.

LEGAL VOCABULARY

Remand the legal status of an accused when they are held in custody awaiting trial.

The principle of representative government is also protected by other sections of the Australian Constitution. For example, s 28 of the Australian Constitution requires the occurrence of regular elections by outlining that the duration of the House of Representatives 'shall continue for three years'. This prevents parliament from creating laws to extend its term indefinitely and enables Australian citizens to elect representatives on a regular basis.

CONSTITUTION

Section 28

The role of the High Court in protecting the principle of representative government 4.1.9.2

The High Court of Australia has an important role in interpreting the Australian Constitution and settling disputes about its meaning. Sections 75 and 76 of the Australian Constitution outline the original jurisdiction of the High Court, which includes the power to hear matters arising under the Constitution or involving its interpretation. In carrying out its role, the High Court may declare a law, or part of a law, as **ultra vires** if it goes beyond the law-making powers of parliament, meaning it becomes invalid. Therefore, the High Court acts as a check on parliament, preventing the legislative branch of government from creating laws that infringe upon the principle of representative government. However, the High Court can only interpret the Constitution and declare a law, or part of a law, **ultra vires** if a case is brought before it by a person with **standing**.

The High Court has been required to interpret ss 7 and 24 of the Constitution on a number of occasions. By interpreting these sections of the Constitution, the High Court of Australia has been able to facilitate the protection of the principle of representative government by:

- recognising the **implied right** to freedom of political communication. As a result, Australians are able to more readily access information regarding political candidates and parties so their vote can accurately reflect their values, enabling the establishment of a government that best represents the majority views of the Australian population.

CONSTITUTION

Section 75

Section 76

LEGAL VOCABULARY

Ultra vires a Latin term meaning 'beyond the powers'; used in law to describe an act by a government body or corporation that requires legal authority but is done without it.

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.

Implied right a right that is not explicitly outlined in the Australian Constitution but has been interpreted by the High Court to exist.

LEGISLATION

Political Broadcasts and Political Disclosures Act 1991 (Cth)

- defining when the ability to vote in Commonwealth elections can and cannot be removed. This ensures a substantial majority of the Australian population plays a role in selecting the individuals representing them in parliament and large groups of people are not excluded from this process.

LEGAL CASE

Australian Capital Television Pty Ltd and NSW v Commonwealth (1992) **177 CLR 106**

Facts

In 1991, the Commonwealth Parliament passed legislation to restrict television advertising during an election campaign. The *Political Broadcasts and Political Disclosures Act 1991 (Cth)* prohibited the broadcasting of 'political advertisement(s)' during an election period. This meant an advertisement containing matter that intended, or had the ability to affect voting in the relevant election, matter, or referendum, was prohibited.

Legal issue

The plaintiffs, Australia Capital Television Pty Ltd and NSW, challenged the validity of this Act in the High Court. They argued that there was an implied right to freedom of political communication and this Act contravened this implied right.

Decision

Sections 7 and 24 require voters to be free to communicate on political matters. It was interpreted that a right to free political communication was implied by the words 'directly chosen by the people'. Therefore, the Act was declared invalid as, according to Chief Justice Mason, 'freedom of communication [is] an indispensable element in representative government'.

Significance

This High Court decision recognised that ss 7 and 24 establish implied rights to freedom of political communication and it defined what sort of communication is protected by this implied right. The Court's decision created a restriction on the powers of the Commonwealth Parliament, as it was unable to pass laws that prevent free discussion of political issues. By allowing freedom of political communication, the principle of representative government can be preserved as Australians remain informed about who they are voting for, ensuring individuals voted into power are accurate reflections of the values held by the majority of Australians.



Image: zieusin/Shutterstock.com

Figure 1 The High Court recognised the implied right to freedom of political communication

LEGAL CASE

Lange v Australian Broadcasting Corporation (1997) 189 CLR 520

Facts

Former prime minister of New Zealand, David Lange, brought a defamation claim against Australian Broadcasting Corporation (ABC) after he was featured in ABC's 'Four Corners' program. The program alleged that the government was under the influence of large corporations as a result of political donations made to the party. Therefore, Lange claimed that the ABC had made defamatory statements by suggesting he was a corrupt prime minister.

Legal issue

The High Court was required to determine whether the statements made during the ABC program were defamatory, or protected by the implied freedom of political communication within the Constitution.

Continues →

LEGAL CASE***Lange v Australian Broadcasting Corporation (1997) 145 ALR 96 – Continued*****Decision**

The High Court held that the statements were defamatory and therefore, not protected by the implied right to freedom of political communication.

Significance

In its judgement, the High Court developed a two-stage test to determine whether a law infringes upon the implied freedom of political communication:

1. Firstly, does the law restrict freedom of communication about government or political matters?
2. If the law does restrict that freedom, is the law reasonably appropriate and adapted to serve a legitimate end that is compatible with the maintenance of representative and responsible government?

If the answer to the first question is 'yes', and the second question is 'no', the law will be found to breach the implied freedom of political communication.

However, in a separate legal decision for the case of *McCloy v NSW* (2015) 257 CLR 178, the test was expanded to include a third point:

3. Is the law reasonably appropriate and adapted to advance that legitimate objective?

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'evaluate the means by which the Australian Constitution acts as a check on parliament in law-making'. The role of the High Court in protecting the principle of representative government is one of these means. Therefore, this table showing strengths and limitations can help you complete this evaluation.

Table 1 Evaluating the role of the High Court in protecting the principle of representative government as a check on parliament in law-making

Strengths	Limitations
• The High Court can declare a law, or part of a law, invalid if it breaches the principle of representative government and has been made beyond the law-making powers of parliament. • When interpreting the Australian Constitution, the High Court may recognise implied rights, such as the right to freedom of political communication, which is fundamental to upholding the principle of representative government. • The High Court is an independent judiciary, meaning it is not subject to the influence of other branches of government. This independence enables the Court to impartially interpret the Constitution and declare a law, or part of a law, invalid if it breaches the principle of representative government. • The difficulty in bringing a case to the High Court and establishing standing to do so ensures that only relevant cases, often requiring High Court interpretations of the Constitution, are brought before it.	• The High Court can only interpret the Constitution and declare a law, or part of a law, invalid for breaching the principle of representative government if a case is brought before it. Therefore, the Court cannot declare a law invalid as soon as it has been passed by parliament, meaning an invalid law may operate for several years until a person challenges its validity in the High Court. • In order for a person to bring a case to the High Court, they must have standing. For example, an individual with an interest in correcting the law, but who is not directly affected by it, has no avenue to bring the case to court. • The High Court can only protect the principle of representative government relevant to the facts of the case before it. Therefore, the High Court cannot create laws to further protect representative government outside the case. • High Court judges are appointed by the government of the day, which may lead to the appointment of judges who are sympathetic towards the government's position, rather than being impartial. • As the cost and time associated with bringing a case to the High Court are significant, this decreases the number of cases initiated in the High Court. Thus, the Court's ability to act as a check on parliament in law-making is limited.

Lesson summary

The principle of representative government is established and protected by ss 7 and 24 of the Constitution. To ensure the principle of representative government is upheld, the High Court of Australia may be required to:

- give meaning to the words in the Australian Constitution and, if necessary, declare a law, or part of a law, invalid if it infringes upon the democratic principles and system of government the Constitution establishes.
- interpret the Australian Constitution and recognise an implied right that, whilst not explicitly stated in the Constitution, is fundamental in upholding the principle of representative government.

71 Questions

Check your understanding

Question 1

The principle of representative government ensures members of parliament are elected by the Australian people to make laws on their behalf.

- A. True
- B. False

Question 2

Fill in the blanks with the following terms:

House of Representatives

Senate

Section 7 of the Australian Constitution requires members of the [] to be directly chosen by the people, whilst section 24 requires members of the [] to also be directly chosen by the people.

Question 3

The High Court of Australia may be required to give meaning to words in the Australian Constitution and, if necessary, declare any law invalid that infringes upon the democratic principles and system of government the Constitution establishes.

- A. True
- B. False

Question 4

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of the High Court in protecting the principle of representative government.

Statement	Strengths	Limitations
I. High Court judges are appointed by the government of the day, which may lead to the appointment of judges who are sympathetic towards the government's position, rather than being impartial.	☐	☐
II. The High Court can only interpret the Constitution and declare a law invalid for breaching the principle of representative government if a case is brought before it.	☐	☐
III. If a case is brought before it, the High Court can declare a law invalid if it has been made beyond the law-making powers of parliament.	☐	☐

Question 5

The High Court can declare laws that infringe upon ss 7 and 24 of the Australian Constitution to be invalid, and create new laws to further protect the principle of representative government.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 6

(3 MARKS)

Explain the role of the High Court in protecting the principle of representative government.

Question 7

(3 MARKS)

Describe how ss 7 and 24 of the Australian Constitution protect the principle of representative government.

Adapted from VCAA 2021 exam Section A Q4

Question 8

(4 MARKS)

Analyse how the High Court, in protecting the principle of representative government, acts as a check on parliament in law-making.

Adapted from VCAA 2022 exam Section A Q3

Question 9

(4 MARKS)

In *Roach v Electoral Commissioner* (2007), the High Court declared Commonwealth legislation was invalid as it banned all prisoners from voting in Commonwealth elections. Before this new law was passed, the law prevented those serving a prison term over three years from voting. The High Court stated that a complete ban on all prisoners from voting was unconstitutional as it was inconsistent with the protection of representative government under ss 7 and 24 of the Constitution.

With reference to *Roach v Electoral Commissioner*, analyse how ss 7 and 24 of the Australian Constitution have protected the principle of representative government.

Adapted from VCAA 2021 Section A Q4

Extended response

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

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of the High Court in acting as a check on parliament by protecting the principle of representative government.

Statement	Strengths	Limitations
I. The High Court can only interpret the Constitution and declare a law invalid on the basis that it breaches the principle of representative government if a case is brought before it.	☐	☐
II. The High Court can declare a law invalid if it has been made beyond the law-making powers of parliament, meaning it has unconstitutionally breached the principle of representative government.	☐	☐
III. When interpreting the Australian Constitution, the High Court may recognise implied rights, such as the freedom of political communication.	☐	☐
IV. High Court judges are appointed by the government of the day, which may lead to the appointment of judges who are sympathetic towards the government's position, rather than being impartial.	☐	☐
V. As the cost and time associated with bringing a case to the High Court are high, this decreases the number of cases initiated in the High Court.	☐	☐

Question 11

(5 MARKS)

Evaluate how the High Court, in protecting the principle of representative government, acts as a check on parliament in law-making.

Adapted from VCAA 2020 exam Section A Q6

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

Use the following information to answer questions 12 and 13.

Following criticism of Australia's voting system, a law has been passed that bans all people under the age of 30 from voting in elections. Sally, who is 25 years old, believes this is in breach of her right to vote, which is protected by sections 7 and 24 of the Australian Constitution. She is therefore thinking of taking the matter to the High Court.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the High Court to act as a guardian of the Australian Constitution in its interpretation of ss 7 and 24.

Statement	Strengths	Limitations
I. The High Court can declare the law banning all people under the age of 30 from voting in elections invalid if it is found to breach ss 7 and 24 of the Australian Constitution.	☐	☐
II. The High Court can only interpret ss 7 and 24 of the Constitution and declare the law banning all people under the age of 30 from voting in elections invalid if the case is brought before it.	☐	☐
III. As the High Court is an independent judiciary and is not subject to the influence of parliament, it can interpret ss 7 and 24 of the Constitution and declare the law invalid without being influenced by political considerations.	☐	☐
IV. Sally may not wish to spend money and time bringing her case to the High Court, therefore it may not be determined if the law banning those under 30 from voting is unconstitutional.	☐	☐

Question 13

(6 MARKS)

With reference to Sally, discuss the role of the High Court in acting as a guardian of the Australian Constitution in its interpretation of ss 7 and 24.

Adapted from VCAA 2018 Sample exam Section A Q6

Linking to previous learning

Question 14

(2 MARKS)

Describe **one** role of the House of Representatives in upholding the principle of representative government.

7J The Constitution as a check on parliament – the separation of powers

STUDY DESIGN DOT POINT

- the means by which the Australian Constitution acts as a check on parliament in law-making, including:
 - the role of the High Court in protecting the principle of representative government
 - the separation of the legislative, executive and judicial powers
 - the express protection of rights

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.10.1

The separation of powers



Image: aleks333/Shutterstock.com

If you could have any superpower, what would it be? Maybe invisibility or teleportation, or perhaps mind reading? In any case, every superhero has unique powers that enable them to do certain things. Likewise, those who have the power to govern society by making or administering the laws have distinct powers and responsibilities to ensure society functions in a cohesive and democratic manner.

Lesson introduction

The Australian Constitution outlines three distinct branches of power within the parliamentary system. This distinction is known as the **separation of powers**, and ultimately ensures there is no abuse of powers within the parliamentary or judicial system by defining which bodies have the power to perform certain functions. Although the separation of powers, according to the Australian Constitution, only applies to the federal level of parliament, the states and territories have also adopted the same mechanism in their parliamentary and judiciary bodies.

The separation of powers 4.1.10.1

The three powers contained in the separation of powers include **legislative power**, **executive power**, and **judicial power**.

Legislative power resides with the parliament and allows it to make laws. Executive power refers to those that belong to the **Governor-General**. This branch of power administers laws and manages the business of government. In practice, the executive power is primarily exercised by **Cabinet**, which includes the prime minister and senior ministers, and more broadly by the government and public servants employed by the government, such as the police. Finally, the judicial power allows the courts and tribunals to apply the laws to cases before them and resolve legal matters.

Key reasons for the separation of powers include:

- preventing any abuses of power by bodies involved in the creation of laws and the administration of justice
- upholding the rule of law and ensuring one body cannot simultaneously make, administer, and apply the law
- ensuring parliament cannot prosecute and adjudicate legal matters, the same way judges cannot hold seats in parliament where the laws are being made.

KEY TERMS

Separation of powers a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate.

Legislative power the power vested in parliament that enables it to make laws.

Executive power the power, vested in the King and exercised by the Governor-General, to maintain and administer the law and the business of government.

Judicial power the power vested in courts and tribunals that enables them to enforce laws and resolve legal matters.

LEGAL VOCABULARY

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

Cabinet a central decision-making body consisting of the prime minister, in the federal context, and the premier, in the state context, alongside senior members of government, including ministers, who are responsible for developing government policy and addressing issues of concern.

USEFUL TIP

Remember the division of powers and the separation of powers are two distinct and separate concepts. The division of powers, being exclusive, concurrent, and residual, are the different powers distributed between the Commonwealth and the states that allow them to make laws in different areas. On the other hand, the separation of powers, being legislative, executive, and judicial, refers to the three branches of power that ensure a proportionate distribution of power amongst the parliament and the courts.

Table 1 The separation of powers

Power	Explanation	Relevant section of the Australian Constitution	The party that exercises the power
Legislative power	The power vested in parliament that enables it to make laws.	Section 1	- The Commonwealth Parliament can exercise legislative powers. - This includes the House of Representatives and the Senate.
Executive power	The power, vested in the King and exercised by the Governor-General, to maintain and administer the law and the business of government.	Section 61	- This power is technically vested in the Crown and exercised by the Governor-General, but in practice, it is exercised by the prime minister, senior ministers, and government departments. - For example, the Department of Foreign Affairs is part of the executive branch.
Judicial power	The power vested in courts and tribunals that enables them to enforce laws and resolve legal matters.	Section 71	Courts and tribunals can exercise this power.

In theory, all three powers are separate. However, in Australia, the legislative and executive powers are combined and operate together. This is because the power to manage the business of government and administer the law (executive power) resides with Cabinet, which is also involved in creating legislation (legislative power). Therefore, it is Cabinet, composed of the prime minister and senior ministers at the Commonwealth level, that exercises executive powers, as opposed to the Governor-General. These ministers also contribute to exercising legislative power by making laws.

However, the judicial powers must operate independently. Judges and the courts are completely separate from the parliamentary process of making legislation and cannot exercise legislative or executive powers. Similarly, a **member of parliament (MP)** must also not exercise judicial powers.

CONSTITUTION

Section 1
Section 61
Section 71

LEGAL VOCABULARY**Member of parliament (MP)**

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

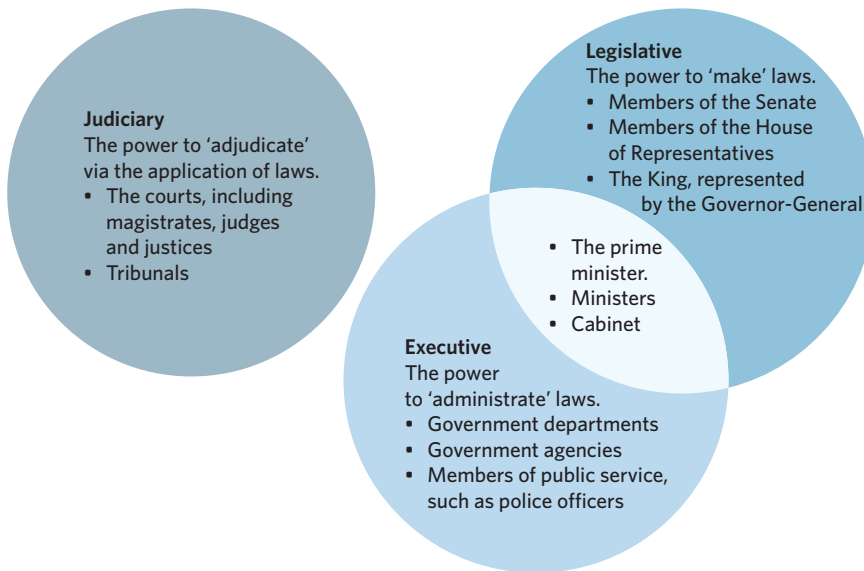


Figure 1 The relationship between legislative, executive, and judicial powers

WANT TO KNOW MORE?

The unprecedented nature of the COVID-19 pandemic led to the executive branch of government utilising emergency powers and bypassing the standard protocols of operation for the executive and legislative branches, in order to enact lockdown laws. You can find out more about the influence of the pandemic on the separation of powers by searching 'Who is making our laws? The separation of powers in 2020' and clicking the 'LSJ' (Schwarz, 2020) webpage.

DEEP DIVE

Comparing the judicial selection process in the United States and Australia

Whilst there are various processes utilised globally to select judges, the United States and Australia both use a method of appointment. This process grants the executive branch of government, or other relevant judiciary councils, the responsibility of appointing judges.

According to the US Constitution, the power to nominate judges resides with the President. After nominating a candidate, the Senate Judiciary Committee will conduct an interview process in what is known as a 'confirmation hearing'. Finally, the entire Senate votes to either accept or reject the President's nominee. Notably, at the state level, judicial selection processes vary with some states in the US choosing to follow an appointment method, whilst other states use an election process whereby citizens are involved in the selection of judges.

Australia employs an appointment process at both the federal and state level. Section 72 of the Constitution states that the Governor-General is responsible for appointing federal judges on the advice of Cabinet and according to a range of criteria. Unlike the United States, parliament is rarely involved in the process of judicial selection. Additionally, the specific details of judicial appointment vary across jurisdictions and courts at the state level.

Adapted from 'Judicial appointments: US and Australia' (Rule of Law Education Centre, 2016) and 'Judicial Selection in the United States - A Special Report' (Office of Justice Programs, 1980)

CONSTITUTION

Section 72

LESSON LINK

You learnt about exclusive and concurrent powers in **7C The division of powers**.

LEGAL VOCABULARY

Ultra vires a Latin term meaning ‘beyond the powers’; used in law to describe an act by a government body or corporation that requires legal authority but is done without it.

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.

LEGAL CASE

Australian Communist Party v Commonwealth (1951) 83 CLR 1

Facts

In October 1950, the Commonwealth Parliament passed the *Communist Party Dissolution Act 1950* (Cth), banning the Communist Party of Australia and taking possession of all its property. The legislation included passages outlining why communism presented a threat to Australia and therefore, deserved to be banned. It also sought to prevent members of the Communist Party from being employed in any Commonwealth government department.

The government of the day had been elected on the promise of introducing and passing this legislation, and it was very popular with a majority of voters.

Legal issue

The Communist Party, and various other individuals and trade unions affected by the law, challenged the validity of this legislation in the High Court, arguing the Commonwealth did not have the authority to pass laws banning a political party.

Decision

The High Court upheld this challenge, ruling the legislation was 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. Rather, the Court’s role was to decide whether the Commonwealth had the power to make the law as per the Australian Constitution. The Court decided neither the exclusive nor the concurrent powers enabled the Commonwealth Parliament to pass this law.

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 check on the law-making power of the parliament. Without the separation of the judicial power, this check may not have been possible.

Table 2 Evaluating the separation of powers as a check on parliament in law-making

Strengths	Limitations
- The separation of powers ensures there is a constitutional check and balance that minimises the possibility of an abuse of powers. - The independence of the judiciary ensures legal matters can be determined without the influence of external factors, such as political pressures, given judges cannot be associated with political parties. - The legislative branch acts as a check on the power of the executive as bills introduced by members of the executive, such as Cabinet MPs, may still be scrutinised and not passed if parliament does not agree with its purpose. - The judiciary can declare laws created by parliament ‘ultra vires’ the Commonwealth Parliament has breached its law-making powers according to the Constitution. This restricts the Commonwealth Parliament’s legislative power, ensuring it cannot legislate outside the scope of its exclusive and concurrent powers. - The separation of powers is constitutionally guaranteed, meaning it must be upheld and cannot be removed without a referendum.	- In practice, legislative and executive powers overlap and operate together, which can limit the ability of parliament to act as a check on itself internally. - Though the judiciary must remain completely independent, judges are appointed by the executive. Consequently, the composition of the judiciary may be somewhat influenced by the political motivations and values of the executive of the day. - The composition of MPs from each party within the Houses of Parliament can influence the effectiveness of the legislature in acting as a check on the executive and laws in general. For example, where the government holds a majority in both houses, the bills introduced by members of the executive may not be challenged sufficiently by members of the legislature, resulting in less scrutiny and debate on proposed legislation. - In order to challenge a law in the High Court, a person must have standing. Laws created by parliament that are invalid may therefore, remain in force if no one has the standing or financial means to bring an allegedly invalid law before the court and have it deemed ultra vires. - The Australian Constitution ensures the separation of powers at the Commonwealth level but does not guarantee the separation of powers at the state level. However, most states have embedded this principle in their state constitutions.

Lesson summary

The separation of powers operates as a constitutional check on parliamentary law-making and ensures abuses of power do not occur. The powers are separated into three branches: the executive, legislative, and judiciary. These powers are explicitly laid out in the Australian Constitution.

Table 3 Sections of the Constitution that establish the separation of powers

Power	Section of the Constitution
Legislative	Section 1
Executive	Section 61
Judicial	Section 71

In practice, the people comprising the executive and legislative branches overlap, whilst the judiciary must remain completely independent.

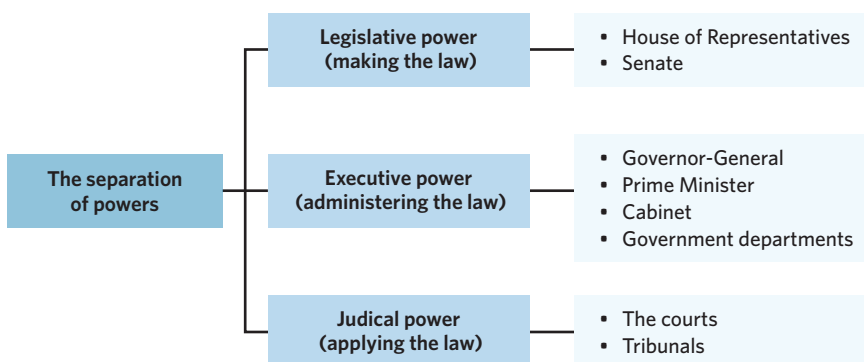


Figure 2 A summary of the separation of powers

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'evaluate the means by which the Australian Constitution acts as a check on parliament in law-making'. The separation of powers is one of these means. Therefore, the table showing strengths and limitations of the separation of powers as a check on parliament in law-making can help you complete this evaluation.

7J Questions

Check your understanding

Question 1

The separation of powers refers to:

- the exclusive, concurrent, and residual law-making powers that allow the Commonwealth and state parliaments to legislate in different areas.
- a principle whereby the Constitution establishes three branches of power that must remain separate.
- the divide between the power of the parliament and the power of the people.

Question 2

Fill in the blanks with the following terms:

executive

judicial

legislative

The [] is the branch with the power to administer laws and conduct the business of the government, whereas the [] power is exercised to create laws in Australia. Finally, the [] power ensures the independent application of laws to resolve legal matters.

Question 3

Which of the following are members of the executive branch? **(Select all that apply)**

- A. A judge of the Federal Court of Australia.
- B. Government departments.
- C. The prime minister.
- D. The Governor-General.

Question 4

The section of the Australian Constitution relating to judicial powers is:

- A. section 1.
- B. section 61.
- C. section 71.

Question 5

In practice, executive and legislative powers overlap and are not completely separate.

- A. True
- B. False

Question 6

Key reasons for the separation of powers include:

(Select all that apply)

- A. preventing any abuses of power by bodies involved in the creation of laws and the administration of justice.
- B. ensuring the prime minister has enough power to govern the country.
- C. upholding the rule of law and ensuring one body cannot simultaneously make, administer, and apply the law.
- D. ensuring parliament cannot prosecute and adjudicate legal matters, the same way judges cannot hold seats in parliament where laws are being made.

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Outline the executive power under the separation of powers.

Question 8

(3 MARKS)

Explain how the separation of powers acts as a check on the law-making of parliament.

Adapted from VCAA 2021 exam Section A Q2

Question 9

(3 MARKS)

Distinguish the legislative power and judicial power.

Question 10

(4 MARKS)

'In practice, the executive power is always exercised by the Governor-General.'

Is this statement true? Justify your response.

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** or **limitations** of the separation of powers as a check on parliamentary law-making.

Statement	Strengths	Limitations
I. The judiciary can declare laws created by parliament as 'ultra vires' if the Commonwealth Parliament has breached its law-making powers according to the Constitution. This restricts the Commonwealth Parliament's legislative power to ensure it cannot legislate outside the scope of its exclusive and concurrent powers.	☐	☐
II. Although the judiciary must remain completely independent, judges are appointed by the executive. Consequently, the composition of the judiciary is influenced by the political motivations and values of the executive.	☐	☐
III. The independence of the judiciary ensures cases can be determined without the influence of external factors, such as political pressures, given judges cannot be associated with political parties.	☐	☐
IV. In practice, legislative and executive powers overlap as members of parliament may also be ministers that form part of the executive. This can limit the ability of each branch of government to act as a check on each other.	☐	☐

Question 12

(6 MARKS)

Evaluate the extent to which the separation of powers acts as a check on parliament in law-making.

Adapted from VCAA 2018 Sample exam Section A Q7

Linking to previous learning

Question 13

(7 MARKS)

Federal MP, Duncan Anderson, wishes to introduce a bill, the Mandatory Education Material Bill 2084 (Cth), mandating all schools to use Edrolo products. He believes that if the law was passed and a parent sued the government for mandating certain educational material, he would be entitled to be the judge determining the case.

- Justify whether MP Anderson has the ability to introduce a bill regarding education. 3 MARKS
- With reference to the separation of powers, explain whether MP Anderson would be entitled to be the judge determining the court case involving the Mandatory Education Material Act 2084 (Cth). 4 MARKS

7K The Constitution as a check on parliament – express protection of rights



Image: Arthimedes/Shutterstock.com

In Australia, there are various national public holidays, such as Christmas, New Year's Day, and the King's birthday. Yet, what would happen if the government suddenly declared that all national public holidays no longer exist.... do they have the power to do so? Or do citizens have a fundamental right to public holidays? Even though it would be highly unlikely to occur, public holidays are not protected by the Australian Constitution, meaning they are not a guaranteed right and parliament has the power to erase public holidays. However, other key rights, known as express rights, are afforded to all Australian citizens and are protected by the Australian Constitution.

STUDY DESIGN DOT POINT

- the means by which the Australian Constitution acts as a check on parliament in law-making, including:
 - the role of the High Court in protecting the principle of representative government
 - the separation of the legislative, executive and judicial powers
 - the express protection of rights

7A 7B 7C 7D 7E 7F 7G 7H 7I 7J 7K

4.1.11.1

The express protection of rights

- 4.1.11.1.1 Acquisition of property on 'just terms'
- 4.1.11.1.2 Trial by jury for Commonwealth indictable offences
- 4.1.11.1.3 Interstate trade and commerce
- 4.1.11.1.4 Freedom of religion
- 4.1.11.1.5 No discrimination based on your state of residence

KEY TERM

Express rights the five human rights that are explicitly stated and entrenched in the Australian Constitution.

LEGAL VOCABULARY

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

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 will learn more about referendums in **10B Referendums**.

You will learn more about standing in **8D Courts' ability to make law** - costs, time, and the requirement for standing.

Lesson introduction

The Australian Constitution explicitly establishes five rights that are afforded to every Australian citizen. These rights are entrenched in the Constitution, meaning they cannot be removed or changed by parliament alone, unlike other legal rights, which may be altered. Express rights can act as a check on parliament's law-making by ensuring it cannot pass laws that restrict or infringe certain core rights.

The express protection of rights 4.1.11.1

Express rights are human rights or legal entitlements specifically stated and entrenched in the Australian Constitution. Given such rights are entrenched in the Constitution, they can only be amended or removed through the process of a **referendum**. A referendum requires a compulsory, national vote and is the only mechanism by which the Constitution's wording can be changed. Express rights are legally enforceable, meaning if legislation is created by parliament that a person or organisation believes breaches a certain express right, the law's validity can be challenged in the High Court by a person with **standing**.

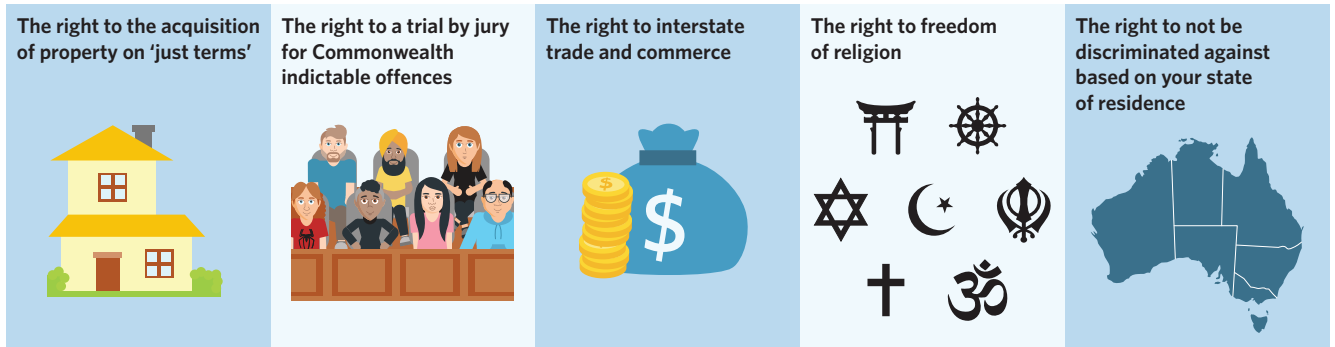


Figure 1 The five express rights established in the Constitution

Acquisition of property on 'just terms' 4.1.11.1.1

According to section 51(xxxi) of the Constitution, the Commonwealth Parliament has the right to legislate about and acquire 'property on just terms from any State or person' for any purpose that is within the scope of its law-making powers. Section 52(i) of the Constitution states that the Commonwealth has the power to make laws regarding land acquired for public purposes. Therefore, the Commonwealth Parliament may acquire land for public purposes, such as building an airport or erecting a public office. If the Commonwealth enacts this power, it must provide 'just terms' to the owner of the property, such as fair and reasonable compensation.

CONSTITUTION

Section 51 (xxxi)

Limitations of the right to acquisition of property on 'just terms':

- There is no specification on what constitutes 'just terms'. Therefore, the compensation provided by the Commonwealth Parliament may be disputed and perceived as unjust depending on the subjective circumstances.
- This section does not apply to the states. There is no right enshrined in the Constitution ensuring states provide just terms when acquiring property from a person or business. Although many states have created legislation ensuring the acquisition of property is on 'just terms', this legislation can be repealed. However, this is unlikely to occur therefore this limitation is minor.

LEGAL CASE

ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140

Facts

In 2004, the *National Water Commission Act 2004* (Cth) established an independent statutory body called the National Water Commission. The commission was designed to assess the progress of the states and territories in relation to the National Water Initiative's objectives and provide advice to governments on national water issues. The commission was also able to create funding agreements. One of these agreements was with New South Wales (NSW), where the state agreed to reduce its citizens' entitlements to groundwater under NSW legislation in exchange for funding that would provide payments to those affected by this change.

Prior to the legislative changes and under previous water boring licences, two of the plaintiffs (who united to form 'ICM') were entitled to access 70% more water, whilst the third plaintiff (Hillston) was entitled to access 66% more water. The NSW state government offered the plaintiffs \$818,730 and \$93,830 in compensation, respectively. However, the plaintiffs claimed these payments were inadequate and did not comply with the meaning of 'just terms' as per s 51(xxxi) of the Constitution. The Commonwealth conceded that the making of these payments would not amount to 'just terms' but disputed that there had been an 'acquisition' of property under s 51(xxxi).

Legal issue

One key issue in this case was whether the state's regulation of water was considered an 'acquisition' of property as per s 51(xxxi). The plaintiffs argued the new legislation did amount to acquisition and, therefore, the provision of 'just terms' to the plaintiffs was necessary.

LEGISLATION

National Water Commission Act 2004 (Cth)

Continues →

LEGAL CASE

ICM Agriculture Pty Ltd v Commonwealth (2009) 240 CLR 140 –Continued**Decision**

The High Court held there had been no acquisition of the plaintiffs' property under s 51(xxxi) as the legislation that reduced the plaintiffs' water entitlements conferred no identifiable benefit to NSW. NSW always had the power to limit the volume of water usage by the plaintiffs and had, in the past, restricted the plaintiffs' access to and use of this natural resource. Although the new legislation limited the plaintiffs' use of water, it did not constitute 'acquisition'.

Significance

The scope of 'acquisition' was explained by the High Court to be the 'obtaining of at least some identifiable benefit or advantage relating to the ownership or use of property'. Therefore, since NSW obtained no benefit from owning the property, acquisition was not made out. Furthermore, the court distinguished between the concepts of 'acquisition' and 'deprivation', suggesting the extinguishment, modification, or deprivation of property rights does not amount to acquisition, rather an identifiable benefit is required for acquisition. This decision may influence the validity of any legislative provisions relating to a potential acquisition as per the meaning of s 51(xxxi), where there is a dispute about whether an acquisition has occurred.

REAL WORLD EXAMPLE



Image: MC MEDIASTUDIO/Shutterstock.com

Figure 2 In 2018, the Federal government purchased land for 10 times its value

Federal fumble – the Leppington Triangle

In 2018, the Federal government bought a plot of land, known as the Leppington Triangle, from the Leppington Pastoral Company (LPC), for \$29.8 million. The land was purchased as part of a development plan for a second runway at the Western Sydney Airport, which is not expected to be built until 2050. However, an investigation conducted by the Australian National Audit Office (ANAO) less than one year after the purchase revealed the land was only worth just over \$3 million.

Hence, whilst the Commonwealth Parliament must acquire property on 'just terms', there has been much backlash and inquiry into how the sale of the land, which was purchased for 10 times its actual value, was agreed upon and finalised.

Adapted from 'Government paid 10 times what Western Sydney Airport land was worth, audit finds' (Doran, 2020)

Trial by jury for Commonwealth indictable offences 4.1.11.1.2

CONSTITUTION

Section 80

According to section 80 of the Constitution, 'the trial on indictment of any offence against any law of the Commonwealth shall be by jury'. This means for all Commonwealth indictable offences, such as trafficking commercial quantities of drugs or slavery, the accused person who committed the offence must be tried by jury. In Commonwealth trials by jury, the decision of the jurors must be unanimous in order for the accused to be found guilty, meaning all jurors must believe, beyond reasonable doubt, the accused committed the alleged offence.

As s 80 only guarantees a trial by jury for Commonwealth indictable offences, it is up to individual states and territories to uphold this right for their respective indictable offences by passing relevant legislation. For example, in Victoria the rights of an accused include the right to a trial by jury, which is protected by the *Criminal Procedure Act 2009* (Vic).

LEGISLATION

Criminal Procedure Act 2009 (Vic)

Limitations of the right to a trial by jury for Commonwealth indictable offences:

- Most criminal offences are created by state laws, not Commonwealth law.
- Section 80 does not prevent state parliaments from passing laws to have serious offences tried by judges alone.
- Section 80 only applies to those charged with an indictable offence and is not applicable to summary offences.

LESSON LINK

You learnt about the right to a trial by jury in Victoria in **1B Rights of an accused**.

WANT TO KNOW MORE?

Just as each state has its own Acts in criminal law, such as the Victorian *Crimes Act 1958* (Vic) and *Summary Offences Act 1966* (Vic), the Commonwealth also has a *Criminal Code Act 1995* (Cth). You can find out more about crimes that are Commonwealth offences by searching 'Commonwealth criminal offences' and clicking the Slades & Parsons (2018) webpage.

LEGAL CASE***Brown v R* (1986) 160 CLR 171****Facts**

Mr Brown was charged with an indictable offence under the *Customs Act 1901* (Cth) and requested to be tried by a judge alone, without a jury. *The Juries Act 1927* (SA) stipulates that an indictable offence may be tried by a judge alone if the court and the prosecution consent. However, the trial judge ruled that even if the court consented to a judge-alone trial, s 80 of the Constitution does not allow a person charged with a Commonwealth offence to be tried by a judge alone, and hence a jury trial is the only option.

Following the trial, the accused appealed the case on multiple grounds, one reason being that the trial judge ruled against a trial by judge alone and this was contrary to s 7(1) of the *Juries Act 1927* (SA). This section of the Act stipulated an accused could elect to be tried by judge alone and, if the accused received legal advice to be tried by judge alone, the judge must allow the trial to proceed without a jury. Therefore, Mr Brown contended the trial judge should have allowed his trial to proceed without a jury since he had requested a judge-alone trial.

Legal issue

The High Court was required to determine whether s 80 contains an 'imperative and indispensable requirement' that there must be a trial by jury if an accused is charged with a Commonwealth indictable offence, or whether a trial by jury is a privilege an accused can waive if permitted.

Decision

The High Court held an accused charged with a Commonwealth indictable offence must be tried by jury and there cannot be a trial by judge alone. Therefore, s 7 of the *Juries Act 1927* (SA) was held to not apply to Commonwealth indictable offences, but was still valid for criminal offences regulated under South Australian legislation. Therefore, Mr Brown could not be exempt from a trial by jury as his crime was a Commonwealth indictable offence.

Significance

This case demonstrates that the express right to a trial by jury cannot be waived when an accused is charged with a Commonwealth indictable offence. Though state legislation may exist that permits trial by judge alone for indictable offences, this is only applicable to cases where the individual has been charged with an indictable offence under state law, not Commonwealth law.

LEGISLATION

Customs Act 1901 (Cth)

Juries Act 1927 (SA)

USEFUL TIP

Remember, the Constitutional right to a trial by jury only applies to Commonwealth indictable offences. Therefore, if you are asked in an exam or SAC whether an individual has the constitutionally guaranteed right to a trial by jury, the answer is usually 'no', unless they have been charged with a Commonwealth indictable offence. However, this does not mean the accused does not have the right to a trial by jury, as states have created their own laws that establish which offences require a trial by jury.

HYPOTHETICAL SCENARIO**Money, money, money, it's a rich man's world**

Gio was arrested for operating a lucrative money laundering scheme to fund his dance studio and new astrology business. His scheme involved importing mutilated coins that cannot be easily identifiable as coins, and depositing them into various ATMs across a six-month period. Damaged coins are not considered valid currency in Australia. Gio's scheme produced over \$1 million, some of which was seized from his property at the time of his arrest. He is set to face court in three months and will be tried by jury as money laundering is a Commonwealth indictable offence. This means a 12-person group of randomly selected members from the electoral roll will listen to evidence and facts presented at trial before delivering a verdict as to whether Gio is guilty or not guilty of money laundering.



Figure 3 Gio's groovy dreams were funded by fraud

CONSTITUTION

Section 92

Interstate trade and commerce 4.1.11.1.3

According to section 92 of the Constitution, ‘trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free’. This means the Commonwealth or state parliaments cannot restrict the flow of trade and movement of goods between states. For example, taxes that are protectionist in nature, in that they seek to put one state in a better position than another, cannot be introduced on items that are transported between states. Additionally, in practice, this right generally relates to the movement of individuals between states, which cannot be restricted by law. However, as demonstrated by the *Palmer v Western Australia* (2021) 274 CLR case, where the plaintiff argued Western Australia’s border closures were unconstitutional during the COVID-19 pandemic, the High Court ruled that border closures were constitutionally valid in these circumstances. This was because such restrictions were not discriminatory on interstate trade and commerce. Hence, laws that seek to restrict interstate trade and commerce can still exist as long as they are not discriminatory.

Limitations to the right to interstate trade and commerce:

- It is not an absolute right and laws can still exist that restrict interstate movement as long as they are not deemed ‘discriminatory’.

LEGISLATION*Sea Fisheries Regulations 1962 (Tas)***LEGAL CASE*****Cole v Whitfield* (1988) 165 CLR 360****Facts**

David Whitfield, a Tasmanian citizen, was charged with unlawfully possessing undersized crayfish. The crayfish had been purchased from South Australia and shipped to Tasmania. According to South Australian laws, the crayfish was a legal size, however, this was not the case according to Tasmanian law. Inspector Robert Cole charged Whitfield under the *Sea Fisheries Regulations 1962 (Tas)* for possessing the illegal-sized crayfish. Whitfield argued that according to s 92 of the Australian Constitution, he had the right to freedom of interstate trade and to import the crayfish from South Australia.

Legal issue

The court was required to determine whether the *Sea Fisheries Regulations 1962 (Tas)* breached the constitutional express right to interstate trade and commerce.

Decision

The court determined that the *Sea Fisheries Regulations 1962 (Tas)* did not breach the constitutional express right of free interstate trade and commerce as the purpose of the Tasmanian legislation was not discriminatory or protectionist, rather the legislation sought to encourage the conservation of the species. Therefore, the law was not discriminatory as it applied to all imported crayfish.

Significance

Although interstate trade and commerce must remain ‘absolutely free’ according to s 92, this express right does not guarantee that trade and commerce must always be absolutely free from restriction. The court held that the restriction on selling undersized crayfish did not have a discriminatory purpose and was in the interest of protecting natural resources. The case highlighted that laws can still exist that restrict interstate movement as long as they are not deemed ‘discriminatory’ or have a protectionist purpose.

Freedom of religion 4.1.11.1.4**CONSTITUTION**

Section 116

According to section 116 of the Constitution, 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.

Limitations of the right to freedom of religion:

- 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, the Commonwealth Parliament can pass a law conscripting individuals to fight in a war, even though it may be contrary to some individuals' religious beliefs about protecting life, and this would not be invalid under s 116.

REAL WORLD EXAMPLE

Queensland court rules that Sikh ceremonial knives are permitted on school grounds

According to Sikh religious practices, Sikhs are required to wear five articles of faith at all times, known as the five Ks, one of which is a curved blade known as a kirpan. However, Queensland legislation banned the carrying of knives in public places and schools. Ms Athwal, who practises the Sikh religion, took the government to court in 2022, claiming the legislation was discriminatory against people of the Sikh faith.

The Court of Appeal found that the *Weapons Act 1990* (Qld) was inconsistent with the *Racial Discrimination Act 1975* (Cth) and, as a result, s 51(5) of the *Weapons Act 1990* (Qld) was deemed invalid as per s 109 of the Constitution. The court held that Sikhs are legally permitted to carry the Kirpan in schools, however, this does not extend to other individuals carrying knives in a school environment.

This case demonstrates how a parliament's law-making can be restricted by express rights. The express right to the freedom of religion does not explicitly apply to states, meaning states could pass legislation that restricts religious practices. However, s 116 can still be impactful if the state legislation conflicts with a Commonwealth Act that seeks to protect an express right. Ultimately, this case protected freedom of religion and reiterated the right for individuals to freely practise religion.

Adapted from 'Sikh Queenslanders allowed to carry ceremonial knives in school after court ruling' (Roberts, 2023)



Image: Marygrace_97/Shutterstock.com

Figure 4 The kirpan is a ceremonial Sikh knife that may need to be carried by members of the religion according to its practices

LEGISLATION

Weapons Act 1990 (Qld)

Racial Discrimination Act 1975 (Cth)

No discrimination based on your state of residence 4.1.11.1.5

According to section 117 of the Constitution, Australian Citizens of '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'. In practice, this means a state cannot create or apply laws in a discriminatory manner based on an individual's state of residence. For example, it would be invalid according to s 117 to pass a Victorian law that specifically prohibits South Australian residents from travelling to Victoria without paying an extra \$5,000 to enter the state.

CONSTITUTION

Section 117

LEGISLATION

Motor Vehicles Insurance Act 1936 (Qld)

Limitations of the right to protection from discrimination based on one's state of residence:

- 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.

LEGAL CASE

Goryl v Greyhound Australia Pty Ltd (1994) 179 CLR 463**Facts**

Ms Goryl, the plaintiff, was a New South Wales (NSW) resident who was injured whilst travelling on a tourist bus in NSW after the bus veered off the road and collided with a paddock fence. The tourist bus was registered in Queensland under the *Motor Vehicles Insurance Act 1936 (Qld)*. Ms Goryl commenced legal action against the owner of the vehicle, Greyhound Australia Pty Ltd. She sought damages for her injuries from Suncorp Insurance and Finance and the owner of the bus in Queensland.

Legal issue

Under s 20 of the *Motor Vehicles Insurance Act 1936 (Qld)*, a person injured in connection with a Queensland motor vehicle could not recover more damages in Queensland than what would be recoverable in the injured party's principal state of residence. Therefore, Ms Goryl would be limited to claiming damages recoverable under NSW's law considering NSW was her primary state of residence. The amount Ms Goryl could recover under the law of NSW was less than the amount she was entitled to under the Queensland law governing damages, as different limitations to damages applied in NSW. Therefore, Ms Goryl argued the law breached s 117 of the Constitution as it discriminated against her based on her state of residence by preventing her from obtaining the damages she was entitled to under Queensland law, solely on the basis of being a NSW resident.

Decision

The majority held that the *Motor Vehicles Insurance Act 1936 (Qld)* imposed a disability and discrimination on non-Queensland residents on the basis of their state of residence and was, therefore, invalid under s 117 of the Constitution. In Dawson and Toohey JJ's joint judgment, the Justices found the Act resulted in 'a non-resident being afforded under Queensland law different and less advantageous treatment than she would be afforded if she were a resident of Queensland'. Thus, s 117 applied to invalidate the law so Ms Goryl was entitled to recover a full amount of damages in Queensland, without restriction from NSW's limitations on damages.

Significance

This case affirmed that a wide interpretation of s 117 of the Constitution should be adopted. This means state laws cannot discriminate or impose a disability against other states' residents unless such laws are required to maintain the structure of the federal system. For example, voting laws can discriminate against another state's residents, in that a NSW resident cannot vote in Victorian elections, as such restrictions are necessary.

LEGAL VOCABULARY

Ultra vires a Latin term meaning 'beyond the powers'; used in law to describe an act by a government body or corporation that requires legal authority but is done without it.

HYPOTHETICAL SCENARIO



Figure 5 Kristen sued the Victorian Government for discriminatory property purchasing laws

Beach house battle

Kristen is a NSW resident who wishes to purchase a beach house in Victoria's Mornington Peninsula. However, when inspecting the properties, the real estate agent informs her that the Victorian Parliament has recently passed a law that prohibits interstate residents from purchasing only one property, meaning Kristen would need to purchase two or more beach houses at the same time if she wishes to acquire property in Victoria. Enraged by this law, Kristen takes the matter to the High Court, suing the Victorian Government for breaching s 117 of the Australian Constitution. Kristen was successful in her case and the High Court deemed that the Victorian law breached s 117 of the Constitution as it discriminated against residents of other states and prohibited them from purchasing one property merely because of their state of residence. Therefore, the law was declared '**ultra vires**' and Kristen was able to purchase the home in Mornington without having to purchase a second.

Lesson summary

Five express rights, afforded to every Australian citizen, are explicitly stated and entrenched in the Constitution. These rights are:

- acquisition of property on 'just terms'
- trial by jury for Commonwealth indictable offences
- interstate trade and commerce
- freedom of religion
- no discrimination based on your state of residence.

Table 1 Evaluating the express protection of rights as a check on parliament in law-making

Strengths	Limitations
• Express rights are enshrined in the Constitution and can only be modified or removed through a referendum, meaning they cannot be changed by parliament alone. A referendum is a national vote that requires the majority of Australians to agree with the proposed change to the Constitution, as well as a majority of people in the majority of states. • Express rights are fully enforceable by the High Court, meaning if legislation is created that breaches an express right, an individual with standing can take the case to the High Court, where it may be deemed invalid, otherwise known as 'ultra vires'. • The High Court is independent of the executive and legislature, meaning it is not politically affiliated with any party and can rule against a law breaching an express right even if breaching the right is desired by parliament.	• The High Court has interpreted some of the express rights narrowly. Therefore, certain laws can be created by parliament that may appear to breach an express right. However, the court can still find such a law to be valid. • There is no mechanism preventing parliament from passing laws that are constitutionally invalid or breach the express rights in the first place. Therefore, laws can be established that infringe on express rights and will be enforced until a case is brought before the High Court, where the Act may be deemed invalid. • In order to challenge a law in the High Court, a case must be brought by an individual with standing. Considering this requirement, in addition to the cost and time-consuming nature of initiating legal action, legislation breaching one of the express rights may continue to remain in force, preventing parliament's law-making powers from being checked. • Relatively few rights are protected by and entrenched in the Constitution as there are only five express rights. This means there are no significant limits on parliamentary law-making in regards to legislating on the core rights of each citizen, and there are few rights that are constitutionally protected. • Given a referendum is required to add new express rights to the Constitution, it is unlikely more rights will be introduced to further limit parliament's law-making powers, as referendums are very costly and time-consuming.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'evaluate the means by which the Australian Constitution acts as a check on parliament in law-making'. The express protection of rights is one of these means. Therefore, this table showing strengths and limitations of the express protection of rights as a check on parliament in law-making can help you complete this evaluation.

7K Questions

Check your understanding

Question 1

In Australia, there are five express rights that are constitutionally entrenched.

- A. True
- B. False

Question 2

Senator Rodrigo believes the express right to a trial by jury for Commonwealth indictable offences should be extended to cover the right to a trial by jury for any Commonwealth summary offence. She believes it will be simple to amend and can be done by passing a bill in parliament.

Which of the following statements is correct in relation to Senator Rodrigo?

- A. Ms Rodrigo has the power to introduce bills and therefore, can change the wording of the Constitution.
- B. As express rights are protected by statutes they can be amended through the usual process of amending a law.
- C. The wording of the Constitution, and hence the express rights, cannot be modified without a referendum which would require the amendment to occur by a bill being passed in parliament, and then put to the Australian people to vote on.
- D. Senator Rodrigo does not sit in the House of Representatives and therefore, cannot introduce a bill to change.

Question 3

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

limited

free

inapplicable

applicable

According to section 92 of the Constitution, 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely []'. On the other hand, according to section 117 of the Constitution, Australian Citizens of 'any State, shall not be subject in any other State to any disability or discrimination which would not be equally [] to [them] if [they] were... resident in such other State'.

Question 4

Which of the following statements are correct about the express right of freedom of religion?

(Select all that apply)

- A. The express right to freedom of religion enables the Commonwealth Parliament and state parliaments to pass laws that mandate religious practices in all work industries.
- B. Commonwealth laws restricting religious practice are prohibited according to s 116.
- C. An individual cannot be discriminated against by the Commonwealth Parliament based on their association with a religion.
- D. An individual cannot be subject to a religious test in order to qualify for a position in office or as a public servant under the Commonwealth Parliament.

Question 5

Nora has received a letter from the government stating that her property will be acquired by the government and demolished as part of a new airport construction project. According to s 51(xxxi), in this scenario, Nora is entitled to:

- A. nothing, as the government has the ultimate power to obtain any property it wishes if it is in the interest of the broader community.
- B. 50% compensation of the property's value and a new house in another suburb.
- C. 'just terms', meaning the Commonwealth Parliament must provide fair compensation for taking her property.

Question 6

If the Commonwealth Parliament passes a law that infringes upon an express right, it can only be deemed invalid if:

- A. it is challenged in the High Court by an individual with standing.
- B. a Justice in the High Court notices the law infringes upon the express rights.
- C. a referendum is held and the majority of the nation agrees the Commonwealth Parliament has breached the express rights.

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

(2 MARKS)

Outline **one** express right entrenched in the Australian Constitution.

Question 8

(3 MARKS)

Explain how the express protection of rights acts as a check on parliament in law-making.

Adapted from VCAA 2021 exam Section A Q2

Question 9

(4 MARKS)

It is the year 2056, and Jorja is a South Australia resident who has applied for a job in Victoria. She has been told she has been successful and can begin the position in a month's time. However, in order to begin her employment, Jorja's employer has told her she must pay \$500 to the state, as per the newly introduced Interstate Employee Fee Act 2056 (Vic).

Would the Interstate Employee Fee Act 2056 be valid? Justify your answer.

Adapted from VCAA 2017 exam Q3

Extended response

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

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the express rights as a constitutional check on parliamentary law-making.

Statement	Strengths	Limitations
I. Relatively few rights are protected by and entrenched in the Constitution as there are only five express rights. This means there are no significant limits on parliament in law-making with regard to legislating on the core rights of each citizen, and there are few rights that are constitutionally protected.	☐	☐
II. Express rights are enshrined in the Constitution and can only be modified or removed through a referendum, meaning they cannot be changed by parliament alone.	☐	☐
III. There is no mechanism preventing parliament from passing laws that are constitutionally invalid or breach the express rights in the first place. Therefore, laws can be established that infringe on express rights and will be enforced until a case is brought before the High Court where the Act can be deemed invalid.	☐	☐
IV. In order to challenge a law in the High Court, a case needs to be brought by an individual with standing. Considering this requirement, in addition to the cost and time-consuming nature of initiating legal action, legislation breaching one of the express rights may continue to remain in force, preventing parliament's law-making powers from being checked.	☐	☐
V. Express rights are fully enforceable by the High Court, meaning if legislation is created that breaches an express right, an individual with standing can take the case to the High Court where the legislation may be deemed invalid, otherwise known as 'ultra vires'.	☐	☐

Question 11

(6 MARKS)

Evaluate the express protection of rights as one way in which the Australian Constitution acts as a check on parliament in law-making.

Adapted from VCAA 2020 exam Section A Q6

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

Use the following information to answer questions 12 and 13.

A new law, Mandatory Religion Classes Act 2075 (Cth), has been passed by the Commonwealth Parliament and requires all public high schools to integrate religion classes that teach students about a new emerging religion known as 'Edroloism'.

Jacey is a VCE 3/4 Legal Studies student attending a public high school and believes the Commonwealth Parliament has breached its law-making powers by forcing students to learn about a certain religion. She believes s 116 of the Constitution ensures the right to freedom of religion and therefore, the Commonwealth law should be deemed invalid.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the Constitution in acting as a restriction on the Commonwealth Parliament's ability to make laws about religion.

Statement	Strengths	Limitations
I. The right to freedom of religion, as an express right, is fully enforceable by the High Court. Therefore, if an individual with standing, like Jacey, takes the case to the High Court, the legislation may be deemed invalid.	☐	☐
II. The High Court is independent of the executive and legislature. This means it can deem the Mandatory Religion Classes Act 2075 (Cth) ultra vires, even if the majority of parliament wishes to enforce it.	☐	☐
III. There is no mechanism preventing parliament from passing laws that are constitutionally invalid in the first place. Therefore, the Mandatory Religion Classes Act 2075 (Cth) has been passed, despite infringing on an express right, and will continue to operate until it is deemed invalid by the High Court.	☐	☐
IV. In order to challenge a law in the High Court, a case needs to be brought forward by an individual with standing. Though Jacey can prove she has a 'special interest' in the case, as she is directly impacted by the legislation as a high school student, there are significant cost and time factors associated with bringing a case to court. Therefore, if she does not have the means to take the case to court, the legislation will remain in force preventing parliament's law-making powers from being checked.	☐	☐

Question 13

(5 MARKS)

With reference to the scenario, discuss the extent to which the Constitution can restrict the Commonwealth Parliament's ability to make laws on religion that may infringe upon the express right to freedom of religion.

Adapted from VCAA 2019 exam Section A Q6

Linking to previous learning**Question 14**

(7 MARKS)

Ceci has been charged with murder in Victoria under the *Crimes Act 1958* (Vic) and has pleaded not guilty, therefore they will be tried for their offence in the Supreme Court of Victoria. They believe they have the right to a trial by jury because it is an express right entrenched in the Constitution.

a. Explain whether Ceci is correct about having the right to a trial by jury.

3 MARKS

b. Describe **two** roles of the jury in Ceci's case.

4 MARKS

8

CHAPTER 8

The Victorian courts and the High Court in law-making

LESSONS

- 8A** Statutory interpretation
- 8B** The doctrine of precedent
- 8C** Courts' ability to make law
– judicial conservatism and activism
- 8D** Courts' ability to make law – costs, time, and the requirement for standing
- 8E** The relationship between courts and parliament in law-making

Image: Greg Brave/Shutterstock.com

KEY KNOWLEDGE

The Victorian courts and the High Court in law-making

- the reasons for, and effects of, statutory interpretation
- features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent
- factors that affect the ability of courts to make law, including:
 - the doctrine of precedent
 - judicial conservatism and judicial activism
 - costs and time in bringing a case to court
 - the requirement for standing.
- features of the relationship between courts and parliament in law-making, including:
 - the supremacy of parliament
 - the ability of courts to influence parliament
 - the codification of common law
 - the abrogation of common law.

8A Statutory interpretation



Image: clkraus/Shutterstock.com

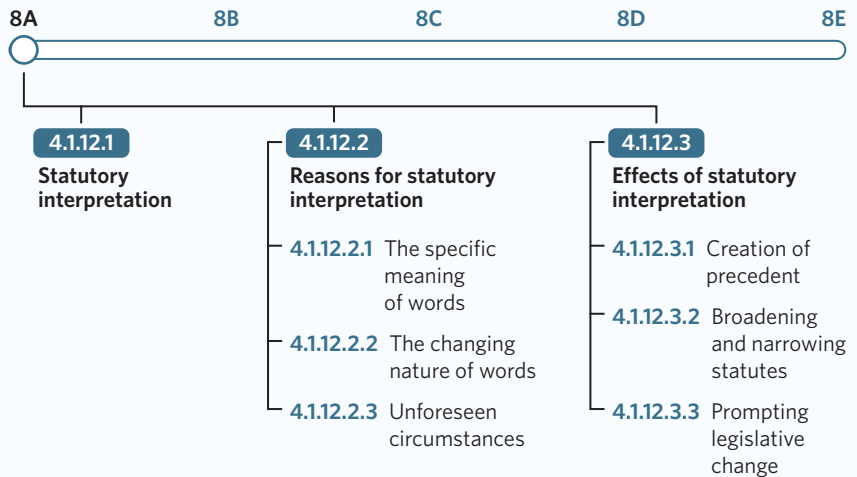
*'The panda eats shoots and leaves.
The panda eats, shoots and leaves.
The panda eats shoots, and leaves.'*

—Lynne Truss (English novelist, broadcaster, and journalist, 2003)

Words and their meaning can change due to punctuation, context, and reader interpretation. Therefore, it is important that laws are written in a clear manner so that they are not open to unreasonable interpretations that change the legislation's intended meaning.

STUDY DESIGN DOT POINT

- the reasons for, and effects of, statutory interpretation



Lesson introduction

Parliament makes laws 'in futuro', meaning laws are created for the purpose of applying to future events. The main role of the courts is to settle legal disputes by interpreting existing legislation and applying it to the facts of the case before them. In doing so, judges can give meaning to words in legislation. Whilst statutes often provide definitions, some words remain ambiguous and subject to evolving meanings. Therefore, judges must determine the meaning of these ambiguous phrases or words in statutes and apply them to the case before them.

Statutory interpretation 4.1.12.1

Statutory interpretation occurs when the courts interpret and apply legislation to the case presented before them. When determining cases, the courts may be required to clarify the meaning of legislation in order to resolve disputes and provide justice. When judges undertake this interpretation, an area of law may be inadvertently developed, and courts can continue to interpret these words in legislation over time to modify established areas of law. 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 the future. However, judges cannot choose which laws to interpret. Rather, a person with **standing** must bring a case before the court which requires legislation to be interpreted to enable the judge to apply it.

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

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.

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.

HYPOTHETICAL SCENARIO**What does 'use' really mean?**

Alex has been charged with breaking a law by 'using' a Quantum Translocator, which is a teleportation device, without a permit. The specific provision of the Act that he has been accused of contravening states:

'any person who uses a Quantum Translocator without proper authorisation shall be subject to fines and imprisonment'.

Judges must determine the meaning of the word 'uses' as Alex alleges that he never actually activated the device, he merely possessed it. Therefore, the judges need to consider the plain language of the statute and examine its surrounding context, legislative history, and the purpose behind the enactment of the law.

Some judges argue that 'uses' should be interpreted broadly, encompassing the mere possession and intent to utilise the device. On the other hand, opposing judges adopt a narrower interpretation, contending that 'uses' should be restricted to the physical activation and transportation function of the Quantum Translocator.

Ultimately, the judges rule in favour of the narrower interpretation, concluding that for someone to be deemed to have 'used' a Quantum Translocator, they must have actively triggered its transportation function. This decision sets a precedent for future cases involving Quantum Translocators.

LESSON LINK

You will learn more about precedent in **8B The doctrine of precedent**.

USEFUL TIP

The terms 'statute', 'Act', and 'legislation' all refer to laws made by parliament. They are interchangeable terms.

Reasons for statutory interpretation 4.1.12.2

Judges interpret statutes to apply the legislation to resolve the case before them. By adding to or clarifying the meaning of ambiguous words or phrases in the statute through their statutory interpretation, judges may consequently resolve any drafting issues that exist in the legislation. The courts' interpretation often serves to clarify:

- the specific meaning of words
- the changing nature of words
- unforeseen circumstances.

The specific meaning of words 4.1.12.2.1

Judges may be required to interpret the specific meaning of words or phrases to identify the scope of the statute and determine whether it extends to certain areas. Where words or phrases are not defined in the legislation, the court may add meaning to the words and phrases of the Act through their interpretation.

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 that 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', as written in the *Control of Weapons Act 1990* (Vic), 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'.

Continues →

LEGISLATION

Control of Weapons Act 1990 (Vic)

USEFUL TIP

When providing reasons for statutory interpretation, you need to provide a full response. It is not enough to mention that 'judges need to clarify the specific meaning of words'. A brief example, such as mentioning *Deing v Tarola* or the 'Studded Belt Case', is one way of strengthening your answer.

LEGAL CASE

Deing v Tarola* [1993] 2 VR 163 – Continued*Significance**

Deing's belt was found not to fall within the definition of a weapon and his conviction was overturned. The judge narrowed the definition of 'weapon' by excluding items, such as studded belts, thus clarifying the specific meaning of the words in the Act.



Image: Bussakorn Ewesakul/Shutterstock.com

Figure 1 The case of *Deing v Tarola* found a studded belt did not constitute a 'weapon'

The changing nature of words 4.1.12.2.2

As society progresses, the meaning of words and how they are used reflects these changes. Judges may interpret the meaning of words to align with society's values.

LEGAL CASE

CONTENT WARNING This section explores content that is sensitive in nature, relating to discrimination based on gender.

Attorney-General (Cth) v Kevin and Jennifer* (2003) 172 FLR 300*Facts**

Kevin was born biologically female but identified as a male. As an adult, he underwent gender-affirming surgery. Kevin married Jennifer in 1999 and applied for a declaration of the validity of their marriage.

Legal issue

The marriage was challenged by the Attorney-General who argued Kevin was not a man for the purpose of the definition of a marriage. At the time the *Marriage Act 1958* (Vic) was written, 'marriage' was defined as the 'union of a man and a woman', but the Act did not include a definition of 'man'. The Family Court was therefore asked to decide whether Kevin was legally a 'man' at the time of the marriage. That is, the court had to assess what criteria should be applied in determining whether a person is a 'man' or a 'woman' for the purpose of the law of marriage.

Decision

The Family Court held the marriage was valid as Kevin was considered a man in the everyday sense.

Significance

The court determined the word 'man' should be given a contemporary, normal, and everyday meaning, which in the 21st century was held to include those who are transgender.



Image: Ink Drop/Shutterstock.com

Figure 2 The court declared transgender men fell within the definition of the term 'man'

LEGISLATION

Marriage Act 1958 (Vic)

Unforeseen circumstances 4.1.12.2.3

Laws are drafted with the intention to cover future legal issues. There are many instances where legislative drafters have not taken into account all possible circumstances where the statute could apply. The court must interpret the legislation and apply it to unforeseen circumstances that were not anticipated by parliamentarians when drafting legislation.

HYPOTHETICAL SCENARIO

Uncharted laws of Chat GPT

Imagine a legal case that requires judges to apply an existing law to an unforeseen circumstance involving the widespread availability of ChatGPT, an advanced AI language model, to the general public. The case brings to light the need for judges to use statutory interpretation to address a situation that could not have been anticipated at the time the law was enacted.

Rohan has been charged with copyright infringements after he published information developed by ChatGPT. The provision he was charged under criminalises the use of 'automated tools'. The law was intended to target software programs and automated systems that facilitate criminal activities.

The judges face the challenge of interpreting the law in light of the unforeseen circumstances presented by the existence of ChatGPT. They recognise that the traditional application of the law to automated tools may not adequately address the unique features and capabilities of this language model.

The court determined that whilst ChatGPT may have the potential for misuse, the current language of the law does not clearly encompass or address its unique characteristics. Consequently, it found that the charges against Rohan cannot be criminalised under the existing statute.

USEFUL TIP

When considering reasons why courts interpret statutes, be mindful of a few common misconceptions. Judges will not interpret a statute because society's values change or because they have identified a need to narrow or expand the meaning of words. Judges can only interpret laws relevant to the case before them. They cannot create precedent of their own volition, rather, a person with standing must bring a case before them.

Effects of statutory interpretation 4.1.12.3

Through statutory interpretation, judges give meaning to the words in legislation and are able to resolve disputes in the cases before them. The interpretation of legislation in a particular case can also have broader implications, including:

- the creation of precedent
- broadening the operation of a statute
- narrowing the operation of a statute
- prompting legislative change.

Creation of precedent 4.1.12.3.1

Judges' interpretation of statutes establishes a precedent for the cases that follow. By interpreting laws and making decisions about the meaning of words in legislation, all future cases with similar material facts heard in the lower courts must abide by this interpretation. This creates consistency between cases with similar facts and ensures they are treated the same before the law.

HYPOTHETICAL SCENARIO

High heels = High crime

Samantha was wearing high heels on her way to work and was charged with carrying a 'weapon'. The police officer who saw her wearing them declared 'you are under arrest for possessing a weapon'. The officer explained that reports of high heels being used as weapons have led police to believe her heels could be dangerous.

Samantha's case was heard in the Magistrates' Court, where her lawyer cited the precedent of *Deing v Tarola* and argued that, like a studded belt, high heels should not be considered weapons. The court accepted this line of reasoning and ruled in Samantha's favour, declaring that her high heels were not weapons.



Figure 3 The Magistrates' Court utilised precedent in order to determine if Samantha's shoes were a weapon

Broadening and narrowing statutes 4.1.12.3.2

When the courts interpret laws, they can broaden the meaning of legislation, thereby expanding its scope. This can result in the statute applying more frequently.

LEGAL CASE

Carr v State of Western Australia (2007) 232 CLR 138

Facts

Carr was suspected of armed robbery and was questioned by police. During the interview, he made no admission of guilt. In the police cells, he admitted to participating in the armed robbery. This was captured on the police station's video surveillance and used as evidence in Carr's trial. He was found guilty and appealed unsuccessfully to the Western Australia (WA) Court of Appeal, then appealed again to the High Court of Australia.

Legal issue

Section 570D(2) of WA's *Criminal Code* requires that when a person is tried for a serious offence, evidence of any admission of guilt can only be admissible evidence if the admission is videotaped. In s 570D(1), 'videotape' is defined as 'any videotape on which an interview is recorded'. The word 'interview' is critical here. Carr argued an 'interview' requires a degree of formality and a question-answer approach. He stated the conversation in his cell was not an 'interview' as it lacked this formality.

Decision

The majority of justices in the High Court rejected Carr's argument. The court defined 'interview' as any conversation between police and a suspect, therefore the video recording of the conversation in the cell was **admissible evidence** in a trial and his conviction was upheld.

Significance

This broad interpretation of 'interview' in this example of High Court statutory interpretation means in future cases any video recording of a conversation between police and a suspect will be admissible evidence, as long as new precedent is not established to alter this.

LEGAL VOCABULARY

Admissible evidence evidence that abides by the rules of procedure, that is therefore allowed to be presented to the court.

The court can also narrow the meaning of provisions and restrict the scope of the law through their interpretation.

LEGAL CASE

Palmer v State of Western Australia (2021) 272 CLR 505

Facts

In 2021, Clive Palmer took a case to the High Court in which he challenged the validity of Western Australia's border closures during the COVID-19 pandemic in 2020.

Legal issue

Palmer argued that the border closures violated s 92 of the Constitution, which guarantees freedom of movement between states.

Decision

The High Court Justices unanimously rejected Palmer's argument, stating the border closures were justified due to a legitimate purpose. They believed the restrictions on movement were reasonably necessary given the circumstances of the pandemic. Justice Gageler emphasised the 'reasonable necessity' of the lockdown measures, whilst Justice Kiefel and Justice Keane concluded there were no effective alternatives to general entry restrictions, which were necessary for public health and safety.

Significance

As a result of this case, the Justices provided a narrower interpretation of s 92 of the Constitution, clarifying that it does not apply to border restrictions during a pandemic.

CONSTITUTION

Section 92

Prompting legislative change 4.1.12.3.3

Parliament may amend legislation in response to statutory interpretation. If the courts interpret the law in a way that parliament disagrees with, they may decide to amend the legislation in order to provide clarity and override the court decision. Parliament may also wish to confirm a decision made by the courts and create legislation to institutionalise the court's decision.

LEGAL CASE

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.

Mabo v Queensland (No. 2) (The Mabo Case) (1992) 175 CLR

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 of 'terra nullius' was incorrect as First Nations people had lived on the land for tens of thousands of years prior to colonisation. Mabo claimed he had ownership rights over the land in the Murray Islands, within the Torres Strait.

Legal issue

The issue was whether First Nations Australians had '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.

The High Court decided the law's previous assumption that Australia was a 'land of no-one' was racist and discriminatory.

Significance

As a result of this case, the court's decision became part of Australian legislation. The *Native Title Act 1993* (Cth) was created by the Commonwealth Parliament in order to confirm the decision of the High Court.

LEGISLATION

Native Title Act 1993 (Cth)

Lesson summary

Statutory interpretation refers to the process of the courts giving meaning to the words in legislation when resolving a dispute.

Reasons for statutory interpretation include:

- clarifying the specific meaning of words
- reflecting the changing nature of words
- applying legislation to unforeseen circumstances.

Effects of statutory interpretation include:

- creation of precedent
- broadening and narrowing statutes
- prompting legislative change.

USEFUL TIP

Be sure to read the question carefully. It is important not to confuse the 'reasons for statutory interpretation' with the 'effects of statutory interpretation'. Think about 'reasons for statutory interpretation' meaning the 'why' and 'effects of statutory interpretation' as the 'consequence'.

8A Questions

Check your understanding

Question 1

Judges can interpret all statutes regardless of the case presented before them.

- A. True
- B. False

Question 2

Which of the following statements best describes why judges need to interpret legislation to reflect society's values?

- A. The meaning of words never changes, but society's views do. Therefore, judges may interpret the meaning of words to reflect societal shifts.
- B. Society's values rarely change, so judges rarely need to change their interpretation of statutes.
- C. As society progresses, the meaning of words and how they are used reflects these changes. Judges may interpret the meaning of words in line with society's values.

Question 3

Which of the following are **not** effects of statutory interpretation? **(Select all that apply)**

- A. Broadening the application of laws.
- B. Altering laws, as judges can change the current legislation.
- C. Clarifying the meaning of words.
- D. Narrowing the application of laws.

Question 4

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

in the future

in futuro

in futiem

Parliament makes laws [], meaning laws are created that will apply to future events.

Question 5

One reason for statutory interpretation in the *Deing v Tarola* case was:

- A. clarifying the specific meaning of words.
- B. reflecting the changing nature of words.
- C. applying legislation to unforeseen circumstances.

Question 6

When judges interpret statutes, parliament amends them accordingly.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(3 MARKS)

Explain **one** reason why a court may need to interpret a statute.

Question 8

(3 MARKS)

Lily has been charged with fraud after they utilised ChatGPT to impersonate their friend JT in order to purchase a property in Melbourne. In their defence, Lily's legal representation raised that the current fraud statute required 'human interference' and, therefore, Lily's use of ChatGPT as an impersonator of JT was not fraud as no 'human interference' had occurred. The judges must determine if Lily actually 'humanly interfered', as it is not defined in the legislation.

Explain why the phrase 'human interference' may require statutory interpretation.

Adapted from VCAA 2020 exam Section B Q2b

Question 9

(4 MARKS)

Outline **two** effects of interpretation of statute by judges.

Adapted from VCAA 2014 exam Q1

Question 10

(6 MARKS)

Finn was charged with armed robbery. Finn had nail clippers in their pocket, and the prosecution argues this constitutes an 'offensive weapon'.

Explain the reason and effect of statutory interpretation in Finn's case.

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** or **limitations** of statutory interpretation.

Statement	Strengths	Limitations
I. Judges are not elected and do not represent the people when interpreting statutes.	☐	☐
II. Judges can fill in the gaps in legislation and ensure it is tailored to the current societal standards.	☐	☐
III. Parliament has no obligation to consider the decisions made by judges when creating legislation.	☐	☐
IV. Judges can account for circumstances that drafters may not have foreseen.	☐	☐

Question 12

(6 MARKS)

In 1993, the *Native Title Act 1993* (Cth) was created by the Commonwealth Parliament in response to a ground breaking judgment by the High Court justices in the *Mabo Case*.

Discuss the extent to which statutory interpretation is an effective way to make law.

Linking to previous learning

Question 13

(3 MARKS)

Explain the role of the judge with regard to statutory interpretation.

8B The doctrine of precedent

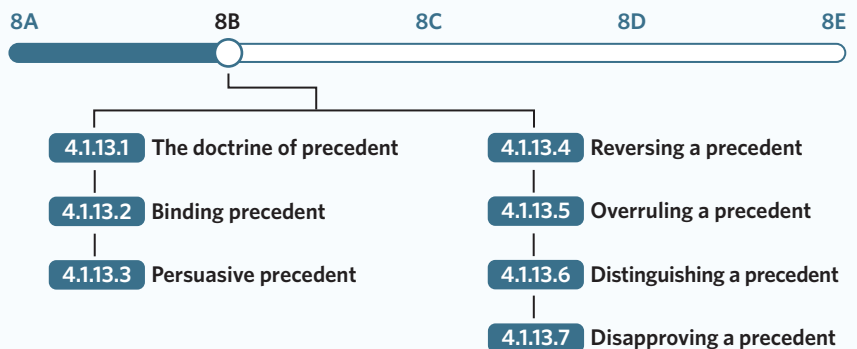


Image: Konstantin Korobeinikov/Shutterstock.com

The doctrine of precedent is like a sturdy bridge across a river of legal uncertainty. Each precedent laid down acts as a supporting pillar, providing a solid foundation for future cases. Just as a bridge ensures safe passage across turbulent waters, precedent guides the legal system, offering stability and predictability. Every new decision strengthens the structure, forming a reliable path that upholds justice and promotes consistency in the law.

STUDY DESIGN DOT POINT

- features of the doctrine of precedent including binding precedent, persuasive precedent, and the reversing, overruling, distinguishing, and disapproving of precedent



Lesson introduction

The common law system is based upon the doctrine of precedent whereby courts lower in the court hierarchy follow the decisions of the courts higher in the hierarchy to provide consistency, predictability, and in turn, justice.

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.

LEGAL VOCABULARY

Stare decisis the legal principle to stand by what has been decided and follow the decisions of previous cases.

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 LINKS

You learnt about court hierarchy in **2D The Victorian court hierarchy and criminal cases** and **5C The Victorian court hierarchy and civil disputes**.

The doctrine of precedent 4.1.13.1

When adjudicating cases with similar circumstances, judges must adhere to the **doctrine of precedent** and follow the decisions made by higher courts within the same court hierarchy. The doctrine of precedent is based upon the principle of '**stare decisis**', meaning 'to stand by what has been decided'. Therefore, cases with similar facts are decided in a similar manner to ensure consistency, predictability, and justice. In order to uphold this principle, the courts are arranged in a hierarchy according to their jurisdiction. Lower courts in the hierarchy must follow the reasoning for decisions made by the higher courts in the same court hierarchy.

A judge's 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, that is, the ratio is 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 is, it does not have to be followed, but can provide guiding principles for judges in future cases.

HYPOTHETICAL SCENARIO

Rocking the rules – from classrooms to society

Michael rocks on his chair at school and Lauren reports Michael to her teacher, as she is worried about his safety. There are no firm rules about rocking on chairs in the classroom, so the teacher decides to create a new rule that students are not allowed to rock on his chair. Three days later, Lauren reports that another student, Scarlett, is rocking on her chair, so the teacher advises Scarlett she is not permitted to do so.

In all future cases, the teacher should apply the same rules to all students, so they are treated fairly. All students should be treated equally by the rules, and should know the rule that they are not allowed to rock on the chairs. 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.



Figure 1 Precedent provides consistency and predictability as the law is applied equally to everyone

Binding precedent 4.1.13.2

Binding precedent is a previous court decision that lower courts within the same court hierarchy are obligated to abide by when the facts of a case are similar. If a precedent is binding, a judge must follow it, regardless of whether they agree with the legal reasoning behind the decision or not. This ensures that cases with similar facts are heard in the same way, therefore providing predictability in the legal system.

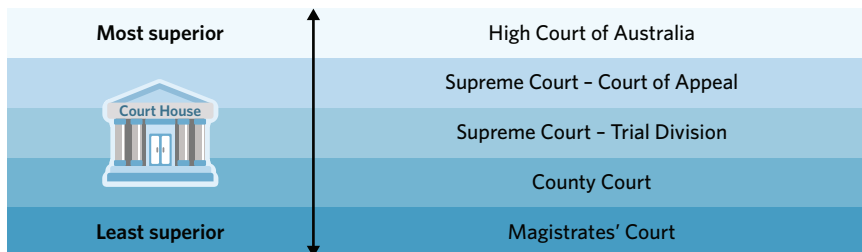


Figure 2 The Victorian court hierarchy

KEY TERM

Binding precedent legal reasoning of a higher court that must be followed by all lower courts in the same court hierarchy where the material facts are similar.

USEFUL TIP

It is really important to correctly memorise the Victorian court hierarchy as some questions may provide you with a case study and require you to indicate whether the precedent will be persuasive or binding.

A common area of confusion is the Supreme Court of Victoria. The Victorian Supreme Court is split into two parts: the Supreme Court – Trial Division and the Supreme Court – Court of Appeal. The Court of Appeal sits above the Trial Division, therefore, the Supreme Court- Trial Division must follow binding precedent from the Court of Appeal.

Persuasive precedent 4.1.13.3

Persuasive precedent refers to decisions that are not binding, but can be used as a tool to help judges determine an outcome for the case before them. When deciding on a case, judges may look at precedents they are not required to follow to help guide their decisions. If there is no law applicable to a particular case, the parties can utilise persuasive precedents to persuade the judge to make a judgment in their favour. For example, persuasive precedent can 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.

KEY TERM

Persuasive precedent legal reasoning that can act as a guide for judges even though they are not bound to follow it.

DEEP DIVE



Image: Michelle Bean/Shutterstock.com

Figure 3 Australian law stems from English laws

English law roots

England's legal system was brought to Australia due to Britain's colonisation of Australia since 1788, and therefore, Australia's legal system is largely influenced by British systems and laws. Even in modern law-making Australia has looked to Britain and its court decisions to inform its own legal decisions, despite Australian judges not being bound by them.

For example, the 'finders keepers' rule from *Parker v British Airways Board* [1982] 1 QB 1004, is a UK precedent that has been adopted into Australian law.

Parker, a passenger in an airline lounge, found a gold bracelet. They handed the bracelet to the staff and asked to be contacted if the owner could not be found. Eventually, the airline sold the bracelet and Parker sued them. The Court held that the airline did not show an intention to control all items in the lounge, which meant the passenger had better rights to the bracelet than the airline as he had claimed it before them.

The principle employed in *Parker v British Airways Board* was adopted in Australian law in *National Crime Authority v Flack* (1998) 86 FCR 16, demonstrating how legal decisions from different countries can influence Australian judges and their decisions.

KEY TERM

Reversing a precedent an act whereby a superior court changes a precedent set by a lower court in the same case on appeal.

Reversing a precedent 4.1.13.4

Reversing a precedent occurs when a case is appealed and the superior court changes the precedent set by a lower court. As a result of reversing the precedent set by the lower court, a new precedent is established by the superior court and must now be followed by all future cases.

LEGAL CASE



Image: Rawpixel.com/Shutterstock.com

Figure 4 The High Court reversed the decision that Google misled or deceived customers through sponsored links

Google Inc v Australian Competition and Consumer Commission (ACCC) (2013) 249 CLR 435

Facts

When conducting a Google search, two types of search results appear: 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 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 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 outcome because Google did not actually author or endorse the sponsored links.

Significance

This case highlights the ability of superior courts to change the previous decisions made by inferior courts. The High Court set a precedent in this case, and all other cases with similar facts will therefore be decided in the same way in Australia. The original decision from the Federal Court was reversed and therefore is not a precedent other courts are bound to follow.

Overruling a precedent 4.1.13.5

Overruling a precedent occurs when a superior court invalidates a previous decision made by a lower court by setting a new precedent in a new case with similar facts. Courts can also overrule their own past decisions.

LEGAL CASE

Imbree v McNeilly [2008] 236 CLR 510

Facts

In 1986, the High Court made a ruling in the case of *Cook v Cook* (1986) 162 CLA 376, stating an inexperienced learner driver owed a lower standard of care to their instructor compared to an experienced driver.

Legal issue

In 2002, Imbree allowed McNeilly, a 16-year-old learner driver, to drive his car while he supervised from the front seat. An accident occurred, causing Imbree to suffer spinal injuries. Imbree sued McNeilly, and both the original trial court and the appellate court upheld the principle established in *Cook v Cook* [1986]. Following this precedent, there was a reduction of the compensation awarded to Imbree on the grounds that McNeilly owed a lower standard of care to Imbree as a learner driver. Imbree took the case to the High Court, however, believing McNeilly's standard of care should not be lowered simply due to his inexperience with driving.

Decision

Following another appeal, the High Court overturned the ruling in *Cook v Cook*. The Court held that learner drivers should be held to the same standard of care as all other road users. The reversal of the previous decision created a new precedent.

Significance

The High Court's decision in this case established a new principle of law, stating learner drivers should be held to the same standard of care as other drivers on the road. This ruling overturned the previous understanding established in *Cook v Cook*, which had stated that learner drivers owed a lower standard of care to their instructors.



Image: James Bowyer/Shutterstock.com

Figure 5 Learner drivers were held to the same standard of care as experienced drivers

KEY TERM

Overruling a precedent an act whereby a superior court changes a previous decision made by a lower court, when ruling on a different case.

USEFUL TIP

The difference between reversing and overruling a precedent is that reversing a precedent refers to a decision that is changed on appeal in the same case. Contrastingly, overruling a precedent is when a different case is brought before the courts at a later date and they change the precedent, set by a lower court or one of the same standing, that was established in an earlier case.

USEFUL TIP

Be mindful of your use of terminology, especially concerning the word 'binding'.

If something is 'binding' then by definition it cannot be avoided. For a precedent to be binding, the facts of the previous case and the current case must be the same, or materially similar. If the judge can distinguish between the current case and the case in which the precedent was established, then the precedent is not binding on the case at hand. To summarise, it is correct to say judges can distinguish a precedent, rather than judges 'avoid a binding precedent'.

Distinguishing a precedent 4.1.13.6

Distinguishing a precedent occurs when a lower court refrains from applying a prior ruling. Since lower courts are bound by precedent where the facts of the case they are hearing are similar to the case where the precedent was established, these lower courts are only able to not abide by precedent by demonstrating the current case has dissimilar facts compared to the case in which the precedent was established.

Disapproving a precedent 4.1.13.7

Disapproving a precedent occurs when a lower court acknowledges its disagreement or lack of approval towards a binding precedent, whilst still being obliged to follow it. These expressions of disapproval are obiter dictum. Disapproving a precedent does not change it, it merely shows the judge deciding upon the present case does not agree. If the judge is in a court lower in the hierarchy, they are still required to follow it.

KEY TERMS

Distinguishing a precedent an act whereby a lower court avoids applying a precedent by demonstrating that the case before it has different material facts to the case in which the precedent was established

Disapproving a precedent an act whereby a lower court expresses its disapproval of a precedent established by a higher court through its written judgment, but is still bound to follow it.

Lesson summary

- The doctrine of precedent describes the legal principle whereby judges apply the legal reasoning of decisions made by superior courts, in the same court hierarchy, to cases before them with similar material facts.
- There are two main types of precedent:
 - binding precedent
 - persuasive precedent.
- Judges are able to interpret past decisions and use them to inform current decisions. However, they may be able to:
 - create their own precedents by reversing or overruling precedent
 - avoid abiding by past decisions by distinguishing precedent
 - express their disapproval for a past decision by disapproving precedent.

8B Questions

Check your understanding

Question 1

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 before them with similar material facts.

Question 2

The ratio decidendi is the legal reasoning for the decision of a case that must be followed by courts lower in the same court hierarchy in cases with similar facts, whereas obiter dictum is legal reasoning that helps the judge in a higher court reach a decision, but does not have to be followed. Rather, it can provide guiding principles for judges in future cases.

- A. True
B. False

Question 3

Tick the box to indicate whether each of the following statements refers to **binding precedent** or **persuasive precedent**.

Statement	Binding precedent	Persuasive precedent
I. All lower courts in the same hierarchy must follow the ratio decidendi of superior courts' decisions in cases with similar material facts.	☐	☐
II. All courts can consider decisions from other court hierarchies to help guide their decisions.	☐	☐
III. Even if the judge disagrees with the reasoning of a previous decision, they are still bound to follow it.	☐	☐
IV. If the judge disagrees with the reasoning of a previous decision, they are not bound to follow it.	☐	☐

Question 4

Which of the following statements is correct?

- A. A superior court can reverse a precedent set by a lower court in the hierarchy in the same case on appeal.
- B. Overruling a precedent is when a superior court changes a previous decision made by a lower court in a later case with different facts.

Question 5

Which of the following statements most accurately describes the concept of distinguishing a precedent?

- A. Where the material facts of two cases are the same, but the judge decides to use persuasive precedent.
- B. Where the facts are similar, but have material differences that allow the judge to avoid using precedent, and enables them to make their own decision.
- C. Where the material facts are so different that another precedent applies.

Question 6

Disapproving a precedent occurs when the judges:

- A. decide not to use a precedent they disagree with.
- B. disapprove of a precedent in the obiter dictum of the case they are deciding upon and do not use the precedent.
- C. disapprove of a precedent in the obiter dictum of the case they are deciding upon but are still bound to follow it.

Question 7

Once a precedent has been set, it cannot be changed by any court and must be followed by lower courts in all jurisdictions in future cases where material facts are similar.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(2 MARKS)

Outline **one** reason why the Magistrates' Court of Victoria may not be bound by a decision of the County Court of Victoria.

Adapted from VCAA 2015 exam Q2

Question 9

(3 MARKS)

Distinguish between binding precedent and persuasive precedent.

Question 10

(3 MARKS)

Priya is a famous actress who has been defamed online. A similar case has recently been heard in the Supreme Court of Victoria – Court of Appeal in which the celebrity lost the case. Priya's lawyers warn her that this recent case has set a precedent where the decision is unlikely to be in her favour for her own case. Priya's case is set to be heard in the County Court of Victoria.

Explain **one** reason why the court may not be able to change the law in this case.

Adapted from VCAA 2018 Sample exam Section B Q3c

Question 11

(6 MARKS)

Lily was convicted of murder in the Victorian Supreme Court – Trial Division and she appealed the decision to the Supreme Court – Court of Appeal. The decision is overruled on appeal and the Supreme Court – Court of Appeal explains it is bound to follow a decision from the House of Lords, a court in England.

A case with similar facts comes before the Supreme Court – Trial Division three years later. The Supreme Court – Trial Division follows every part of the Supreme Court – Court of Appeal's judgment as it is binding precedent. It is bound by all parts of the judgment made by the Supreme Court – Court of Appeal, including the obiter dictum of this decision.

Identify **three** errors in the scenario above and, for each error, explain the correct process or procedure that should have occurred.

Adapted from VCAA 2020 exam Section A Q5

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 doctrine of precedent? **(Select all that apply)**

- A. An appellate court can reverse the decision of the original court when deciding on the same case.
- B. Judges are only bound by persuasive precedent.
- C. Judges are able to avoid being bound by precedent where they can distinguish the current facts in the case they are deciding upon from the facts of the previous case that created the binding precedent.
- D. Judges in a superior court can overrule a previous decision made by a lower court to avoid using precedent.

Question 13

(5 MARKS)

'Judges are always bound to follow an existing precedent'.

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2022 exam Section A Q6

Linking to previous learning**Question 14**

(2 MARKS)

'The Victorian court hierarchy is an important part of the legal system. It allows the doctrine of precedent to operate and it establishes the jurisdiction of courts.'

Outline **one** reason why a precedent established in the Victorian Supreme Court – Court of Appeal may be followed in the Victorian Supreme Court – Trial Division.

8C Courts' ability to make law – judicial conservatism and activism

STUDY DESIGN DOT POINT

- factors that affect the ability of courts to make law, including:
 - the doctrine of precedent
 - judicial conservatism and judicial activism
 - costs and time in bringing a case to court
 - the requirement for standing

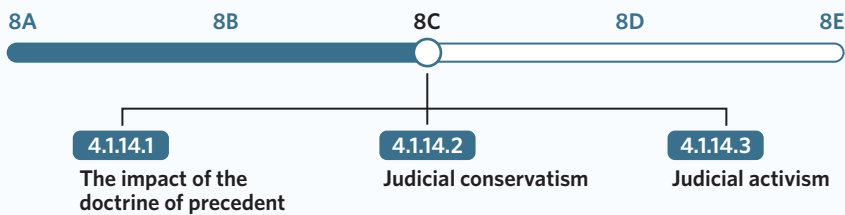


Image: Monkey Business Images/Shutterstock.com

Imagine your old legal studies teacher retired and was replaced with a young, new teacher. The new teacher is considering whether or not to abolish the long-standing rule that students who do not hand in their homework on time must stay after school to complete it. She thinks this rule is unfair and is considering making homework optional. Will she act conservatively and leave the rule as is, or progressively and create a new, potentially controversial rule?

Lesson introduction

Whilst the main role of the courts is to apply the law and resolve cases before them, judges may also be required to develop new laws when existing laws are not directly applicable to the case at hand. Some judges may believe that a change in existing common law is urgent and necessary, consequently making their own significant and potentially controversial changes to such law. On the other hand, other judges may avoid making such changes and leave law-making to parliament as it is the supreme law-making body.

The impact of the doctrine of precedent 4.1.14.1

As the **doctrine of precedent** requires judges to follow the decisions made by superior courts within the same court hierarchy where material facts are similar, this legal principle impacts the court's ability to create new laws. The primary role of the courts is to resolve legal issues that arise out of both criminal cases and civil disputes. They do this by interpreting legislation or common law and applying the legal principles to the matters before them, throughout which they must also follow any relevant principles established by existing precedent. Therefore, the courts play an important role in law-making and will only create new laws when the relevant legislation is unclear, or there is no common law applicable to the case they are resolving. When making law, the doctrine of precedent can both enhance and restrict law-making by the courts.

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.

LESSON LINK

You learnt about the doctrine of precedent in **8B The doctrine of precedent**.

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.

Ex post facto a Latin term meaning 'from a thing done afterwards', which refers to a situation in which a law is created or amended in relation to an act, after that act has taken place.

LESSON LINKS

You will learn more about the requirement for standing in **8D Courts' ability to make law – costs, time, and the requirement for standing.**

You will learn more about the supremacy of parliament and the abrogation of common law in **8E The relationship between courts and parliament in law-making.**

Table 1 Evaluating the effect of the doctrine of precedent on the ability of courts to make law

Strengths	Limitations
- If no statute or common law exists, or it is not clear how the law should be applied to the case before them, judges are able to create a precedent, thereby developing the law. - Judges on the same hierarchical level or from superior courts can overrule or reverse a decision made by lower courts in the hierarchy, therefore developing the common law. - Judges can distinguish a precedent by demonstrating the current case has different material facts to the case in which the precedent was established. The court can then develop new precedents if necessary. - Courts can disapprove of a precedent by expressing their objection to an existing precedent. These comments may persuade parliament or superior courts to create new laws in future cases. - The doctrine of precedent enables courts to fill in the gaps of existing legislation when interpreting statutes. This allows judges to create and apply legal principles that specifically address the matters in the case by considering issues that have not been accounted for by the legislation.	- In civil disputes, judges must wait for an individual with standing to bring a civil case to court before they can establish a new law. Similarly, in the context of criminal law, the courts must wait for an accused to be brought to court before they can establish new law. Courts cannot develop laws whenever they wish. - Judges make law ex post facto, meaning they make laws retrospectively only after a case is brought before them. - Courts can only develop new law where no law currently exists, or it is not clear how the law applies to the case before them. This means the courts cannot make laws on the basis that they disagree with existing legislation. - Even if judges are in a position to change the law, some may be hesitant or unwilling to do so. - Whilst the courts can create new laws, parliament can still pass legislation that abrogates these laws due to the supremacy of parliament.

LEGAL CASE



Image: Oleg Troino/Shutterstock.com

Figure 1 The UK 'snail in the bottle' case established one of the most famous precedents

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 from 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. As a result, Donoghue sued Mr Stevenson, the manufacturer of the ginger beer, seeking compensation for her injuries.

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 their 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 her, and all other consumers of their ginger beer, 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 to the person you owed a duty to makes an individual liable to pay compensation to the injured party.

Significance

Although this case was heard in the United Kingdom, it demonstrates the ability of the courts to make law where no principle of law previously existed. 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 liable for injuries resulting from their products.

Judicial conservatism 4.1.14.2

Some judges may be reluctant to develop new laws as they believe it is parliament's responsibility to make laws as the supreme law-making body. This caution or restraint adopted when approaching issues that may require establishing new precedents or changes to common law is known as **judicial conservatism**. To avoid making substantial changes to the law, conservative judges tend to interpret legislation narrowly, focusing only on the case before them. Conservative judges aim to ensure they do not base their decisions on their own political views or opinions to make controversial changes to the law. Instead, these judges demonstrate restraint and develop case-specific judgments rather than creating precedent. Hence, judges leave this responsibility of creating new laws to parliament. Furthermore, judicial conservatism may result in judges in superior courts applying outdated precedents, even in circumstances when the court is not bound to follow these existing laws.

Table 2 Evaluating the effect of judicial conservatism on the ability of courts to make law

Strengths	Limitations
- Conservative judges show restraint in making decisions that could significantly change the law, ensuring the law remains stable. - Judicial conservatism prevents the creation of controversial laws as judges do not base their decisions on their own political views and opinions. - Judicial conservatism means courts will not make radical and controversial changes in the law, reducing the likelihood of appeals being made on a question of law, whereby the precedent may be reversed.	- Conservative judges tend to interpret the law narrowly, which restricts courts from making substantial changes to the law. - Judicial conservatism may result in judges in superior courts applying outdated precedents rather than creating new ones, even in circumstances when the court is not bound to follow the existing precedent. This may mean that relevant community views and values are no longer reflected in the existing precedent.

KEY TERM

Judicial conservatism a judicial approach where a judge is reluctant to develop new law as they feel it is the role of parliament, as the elected representative body, to do so.

USEFUL TIP

It is important to provide explanations in your answers. It is not enough to mention the features of the doctrine of precedent, being reversing, overruling, distinguishing, and disapproving. Rather, you need to explain how the doctrine of precedent can impact the ability of the courts to make law.

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.

LEGAL CASE

State Government Insurance Commission v Trigwell [1979] HCA 40

Facts

Mr and Mrs Trigwell were injured in a car accident when a vehicle collided with their car after attempting to avoid a collision with sheep that had roamed onto the road. The Trigwells sued the owners of the sheep, arguing they were negligent by not taking substantial measures, such as putting up fencing, to prevent their sheep from escaping onto the highway.

Legal issue

The High Court was required to determine whether it should follow an old common law principle established in *Searle v Wallbank* [1947] AC 341. The principle asserted that landowners are not responsible for damage caused by their livestock wandering off their property and onto highways.

Decision

As the highest court in the hierarchy, the High Court had the ability to overrule the old precedent and create new law, but chose not to and took a conservative approach. The court upheld the existing precedent and deemed that the owners of the sheep should not be held responsible for the damage caused by their livestock.

Significance

Justice Mason suggested in his judgment that if a change to this law is required, it should come from parliament, stating 'the court is neither a legislature nor a law reform agency. Its responsibility is to decide cases by applying the law to the facts as found'. This is an example of courts adopting a conservative approach in developing the law. The Victorian Parliament later passed the *Wrongs Act (Animals Straying on Highways) Act 1984* (Vic), abolishing the outdated common law principle.

LEGISLATION

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

Judicial activism 4.1.14.3

KEY TERM

Judicial activism a judicial approach where a judge takes into account numerous social and political factors when interpreting the law and deciding cases.

Unlike judicial conservatism, **judicial activism** is an approach to law-making where judges act progressively to consider a range of social and political factors when interpreting the law and making decisions. Judges who take an activist approach feel that, whilst they have a primary role in resolving cases before them, they also have a responsibility to undertake a secondary role in developing common law, where it is necessary to do so.

Judges may take an activist approach and change the law in areas where parliament is hesitant to do so. Unlike parliament, judges are not elected by the people and are, therefore, free from political influences. This means they can make controversial changes in the law without needing to consider their prospects of re-election. Therefore, judges may interpret the law in a way that protects the interests or rights of minority groups. However, those who disapprove of judicial activism argue that judges should not make substantial changes to the law as they are not democratically elected to create laws on behalf of a nation's people.

USEFUL TIP

Remember, judicial activism does not enable progressive judges to simply change an area of law when they want to or solely according to their personal views and values. The court must:

- wait for a case to come before them by a person with standing or by an accused charged with a crime involving particular facts where the current laws does not cover the issues at hand
- have no other law they can apply, or have no law that clearly applies to the case.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'discuss the ability of parliament and the courts to make law.' These tables throughout this lesson evaluating the effect of the doctrine of precedent, judicial conservatism, and judicial activism on the ability of the courts to make law can help you in discussing the court's ability to make laws.

'Strengths' of the effect refer to factors that can strongly influence the courts' ability to make law and/or the effectiveness of that law-making, whereas 'limitations' are factors that limit the influence of the factor on law-making by parliament, or its effectiveness in law-making.

Table 3 Evaluating the effect of judicial activism on the ability of courts to make law

Strengths	Limitations
• Judges who take an activist approach feel their role extends beyond merely applying legal principles to the case before them and therefore, undertake a secondary role in developing common law where necessary. • Unlike parliament, judges are not elected by the people and can, therefore, make controversial changes in the law without the fear of not being re-elected. • Judges can develop laws that put pressure on parliament to make legislative changes. • As the High Court is not bound by any previous decisions, judges in this court are able to engage in judicial activism and radically change the law.	• Courts must still wait for a relevant case before actively changing the law. • Judges are not elected by the wider community meaning that the common law created may not actually reflect the views and values of the majority. • The High Court is the only court that is not bound by the doctrine of precedent. Therefore, courts lower than the High Court are still restricted from making new law, where there is existing precedent set by a higher court. • If a judge, aside from justices in the High Court, seeks to radically change the law, a party may appeal this decision on the basis that it is an incorrect interpretation and application of the law. This could possibly result in the new precedent being overruled, reversing the change. • Parliament is the supreme law-making body and can, therefore, abrogate any radical common law created by the courts as legislation will prevail over such law.

LEGAL CASE

CONTENT WARNING This example contains references to deceased persons of Aboriginal and/or Torres Strait Islander descent

Mabo v Queensland (No. 2) (The Mabo Case) (1992) 175 CLR 1**Facts**

Before European settlement in 1788, it was believed 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 of 'terra nullius' was incorrect as First Nations peoples had lived on the land for tens of thousands of years prior to colonisation. Mabo claimed First Nations peoples had ownership rights over the land in the Murray Islands, within the Torres Strait.

Legal issue

The issue was whether Aboriginal and Torres Strait Islander peoples had 'native title' to the land of Australia. Native title is the legal recognition of the rights and interests of First Nations people in the land and waters based on their traditional ownership of the land which existed prior to British colonisation 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 proven 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.

The High Court decided the law's previous assumption that Australia was a 'land of no-one' was racist and discriminatory.

Significance

As a result of this case, the court's decision was later codified and became part of Australian legislation. *The Native Title Act 1993* (Cth) was created by the Commonwealth Parliament in order to confirm the decision of the High Court.

The judges in this case took an activist approach as the judgment declaring 'terra nullius' as a legal fiction was progressive and regarded by many as controversial. The precedent had a significant impact on Australian property law. Justice Brennan stated that 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'.

LEGISLATION

Native Title Act 1993 (Cth)

Lesson summary

Whilst the courts serve an important role in law-making, certain factors both enhance and constrain their ability to do so, including:

- the doctrine of precedent, which requires judges to adhere to reasons given by superior courts when deciding a case with similar facts.
- judicial conservatism, whereby judges only make minor changes to common law, leaving it to parliament to make any significant changes to the law.
- judicial activism, whereby judges make radical changes to the law to reflect the political and social progression of society.

8C Questions

Check your understanding

Question 1

The courts play an important role in law-making and will only make new common law when the current law is unclear, or there is no law applicable to the dispute they are resolving.

- A. True
- B. False

Question 2

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the effect of the doctrine of precedent on the ability of the courts to make law.

Statement	Strengths	Limitations
I. Judges must wait for an individual with standing to bring a civil case to court before they can make law. Alternatively, they must wait for an accused to be charged and brought to trial before the law can be interpreted and potentially changed. Therefore, courts cannot develop laws whenever they wish.	☐	☐
II. Courts can only develop new law where no law currently exists, or it is not clear how the law may be applied to the case before them. This means the courts cannot make laws on the basis that they disagree with existing legislation.	☐	☐
III. Judges from the same hierarchical level or superior courts can overrule or reverse a decision from lower courts in the hierarchy, therefore developing common law.	☐	☐
IV. Judges can distinguish a precedent by demonstrating the current case has different material facts to the case in which the precedent was established. The court can then develop new precedent if necessary.	☐	☐

Question 3

Even if judges are able to establish a new law, they may take a conservative approach and feel it is not their role to do so.

- A. True
- B. False

Question 4

Fill in the blanks with the following terms:

conservatism

activism

Judicial [] involves judges taking into account social and political factors to interpret the law broadly and, in turn, create new legal principles. Alternatively, judicial [] involves judges interpreting the law narrowly to avoid making controversial changes to the law.

Question 5

A possible way judicial activism limits the law-making powers of the courts is that:

- A. courts must still wait for a relevant case before actively changing the law.
- B. unlike parliament, judges are not elected by the people. Therefore, they can make controversial changes in the law without the fear of not being re-elected.
- C. justices in the High Court are able to engage in judicial activism and radically change the law as this court is not bound by any previous decisions.

Question 6

Which of the following statements describes ways judicial conservatism limits law-making?

(Select all that apply)

- A. Judicial conservatism may result in judges in superior courts applying outdated precedents rather than creating new ones, even in circumstances where the court is not bound to follow the existing precedent.
- B. Conservative judges tend to interpret the law narrowly, restricting courts from making substantial changes to the law.
- C. Judicial conservatism means courts will always make radical and controversial changes in the law, reducing the likelihood of appeals being made on a question of law whereby the precedent may be reversed.

Question 7

The courts always leave law-making to parliament as it is composed of elected representatives who are best suited to make laws reflecting society's views and values.

- A. True
- B. False

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

(3 MARKS)

Explain how the doctrine of precedent influences the courts' ability to make law.

Question 9

(3 MARKS)

Distinguish between judicial conservatism and judicial activism.

Question 10

(3 MARKS)

Nick was a DJ at a restaurant owned by Sam. While working at the restaurant, Nick claims he was constantly criticised by Sam who said his DJ tracks were 'less than adequate' and defamed him on multiple social media platforms. As a result, Nick has suffered emotional trauma and has lost work opportunities and is now suing Sam in the Supreme Court of Victoria. There is an old-standing principle that impacts Nick's case. Nick's lawyer has advised him that when resolving the dispute, the Supreme Court may act as both a law-maker and a dispute resolver.

Explain **one** reason why the court may not change the law in this case.

Adapted from VCAA 2018 Sample exam Section B Q3c

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** or **limitations** of the ability of the courts to make law.

Statement	Strengths	Limitations
I. Judges are not elected by the people and may create laws that do not reflect the views and values of the majority of society.	☐	☐
II. The doctrine of precedent enables courts to fill in any gaps in legislation when interpreting statutes in order to resolve the case before them. When doing so, they can consider a range of issues that have not been considered by parliament.	☐	☐
III. Judges must wait for an individual with standing to bring a case to court before they can create law. Unlike parliament, courts cannot develop laws whenever they wish.	☐	☐
IV. Judges are not elected by the people and are free from political influences. This means they can make progressive and controversial changes to the law without considering their prospects of re-election.	☐	☐

Question 12

(5 MARKS)

'Judges are effective law-makers because, unlike parliament, they do not have to worry about being re-elected.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2017 exam Q6

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

Use the following information to answer questions 13 and 14.

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.

In 1992, the High Court made a ruling in the *Mabo Case* which acknowledged the land rights of Aboriginal and Torres Strait Islander peoples, including the right to assert their claims over their ancestral lands, known as 'native title'. This decision was significant because it overturned the longstanding common law notion that Australia was terra nullius, or unowned land, prior to British colonisation. The outcome of the High Court's decision meant that the land rights of Aboriginal and Torres Strait Islander peoples were acknowledged by Australia's legal system.

Adapted from VCAA 2021 exam Section B Q1

Question 13

Which of the following statements are correct about how judicial activism is a strength of the law-making process in relation to the *Mabo* judgment? **(Select all that apply)**

- A. The judges in the *Mabo Case* were able to radically reform the law and develop the law in relation to the land rights of Aboriginal and Torres Strait Islander peoples.
- B. The High Court justices are unlikely to be re-elected as the decision in the *Mabo Case* was controversial at the time and may not have reflected the views and values of the majority of society.
- C. The *Mabo Case* illustrates how the courts are limited in their law-making ability and can only change the law when a case is brought before them by an individual with standing, as Eddie Mabo did not have standing.
- D. As judges are free from political influence, the court could recognise 'native title' without being concerned about whether it aligns with the views and values of the majority of society.

Question 14

(6 MARKS)

Referring to the *Mabo* judgment, analyse how judicial activism is a strength of the law-making process. Provide **two** reasons in your response.

Adapted from VCAA 2021 exam Section B Q1b

Linking to previous learning**Question 15**

(2 MARKS)

Describe how judicial conservatism upholds the principle of representative government.

8D Courts' ability to make law – costs, time, and the requirement for standing

STUDY DESIGN DOT POINT

- factors that affect the ability of courts to make law, including:
 - the doctrine of precedent
 - judicial conservatism and judicial activism
 - costs and time in bringing a case to court
 - the requirement for standing

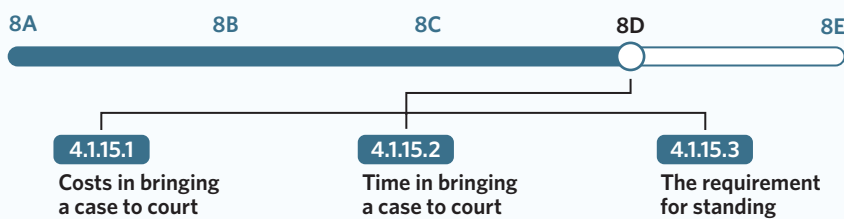


Image: Dean Drobot/Shutterstock.com

At school, if you witnessed two students from different year levels arguing, both of whom you did not know, it is unlikely you would get involved. Not only do the matters being discussed not concern you, but why would you want to waste your time engaging in an argument that has nothing to do with you? Likewise, the courts will not allow individuals with no connection to or interest in a case to initiate legal proceedings, ensuring their time and money are not unnecessarily wasted.

Lesson introduction

In order for the courts to adjudicate a case and subsequently create law, they must wait for a case to be brought before them. However, a party must be affected by, or have a sufficient interest in, the matters involved in the case to bring it to court. In addition, a party may not be able to afford, nor have the time to bring their case to court due to the costs and time involved in such proceedings. As a result, cases that require clarifications or modifications of the law may not come before the courts as a portion of society may be unable to initiate court proceedings. Naturally, when there is no case before them, the courts cannot establish common law. Therefore, there are systems in place to reduce the costs and time associated with bringing a case to court.

Costs in bringing a case to court 4.1.15.1

The **costs** involved in bringing a case to court can be a significant burden for many parties. Some of the costs involved in pursuing a matter through the courts can include:

- fees for legal representation, such as paying a solicitor and a barrister
- court fees to commence and progress a court proceeding, such as court filing fees
- jury fees if one or both of the parties request one
- some or all of the other parties' fees, depending on the outcome of the case.

Whilst Victoria Legal Aid's (VLA) financial support, advice, and low-cost legal representation is available to some, it is generally limited to criminal matters and is not an exhaustive resource. Therefore, a potential plaintiff may not be able to afford or may be deterred by these costs, choosing to not initiate civil proceedings in the courts. As courts are only able to make law when a case is brought before them, this limits the courts' ability to create new legal principles that can apply in future cases.

LESSON LINK

You learnt about the impact of costs and time in civil disputes in **5K The impact of costs and time – civil disputes**.

KEY TERM

Costs the amount of money, including court fees and fees for legal representation, that has to be paid to resolve a legal dispute.

LESSON LINKS

You learnt about solicitors and barristers in **5F Legal practitioners in a civil dispute**.

You learnt about Victoria Legal Aid (VLA) in **2B Victoria Legal Aid and community legal centres**.

You learnt about the role of case management in **5D Judges, magistrates, and juries in a civil dispute**.

WANT TO KNOW MORE?

When paying fees for legal representation, this is split into two parts:

1. Fees for professional services
2. Other expenses, such as court filing fees.

You can find out more about how lawyers charge clients for their services by searching 'How do lawyers charge for their services?' and clicking the 'Victorian Legal Services Board' (2022) webpage.

Table 1 Evaluating the effect of factors relating to costs on the ability of courts to make law

Strengths	Limitations
• Victoria Legal Aid (VLA) is available for some civil matters, meaning parties may be able to access resources that can assist them in pursuing their case through the courts. This can provide more opportunities for the courts to make law. • Judges often give directions to parties, such as limiting the number of witnesses or topics that they may be questioned about, with the aim of reducing the costs associated with a trial. As a result, the time a court proceeding takes is lessened, and hence, the costs are reduced. Therefore, having a case heard in the courts may be more affordable for parties, ultimately providing greater opportunities for the courts to make law.	• The eligibility criteria for VLA is strict for civil cases, as it is generally limited to criminal matters and is not an exhaustive resource. Therefore, parties who are ineligible for VLA assistance or legal representation may be unable to afford the costs involved in bringing their case to the courts, reducing the ability of the courts to make law. • The reluctance of parties to pursue a matter through the courts, due to the high costs, means there are fewer opportunities for judges to develop common law. Consequently, outdated precedents can remain binding in the courts.

HYPOTHETICAL SCENARIO

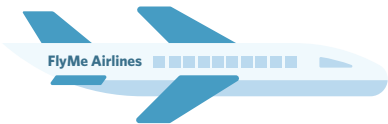


Figure 1 Sally cannot afford to initiate proceedings against FlyMe Airlines, preventing law from being developed in relation to this subject matter

CONTENT WARNING This example explores content that is sensitive in nature, relating to anti-disability.

FlyMe Airlines escapes legal battle

Sally wants to bring a case against FlyMe Airlines as she believes the airlines' travel requirements, that apply to her, are discriminatory. The travel requirement in question is that all passengers must be capable of reaching for and pulling down the overhead oxygen mask in the case of an emergency. If this is not possible, passengers must travel with a carer or a person who can assist them. As she is travelling alone, FlyMe prevents Sally from boarding the plane as she is disabled and would be unable to reach for the mask herself. Sally sought legal representation for advice and her lawyer stated that the courts would likely have to establish new legal principles in this case as no common law relevant to this issue currently exists.

After receiving a bill of \$2,000 for a three-hour meeting with her lawyer, Sally decided not to initiate proceedings against FlyMe Airlines as she could not afford to pay these legal fees. Therefore, as a result of these high legal costs, the courts would not hear this case and would be unable to develop law in this area.

DEEP DIVE

High Court fees

As the most superior court in the hierarchy, the High Court has the power to establish new precedents that are binding in all lower courts. In the High Court, different rates apply to parties depending on whether they are:

- a publicly listed company, which pays the highest rate of fees
- a corporation or a public authority, which pays the next highest rate
- an individual, a small business, a not-for-profit association, or any other case, which pays the lowest rate.

For example, as of 1 July 2023, the filing fees associated with an application for constitutional or other writs are:

- \$17,705 for a publicly listed company.
- \$11,795 for parties falling under the 'corporate' category.
- \$3,910 for parties falling under the 'individuals or other' category.

Adapted from 'Party category information' (High Court of Australia, n.d.) and High Court of Australia (Fees) Regulations 2022' (High Court of Australia, n.d.)

LESSON LINKS

You learnt about administrative convenience in civil disputes in **5C The Victorian court hierarchy and civil disputes.**

You learnt about mediation in **5B Methods of resolving civil disputes.**

USEFUL TIP

Try to always provide evidence to support your statements. Simply stating that the court process is time-consuming or costly is not enough. Provide evidence of this and explain why it is costly or time-consuming, such as due to the high costs of legal representation or due to court delays. Try re-reading your answers and if you can ask 'Why...?' or 'How...?' you may need to add more!

Time in bringing a case to court 4.1.15.2

Pursuing a claim in court can be very time-consuming. There is a significant backlog of cases in the justice system, which means individuals may have to wait months, or even years, to have a matter heard before the courts. Other reasons for court delays include:

- the significant amount of time it takes for parties to gather evidence and prepare for a trial
- lengthy trial procedures, such as the time spent hearing the oral arguments of legal practitioners and examining witnesses
- delay tactics by parties to avoid proceeding to trial.

Therefore, a potential litigant may be deterred by these various delays and choose to not initiate proceedings in court. As courts are only able to make law when a case is brought before them by an individual or group, this limits the courts' ability to create new legal principles and participate in law-making.

Table 2 Evaluating the effect of factors relating to time on the ability of courts to make law

Strengths	Limitations
• Judges will often give directions to parties, such as limiting the number of witnesses or topics they are questioned on, with the aim of reducing the length of a trial. As a result, the parties may be able to have their case heard in a timely manner, providing more opportunities for the courts to make law as a greater number of cases per year can come before the courts.	• The reluctance of parties to pursue a matter through the courts due to the time it takes for a case to be resolved means there are fewer opportunities for judges to develop common law. Consequently, this may result in outdated and ineffective precedents remaining binding as they are not challenged for long durations.
Continues →	

Table 2 Continued

Enhances	Restricts
- The existence of the Victorian court hierarchy enables administrative convenience to be achieved, separating disputes across the courts, thereby minimising delays. This permits the courts to hear more cases each year, likely increasing their capacity to create or amend common law. - For a bill to successfully pass through parliament and become a law, a proposed amendment to the law must first be introduced, both houses must support the law, and then royal assent must be provided. Contrary to this, the courts' law-making is instant. From when the decision is handed down to the parties, the precedent is established and will then become binding in future cases heard in lower courts, or those of equal superiority, in the same hierarchy.	- Judges in superior courts need to wait for a case to come before them before they can develop law. The time taken to appeal to the higher courts slows the development of the law as precedent is generally set on appeal. - Some cases in higher courts can take months to be determined, resulting in delays to the law being amended. - Judges often give directions to parties that encourage them to resolve the dispute themselves outside of a courtroom, such as ordering parties to attend mediation. Therefore, the court's ability to make laws is reduced when parties reach an out-of-court settlement.

KEY TERM

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.

LEGAL VOCABULARY

Locus standi a Latin term meaning 'place to stand', which refers to the right to initiate legal proceedings in court.

The requirement for standing 4.1.15.3

In order for an individual or group to bring a case to court, they must have **standing**, meaning they are affected by, or have a special interest in, the issues involved in the case. It is based upon the legal principle of **locus standi**, meaning 'place to stand'. The requirement for standing prevents individuals who have a general interest in the case, and simply want to prove a certain point, from bringing a case to court. Generally, to establish standing, a party must demonstrate to the courts that one of the following situations apply:

- they are an aggrieved party, that is, a person whose interests are, or would be, adversely affected by the matters involved in the case.
- their private rights have been directly affected by a legal issue.
- the action of another party and the infringement would continue unless the court provided relief.

Alternatively, a party may have standing if it can demonstrate 'special interest' in a legal matter. A 'special interest' can include:

- a public interest group challenging a government decision that could be a public concern.
- a trade union challenging a government decision that may impact its members.
- a business challenging a government decision that may be favourable to a commercial rival.
- a member of the public who challenges a government decision that directly affects them.

The 'special interest' test was developed by the High Court. In the case of *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, a special interest test was established, which does not need to involve legal or financial rights, but must be more than a 'mere intellectual or emotional concern'. The 'special interest' test requires a party to show that their interests are adversely affected by the action or decision of another party beyond that of any other member of the public.

HYPOTHETICAL SCENARIO

DigiWat's dissatisfaction regarding data collection

Suppose the Commonwealth Parliament passed new legislation regarding the collection of electronic data that has meant customers' metadata from phone calls, text messages, emails, and internet activity will be stored indefinitely and be able to be accessed by the government. Whilst exemptions have been made for some social media platforms, the users' data of DigiWat, a social media platform, will be collected and stored.

DigiWat feels this is unfair to its users and has challenged the validity of this legislation, claiming it has a special interest in the outcome of the case. DigiWat asserted that it is a commercial entity challenging a government decision that may be favourable to a commercial rival. Furthermore, it feels its interest in this matter is beyond that of any other member of the community.

DigiWat has demonstrated it has a 'special interest' in the case beyond that of any other member of the community. Therefore, a court would likely allow DigiWat to challenge the validity of the legislation in court.

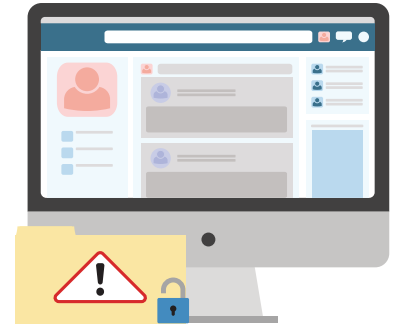


Figure 2 DigiWat has standing to bring a case to court by demonstrating it has a 'special interest' in the case beyond that of any other member of the community

Table 3 Evaluating the effect of the requirement for standing on the ability of courts to make law

Strengths	Limitations
The requirement for standing reduces the number of frivolous claims being made in court by individuals who merely have a general interest in the matters involved in a case. In turn, this reduces delays in the court system and allows more opportunities for genuine cases to be pursued through the courts.	- The requirement for standing limits the ability of individuals with a general interest to change the law as they will be unable to pursue the matter through the courts. This slows the development of the law as individuals who do not have standing, but wish to bring a case to court, cannot do so. - Individuals with standing may still be unable to bring their case to the courts if they do not have the time or money to do so. In these instances, the courts will miss out on law-making opportunities.

USEFUL TIP

An important key skill in Area of Study 1 of Unit 4 VCE Legal Studies is 'discuss the ability of parliament and the courts to make law'. The tables throughout this lesson evaluating the effect of costs, time, and the requirement for standing on the ability of the courts to make law can help you in discussing the courts' ability to make law.

'Strengths' of the effect refer to factors that can strongly influence the courts' ability to make law and/or the effectiveness of that law-making, whereas 'limitations' are factors that limit the influence of the factor on law-making by parliament, or its effectiveness in law-making.

LEGAL CASE

Kinglake Friends of Forest Inc. v VicForests (No 4) [2021] VSC 70

Facts

Kinglake Friends of the Forest Inc (Kinglake FF) initiated proceedings against VicForests in the Supreme Court of Victoria. Kinglake FF alleged that VicForests conducted unlawful timber harvesting. It sought a declaration and permanent injunction against VicForests in relation to timber harvesting, to stop cutting trees. One of the arguments put forth by VicForests was that Kinglake FF did not have standing in the case. Kinglake FF organised a range of public events, such as wildlife spotting nights, carried out five flora and fauna surveys in various logging coupes, and lodged 18 breach reports regarding logging in forests.

Legal issue

The court was required to determine whether Kinglake FF had standing in the case.

Decision

The court held that Kinglake FF did have standing. It was satisfied that Kinglake FF had a 'special interest in the preservation of the native forests of Kinglake and the Central Highlands, beyond a mere intellectual or emotional concern'. Additionally, this interest was greater than that of the general public.

Significance

As a result of satisfying the requirement for standing, Kinglake FF was able to bring its case against VicForests. Additionally, the court granted the injunction requested by Kinglake FF.



Image: Viktor Sergeevich/Shutterstock.com

Figure 3 Kinglake FF met the requirement for standing in its case against VicForests

Lesson summary

Whilst the courts are able to develop the law in cases before them by declaring legislation invalid or by setting precedent where no law exists, or where the law is unclear, there are factors that may prevent this from occurring:

- A potential plaintiff may be unable to bring their case to court due to the costs and time involved in court proceedings. Consequently, the courts will not be able to make law in such cases where parties cannot overcome these barriers.
- A potential plaintiff must have standing and cannot bring a claim to court out of general interest or to prove a legal point. As a result, this reduces the number of cases initiated in the courts, subsequently limiting the number of opportunities for the courts to make law.

8D Questions

Check your understanding

Question 1

A court's ability to make law is restricted when:

- A. a party has standing and has demonstrated they have a special interest in a legal matter.
- B. a party is reluctant to pursue a matter through the courts due to the costs and delays.

Question 2

The costs involved in bringing a case to court do not affect the courts' ability to make law as parties can apply for assistance from Victoria Legal Aid.

- A. True
- B. False

Question 3

Which of the following statements are correct about how the costs and time in bringing a case to court may restrict the ability of the courts to make law? **(Select all that apply)**

- A. VLA is available for some civil matters, meaning parties may be able to pursue their case through the courts. Thus, providing more opportunities for the courts to make law.
- B. Judges in superior courts need to wait for a case to come before them before they can develop law. The time taken to appeal to the higher courts slows the development of the law.
- C. The eligibility criteria for VLA is strict for civil cases, as it is generally limited to criminal matters and is not an exhaustive resource. Therefore, parties who are ineligible for VLA assistance or legal representation may be unable to afford the costs involved in bringing their case to the courts, reducing the ability of the courts to make law.
- D. The existence of a Victorian court hierarchy enables administrative convenience to be achieved, separating disputes across the hierarchy, thereby minimising delays. Therefore, the ability of the courts to make law may increase as they can hear more cases.

Question 4

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

deterred

encouraged

A potential party to a legal dispute may be [] by court delays, such as delays caused by lengthy trial procedures. As a result, they may choose to not initiate proceedings in the court.

Question 5

Which of the following statements demonstrates that a party has standing? **(Select all that apply)**

- A. The party's interests are adversely affected by the matters involved in the case.
- B. The party has a general interest in the issues involved in the case.
- C. The party has a special interest in the legal matter by having more than a 'mere intellectual or emotional concern'.
- D. The party wants to prove a point by bringing the case but is otherwise unrelated to the case's issues.
- E. The party's private rights have been directly affected by a legal issue.

Question 6

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the courts to make law in relation to the requirement for standing.

Statement	Strengths	Limitations
I. The requirement for standing reduces the number of frivolous claims being made in court by individuals who merely have a general interest in the matters involved in a case. In turn, this reduces delays in the court system and allows more opportunities for genuine cases to be pursued through the courts.	☐	☐
II. The requirement for standing limits the ability of individuals with a general interest in the case to change the law as they are unable to pursue the matter through the courts.	☐	☐
III. Individuals with standing may still be unable to bring their case to court if they do not have the time or money to do so.	☐	☐

Question 7

The costs and time required in bringing a case to court and the requirement of standing are the only factors affecting the ability of the courts to make law.

- A. True
- B. False

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

(2 MARKS)

Describe **one** way the costs and time associated with bringing a case to court may restrict the ability of the courts to make law.

Question 9

(3 MARKS)

Explain why the requirement for standing is important for a court to be able to make law.

Adapted from VCAA 2018 Sample exam Section A Q3

Question 10

(4 MARKS)

Kirby's neighbour recently built a new boundary fence over two metres high, which caused Kirby to lose significant sunlight in the part of her garden where she grows her vegetables. Whilst the neighbours indicated they had a building permit from the local council, Kirby believes the council failed to consider her interests in its decision.

Describe the requirement for standing and advise Kirby as to whether she might be able to meet the standing requirement.

Question 11

(4 MARKS)

Ahmet is an unemployed university student who is studying constitutional law. The Commonwealth Parliament passed the Religion Prohibition Act 2056 (Cth) which prohibits the exercise of religion in public places. Ahmet believes this breaches s 116 of the Australian Constitution, which prevents the Commonwealth from making laws that prohibit the free exercise of any religion. Ahmet is considering pursuing action in court against the Commonwealth Parliament for this law, believing it violates his religious rights, but is unsure if he can afford to do so.

Explain **one** reason why the court may not be able to change the law in Ahmet's case.

Adapted from VCAA 2018 Sample exam Section B Q3c

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.

Alex purchased a can of Betty's Beans from his local supermarket. Halfway through eating the beans, he discovered a maggot and threw the tin out in disgust. Alex did not become sick from the incident but still wants compensation for the trauma of finding a maggot in his beans. Currently, a precedent established in the 1920s will apply in this case as it suggests if a person does not become sick from a manufacturer's error, the manufacturer can never be found liable for that error. Therefore, Betty's Beans would not be found liable for the maggot incident since Alex did not get sick. This is an outdated principle yet no case relating to this precedent has come before the courts in over a century. Alex wants to bring a case in the High Court against Betty's Beans yet, as a university student, does not have the funds or time to do so. He is considering reaching out to Victoria Legal Aid (VLA) for help.

Question 12

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the courts to make law in relation to Alex's case.

Statement	Strengths	Limitations
I. If Alex is unable to bring the case to the High Court against Betty's Beans due to the high costs and time involved, the High Court will be unable to change the law and the outdated principle will remain binding.	☐	☐
II. The eligibility criteria for VLA is strict for civil cases, as it is generally limited to criminal matters and is not an exhaustive resource. Therefore, Alex may be ineligible and thus, unable to bring his case to the High Court.	☐	☐
III. Judges often give directions to parties aimed at reducing the costs and time associated with a trial, such as limiting the number of witnesses or topics that witnesses may be questioned on. As a result, the amount of time Alex's court proceedings take may be lessened and the costs may be reduced.	☐	☐
IV. The existence of a Victorian court hierarchy enables administrative convenience, therefore Alex's case would be heard by a suitable court, minimising delays across the courts as different courts are allocated cases according to their capacity and jurisdiction.	☐	☐

Question 13

(6 MARKS)

Referring to Alex's case, discuss the extent to which courts are able to overcome the limitations of costs and time in making laws.

Adapted from VCAA 2015 exam Q13

Linking to previous learning

Question 14

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of the Victorian courts in law-making.

Statement	Strengths	Limitations
I. The Victorian courts have a role in setting precedents that allow them to establish legal principles in circumstances where no statute or common law exists, or it is not clear how the law should be applied to the case before them.	☐	☐
II. Judicial activism involves a judge considering social and political factors to interpret the law broadly and, in turn, create new legal principles.	☐	☐
III. Judges make law ex post facto, meaning they make laws retrospectively only after a case is brought before them.	☐	☐
IV. The requirement for standing means judges must wait for an individual who is affected by, or has a special interest in, the issues involved in the case to bring it to court before they can establish a new law.	☐	☐
V. Judicial conservatism is an approach to law-making where a judge is reluctant to develop new law as they feel it is the role of parliament, as the elected representative body, to do so.	☐	☐

Question 15

(6 MARKS)

Evaluate the role of the Victorian courts in law-making.

Adapted from VCAA 2021 exam Section A Q5

8E The relationship between courts and parliament in law-making

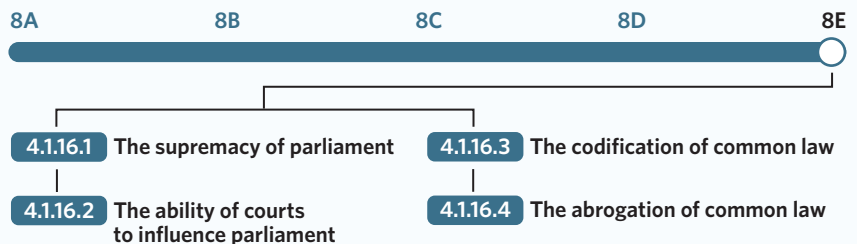


Image: Maxx-Studio/Shutterstock.com

In the study of chemistry, scientists combine elements in order to create reactions as specific elements, when under certain conditions, can create a unique product. Consider the courts and parliament as major elements of law-making in Australia. The two have a unique relationship and can be thought of as forming a compound, like how hydrogen and oxygen form H_2O . Therefore, when both the courts and parliament come together to create law, there are certain reactions and outcomes that occur.

STUDY DESIGN DOT POINT

- features of the relationship between courts and parliament in law-making, including:
 - the supremacy of parliament
 - the ability of courts to influence parliament
 - the codification of common law
 - the abrogation of common law



Lesson introduction

The parliament and courts both have the ability to create law independently. However, the legal system is constructed in a way that permits them to interact with one another to reform laws and respond to changing societal conditions. At the centre of the relationship is the notion of parliamentary supremacy, meaning the parliament ultimately has the final say in law-making. Despite this, the courts can still have considerable influence on this process.

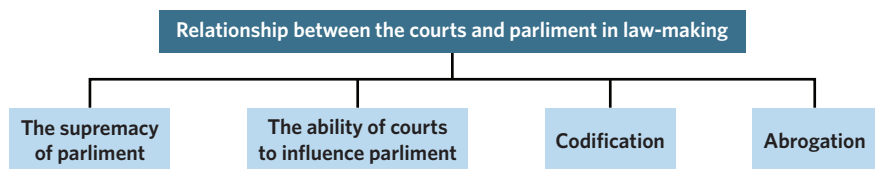


Figure 1 The relationship between courts and parliament in law-making

KEY TERM

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.

The supremacy of parliament 4.1.16.1

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. However, whilst parliament has a significant role in creating the courts and their jurisdictions, it must also adhere to the limitations to its power protected by the Constitution, such as the **separation of powers** at the Commonwealth level. This means the courts must be independent, impartial, and not forced to serve roles that require political biases. Therefore, the courts cannot act as merely a servant of parliament's wishes.

As a result of parliament establishing the courts, aside from the High Court of Australia, there is a strong connection between the two in law-making.

REAL WORLD EXAMPLE

Koori Court expansion

The **Koori Court** is an alternative sentencing court that operates in Victoria, assisting Aboriginal offenders who committed a criminal act in Victoria to access culturally appropriate outcomes in the criminal justice system.

Following the Victorian Royal Commission into Family Violence completed in 2015, one of the 227 recommendations was to 'extend the jurisdiction of the Koori Magistrates' and County Courts'. This recommendation meant the Koori Court would be able to hear offences where the accused has allegedly contravened a family violence intervention order (FVIO).

In 2019, led by Court Services Victoria, the Department of Justice and Community Safety consulted with the Aboriginal Justice Forum to develop the necessary amendments to the *Family Violence Protection Amendment Act 2017* (Vic) in order to alter the jurisdiction of the Koori Court. In May 2019, in Mildura, the Koori Court division of the County Court heard its first hearings of FVIO contraventions.

This process outlines how, ultimately, it is at the parliament's discretion, as the supreme law-making body, to manage aspects of the courts, such as their jurisdiction.

Adapted from 'Extend the jurisdiction of the Koori Magistrates and County Courts' (State Government of Victoria, 2020)



Image used with permission from Peter McManus of Yard Furniture

Figure 2 The Koori Court jurisdiction was expanded by the Victorian Parliament in 2019

LEGISLATION

County Court Act 1958 (Vic)

Family Violence Protection Amendment Act 2017 (Vic)

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.

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

Separation of powers a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate.

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.

LESSON LINKS

You learnt about the separation of powers in **7J The Constitution as a check on parliament – the separation of powers**.

You learnt about the Koori Court in **2I The impact of cultural differences – criminal cases**.

The ability of courts to influence parliament 4.1.16.2

When handing down their final judgment, judges and magistrates may make remarks in **obiter dictum**, which often involves sharing an opinion on the current state of the law that applied to the case. These comments have proven to be influential on parliament as their aim is to create laws that suit the conditions of current-day society and improve the justice system for the better. However, parliament is never under any obligation to follow and adopt the issues raised in such statements.

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.

LESSON LINKS

You learnt about judicial conservatism in **8C Courts' ability to make law** – **judicial conservatism and activism**.

You will learn more about the role of the public in influencing law reform in **9B Influences on law reform**.

In some cases, a judge may indicate in their written judgment 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. In cases of judicial conservatism, judges choose to apply existing precedent instead of changing this precedent, even if they believe the law should change, as they prefer to leave the law-making responsibility to parliament. However, when delivering their judgment, they may remark on their grievances with the statute or common law they applied to the case at hand.

The courts may also indirectly influence parliament through a combination of both their decisions and the public. If the courts hand down a particular decision that highlights an issue with the current law, public unrest and community feedback can then spur law-making and reform.

LEGAL CASE***State Government Insurance Commission v Trigwell (1979) 142 CLR 617*****Facts**

Members of 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 Trigwells argued 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. The court found that the farmer was not responsible for their sheep and therefore, not liable for the accident and injuries. The court decided to follow old common law, originating in Britain, that suggested farmers were not responsible for their roaming livestock. This principle existed 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)*. This, consequently, abrogated the common law and meant that farmers and landowners were now responsible for their livestock and any damage they may cause.



Image: Nataliia Melnychuk/Shutterstock.com

Figure 3 The courts did not want to change the law in the Trigwell case after the family was injured in a car accident involving wandering sheep

LEGISLATION

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

KEY TERM

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

The codification of common law 4.1.16.3

When parliament incorporates and confirms legal principles established by a court through the process of enshrining these principles into legislation, this is known as **codification**. This usually occurs because parliament agrees with a principle of common law established by judges from a particular case and wants to incorporate the legal principle into legislation so that it becomes more solidified and protected statute law. Following the codification of common law, judges cannot change their minds and reverse the common law principle they initially established, meaning they must follow this codified law in future cases. However, the law can be reformed if parliament decides to amend or repeal the legislation.

The process of codification also allows parliament to consolidate common law principles that were established under similar circumstances into one piece of legislation, improving the consistency and predictability of the law in certain areas. Without codified legislation, parties may struggle to understand the relevant legal principle that applies to their case, and such application may differ depending on the court that hears their case due to differing interpretations of existing precedent.

LEGAL CASE

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.

Mabo v Queensland (No. 2) (The Mabo Case) (1992) 175 CLR 1

Facts

Before European settlement in 1788, it was believed 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 of 'terra nullius' was incorrect as First Nations peoples had lived on the land for tens of thousands of years prior to colonisation. Mabo claimed Torres Strait Islander peoples had ownership rights over the land in the Murray Islands, within the Torres Strait.

Legal issue

The issue was whether Aboriginal and Torres Strait Islander peoples had 'native title' to the land of Australia. Native title is the legal recognition of the rights and interests of First Nations peoples to the land and waters based on their traditional ownership of the land.

Decision

In 1992, the High Court held 'terra nullius' was a legal fiction and found that native title could exist if it could be proven 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.

The High Court decided the law's previous assumption that Australia was a 'land of no-one' was racist and discriminatory.

Significance

Justice Brennan stated that 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 newly established precedent had a significant impact on Australian property law.

As a result of this case, the Commonwealth Parliament codified the precedent into Australian legislation, demonstrating that members of parliament supported the court's decision. Within a year of the case's conclusion, the *Native Title Act 1993* (Cth) was created by the Commonwealth Parliament as a confirmation of the High Court's decision.

LESSON LINKS

You learnt about the Mabo case in **8A Statutory interpretation** and **8C Courts' ability to make law** - **judicial conservatism and activism**.

You learnt about the Trigwell case in **8C Courts' ability to make law** - **judicial conservatism and activism** and you will learn more about it in **9B Influences on law reform**.

LEGISLATION

Native Title Act 1993 (Cth)

The abrogation of common law 4.1.16.4

As opposed to codification, parliament may undertake **abrogation** of a legal principle developed by a court, rendering the common law invalid by passing legislation that overrides it. In this situation, the common law is superseded by legislation passed by parliament, due to its supremacy, whereby it is the superior law-making power capable of overriding the court's laws.

There are a few potential reasons as to why this may occur, with the most common being that the parliament disagrees with the principle established in the courts. This disagreement may be due to a perceived statutory misinterpretation by the courts, meaning a judge has applied a statute in a way that was not aligned with the intended purpose of the Act and its associated outcomes.

KEY TERM

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

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.

HYPOTHETICAL SCENARIO**Festival fiasco!**

In 2050, the number of people attending festivals has declined in Victoria due to the heat of these events and the lack of well-known artists performing at them. To combat this issue, the Victorian Parliament passed the Festival Incentive Act 2050 (Vic). Under section 5 of the Act, a person can receive a \$100 payment for attending a festival in an effort to increase the number of patrons, thus boosting the economy in the areas hosting these festivals. However, s 5 has restrictions on who can access this payment, stating:

'In order to access the festival payment, a person must have:

- residency in Victoria
- attended a Victorian festival before
- a bachelor's degree from an Australian university.'

Otto sought to receive a payment under the Act to attend 'Camp', a festival in regional Victoria. However, he was rejected on the basis he did not have a house in Victoria. He brought an action against the State of Victoria claiming it was incorrect for the state to refuse giving him a payment on the basis that he did not meet the residency criteria, as he did meet the 'residency' criteria by living in Victoria for the past nine months, even though he was living in a hotel during this time. The judge had to interpret the meaning of 'residency', deciding it required a person to have been living primarily in Victoria for the past 12 months, but did not require that the person was living in a permanent home or apartment, meaning living in Victoria was sufficient. Therefore, even if someone had a home in Victoria, but had been overseas or in a different state for the past six months or more, they would not meet the 'residency' requirement and could not receive the funding.

The Victorian Parliament believed this to be an incorrect interpretation of 'residency'. Parliament amended the Festival Incentive Act 2050 (Vic) to include a definition of 'residency' in section 3 of the Act, which stated:

'Residency in Victoria requires a person to have a permanent property in Victoria, either an apartment or house. The amount of time a person spends in Victoria shall not be considered when determining if a person is a resident.'

By adding this section to the Act, parliament abrogated the court's interpretation of 'residency' so Victorians living in hotels in the future would be unable to claim the festival payment under the Act.



Figure 4 Parliament ruled against the court's decision on the definition of 'residency' after Otto could not attend the festival for a cheaper rate

Lesson summary

- There are four features of the relationship between courts and parliament in law-making, which are the:
 - supremacy of parliament
 - ability of courts to influence parliament
 - codification of common law
 - abrogation of common law.
- Each of these features of the relationship between parliament and the courts demonstrates the constant link between these institutions, not just in law-making, but in the legal system overall.

8E Questions

Check your understanding

Question 1

The parliament and courts are completely separate in law-making and are largely independent of each other.

- A. True
- B. False

Question 2

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

- A. final notes.
- B. mens rea.
- C. obiter dictum.
- D. ratio decidendi.

Question 3

Parliament cannot alter or introduce a law if the Constitution prohibits it from doing so. It does not have supremacy over the Constitution.

- A. True
- B. False

Question 4

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 its approval of a common law principle through abrogation.	☐	☐
II. The parliament demonstrates its disapproval of a common law principle through codification.	☐	☐
III. The parliament demonstrates its approval of a common law principle through codification.	☐	☐
IV. The parliament demonstrates its disapproval of a common law principle through abrogation.	☐	☐

Question 5

Parliament is always bound to listen to the comments of judges.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 6

(2 MARKS)

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

Question 7

(2 MARKS)

Describe **one** way the courts may be able to influence parliament in law-making.

Question 8

(3 MARKS)

Distinguish between the codification and abrogation of common law.

Question 9

(3 MARKS)

A legal critic once said, 'Parliament is less powerful than the Supreme Court of Victoria in law-making'.

Is this statement correct or incorrect? Explain your answer.

Adapted from VCAA 2013 exam Q5b

Question 10

(3 MARKS)

Imagine that in the year 2078, a case comes before the High Court of Australia, relating to holographic advertising. The plaintiff, Ms Ashton, was disturbed by a holographic billboard emitting excessive light next to her property. The High Court rules in Ms Ashton's favour and against the advertising company, PG Inc. In doing so, it creates the 'holo-limits' principle, which becomes binding precedent.

Explain how the common law principle of 'holo-limits' might influence parliament.

Adapted from VCAA 2019 exam Section B Q2c

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.

A complex criminal case is heard in the Supreme Court in regard to assault using electric scooters. The ruling judge acknowledges that the circumstances of the crime are not specifically defined in the relevant statute law and therefore, through their interpretation, creates a new common law principle. Following the resolution of the case, another case of a 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 involving electric scooters. Parliament is unhappy and decides to take action by creating legislation that goes against the common law principle made by the first, Supreme Court judge.

Question 11

Tick the box to indicate whether each of the following statements are **true** or **false** about the relationship between parliament and the courts in relation to assault using electric scooters.

Statement	True	False
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 the creation of new legislation.	☐	☐
III. Parliament has demonstrated its approval for the common law principle applied by the Supreme Court judge through creating legislation enshrining this principle in statute.	☐	☐
IV. Parliament is able to overrule the decision of the Supreme Court as it is the supreme law-making body.	☐	☐

Question 12

(6 MARKS)

Analyse the relationship between parliament and the courts in relation to assault using electric scooters.

Linking to previous learning**Question 13**

(5 MARKS)

'Statutory interpretation and the doctrine of precedent are the only ways that courts can influence law-making.'

Is this statement correct? Justify your 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 would **enhance** or **limit** the effectiveness of law-making by parliament or the courts.

Statement	Enhance	Limit
I. The bicameral structure of parliament ensures that legislation is scrutinised by all members of parliament.	☐	☐
II. If the parliament consisted of only one house in which the government of the day had a majority, the government in power could influence changes in legislation that align solely with its political agenda rather than enacting statute that reflects the views and values of all constituents. The requirement for legislation to pass through a second house of parliament can prevent this from happening.	☐	☐
III. Where the government of the day has a majority in both the lower and upper house of parliament, the upper house may 'rubber stamp' bills, whereby it passes legislation with little scrutiny. In these circumstances, a bill may undergo little to no consideration.	☐	☐
IV. The Commonwealth Parliament may be more inclined to introduce or modify legislation to ensure it upholds human rights since if Australia is found to be in breach of human rights treaties it is a signatory to, parliament will likely face criticism from other countries.	☐	☐
V. Judges can create new legal principles or interpret existing legislation. This allows judges to create and apply legal principles that specifically address the matters in the case by considering issues that have not been accounted for by legislation.	☐	☐
VI. The reluctance of parties to pursue a matter through the courts due to the costs and time required for a case to be resolved means that some cases are not heard in court.	☐	☐
VII. The requirement for standing limits the ability of individuals with a general interest in an issue to change the law as they are unable to pursue the matter through the courts if they have not been directly affected by the matter or do not have a special interest in the case.	☐	☐
VIII. Unlike members of parliament, judges are not elected by the people and may, therefore, be more inclined to make progressive changes to the law without the fear of not being re-elected. This can result in the courts more easily altering common law principles in Australia to better align with progressive shifts in society's values.	☐	☐

Question 15

(10 MARKS)

'Parliament will always be more effective in law-making when compared to courts. Therefore, it is best for courts to leave the duty of creating and amending laws to parliament.'

Discuss the extent to which you agree with this statement.

UNIT 4 AOS 2

The people and reform

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

In this area of study, students investigate the need for law reform and the means by which individuals and groups can influence change in the law. Students draw on examples of individuals, groups and the media influencing law reform, as well as examples from the past four years of inquiries of law

reform bodies. Students examine the relationship between the Australian people and the Australian Constitution, the reasons for and processes of constitutional reform, the successful 1967 referendum and calls for future constitutional reform, such as that articulated by the 2017 Uluru Statement from the Heart.

Outcome 2

On completion of this unit the student should be able to explain the reasons for law reform and constitutional reform, discuss the ability of individuals to change the Australian Constitution and influence a change in the law, and evaluate the ability of law reform bodies to influence a change in the law.

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KEY SKILLS

- define and use legal terminology
- discuss, interpret and analyse legal principles and information
- explain the reasons for law reform and constitutional reform, using examples
- analyse factors affecting the success of a referendum
- analyse the role of the media in law reform using examples
- discuss the means by which individuals or groups can influence law reform, using examples
- discuss the ability of the Australian people to change the Australian Constitution, including in relation to the 1967 referendum about First Nations people and possible future constitutional reform
- evaluate the ability of law reform bodies to influence a change in the law, using recent examples
- synthesise and apply legal principles to actual and/or hypothetical scenarios.

9

CHAPTER 9

Parliament and the Australian Constitution

LESSONS

- 9A** Reasons for law reform
- 9B** Influence on law reform
- 9C** The role of media in law reform
- 9D** The Victorian Law Reform Commission
- 9E** Royal Commissions
- 9F** Parliamentary committees

Image: Ground Picture/Shutterstock.com

KEY KNOWLEDGE

Law reform

- reasons for law reform
- the means by which individuals or groups can influence law reform including through petitions, demonstrations and the use of the courts
- the role of the media, including social media, in law reform
- the role of the Victorian Law Reform Commission and its ability to influence law reform
- one recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system
- the role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- one recent Royal Commission inquiry or one recent parliamentary committee inquiry.

9A Reasons for law reform



Image: MsDianaZ/Shutterstock.com

Imagine being bound by law that existed 100 years ago. Completing secondary school was a foreign concept for most, there was no minimum legal working age, and instead of reading this textbook, you would most likely have been labouring in the fields. This is one of the reasons why the law must adapt; to suit the period of time for which it is being made.

STUDY DESIGN DOT POINT

- reasons for law reform

9A 9B 9C 9D 9E 9F

4.2.1.1

Reasons for law reform

- 4.2.1.1.1 Shifts in community values
- 4.2.1.1.2 Advances in technology
- 4.2.1.1.3 Changes to economic conditions
- 4.2.1.1.4 Protection of society
- 4.2.1.1.5 Improving the legal system

Lesson introduction

Parliament, as the supreme law-making body, monitors when laws require change and makes modifications accordingly. Laws need to be relevant to the particular social, political, and economic climate of the day.

Given members of parliament are elected representatives, they should seek to develop laws that are in the best interests of the people. This can be achieved through consultation with the community, responding to recommendations from law reform bodies and inquiries, monitoring opinion polls, and observing social behaviours and events.

Reasons for law reform 4.2.1.1

Society is constantly changing and it is important that the law reflects these changes. For laws to be effective, it is crucial that people are willing to be bound by them. Thus, it is essential for **law reform** to occur in accordance with shifts in community values, advances in technology, and changes in economic conditions. Laws must also be modified to protect society and holistically improve the legal system. Moreover, **international pressures** can also be a catalyst for law reform as Australian laws may also need to be reflective of broader international agreements and the global sociopolitical climate. There are many reasons why law reform might become necessary, including the examples shown in Figure 1.

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.

LEGAL VOCABULARY

International pressures the influence that other countries and international organisations exert on parliaments to ensure the laws created comply with international standards.

LESSON LINK

You learnt about international pressures in **7G Parliament's ability to make law - international pressures**.

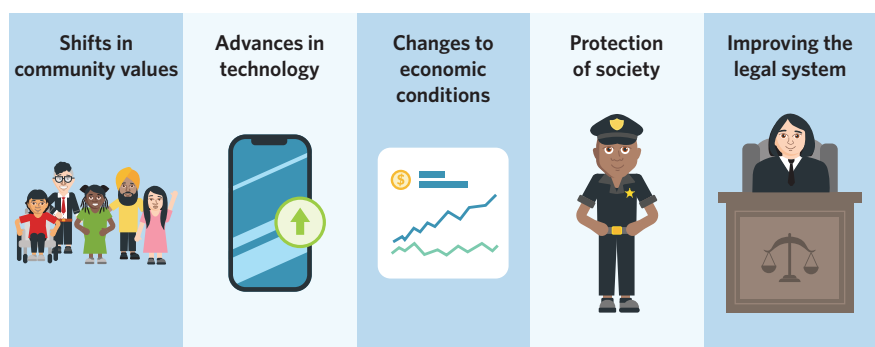


Figure 1 Examples of reasons for law reform

Shifts in community values 4.2.1.1.1

The shared beliefs of the local, state, and national communities are always changing. Therefore, laws must adapt to suit these changing beliefs, so that citizens are more likely to respect and obey the law. Parliament can become aware of shifts in community values by observing opinion polls, hosting consultations with the community, and observing major events, such as demonstrations. Recent examples of shifts in community values include changing views in relation to smoking, religion, and gender equality. When the widespread beliefs relating to these social issues change over time, new laws may need to be created to reflect newly updated and commonly accepted values.

REAL WORLD EXAMPLE

A shift in community values regarding climate change

In a 2012 survey by the Lowy Institute, 36% of Australian people expressed that climate change was a serious and pressing issue. This number rose to 60% in 2022. Therefore, in recognition and acknowledgment of the shift in societal attitudes about this significant matter, parliament passed the *Safeguard Mechanism (Crediting) Amendment Act 2023* (Cth) in April 2023.

The Act seeks to reduce emission intensity by 4.9% annually to help achieve Australia's targets under the Paris Climate Agreement, among other purposes. Furthermore, the Act will repeal the objectives of the *National Greenhouse and Energy Reporting Act 2007* (Cth) under subsection 3(2), instead aiming to achieve a series of alternative objectives. These objectives include decreasing net safeguard emissions to a maximum of 100 million tonnes of carbon dioxide in 2029, and zero from 2049 onwards. Therefore, the Act seeks to assist the government's 2030 objective of reducing emissions by 43% and ultimately ensures better alignment with shifts in community values.

Adapted from 'Climate Change' (Lowy Institute Poll, 2023) and 'Review of the National Greenhouse and Energy Reporting Legislation Final Report' (Australian Government Climate Change Authority, 2018)



Image: Leonid Sorokin/Shutterstock.com

Figure 2 The Australian Parliament has implemented new legislation to reduce gas emissions by corporations

LEGISLATION

Safeguard Mechanism (Crediting) Amendment Act 2023 (Cth)

National Greenhouse and Energy Reporting Act 2007 (Cth)

Advances in technology 4.2.1.1.2

Technology is becoming increasingly widespread and essential to the everyday lives of humans. Advances in technology have numerous implications for many different areas of law. Whilst physical stalking has been an area of law tackled for decades, issues such as cyberstalking and online scams are relatively new and require updated legislation to appropriately address any potential harm. Furthermore, the language of law may become outdated, which has prompted parliament to adopt technology-neutral phrasing in some areas of law to allow for a wide interpretation. Overall, with these new developments in technology, there are more scenarios in which laws need to be created to ensure their relevance.

For example, in 2022, the Commonwealth Parliament passed the *Corporations Amendment (Meetings and Documents) Act 2022* (Cth). This Act allows companies to now validly use technology to execute documents, instead of having to sign such documents in person. It was introduced during the COVID-19 pandemic as companies were having difficulties meeting in person to execute documents.

LEGISLATION

Corporations Amendment (Meetings and Documents) Act 2022 (Cth)

LEGISLATION

Electronic Transactions Act 1999 (Cth)

REAL WORLD EXAMPLE

Archaic Acts?

The *Electronic Transactions Act 1999* (Cth) aims to facilitate peoples' use of technology in conducting business, such as the signing of contracts via electronic devices. The last time it was amended to reflect technological advances was in 2011. Since then, technology has rapidly evolved with new technologies being invented and great progressions occurring in the field of artificial intelligence.

However, given that the Act was last updated just over a decade ago, it is a key example of legislation that is likely in need of an update to ensure it remains relevant to new situations that may arise as a result of swift advances in technology.

Adapted from 'It's official: Virtual meetings and e-signing are here to stay' (Khong et al., 2022)



Image: Leonid Sorokin/Shutterstock.com

Figure 3 The latest iPhone model from when the *Electronic Transactions Act 1999* (Cth) was last amended

Changes to economic conditions 4.2.1.1.3

Due to the cyclical nature of Australia's economy, economic conditions are constantly changing. Therefore, legislation must be created or amended to reflect the economy's needs throughout various stages of its cycle. For example, in periods of recession, it may become apparent that amendments to legislation are needed to cater for the adverse economic conditions occurring at that time. Legislation must also reflect the consequences of unusual economic events, such as global supply shocks or pandemics, due to the effects of these occurrences on peoples' income, employment, and spending.

REAL WORLD EXAMPLE



Image: Chansom Pantip/Shutterstock.com

Figure 4 Many businesses were not permitted to trade during Victorian COVID-19 lockdowns

As COVID-19 cases rose, so too did the unemployment rate

During the COVID-19 pandemic, economic conditions worsened as lockdowns progressed. Many people were let go from their jobs and unable to find new work, with the unemployment rate reaching 7.5% in July 2020 (Australian Bureau of Statistics, 2023). In order to stimulate the economy, a \$550 fortnightly Coronavirus Supplement for new and existing members of the JobSeeker payment, a welfare program for those seeking employment, was introduced via amendments to existing social security legislation. This law reform aimed to adequately react to the change in economic conditions.

Adapted from 'Labour Force, Australia' (Australian Bureau of Statistics, 2020)

Protection of society 4.2.1.1.4

Our society is comprised of various different groups and communities, many of whom are vulnerable to harm. Parliament must change the law when it is clear that existing laws do not adequately protect these particular groups, especially when these groups cannot prevent or control the harm that is occurring. Often, these sources of harm can develop and change over time. Therefore, new legislation must be created to address these new harms.

For example, in May 2023, the Victorian Government announced an importation ban on non-prescription vaping products, with only pharmacies being able to access certain vapes with minimum branding, flavouring, and coloured advertising. This law reform aims to protect the general population, particularly teenagers, from accessing vaping products that cause harm to their physical health.

REAL WORLD EXAMPLE**Jail time for harm to emergency workers**

In 2020, the *Sentencing Act 1991* (Vic) was amended by the *Sentencing Amendment (Emergency Worker Harm) Act 2020* (Vic). The purpose of the Amendment Act was to protect emergency workers from harm on the job. For example, the Amending Act requires courts to impose a sentence of imprisonment in all cases where an offender recklessly or intentionally injures an emergency worker on duty, except in circumstances of mental impairment.

Adapted from 'Protecting Emergency Workers From Harm' (Premier of Victoria, 2020)



Image: Ann Kosolapova/Shutterstock.com

Figure 5 Emergency workers are particularly exposed to the possibility of harm in their course of work

LEGISLATION

Sentencing Act 1991 (Vic)

Sentencing Amendment (Emergency Worker Harm) Act 2020 (Vic)

Improving the legal system 4.2.1.1.5

Sometimes, the structure and systems of the legal system require updating to better achieve justice for parties. For example, solicitors typically charge hundreds of dollars per hour for their time, leaving those who cannot afford such fees to rely on self-representation. Consequently, parties in a case may not be equally represented. To help rectify the inequalities that exist, law reform has occurred in the past to enable all people in the community to have better access to legal information and advice. For example, in 2022, the Victorian Parliament passed legislative amendments requiring courts to regard additional considerations when determining whether to allow the pre-trial cross-examination of a witness with a cognitive impairment.

LESSON LINK

You learnt about the impacts of costs in criminal and civil cases in **2H The impact of costs and time - criminal cases** and **5K The impact of costs and time - civil disputes**.

REAL WORLD EXAMPLE**Unscrambling 1,000 eggs: Structurally reforming the family law system**

A culmination of many factors led to a backlog of over 20,000 family law cases before the courts in 2017. Moreover, amendments to the *Family Law Act 1975* (Cth) resulted in further rights being stripped from children, which legal professor Camila Nelson noted as a 'matter of public shame' (Nelson, 2023).

Consequently, the Australian Law Reform Commission (ALRC) was tasked with undertaking a review of the entire family law system, producing a report in 2019 with over 60 recommendations. The report outlined that an entire overhaul of the system was required, which critics dubbed an insurmountable task, akin to 'unscrambling 1,000 eggs' (Lorimer, 2022).

Following this, in 2023, the Commonwealth Parliament passed the *Family Law Amendment Act 2023* (Cth). The Act adopts some of the ALRC's recommendations, as well as elements of a joint select committee report. The Act aims to simplify and streamline the legislative framework of the family law system in order to reduce delays. The Act also proposes children be at the centre of every legal determination, with the aim of upholding their rights. However, children are yet to be given material legal rights in family disputes.

Adapted from 'Reform of family law' (Lorimer, n.d.), 'Labor's proposed family law overhaul makes some important changes but omits others' (Nelson, 2023), and 'Family Law Amendment Bill 2023: Explanatory Memorandum' (Parliament of Australia, 2023)

LEGISLATION

Family Law Act 1975 (Cth)

Family Law Amendment Act 2023 (Cth)

USEFUL TIP

In past VCAA Legal Studies exams, questions about the reasons for law reform have asked students to reflect on stimulus to determine why law reform has occurred. In the examiner comments for VCAA 2022 exam Q1b, the examiners wrote: 'meaningful use of the stimulus material was required'. When tasked with a stimulus question, remember to always refer back to the scenario or example given in order to obtain full marks. Not all reasons for law reform addressed in this lesson will apply to certain scenarios, so it is also important to talk about reasons for law reform that relate most closely to the scenario.

Lesson summary

Table 1 Summary of the reasons for law reform

Reason for law reform	Example
Shifts in community values	Legislation requiring companies to reduce carbon emissions in order to reflect community values about climate change.
Advances in technology	Amendments to legislation allowing corporations to execute documents using technology.
Changes to economic conditions	\$550 Coronavirus Supplement.
Protection of society	Broadening offences relating to harm against emergency workers.
Improving the legal system	The ALRC review of the Australian family law system.

9A Questions

CONTENT WARNING These questions mention content that is sensitive in nature, relating to sexual offences.

Check your understanding

Question 1

Which of the following is the most appropriate way parliamentarians can monitor the need for law reform?

- A. Consult the community.
- B. Read history books.
- C. Have a team lunch.
- D. Ask artificial intelligence.

Question 2

Which of the following statements explain why advances in technology are a reason for law reform?

(Select all that apply)

- A. To ensure the language of the law does not become outdated.
- B. New technology creates scenarios not previously covered by the law.
- C. Technology is becoming less widespread.
- D. Technology has few implications for existing legislation.

Question 3

Why does the law have to reflect community values? **(Select all that apply)**

- A. So that people obey the law.
- B. So that people will protest the law.
- C. So that people respect the law.
- D. So that people will not want to follow the law.

Question 4

Which of the following examples of law reform is a response to changing economic conditions?

- A. The *Safeguard Mechanism (Crediting) Amendment Bill 2022* (Cth).
- B. The Victorian Law Reform Commission report into stalking.
- C. The \$550 Coronavirus Supplement.
- D. Tasking the Australian Law Reform Commission with undertaking a review of the family law system.

Question 5

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

obey

suit

ignore

The shared beliefs of the local, state, and national communities are always changing. Therefore, laws must adapt to

these changing beliefs, so that citizens are more likely to respect and the law.

Question 6

Which of the following are reasons why parliament may seek to improve the legal system?

(Select all that apply)

- A. To increase accessibility to the legal system.
- B. To reduce costs.
- C. To reduce delays.
- D. To increase delays.

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

(2 MARKS)

Outline **one** reason for law reform.

Question 8

(3 MARKS)

In 2021, the Victorian Law Reform Commission (VLRC) investigated why many people are hesitant to report sexual violence, based on the fact that 87% of victims do not report instances of sexual assault to the police. Some commentators have called for parliament to change the law to make it easier for victims to report sexual crimes.

Why might law reform be necessary in relation to sexual offences? Justify your response.

Question 9

(3 MARKS)

It is the year 3024, and due to a shortage of bees, Australia has introduced robot bees that have abilities to pollinate as regular bees. All bees contain publicly accessible cameras. Australians have started storing the bees in their homes to help grow their own produce. There are currently no laws regulating the cameras on these bees, where these bees can travel, and who can store them for private use.

Explain **one** reason for the need to change the law in Australia in relation to robot bees.

Adapted from VCAA 2019 exam Section B Q1b

Question 10

(6 MARKS)

For decades, in the small town of Indio, being barefoot outside of one's own home has been legal. However, there are an unprecedented amount of construction nails on the ground. A local politician, Eddie, has proposed introducing a new law called the Shoe Bill 2073 which will make it illegal to walk in public barefoot, under the slogan 'shoe the shoeless'. The bill will mandate the wearing of shoes outside. 93% of the community supports the proposed reform.

With reference to the scenario, explain **two** reasons why laws may need to change.

Adapted from VCAA 2020 exam Section B Q2a

Extended response

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

Use the following information to answer questions 11 and 12.

In 2016, the Victorian Government passed the *Tobacco Amendment Act 2016* (Vic) and smoking became prohibited in outdoor dining areas. Second-hand smoking is the involuntary inhalation of burnt tobacco from cigarettes. The effects of second-hand smoke are shown to be harmful even at low levels, such as in outdoor areas, given cigarettes contain 7,000 harmful chemicals. Over 73% of Victorians supported the introduction of a ban on smoking in outdoor areas.

Question 11

Tick the box to indicate whether the following statements relates to the **protection of the community** or a **shift in community values** as reasons for smoking law reform.

Statement	Protection of the community	A shift in community values
I. Law reform may be required to protect particular communities from harm, especially when these groups cannot prevent or control the harm that is occurring.	☐	☐
II. As 73% of Victorians support a ban on smoking in outdoor dining areas, law reform should occur.	☐	☐
III. It is imperative that laws shift alongside community values, so that citizens are more willing to respect and obey the law.	☐	☐
IV. Non-smokers cannot control the degree of second-hand smoke they inhale when dining outdoors.	☐	☐

Question 12

(6 MARKS)

Analyse the links between smoking in outdoor dining areas and the need for law reform.

Adapted from VCAA 2018 exam Section B Q2c

Linking to previous learning

Question 13

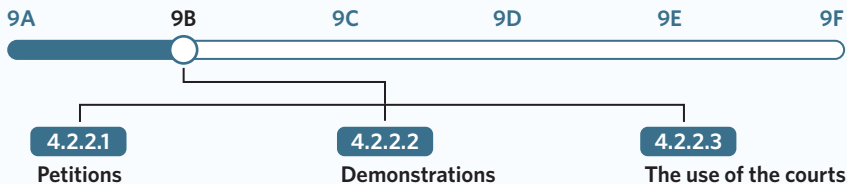
(4 MARKS)

Explain **one** way in which international pressures can act as a reason for law reform.

9B Influences on law reform

STUDY DESIGN DOT POINT

- the means by which individuals or groups can influence law reform including through petitions, demonstrations and the use of the courts



'No government can accomplish anything alone. It can do only what the people approve of or at least permit to be done.'—Alexander Berkman (Philosopher, 'Now and After', 1929)

Without the approval of the people, the law holds little value. Collectively, nearly 26 million Australians have the power to be the direct determinants of their fate and governing laws, should they choose to use this power and exercise their influence through various means and institutions.

Lesson introduction

Individuals and groups can be powerful in pressuring parliament to make legislative change to ensure laws represent their views and values. The desire for change can be publicly signified through various methods including petitions, demonstrations, and the use of the courts. The collective power and capacity of the people can be extremely effective in establishing law reform. For example, if every working person in Victoria boycotted their occupation, the economy would collapse.

Petitions 4.2.2.1

A **petition**, in the context of law reform, is a written document signed by a number of people to demand change from the government. Petitions are usually political in nature and are the only means for directly presenting grievances to parliament. Generally, a petition is initiated with the intention of demanding the introduction of new legislation or the amendment of an existing law or policy. Petitions must be tabled before parliament if they are to be officially considered. There are no costs associated with initiating a petition, and they can be made online as e-petitions, which are lodged on the Victorian and Commonwealth parliamentary websites, or be presented to parliamentarians as hardcopies.

KEY TERM

Petition a formal document addressed to the government that is signed by individuals who are demanding action or legislative reform.

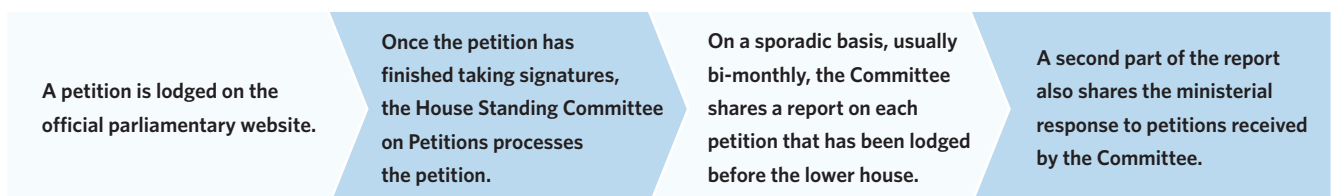


Figure 1 The process of lodging an e-petition

Following the submission of a petition and the subsequent ministerial response, it is up to the relevant minister to action the requests of the petition. Parliament receives hundreds of petitions each year, thus, petitions with high levels of community support are more likely to be actioned, as the government theoretically should ensure its laws represent the views and values of the majority.

REAL WORLD EXAMPLE



Figure 2 Former prime minister Kevin Rudd's petition on media ownership diversity was one of the largest petitions in Australian history

Rudd takes on the Australian Media

In 2020, former prime minister Kevin Rudd launched what would become Australia's largest ever e-petition, and third largest petition in Australian history, garnering over 501,000 signatures. The petition urged the government to initiate a royal commission into the ownership of media in Australia.

The petition was successful in gaining the attention of parliament and became the subject of a year-long Senate inquiry. The final report was published in December 2021 and resulted in a damning indictment on media ownership in Australia, labelling the entire system as 'not-fit-for-purpose'. It also outlined the ramifications of the digital consumption of news content and called for a judicial inquiry to investigate the media system as a whole. Since the publication of the report's findings, no further action has occurred in regard to media consumption and diversification.

Therefore, Rudd's petition is a key example of the limitations of petitions, as once the petition is created and campaigned for, it is then in the hands of parliament to determine how the demands will be actioned, if they are actioned at all.

Adapted from 'How large is Rupert Murdoch's reach through News Corp in Australian media, old and new?' (Campbell, 2021) and 'What next for Kevin Rudd's Murdoch royal commission push?' (Visentin, 2022)

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 VCE Legal Studies is to 'discuss the means by which individuals or groups can influence law reform, using examples'. These tables showing the strengths and limitations of each method of influencing law reform, along with examples throughout this lesson, can help you develop a discussion on this topic.

Table 1 Strengths and limitations of petitions as a means of influencing law reform

Strengths	Limitations
- Petitions are a convenient and free method of collating support for action, particularly e-petitions. - The relevant minister is required to respond to all e-petitions in the Petition Report, which is tabled every few weeks in parliament. - Petitions with a large number of signatures can successfully raise awareness about an issue within the media and community, even if legislative change is not actioned.	- Parliament is unlikely to respond to calls for law reform if a petition does not have many signatures or high levels of community support. It is difficult to attain enough signatures on a petition to convince parliament that law reform is required. - It is ultimately up to the relevant minister to determine if the demands of a petition will be actioned or not. - Petitions generally need to be about legislative issues that are on the current agenda for parliament to pay sufficient attention to the petition's demands.

Demonstrations 4.2.2.2

KEY TERM

Demonstration public protest to a law or action undertaken by a large group of people.

LEGAL VOCABULARY

Constituent a person who votes for, and is then represented in government by, an elected official.

Demonstrations occur when a large number of people congregate to bring attention to a common issue and are often the result of people's dissatisfaction with the current law. Demonstrations have effectively influenced law reform for centuries and have the ability to either initiate minor legislative changes or even overthrow whole governments and economic systems. Given the disruptions demonstrations can cause, such as blocking major intersections or striking and leaving workplaces empty until reform is enacted, the demands of a demonstration are more likely to be met swiftly. However, an overly disruptive or violent demonstration may lead to the cause being perceived negatively by the media and the public.

However, demonstrations must be persistent. If momentum for a movement is enhanced by a demonstration, the momentum must be built upon and maintained, otherwise legislative reform may not occur and the passion for a common issue may fade as quickly as it was mustered up.

REAL WORLD EXAMPLE

A fair day's work, for a fair day's pay

In April 1856, Victorian stonemasons laid down their tools and went on strike against their employers, wanting improved working conditions. They demanded a day that included eight hours of work, eight hours of rest, and eight hours of sleep, an idea originating in socialist Scottish communities in 1817. The demonstration grew as the initial protesting stonemasons, who were in the midst of constructing the Melbourne University law facility, marched to the Victorian Parliament and were joined by additional stonemasons on their way.

Protests continued until negotiations concluded with the government, whereby most tradesmen were granted an eight-hour working day for 10 hours of pay. Demonstrations and demands continued across all professions and eventually, the eight-hour day movement reached all Victorian workers in 1916. Subsequently, all Australians in 1948 were affected by the movement's success when the Commonwealth Parliament legislated the 40-hour, five-day working week.

The eight-hour stonemason movement was a watershed moment for all Australian workers. Ultimately, the movement serves as a great example of the power of protests in enabling individuals and groups to influence changes to the law.

Adapted from 'Eight-hour day' (National Museum of Australia, 2023)



Figure 3 The eight-hour day monument in Melbourne

REAL WORLD EXAMPLE

From 350,000 to a few dozen – the decline of the Australian School Strike for Climate movement

The Australian School Strike for Climate (SS4C) movement garnered the support of over 350,000 students across the country in 2019, protesting for the Australian Government to alter its climate change policy to include a 100% reduction in emissions by 2030. The demonstrations of 2018 and 2019 were highly successful in raising awareness and attracting mass media attention. However, the movement in Australia has markedly declined since. In March 2023, less than 200 people took to the streets of Sydney for the annual strike, despite the current government's climate commitment being only a 43% emissions reduction aim by 2030.

The overarching reason for this decline may be attributed to a loss of momentum over recent years. COVID-19 lockdowns in 2020 and 2021 made protesting somewhat impossible, and when a new federal government was elected in 2022, whose views were slightly more aligned with the SS4C movement than the previous government, it is possible some protesters felt their job was done. Despite the aims of the movement not being met, and one in four young Australians being extremely concerned about climate change, the sense of anxiety regarding climate change has become 'very familiar' for some (Gregoire, 2023) and, ultimately, complacency has occurred.

A valuable lesson lies in the SS4C movement. The momentum that can be stirred up by a demonstration must be consistently followed up with profound and uncompromising action if law reform is to be influenced.

Adapted from "'We're Seeing No Substantial Change": School Strike 4 Climate's Ethan Lyons on a Viable Future' (Gregoire, 2023) and 'Link between climate change, youth mental health concerns highlighted by new national survey' (Miles, 2023)



Figure 4 The number of School Strike for Climate protestors in Australia has declined immensely

Table 2 Strengths and limitations of demonstrations as a means of influencing law reform

Strengths	Limitations
- Demonstrations have the ability to cause disruption and can be an effective tool for people to have their demands met swiftly, as exemplified by workers' strikes. - Demonstrations with a large number of people can be good at gaining publicity for a common issue. - Given the representative nature of parliament, parliamentarians should theoretically pay close attention to demonstrations, as a number of their constituents are clearly communicating their desire for change.	- If a successful demonstration is not immediately followed up by further action, momentum for a cause will often fade. - The disruptions caused by demonstrators often result in negative media attention, particularly if the issue is considered 'extreme' by the media and is against politician's interests. - Demonstrations are difficult to organise and are time-consuming, as they require a large mass of people to be in the same place, at the same time.

The use of the courts 4.2.2.3

LEGAL VOCABULARY

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.

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

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

Individuals and groups with standing can influence law reform by bringing their cases to court as this may lead to the establishment of a new precedent. However, if a party is unable to demonstrate that they are sufficiently impacted by the law and the issues of the case, then they will not have standing and therefore, will not be able to use the courts to influence law reform. If a court does not hear a case regarding a particular issue, then it is impossible for it to set a precedent in that area of law.

Moreover, attention can be drawn to an issue as a result of an individual or group taking a case to court. In particular, class actions may bring significant media attention where there are a number of plaintiffs involved in the dispute. However, this attention is often a by product of the court claim. That is, individuals and groups rarely take issues to court for the sole reason of drawing attention to the issue. Rather, they are usually trying to prove their own claim. Nonetheless, the inadvertent attention brought to an issue of concern can act as an additional influence on law reform. Additionally, individuals and groups may intentionally seek to draw attention to an unsuccessful outcome, possibly with the hopes of garnering community support for a particular issue or law reform.

Furthermore, due to **parliamentary supremacy**, common law may be confirmed by parliament through **codification**. This may enshrine the precedent established in a particular case into legislation, illustrating the ability of individuals to influence law reform through the courts. Alternatively, precedents established during court proceedings may be overruled by parliament through **abrogation**, limiting the ability of individuals or groups to influence law reform through the courts.

Table 3 Strengths and limitations of using the courts as a means of influencing law reform

Strengths	Limitations
- The courts may establish a new precedent when a case is brought before them. - Parliament may codify common law principles into statutory law. - Even if a matter is unsuccessful in court, attention may be garnered that can prompt legislative change.	- Individuals or groups pursuing litigation must hold sufficient standing, whilst also establishing enough evidence to not only bring the case to court but also have an outcome that is in their favour. - The supremacy of parliament means it can abrogate any common law precedent set by the courts. - Pursuing litigation is extremely expensive and time-consuming, so the average person may be deterred from pursuing an issue through the courts.

LESSON LINKS

You learnt about costs and delays in the court system in **5K The impact of costs and time – civil disputes**.

You learnt about class actions in **5G Class actions**.

You learnt about precedent in **8B The doctrine of precedent**.

You learnt about the requirement for standing in **8D Courts' ability to make law – costs, time, and the requirement for standing**.

You learnt about codification and abrogation of common law in **8E The relationship between courts and parliament in law-making**.

LEGAL CASE

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

Facts

The Trigwells were travelling on a main highway when a three-car collision occurred after two sheep strayed onto the road from an adjoining farm.

Legal issue

The Trigwells claimed the accident was caused by the sheep entering the road, therefore constituting negligence committed by the farm owners. The issue then became whether or not to apply the British common law principle established in *Searle v Wallbank* [1947] AC 341, where it was found that occupiers of land adjoining a highway do not owe a duty to the users of the highway.

Decision

The High Court, in the appeal case, maintained the original decision and applied the precedent of *Searle v Wallbank*, therefore dismissing the claims that the sheeps' owners acted negligently.

Continues →

LEGAL CASE

State Government Insurance Commission v Trigwell (1979) 142 CLR 617**– Continued****Significance**

Chief Justice Barwick stated that even if the common law principle established by *Searle v Wallbank* was outdated by modern standards, enacting any change in that area of law was a matter for the legislature and not the judiciary. Ironically, Barwick CJ also stated that the High Court should overrule decisions that are incorrect. This attitude of the High Court resulted in some controversy, and eventually, in response, the Victorian Parliament passed the *Wrongs (Animals Straying on Highways) Act 1984* (Vic). The Act meant that farm owners were then responsible for their animals straying onto highways, thereby abrogating the common law principle. Ultimately, Trigwell is an example of how the courts can be used by individuals to influence law reform, even if the outcome of the case is unsuccessful.



Figure 5 Stray sheep resulted in a major accident

LEGISLATION

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

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 Legal Studies is to 'discuss the means by which individuals or groups can influence law reform, using examples'. This means that you should consider the strengths and limitations of individuals and groups as an influence on law reform. You should use specific examples from the real world of individuals or groups influencing law reform through petitions, demonstrations, and the use of the courts to support your statements, instead of merely explaining the role of the individuals or groups in influencing law reform.

Lesson summary

Table 4 Summary of the influences on law reform

	Explanation	Strengths	Limitations
Petitions	A written document signed by a number of people demanding change from a person or organisation.	• Convenient • Ministerial response required • Ability to raise awareness	• Difficult to attain enough signatures to initiate reform • Minister not required to action any demands • Needs to be a known topic
Demonstrations	Public protest to a law or action, undertaken by a large group of people.	• A useful bargaining tool as it causes disruptions • Can raise awareness • Communicates collective desire for change	• Momentum fades quickly • Can result in negative media attention • Inconvenient to organise
The use of the courts	Utilising the courts to establish new common law.	• Potential for new precedent to be set • Parliament can codify precedent • Awareness can be raised about an issue	• Requirement for standing • Supremacy of parliament • Time and cost factors

9B Questions

Check your understanding

Question 1

Voting is the only way citizens can actually influence law reform.

- A. True
- B. False

Question 2

The most convenient way to influence a change in law reform is through:

- A. using the courts.
- B. petitions.
- C. becoming prime minister.
- D. demonstrations.

Question 3

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

demonstration

petition

A occurs when a large number of people congregate in person and seek to bring attention to a common issue.

Question 4

Petitions are inconvenient as petitioners have to doorknock and acquire physical signatures to validate the petition.

- A. True
- B. False

Question 5

How can individuals use the courts to influence reform? **(Select all that apply)**

- A. Bring a case before the courts and in turn, give the courts an opportunity to set a new precedent in a particular area of law.
- B. Have public attention drawn to an unsuccessful outcome.
- C. Launch litigation in an area of law they are not connected to.
- D. Ask the courts nicely to persuade the prime minister to change the law.

Question 6

Which of the following is a common strength among petitions, demonstrations, and the use of the courts?

- A. Convenience.
- B. Useful bargaining tool.
- C. Ministerial response required.
- D. Ability to raise awareness.

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Outline **one** way in which individuals or groups can influence law reform.

Question 8

(4 MARKS)

'Using the courts to influence law reform is almost impossible. It takes far too much money and time to bring a case before them'.

Do you agree with this statement? Justify your answer.

Extended response

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

Question 9

Tick the box to indicate whether the following statements are **strengths** or **limitations** of demonstrations.

Statement	Strengths	Limitations
I. Demonstrations can cause disruption and therefore be an effective tool for people to have their demands met swiftly.	☐	☐
II. If a successful demonstration is not immediately followed up by further action, momentum for a cause will often fade.	☐	☐
III. Demonstrations with a large number of members can be good at garnering publicity.	☐	☐
IV. Demonstrations are difficult to organise and time-consuming.	☐	☐

Question 10

(6 MARKS)

Discuss how individuals and groups in Australia may successfully influence law reform through demonstrations.

Adapted from VCAA exam 2021 Section B Q1c

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

Question 11

Which of the following are strengths of petitions? **(Select all that apply)**

- A. They are a convenient way to garner people's support for an action without consuming their time.
- B. They occur when a large number of people congregate and look to bring attention to a common issue.
- C. They have the ability to cause disruption.
- D. They must be responded to in the Petition Report by the relevant minister.

Question 12

(6 MARKS)

'Petitions are the only real means by which individuals and groups can influence law reform. Demonstrations cannot actually affect reform.'

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

Adapted from VCAA 2021 exam Section B Q2b

Linking to previous learning**Question 13**

(4 MARKS)

In the year 2040, the Commonwealth Parliament passed an Act banning driverless cars. However, 85% of Australians own driverless cars and do not support the change in law. Giuseppe believes the Act is wrong, and has collated 500,000 signatures on an official parliamentary e-petition. As a result, the Act banning driverless cars is repealed.

Explain the relationship between **one** reason for law reform and petitions.

9C The role of media in law reform



Image: Andrey_Popov/Shutterstock.com

Have you ever wondered what shaped your opinions on political and legal issues? Whether you are actively aware of it or not, your outlook on the legal system, reform, and politics has been shaped by the media you have consumed throughout your life.

STUDY DESIGN DOT POINT

- the role of the media, including social media, in law reform

9A 9B 9C 9D 9E 9F

4.2.3.1

The role of media in law reform

4.2.3.1.1 The role of traditional media

4.2.3.1.2 The role of social media

Lesson introduction

The communication methods of information and news have been ever-evolving. For centuries, information has generally been disseminated through print, such as in newspapers. This form of communication is now considered traditional media. More recently, social media has overtaken traditional media as the primary means by which information is communicated amongst certain groups, mainly young people. These social media sites include Instagram, Facebook, TikTok, and X (formerly Twitter). There are numerous implications for this shift in media communication and how law reform is affected.

The role of media in law reform 4.2.3.1

The primary function of the media in relation to law reform is to inform and educate people about current contentious political and legal issues, as well as debates in the public realm. Individuals, key stakeholders, and groups on one side of a contentious debate may attempt to influence law reform through the media, as community values can be shifted when people are educated about certain issues or opinions. As a result, if sufficient shifts in public opinion about a debated matter occur, parliament may be motivated to initiate law reform in order to respond to community desires in law-making.

Traditional and social media have previously been able to educate the public and will likely be able to continue to do so in the future. Subsequently, law reform is influenced as the media can generate public pressure, compelling the government to act with varying degrees of success.

The role of traditional media 4.2.3.1.1

Traditional media refers to mediums such as television, radio, and newspaper (in print and digital form) that disseminate information to the public. Traditional media has historically set the political and legal agenda regarding law reform. Given the resources that media outlets possess, large-scale and deep investigations into law reform can be particularly informative and directly prompt law reform. Programs, such as ‘Four Corners’ by the Australian Broadcasting Corporation (ABC) and ‘60 Minutes’ by the Nine News Network, delve deep into contentious issues, and on occasion, set the national law reform agenda itself. These investigations put pressure on the **government of the day** to enact certain law reforms, as if they do not act, they may incur negative press which could lead to a decline in public support and therefore reduce chances of re-election.

KEY TERM

Traditional media mechanisms for spreading information that began use prior to the 21st century, such as newspapers, magazines, television, and radio.

LEGAL VOCABULARY

Government of the day the political party or coalition with a majority in the lower house of parliament.

REAL WORLD EXAMPLE

Commonwealth Bank under fire

In 2014, Four Corners, with Fairfax reporter Adele Ferguson, launched an investigation into the Australian banking system titled ‘Banking Bad’. The episode summarised information collected over a two-year investigation into the banking system, prompting a royal commission into the banking sector, a move many members of parliament (MPs) resisted for years prior (Hall, 2019).

The investigation examined, amongst other issues, a ‘sales-driven’ culture inside the Commonwealth Bank’s financial planning division. It exposed the tendency of some mortgage brokers to pursue profit ‘at all costs’, instead of advising consumers in their best interest (ABC, 2014). The resultant three-volume final report issued in 2019 by the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry detailed numerous criticisms against the banking system and prompted law reform.

For example, recommendation 1.2 suggested the implementation of a ‘best interests duty’, which would ensure that mortgage brokers act in the best interests of the intending borrower. The *National Consumer Credit Protection Act 2009* (Cth) was then subsequently amended to include this recommended obligation.

Adapted from: How Banking Bad exposed Commlnsure Conduct (Hall, 2019), ‘VIDEO: Banking Bad’ (Four Corners, 2014), and ‘Misconduct in the Banking, Superannuation and Financial Services Industry: Final Report’ (Royal Commissions, 2019)



Image: Nils Versemann/Shutterstock.com

Figure 2 The Commonwealth Bank was subject to a two-year Four Corners’ investigation



Image: sebra/Shutterstock.com

Figure 1 Traditional media remains largely influential

LEGISLATION

National Consumer Credit Protection Act 2009 (Cth)

However, sometimes the law reform agenda is set in direct accordance with the media’s interests, given the for-profit nature of media ownership in Australia. Issues may be oversimplified or facts omitted. Therefore, media outlets may sometimes skew information or present it in a manner that is not completely honest or free from bias and therefore does not serve the interests of the community.

REAL WORLD EXAMPLE

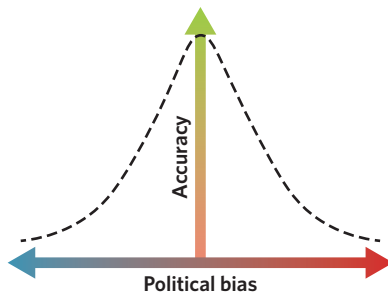


Figure 3 A news source with less political bias is more capable of providing accurate information

Murdoch monopoly

News Corporation, referred to as News Corp, is an American based media corporation founded by Rupert Murdoch and his father, Sir Keith Murdoch. In Australia, News Corp controls over 100 physical and digital newspaper mastheads, including the Herald Sun, news.com.au, Daily Telegraph, and The Australian. Overall, 65% of the Australian newspaper market was controlled by News Corp in 2016 (Campbell, 2021). This is in conjunction with its 65% stake in Foxtel and ownership of shows such as Sky News. The next largest controller of news content in Australia is Fairfax, which oversees TV and newspaper outlets such as Channel 9, The Age, The Sydney Morning Herald, and the Australian Financial Review (Campbell, 2021).

Such a large concentration of private, for-profit media in Australia may result in Australians being persuaded to follow a narrative that is not in their interest, but in the interest of the corporations who own the newspapers. Having for-profit media corporations that will expressly experience a monetary benefit as the result of one legal or political outcome, but not another, creates a 'conflict of interest' (Muller, 2022). As a result, the biased influence that media corporations such as News Corp possess is significant, affecting what issues of law reform are to be on the national law reform agenda, and how they are presented.

Adapted from 'Attacks on Dan Andrews are part of News Corporation's long abuse of power' (Muller, 2022) and 'How large is Rupert Murdoch's reach through News Corp in Australia, old and new?' (Campbell, 2021)

Table 1 Evaluating the role of traditional media in influencing law reform

Strengths	Limitations
- The government may be fearful of negative representations in the media and are therefore more likely to reform the law following in-depth investigations exposing poor practice in certain areas. - Traditional media outlets generally have the financial resources and political connections to investigate and report on contentious issues. This allows people to become informed about political and legal issues that the news companies choose to report on so they can make decisions when it comes to influencing law reform, such as when voting. - Newspapers frequently conduct political surveys and polls, allowing politicians to understand the trends surrounding their popularity. This can help inform the decisions made by members of parliament (MPs) as, if they observe a steep decline in their popularity, for example, they may rectify this issue by changing which policies they are supporting or introducing new bills in parliament to provoke public support. They will do so in order to remain in power as, under the system of representative government, if a politician loses their public support they also may lose their seat in parliament. - Traditional media, such as newspapers, remain accessible to people of all generations in Australia, particularly to older generations who may not use social media. This ensures all generations can stay informed, empowering individuals to make informed voting decisions, and ultimately influencing the success of policies in parliament.	- Certain news outlets can have strong biases depending on their ownership, causing them to disseminate misleading information to the public, hence limiting the ability of traditional media to inform people of relevant issues. In Australia, there are a few major corporations that own a vast majority of the newspapers and other media across Australia. Therefore, the biases of these large corporations will likely influence high proportions of Australians, including law-makers themselves. - The biases present in traditional media organisations may also lead to traditional media platforms using their influence to push against law reform, resulting in the media acting to prevent law reform instead of presenting a platform to encourage it. For example, in the lead-up to the Voice to Parliament referendum, newspapers within the Murdoch media conglomerate were accused of pushing a biased narrative catering to the 'No' campaign (Fielding, 2023). If large proportions of the Australian public consumed this media, then the Voice's success could have been stifled, limiting law reform as no constitutional change occurred. - Traditional media may sensationalise certain events in order to gain attention, leading to the oversimplification of news and events. This may result in the spread of misinformation as people may not bother to read beyond the eye-catching title, believing they gain the full story from this single title. This can reduce the level of meaningful influence that traditional media has on law reform. - Newspapers carry a cost, meaning not everybody will be able to purchase them or be inclined to purchase them, especially younger people.

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.

The role of social media 4.2.3.1.2

Social media has largely become the dominant means by which information is instantaneously communicated. It has meant that individuals and groups can attempt to gather support for an issue themselves, rather than having to wait for the mainstream media to capture the story, hence amplifying community voices. Moreover, social media campaigns can assist politicians in garnering support for a particular reform to enhance its popularity come election time. However, social media's short-form content and the likelihood of users only consuming content that appeals to their views means that facts are rarely presented fully and in an unbiased way.

Social media has an international reach, where people on platforms such as TikTok may be able to spread awareness of global issues, such as climate change and the refugee crisis. This is especially applicable to younger people, who are less likely to consume traditional media. Therefore, people from across the world can share their perspectives with Australian people about international issues. This may encourage people in Australia to learn about problems affecting the whole world. It also may enable people in Australia to learn about law reform that is occurring in other countries, prompting citizens to desire their representatives to enact similar law reform.

KEY TERM

Social media mechanisms for sharing information used in the 21st century, involving digital applications and websites such as Facebook, YouTube, Instagram, and X (formerly Twitter).



Image: Cristian Dina/Shutterstock.com

Figure 4 There are various forms social media can take

DEEP DIVE

The consequences of echo chambers

In news and media, echo chambers are situations in which people only hear opinions of one type, which generally reinforce an individual's existing beliefs. This is a system without rebuttal. Echo chambers therefore do not equally present the facts of the situation, but rather, only convey information from one side of the debate. Subsequently, individuals may hold certain opinions about contentious political and legal issues based on the repeated, biased presentation of an argument that they constantly receive from several sources of social media.

Echo chambers occur easily in social media because algorithms tend to highlight content for an individual to see based on the content they have previously interacted with. This leads an individual to view, and likely react to, that content again. Therefore, the cycle continues of social media amplifying the same content and opinions repetitively. The same also may occur in traditional media, when people purchase newspapers that align with their political views.

LEGAL VOCABULARY

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.

REAL WORLD EXAMPLE

Age of criminal responsibility raised

In 2020, a range of Aboriginal and Torres Strait Islander organisations, in conjunction with human rights groups and other non-governmental organisations, came together to push every single state, territory, and federal government to change the laws and raise the **age of criminal responsibility** from 10 years old to 14 years old.

The campaign has gained traction through social media as #raisetheage was shared across various sites, such as Instagram. Tens of thousands of people have joined the campaign, together lobbying politicians to reform the law and hold events to raise awareness for their goal.

As a result, the Victorian Government announced that children aged 10 and 11 will not be held criminally responsible for their actions by the end of 2024, with plans to increase the criminal age of responsibility to 14 by 2027.

Adapted from 'Victoria to raise the age of criminal responsibility to 12, youth advocates push for 14' (Willingham, 2023)



Image: Daniel Holking/Shutterstock.com

Figure 5 Children as young as 10 years old can be arrested and charged with a crime as of 2023, however by 2024 this law will likely be amended

Table 2 Evaluating the role of social media in influencing law reform

Strengths	Limitations
- Social media campaigns can help assure governments that there is popular support for a particular reform come election time, therefore increasing the likelihood of parliament adopting the reform being called for. - Social media enables communities and groups to gather support for an issue themselves, rather than having to wait for the mainstream media to capture the story, hence amplifying community voices. - Social media can allow individuals to share their personal stories or images easily, which can then attract attention and inspire people to begin campaigning for legislative change in light of more accessible, personal anecdotes being shared. - Social media allows people to access information from all over the world in an instant. Therefore, the law reforms created by other countries or the global issues facing society can be shared through social media, encouraging people in Australia to campaign for law reform. This may increase the likelihood of parliament adopting a reform when Australians, as well as the broader international community, support a certain policy shift. - Many MPs have social media and can, therefore, directly engage with constituents through their online platforms, such as Instagram and X (formerly Twitter), by making comments back to users. This can allow for policymakers to gauge the views and values of members of their electorate. Therefore, parliamentarians may be able to create policies that better reflect the desires of those in the community they were elected to represent. - Social media is free and easily accessible for all to use, meaning information can be more readily shared.	- Just as social media campaigns can push for the law to be reformed, so too can campaigns push against law reform, resulting in social media being utilised to prevent law reform instead of encouraging it. - Social media algorithms tend to highlight content for an individual to see based on the content they have previously interacted with, meaning people are less likely to be exposed to alternative opinions. This can sway people's views on areas of law reform and may lead to uninformed decisions that influence law reform because people are not made aware of the other side of a debate through social media. - Parliament will normally only make legislative changes if it is on their political agenda. Therefore, regardless of how much traction a proposed law reform receives on social media, the government has the final determination on the law reform. - Anyone can post on social media and claim it to be 'news' regardless of whether the information being disseminated is factual or whether the person who posted has the educational background to be able to report on current affairs. Complex events can also be oversimplified into an infographic or short-form video on social media, with people not receiving full information. People may therefore base their votes on certain law reform issues, such as a referendum, on lies that people on social media have shared as facts. - On social media, graphic images or videos may be shared more easily than in traditional media where there are greater restrictions and censorship on the kind of content that can be shared. As a result, people may become desensitised to certain issues, resulting in individuals not considering these issues when campaigning for law reform or casting a vote, as they do not place importance on it.

LEGAL VOCABULARY

Constituent the people politicians have been elected to represent.

Electorate a geographical area comprised of approximately 110,000 voters represented by a member of the Commonwealth Parliament.

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 Legal Studies is to analyse the role of the media in law reform 'using examples'. This means that, in an extended-response question about the media, you should explore the ways in which the media can influence law reform, which can include consideration of the strengths and limitations of the media as an influence on law reform. You should use specific examples from the real world of the media influencing law reform to support your statements, instead of merely explaining the role of the media.

Lesson summary

- The role of the media is to communicate information about political, legal, and social issues to the public.
- The media aims to inform Australians about current debates and contentious issues, therefore allowing them to cast an informed vote and influence law reform if there is a problem in society they are particularly passionate about. However, both types of media are not always successful in doing so.
- There are two main types of media: traditional media and social media.

Table 3 Evaluating the media in influencing law reform

Strengths	Limitations
- The media, through its broad reach, can gain a lot of support for a particular change in the law and assure politicians of the popularity of reform. - Investigative journalism can put pressure on the government to reform the law. - Social media is free and easily accessible for all people.	- Issues presented in the media may be oversimplified, resulting in people not being aware, or being misguided, regarding the law reform that is required. - Members of parliament may only reform the law if it is on their political agenda. - For-profit media organisations may present biased information, leading voters to form opinions about law reform based on misguided information. - Information related to law reform shared in the media may lead to factually incorrect information being spread, particularly on social media. This may make it difficult for parliament to reform the law when the community is against such reform due to being misinformed.

9C Questions

Check your understanding

Question 1

A role of the media in law reform is to:

- persuade people of a narrative that is against their interests.
- misinform people of cases.
- educate people on contentious political, legal, and social issues so they can influence their parliamentarians to alter the law to suit their beliefs.

Question 2

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

media

people

Sometimes the law reform agenda is set in direct accordance with the interests of the , given the for-profit nature of media ownership in Australia.

Question 3

Which of the following are strengths of the media in influencing law reform? **(Select all that apply)**

- The media, through its broad reach, can gain a lot of support for a particular change in the law and assure politicians of the popularity of reform.
- Certain news outlets can have strong biases depending on their ownership, causing them to disseminate misleading information to the public.
- Traditional media may sensationalise certain events in order to gain attention, leading to the oversimplification of news and events.
- The government may be fearful of negative representations in the media and are therefore more likely to reform the law following in-depth investigations exposing poor practice in certain areas.

Question 4

Social and traditional media always outline the facts of the situation in a fair, unbiased, and informative manner.

- True
- False

Question 5

Social media may be beneficial for law reform as:

- A. many MPs have social media and can therefore, directly engage with constituents through their online platforms, allowing them to gain insight into the views and values of their electorate or electoral division in relation to law reform.
- B. anyone can post on social media and claim it to be 'news' regardless of whether the information being disseminated is factual.

Question 6

Law reform is only inspired by traditional media; social media has no influence on parliament.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 7

(2 MARKS)

Outline **one** role of the media in law reform.

Adapted from VCAA 2018 exam Section B Q2a

Question 8

(3 MARKS)

'Four Corners' by ABC produced a report on the adverse impacts of gambling and Australian sport in June 2023. Imagine that, following this report, widespread anti-gambling demonstrations occurred across Australia. Fearing the political ramifications of not responding to the issues raised by the report and the demonstrations, members of the government of the day within the Commonwealth Parliament all vote to approve a law prohibiting all sports gambling.

Describe **one** way in which the media can influence law reform.

Extended response

Use your answers to questions 9 and 10 to support your response to question 11.

Question 9

Which of the following is an example of the traditional media influencing a change in the law?

- A. The Four Corners investigation titled 'Banking Bad'.
- B. The #RaiseTheAge campaign.
- C. Media ownership is concentrated in a few corporations.

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the role of traditional media in law reform.

Statement	Strengths	Limitations
I. Traditional media, such as newspapers, remain accessible to people of all generations in Australia, particularly to older generations who may not use social media.	☐	☐
II. Parliament may be fearful of negative representations in the media and is therefore more likely to reform the law following in-depth investigations exposing poor practice in certain areas.	☐	☐
III. Traditional media may sensationalise certain events in order to gain attention, leading to the oversimplification of news and events.	☐	☐
IV. Traditional media outlets contain inherent biases.	☐	☐

Question 11

(6 MARKS)

Discuss the ability of traditional media to influence a change in the law. In your answer, provide **one** recent example of the media influencing legislative change.

Adapted from VCAA 2014 exam Q13

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 the role of the media in law reform.

Statement	Strengths	Limitations
I. Social media campaigns can assure politicians that there is popular support for a particular reform come election time, therefore increasing the likelihood of parliament adopting the reform being called for.	☐	☐
II. Social media enables communities and groups to gather support for an issue themselves, rather than having to wait for the mainstream media to capture the story, hence amplifying community voices.	☐	☐
III. Certain news outlets can have strong biases based on their ownership, causing them to disseminate misleading information to the public.	☐	☐
IV. Many complex events may be oversimplified into an infographic or short-form video on social media, with people therefore not receiving full information about a contentious issue.	☐	☐

Question 13

(6 MARKS)

'The media is an effective tool for influencing law reform.'

Discuss the extent to which you agree with this statement.

Adapted from VCAA 2020 exam Section B Q2c

Linking to previous learning

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 strengths of **the media** or **demonstrations** in influencing law reform.

Statement	The media	Demonstrations
I. Corporations, such as News Corp, generally have the financial resources and political connections to investigate and report on contentious issues.	☐	☐
II. Social media campaigns can help assure politicians that there is popular support for a reform come election time.	☐	☐
III. Demonstrations have the ability to cause disruption and can be an effective tool for people to have their demands met swiftly, as exemplified by workers' strikes.	☐	☐
IV. Given the representative nature of parliament, parliamentarians should theoretically pay close attention to demonstrations.	☐	☐

Question 15

(6 MARKS)

'The media is the only way law reform is influenced by individuals and groups.'

Discuss the extent to which you agree with this statement. In your response, refer to **one** means by which individuals can influence law reform.

Adapted from VCAA 2018 exam Section A Q7

9D The Victorian Law Reform Commission

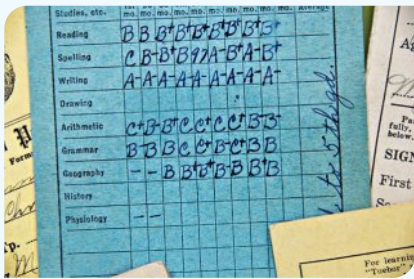


Image: Maria Dryfhout/Shutterstock.com

At the end of each term, you will often receive a school report detailing your marks and feedback from your teachers. These reports can provide helpful insight into areas you are excelling in and others that may need some extra work. Similarly, the Victorian Law Reform Commission (VLRC) provides reports and recommendations to the Victorian Parliament about different areas of law that may need to be reformed and further developed.

STUDY DESIGN DOT POINTS

- the role of the Victorian Law Reform Commission and its ability to influence law reform
- one recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system

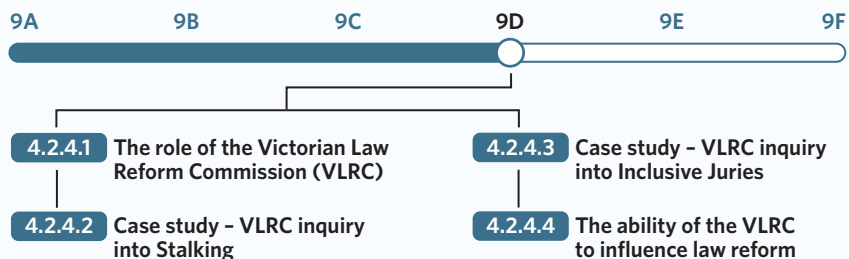


Image used with permission from Victorian Law Reform Commission

Figure 1 The Victorian Law Reform Commission

KEY TERM

Victorian Law Reform Commission (VLRC) the central, independent law reform body in Victoria which investigates a wide range of matters, concerning both the criminal and civil justice system, and provides recommendations to the Victorian Parliament about areas of potential law reform.

Lesson introduction

In a rapidly evolving society, it can be difficult for members of parliament to track, monitor, and implement law reform whilst simultaneously completing their other parliamentary duties. Therefore, Commonwealth, state, and territory governments establish law reform bodies that can objectively inform them about the need for changes to various laws.

Established in 2000, the **Victorian Law Reform Commission (VLRC)** is Victoria's main, independent law reform body and provides the Victorian Government with insight into areas of potential law reform. The commission is central to the development of a fair, just, and inclusive legal system for all Victorians. Despite funding for the VLRC coming from the Victorian Government and the Victorian Legal Services Board, it remains impartial and is not politically affiliated. The VLRC is tasked with investigating and reporting on a wide range of areas that can include matters concerning both the criminal and civil justice systems. Through the VLRC, the community can influence law reform as consultation with the public is a core component of its investigatory processes.

USEFUL TIP

You can use the acronym 'VLRC' in your answers, however, you must write out the full name of the commission, 'Victorian Law Reform Commission (VLRC)', the first time it is mentioned in your answer before doing so. The full name and bracketed acronym must be written for each question when you are referring to the VLRC more than once across different questions in a SAC or the VCAA end-of-year exam.

The role of the Victorian Law Reform Commission (VLRC) 4.2.4.1

The main role of the VLRC is to investigate, report, and make recommendations on issues referred to it by the Victorian **Attorney-General**. The Victorian Attorney-General issues a **terms of reference** to the VLRC to provide information on matters that need to be researched and investigated. Although, in some circumstances, the VLRC also has the power to autonomously investigate minor issues without a terms of reference through community law-reform projects, so long as adequate resources are available. The VLRC is a statutory authority that obtains its powers from a statute, specifically the *Victorian Law Reform Commission Act 2000* (Vic). Section 5 of the *Victorian Law Reform Commission Act 2000* (Vic) sets out the various roles of the commission.

Table 1 The roles of the Victorian Law Reform Commission (VLRC)

Role	Explanation
Receive and analyse the Victorian Attorney-General's terms of reference 	The VLRC must examine, report, and provide recommendations about matters referred to the commission by the Victorian Attorney-General. A terms of reference document contains information about: - the scope of the inquiry - the particular issue or policy being investigated - the final report due date.
Investigate minor community legal issues 	The VLRC has the power to investigate and provide recommendations to the Victorian Attorney-General about minor issues within broader society without a terms of reference. It may conduct such research and investigations as long as it does not require a significant amount of resources. Such investigations are known as community law reform projects. These projects still have a terms of reference, however, these terms are established by the VLRC itself, as opposed to the Victorian Attorney-General.
Conduct inquiries 	In response to the Victorian Attorney-General's terms of reference or as part of a community law reform project, the VLRC must undertake a number of different tasks to thoroughly examine and investigate an issue. By doing so, the VLRC can provide recommendations for law reform relating to the subject matter. VLRC inquiries involve: - initial research and consultations regarding the matter outlined in a terms of reference. - publishing a consultation paper, engaging with relevant experts, and receiving and reviewing submissions from the community. - preparing a report with the recommendations and presenting it to the Victorian Attorney-General. Once the final report is delivered to the Victorian Attorney-General, they must then table it in the Victorian Parliament, at which point the report's recommendations are considered and potentially enacted through law reform. Continues →

LEGISLATION

Victorian Law Reform Commission Act 2000 (Vic)

LEGAL VOCABULARY

Attorney-General the leading law officer of the nation, or state, who is a member of parliament, and acts as the primary legal advisor to the government in regard to a range of matters concerning the legal system.

Terms of reference a document that details the issues that need to be investigated, as well as the specific scope and purpose of an inquiry.

Table 1 Continued

Role	Explanation
Monitor and coordinate law reform 	The VLRC is responsible for monitoring law reform activity throughout Victoria and can request the Victorian Attorney-General to refer a matter of law reform to the commission.
Provide educational programs 	The VLRC provides educational material to the community to inform individuals about its projects, general work, and other areas of relevant law. These resources can be found online in multiple formats and are accessible to the entire community. Additionally, the VLRC offers presentations to schools and has tailored student-specific resources that can be found on its website.

USEFUL TIP

The VCE Legal Studies Study Design indicates that you only need to know one recent Victorian Law Reform Commission (VLRC) inquiry relating to law reform in the civil or criminal justice system. This is your choice, so pick something you are interested in or one that your teacher suggests is appropriate. This lesson provides two examples of VLRC inquiries, but you only need to know one of the case studies in detail for the exam.

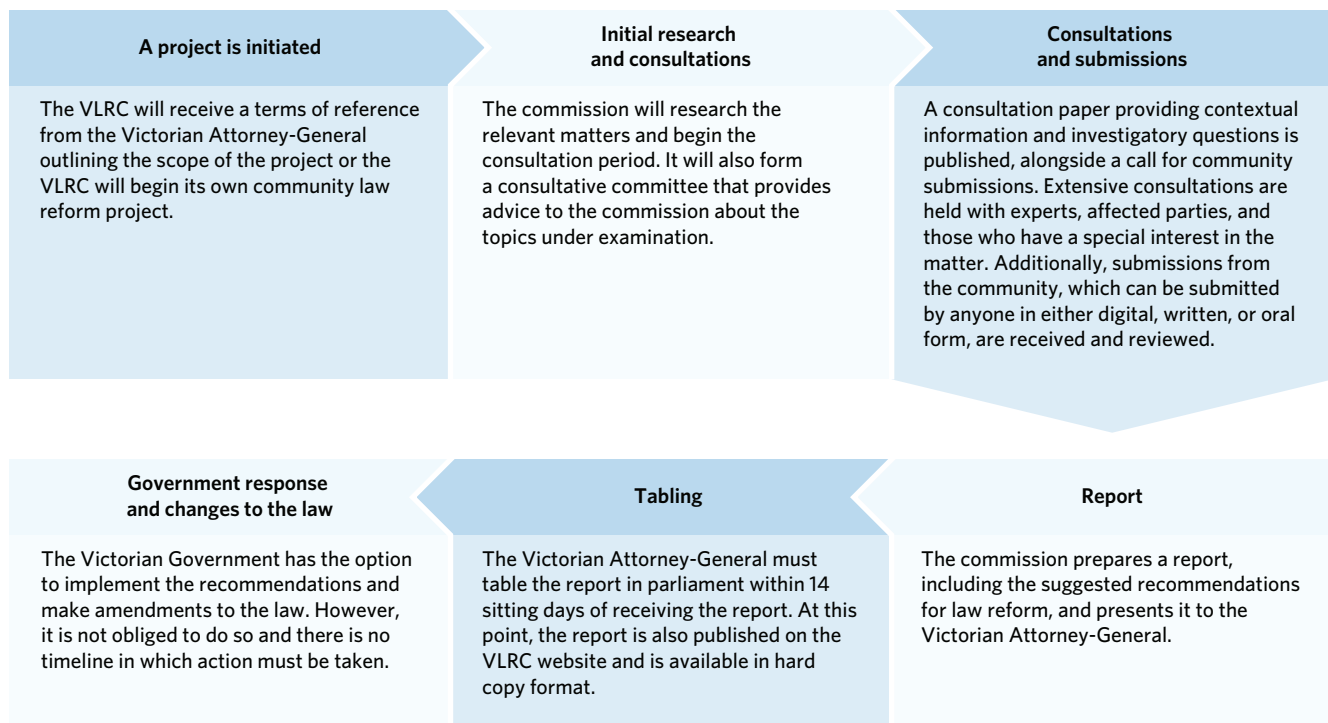


Figure 2 The process involved in VLRC projects

Case study - VLRC inquiry into Stalking 4.2.4.2

In February 2021, the VLRC received a terms of reference from the Victorian Attorney-General to investigate Victoria's response to stalking, harassment, and similar conduct, specifically in the context of non-family violence stalking.

Stalking is considered behaviour or actions that have the potential to harm a victim's health, both mentally and physically. If left unaddressed, stalking can result in severe offending, such as serious violence, or in extreme cases, homicide or suicide. Around one in six women and one in 15 men are affected by stalking. As a result of technological advancements, types of stalking behaviour have also evolved and can now be conducted without physical proximity to the victim.

Moreover, stalking behaviours occur in both family violence and non-family violence contexts. Whilst specialist approaches have been developed to address stalking in family violence contexts, less development has occurred to address stalking in non-family violence contexts. Therefore, this report had a stronger focus on how the justice system responds to non-family violence stalking.

Terms of reference

The main task of the VLRC was to investigate and report on Victoria's legal responses to stalking, harassment, and similar conduct, including the statutory framework concerning the Personal Safety Intervention Order (PSIO) system. Specifically, the report intended to detail recommendations for law reform regarding non-family violence stalking. Furthermore, barriers in current legislation that restrict the effectiveness of responses to stalking, harassment, and similar conduct were also to be analysed, with concern for victim's safety and wellbeing acting as the overarching and utmost important consideration of the inquiry. Though stalking is committed by individuals of all genders, it was also requested that the VLRC consider the fact that 'most perpetrators of stalking are men, and most victims of stalking are women'.

In conducting a review of stalking, harassment, and similar conduct, the terms of reference required the VLRC to consider:

- legislation concerning stalking, harassment, or similar conduct, notably the *Personal Safety Intervention Orders Act 2010* (Vic) and how it may differ from Family Violence Safety Notices and Family Violence Intervention Orders under the *Family Violence Protection Act 2008* (Vic).
- barriers to reporting for victims of stalking and how the law can further promote the safety and wellbeing of victims.
- sentencing practices and available sentencing options for stalking offenders.
- the existing criminal offences that apply to stalking, harassment, and similar conduct under the *Crimes Act 1958* (Vic) and the evidence required to establish each offence.

The VLRC was also asked to consider the Victorian Government and justice system's responses to the findings in the 2016 Royal Commission into Family Violence. It was also asked to conduct its investigation in consideration of the 2019 Victorian Royal Commission into the Mental Health System. The terms of reference stated that an interim report was due by 31 December 2021, with the final report due on 30 June 2022.

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

LESSON LINK

You will learn more about royal commissions in **9E Royal Commissions**.

'While stalking affects many members of society, it is a gendered crime and abuse of human rights most commonly perpetrated by men against women and children. It is both widely prevalent and completely preventable. Unlike family violence, there is minimal policy infrastructure to hold perpetrators of stalking accountable...Therefore, structural change is required to identify victim-survivors at all entry points in social services systems and provide timely services for victim-survivors to meet their diverse needs.'

—Australian Association of Social Workers

'A recurring theme from clients reflects a perception that police have not taken their complaints seriously. Clients frequently report police declining to take a statement, or declining to charge the person, usually on the grounds that there is insufficient evidence. The issue of insufficient evidence often arises in the instance of cyberstalking, whereby the person engaging in stalking behaviour has used a fake account, or has used an application such as Snapchat where the evidence is immediately lost.'

—Springvale Monash Legal Service

'The LIV notes that stalking behaviour must be adequately distinguished from family violence, as it may consist of lawful acts intended to intimidate or arouse fear in victims and is not generally predictable or triggered by certain events.'

—Law Institute of Victoria

Figure 3 Examples of submissions received for the inquiry into Stalking (VLRC, n.d.)

LEGISLATION

Personal Safety Intervention Orders Act 2010 (Vic)

Family Violence Protection Act 2008 (Vic)

Crimes Act 1958 (Vic)

WANT TO KNOW MORE?

You can find out more about the VLRC's Stalking inquiry by searching 'Stalking inquiry VLRC' and clicking the relevant webpages. On these webpages, you can learn more about the investigative process undertaken by the VLRC by reading the other submissions and viewing the transcripts of the conducted hearings.

The investigative process

The VLRC conducted an extensive examination of the matters within the terms of reference. During this process, it received 115 written submissions and 254 responses to an online form requesting people who have experienced stalking to report their views on the issue. The majority of the submissions were from community members detailing their personal experiences with stalking, however, organisations such as the Australian Association of Social Workers, community legal centres, and the Law Institute of Victoria, also provided submissions. Moreover, consultations were conducted with 36 different parties and stakeholders, such as the eSafety Commissioner, the Judicial College of Victoria, and the Victorian Aboriginal Legal Service.

Report and recommendations

The VLRC produced an interim report on 22 December 2021, which was tabled in the Victorian Parliament on 6 April 2021. The findings of the interim report were primarily concerned with the general police response to stalking and how earlier intervention into stalking situations may have alleviated the overall interaction between victims, offenders, and the criminal justice system. Following the completion of the full investigation, the VLRC produced its final report with 45 recommendations for law reform. Some of the key recommendations are provided in Figure 4.

Recommendations for law reform	
Tick/Cross	Recommendations
☐	Reform victim support services and ensure victim survivors of non-family violence stalking receive the necessary support in an efficient, ongoing, and practical manner.
☐	Reform the <i>Personal Safety Intervention Orders Act 2010</i> (Vic), including establishing a category of 'protected witnesses' in the Act to prohibit an accused from directly cross-examining protected witnesses. Additionally, the report recommended amending this Act to introduce a requirement that the courts must order Victoria Legal Aid for unrepresented applicants or protected witnesses.
☐	Reform the stalking offence in section 21A of the <i>Crimes Act 1958</i> (Vic) to enhance its clarity and practicality.
☐	Ensure frontline and specialist Victoria Police members are effectively trained to investigate stalking charges as per section 21A of the <i>Crimes Act 1958</i> (Vic), as well as improving their capabilities in responding to non-family violence cyberstalking.
☐	Provide relevant training to judicial officers and court staff to ensure they can appropriately address and manage cases concerning cyberstalking and non-family violence stalking.
☐	Provide resources and support public education involving non-family violence stalking and cyberstalking.

Figure 4 Examples of recommendations made by the VLRC in relation to its Stalking inquiry

The final report was tabled in parliament on 21 September 2022. As of October 2023, the legislative recommendations are yet to be implemented.

Case Study – VLRC inquiry into Inclusive Juries 4.2.4.3

In 2020, the Victorian Law Reform Commission (VLRC) established a community law reform project that sought to review, investigate, and report upon the accessibility of jury participation for those who are deaf, hard of hearing, blind, or have low vision. Currently, those who are deaf, hard of hearing, blind, or have low vision are unable to serve on Victorian juries. The United Nations has found, in several instances, that Australia has breached its duties under the *Convention on the Rights of Persons with Disabilities* (CRPD) by denying such demographics the opportunity to participate in civic life and associated duties.

The *Juries Act 2000* (Vic) does not explicitly prohibit those who are deaf, hard of hearing, blind, or have low vision from serving as jurors. However, the Act does state that one is ineligible if they are ‘unable to communicate in or understand the English language adequately’ or have ‘a physical disability that renders the person incapable of performing the duties of jury service’. Accommodations, such as an Auslan interpreter or a screen reading program, may be utilised to enable an individual to meet the requirements, however, there are no obligations on the courts or the Juries Commissioner to ensure such adjustments are provided. Moreover, only 12 jurors can be present in the jury room according to an old common law principle, known as the ‘13th person rule’, meaning a juror cannot be assisted by a non-juror, such as a communication assistant, during deliberations. This further renders some people, who struggle to communicate without an interpreter, ineligible to partake in jury duty.

Therefore, through its processes, the VLRC considered how juries can be made more inclusive through legislative amendments. Additionally, the VLRC considered practices within the courtroom that can be modified to enable those who are deaf, hard of hearing, blind, or have low vision to participate in jury duty in Victoria.

Terms of reference

The main task of the VLRC was to ‘examine the current legal framework to consider whether legislative change is required, what practical supports would be necessary, and whether there are specific circumstances in which such jury service should be limited’.

In conducting a review of the jury service system, the terms of reference required the commission to review:

- the current legislation and practices in both local and international jurisdictions.
- existing statistics and practices related to the disqualification or excusal of people who are deaf, hard of hearing, blind, or have low vision from jury service.
- the existing ‘13th person’ common law principle.
- discrimination laws and human rights in Victoria.
- availability of resources and potential requirements for the training of judicial officers and court staff.
- the need for a fair trial and credible jury system.

The terms of reference stated the commission should not consider:

- whether individuals who cannot understand or communicate in English at all should be able to serve on juries. Therefore, the scope of its inquiry was limited to considering the restrictions on jury service for people who are deaf, hard of hearing, blind, or have low vision, not restrictions to people who cannot speak English or have difficulties communicating for other reasons.

LESSON LINKS

You learnt about juries in criminal and civil cases in **2E Judges, magistrates, and juries in a criminal case** and **5D Judges, magistrates, and juries in a civil dispute**.

LEGISLATION

Juries Act 2000 (Vic)

‘A blind person’s education and ability to assess facts obtained through hearing testimonies and having print read to them is equally equipped to contribute to their twelfth of the decision making process in coming to a verdict.’

—Blind Citizens Australia

‘It upsets me when people assume that because you have one disability it stands to reason that you will not have the ability to think or clearly plan alternate ways of achieving a suitable outcome’

—Online survey submission

‘An evolving feature of the jury system since the time of the Magna Carta has been that of a ‘trial by one’s peers’. This concept is a cornerstone of the jury system in Contemporary Australia, but the 384,000 Australians who are blind or have low vision are rarely, if ever, given the opportunity to exercise their role as ‘peers of the accused’ by serving on a jury.’

—Vision Australia

‘Jurors with adversaries with their sight/hearing should be recognised as ordinary persons who go through life like any other person. Whether someone has a disability or not, everybody goes through life with struggles, tribulations and different outlooks. Would it not best demonstrate community values and inclusivity if those within the community be represented?’

—Madison (Community member)

Figure 5 Examples of submissions received for the inquiry into Inclusive Juries (VLRC, n.d.)

The investigative process

The VLRC conducted an extensive examination of the matters within the terms of reference. During this process, it received 14 written submissions from a range of individuals, organisations, and institutions, as well as 27 survey responses from community members. Examples of parties who entered submissions include Blind Citizens Australia, Victoria Legal Aid, Youth Disability Advocacy Service, Vision Australia, Juries Victoria, and the Supreme Court of Victoria. Additionally, 29 consultations were held with a range of core individuals and bodies, some of which also made submissions, including the Victorian Equal Opportunities and Human Rights Commission, the Office of Public Prosecutions Victoria, Deaf Victoria, and community participants.

Submissions from the community were invited and received in both hardcopy, electronic, and audio formats. Individuals were also able to remain anonymous in their submissions and there was an option to provide input via an online survey.

Report and recommendations

Following its investigations, the VLRC provided 53 recommendations for law reform with the intent of improving the inclusivity of Victorian juries. Some of the key recommendations are provided in Figure 6.

WANT TO KNOW MORE?

You can find out more about the Inclusive Juries inquiry by searching 'Inclusive Juries inquiry VLRC' and clicking the relevant webpages. On these webpages, you can learn more about the investigative process undertaken by the VLRC by reading the other submissions and viewing the transcripts of the conducted hearings.

You can find out more about the Victorian Law Reform Commission and recent inquiries by searching 'Current Projects VLRC' and clicking the relevant webpage (VLRC, n.d.).

Recommendations for law reform	
Tick/Cross	Recommendations
☐	Making relevant, physical adjustments available in the jury process, such as Auslan interpreters, support persons, hearing loops, and Braille material, to those jurors who may need such assistance.
☐	Making amendments to the <i>Juries Act 2000</i> (Vic) so that individuals can utilise certain adjustments to participate in jury service. This includes amending the '13th person rule' to make exceptions for Auslan interpreters and support persons being present in the jury room when working alongside jurors.
☐	Allowing the judge presiding over a case to determine whether an individual can serve on jury duty after they consider a range of factors, such as the evidence in the trial and the ability of the individual to engage with such material.
☐	Auslan interpreters and support persons should be required to undertake training to work with jurors and follow a code of conduct, providing an oath to the court.
☐	Disability awareness training should be required for judges, lawyers, and court staff who work with juries.

Figure 6 Examples of recommendations made by the VLRC in relation to its Inclusive Juries inquiry

The final report was tabled in the Victorian Parliament on 16 May 2023.

As of October 2023, the legislative recommendations are yet to be implemented.

The ability of the VLRC to influence law reform 4.2.4.4

As Victoria's leading law reform body, the VLRC can successfully initiate and facilitate the process of law reform. However, there are certain factors that limit the VLRC's ability to do so, including the scope of its inquiries, cost and time restraints, and the implementation of its recommendations.

Table 2 Evaluating the ability of the Victorian Law Reform Commission to influence law reform

Strengths	Limitations
- As the terms of reference are received from the Victorian Attorney-General, who is a member of parliament (MP) and is an official advisor to the government, the subsequent recommendations are more likely to be considered and adopted by parliament. - The VLRC is able to independently initiate projects and investigate matters concerning minor community legal issues without a terms of reference from the Victorian Attorney-General. This enables it to provide recommendations for law reform in areas that are specific to the needs of certain groups and communities. For example, the inquiry into Inclusive Juries was a community law reform project. - Through its processes, the VLRC invites submissions from the community and consults various parties who have expertise or an interest in the subject matter. Both the Stalking and Inclusive Juries inquiries received a number of community submissions, and consultations were held with various expert bodies throughout the investigation process. Therefore, as parliament's law-making is centred around its representative nature, the government is more likely to respond to law reform if there is widespread concern amongst the community to ensure laws reflect the views and values of the majority. Politicians may also be motivated to adopt recommendations for law reform in areas where there is high community support for change in order to maintain voter endorsement. - The VLRC can thoroughly investigate an area of law and provide informed recommendations for legislative reform as it engages with people who are experts on the subject matter it is investigating. This can promote productive law reform as amendments to legislation are more likely to address social issues and community needs. - The VLRC is independent of political parties and is able to review laws on controversial matters objectively and deliver a set of recommendations for law reform to parliament based on its in-depth research, expert opinions, and the views of those who make submissions. - Since its establishment in 2001, the VLRC has completed 46 inquiries and 75% of the total recommendations have been implemented in part or in full. This suggests that the VLRC is successful in its ability to fulfil its role and responsibility to advise the government on potential areas of law reform.	- The government is not obliged to consider or implement any of the recommendations provided by the VLRC. - The VLRC is limited by the terms of reference. It can only conduct research and make suggestions for law reform within the areas outlined by the Victorian Attorney-General. Although the VLRC is able to investigate matters without a terms of reference provided by the Attorney-General, these can only be investigations concerning minor issues, which limits the scope of matters that can be investigated, and the commission's subsequent impact on law reform. - The VLRC inquiries can be very time consuming due to the nature of the processes used. The time spent consulting with relevant parties, engaging with the community, and reviewing submissions is necessary to provide informed recommendations, however, it can result in a slow law reform process. - Both the Stalking and Inclusive Juries inquiries are yet to have their recommendations implemented despite the reports being tabled late in 2022 and early 2023, respectively, hence demonstrating the time-consuming nature of potential law reform. - Projects can be costly. Given the amount of resources available and funding provided, cost factors may limit the scope of VLRC investigations. - The VLRC can only provide law reform recommendations for Victorian law and not for matters regarding Commonwealth legislation.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 VCE Legal Studies is to 'evaluate the ability of law reform bodies to influence a change in the law, using recent examples'. This table shows the strengths and limitations of the Victorian Law Reform Commission (VLRC) in influencing law reform, with reference to the recent examples covered in this lesson. Therefore, this can help you answer higher-mark questions requiring an evaluation of the ability of the VLRC to influence a change in the law, using a recent example. Remember that you only need to know one example of a VLRC inquiry. This lesson and the above table provide two options.

Lesson summary

The Victorian Law Reform Commission is Victoria's leading, independent law reform body. It has multiple roles, including:

- responding to the Victorian Attorney-General's terms of reference
- investigating minor community legal issues
- monitoring and coordinating law reform
- providing educational programs.

Two recent VLRC projects include its inquiry into Stalking (2022), which was directed by a terms of reference received from the Victorian Attorney-General, and its inquiry into Inclusive Juries (2023), which was a community law reform project.

The ability of the VLRC to influence law reform can depend on a range of factors, including parliament's willingness to adopt the provided recommendations, as well as time and resource constraints.

9D Questions

Check your understanding

Question 1

The Victorian Law Reform Commission is Victoria's main, independent law reform body that provides the Victorian Government with insight into areas for potential law reform.

- A. True
B. False

Question 2

Which of the following are roles of the VLRC? **(Select all that apply)**

- A. Monitoring and coordinating law reform
B. Responding to the prime minister's requests for new federal laws
C. Investigating minor community legal issues
D. Responding to the Victorian Attorney-General's terms of reference
E. Facilitating law reform activity in New South Wales
F. Providing educational programs

Question 3

Tick the box to indicate whether each of the following tasks are **part of the process** or **not part of the process** VLRC utilises in its inquiries.

Task	Part of the process	Not part of the process
I. Publishing a consultation paper that provides contextual information, investigatory questions, and a call for community submissions.	☐	☐
II. Ensuring members of parliament attend relevant meetings to pass new legislation.	☐	☐
III. Preparing a report, including the suggested recommendations for law reform, and presenting it to the Victorian Attorney-General.	☐	☐
IV. Researching and consulting with relevant parties, such as experts or those particularly affected by the subject matter.	☐	☐
V. Presenting the findings to the Victorian premier at the conclusion of the inquiry.	☐	☐

Question 4

Which of the following statements are correct about the VLRC inquiry into Stalking? **(Select all that apply)**

- A. Part of the terms of reference was to consider the barriers faced by victims when reporting stalking.
- B. The VLRC inquiry was primarily concerned with stalking in the context of family violence.
- C. The VLRC received 115 submissions and 254 responses to an online form requesting people's experiences with stalking.
- D. No consultations were held with expert bodies in this inquiry.
- E. The VLRC provided 45 recommendations for law reform.
- F. All of the legislative recommendations from the final report have been implemented by the Victorian Government.

Question 5

Which of the following statements is **not** correct about the VLRC inquiry into Inclusive Juries?

- A. This inquiry was a community law reform project as opposed to one initiated by the Victorian Attorney-General.
- B. Alongside investigating the barriers faced by people who are deaf, hard of hearing, blind, or have low vision in participating in jury duty, the VLRC also sought to consider whether those who cannot understand or communicate in English at all should be able to serve on juries.
- C. 53 recommendations for law reform were provided, including measures and adjustments that could be implemented to facilitate the participation of people who are deaf, hard of hearing, blind, or have low vision in jury service.

Question 6

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

Statement	True	False
I. The roles of the VLRC are specifically outlined in s 5 of the <i>Victorian Law Reform Commission Act 2000</i> (Vic).	☐	☐
II. The VLRC has the ability to make law reform recommendations at both the state and federal level.	☐	☐
III. The commission is funded by the Victorian Government and the Victorian Legal Services Board but it remains impartial and is not politically affiliated.	☐	☐
IV. It is difficult for the community to participate in VLRC inquiries as it only accepts a limited number of submissions from a specific geographical area.	☐	☐

Question 7

The VLRC is tasked with investigating and reporting on a wide range of areas that can include matters concerning both the criminal and civil justice system.

- A. True
- B. False

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

(2 MARKS)

Describe the Victorian Law Reform Commission.

Question 9

(3 MARKS)

Explain **one** role the VLRC undertook as part of **one** of its recent inquiries.

Adapted from VCAA 2022 exam Section A Q4a

Question 10

(4 MARKS)

It is the year 2084. Matilda is an employee at the Victorian Law Reform Commission (VLRC) and has been assigned to a new community law reform project that is investigating work from home practices and whether Victorians should be entitled to a three-day weekend.

Outline **two** aspects of the process used by the VLRC to investigate this matter.

Question 11

(4 MARKS)

'The VLRC is limited in its ability to respond to the law reform needs of the community as it can only investigate matters referred to it by the Victorian Attorney-General's terms of reference.'

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

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 the VLRC's ability to influence law reform.

Statement	Strengths	Limitations
I. The VLRC is independent of political parties and is able to review laws on controversial matters objectively and deliver a set of recommendations for law reform to parliament based on its in-depth research, expert opinions, and the views of those who make submissions.	☐	☐
II. The VLRC is able to initiate projects and investigate matters concerning minor community legal issues without a terms of reference from the Victorian Attorney-General. This enables it to provide recommendations for law reform in areas that are specific to the needs of certain groups and communities.	☐	☐
III. The government is not obliged to consider or implement any of the recommendations provided by the VLRC.	☐	☐
IV. Projects can be very time-consuming due to the nature of the processes used by the VLRC. The time spent consulting with relevant parties, engaging with the community, and reviewing submissions is necessary to provide informed recommendations, however, it can result in a slow law reform process. Moreover, once the report is tabled, law reform cannot immediately occur as time is required for the Victorian Parliament to make legislative changes, should it decide to adopt the recommendations of the VLRC.	☐	☐

Question 13

(8 MARKS)

With reference to **one** recent example of the VLRC recommending law reform that you have studied, discuss the extent to which the VLRC is able to influence a change in the law.

Adapted from VCAA 2022 exam Section A Q4b

Linking to previous learning**Question 14**

(4 MARKS)

With reference to **one** reason for law reform, explain how **one** recent VLRC inquiry sought to influence law reform.

9E Royal commissions

STUDY DESIGN DOT POINTS

- the role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- one recent Royal Commission inquiry or one recent parliamentary committee inquiry

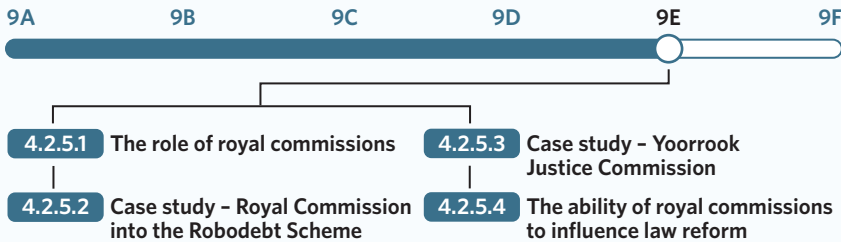


Image: hermanthos/Shutterstock.com

What if the government wants to investigate a particular issue that is of public concern and importance? Do members of the executive independently go out into the community and conduct their own investigations? How does the government know what law reform is required?

Lesson introduction

In order to comprehensively investigate a matter of public importance, a royal commission may be established by the government, either at the state or federal level. Royal commissions are conducted independently of the government, meaning they are not influenced by political issues or party biases. Those conducting royal commissions are equipped with broad powers to investigate a particular issue and provide insightful recommendations for law reform. For example, royal commissions can receive submissions from the community, hold public hearings, and compel witnesses to give evidence under oath. Therefore, they may be effective at influencing changes in the law.

The role of royal commissions 4.2.5.1

Ordered by the federal and/or state government, **royal commissions** are the highest form of inquiry on matters of public importance. They are established to investigate a particular issue. The process of conducting a royal commission involves consultation with experts and the community through submissions and hearings. Royal commissions can explore an area of policy, encompassing social, legal, or political issues in their research. Alternatively, they may also be initiated to investigate a particular incident or allegation when the government is seeking to determine the truth regarding an incident of concern. Providing those conducting a royal commission with coercive powers of investigation can ensure the whole truth regarding an issue emerges. Consequently, an in-depth understanding of the matter can be provided to parliament, potentially inspiring effective law reform. Upon the completion of a royal commission, a final report is delivered and tabled in parliament that contains recommendations for law reform.

USEFUL TIP

The VCE Legal Studies Study Design indicates you only need to know one recent inquiry by one parliamentary committee OR one royal commission. This is your choice, so pick something you are interested in or one that your teacher suggests is appropriate. VCAA requires examples of 'recent inquiries' to be from the past four years, so make sure your chosen inquiry occurred within this time frame.

KEY TERM

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

Royal Commissions Act 1902 (Cth)
Inquiries Act 2014 (Vic)

LEGAL VOCABULARY

Letters Patent the official documents used to establish a royal commission, appoint commissioners, and provide the rules under which it will operate.

Terms of reference a document that details the issues that need to be investigated, as well as the specific scope and purpose of an inquiry.

Interest group a group of people who seek to influence public policy on an issue or concern they believe requires change.

Royal commissions may be established at both the Commonwealth level and the state level. Commonwealth royal commissions are established once a **Letters Patent** has been issued by the Governor-General of the Commonwealth of Australia under the *Royal Commissions Act 1902 (Cth)*. Alternatively, at the state level, the Governor has the power to establish a royal commission. In Victoria, this power is provided under the *Inquiries Act 2014 (Vic)*.

Royal commissions are independent of parliament and may, therefore, be asked to investigate controversial matters. This can enable parliament to delay legislating in contentious areas by instead waiting for the recommendations from the independent commission to advise its future law-making.

Table 1 The role of royal commissions

Role	Explanation
Receive and analyse a terms of reference 	When the government determines an issue or policy that needs to be investigated, it must prepare a terms of reference that formally outlines the subject matter the royal commission will be investigating. This terms of reference document contains information about: - the scope of the inquiry - the particular issue or policy being investigated - the final report due date.
Undertake research and prepare consultation papers 	Before engaging in discussions with the community, a royal commission prepares a consultation paper that details the matter being investigated and the possible reforms that could be implemented as a result of the inquiry. This provides guidance to members of the community seeking to make submissions to the inquiry.
Seek submissions from the community 	A royal commission will seek submissions from the community to ensure the recommendations for law reform effectively reflect the views of society. Therefore, royal commissions provide an avenue through which: - individuals or organisations can express their opinions regarding matters of public concern to instigate legislative reform. - experts can provide their opinions on complex social issues to inform proposed changes to the law. interest groups can express their stance on issues where they seek to influence law reform.
Conduct hearings 	A royal commission will conduct hearings, which may be public or private, where members of the public can observe or provide evidence on the issue being investigated. These hearings may be conducted over several days, during which the royal commission is required to: - listen to the evidence presented by individuals - cross-examine individuals - review written submissions.

Continues →

Table 1 Continued

Role	Explanation
Engage in coercive powers of investigation 	A particular feature of royal commissions is their coercive power of investigation. Royal commissions can: • issue a summons ordering a person to appear before the commission • require individuals to give evidence under oath • require individuals, businesses, or organisations to produce evidence under oath • provide penalties of up to two years imprisonment for those who fail to comply with summons or intentionally provide false or misleading evidence. This coercive power ensures royal commissions have a greater ability to determine the truth, gain insight into the issue, and review all the evidence. Consequently, a greater understanding of the social or legal issue being investigated can be provided, allowing law reforms to be recommended that would most effectively resolve the issue.
Present a final report to parliament with recommendations for law reform 	After the conclusion of the investigation, royal commissions produce a report of the investigation's findings and provide recommendations for law reform.

Case study – Royal Commission into the Robodebt Scheme 4.2.5.2

On 18 August 2022, the Royal Commission into the Robodebt Scheme was established. In 2015, the Department of Human Services (DHS) proposed, and the Federal Government initiated, the debt recovery scheme, commonly referred to as Robodebt. The Robodebt system sought to ensure people who received Centrelink benefits were not under-reporting their income and, consequently, receiving overpayments dating back to the 2010-11 financial year. In order to determine this, the scheme used a number of methods over its four year operation period. The Online Compliance Intervention (OCI) was one iteration of the program that ran from July 2016 to February 2017. The OCI relied on a process called 'income averaging' to assess one's income and subsequent welfare entitlement (The Royal Commission into the Robodebt Scheme, 2023). The OCI compared an individual's earnings recorded on a customer's Centrelink record, with historical, employer-reported income data collected by the Australia Taxation Office (ATO). Customers were asked to confirm their income using the online system and, if they failed to do so or left gaps in the information provided, the system would fill in the gaps using the predicted, fortnightly figure derived from the ATO income data. If the Robodebt system determined that an overpayment had been made, it automatically sent a debt recovery notice to the individual. However, the OCI was faulty and the 'income averaging' process was sending individuals receiving Centrelink payments, or who had once received such payments but no longer did, inaccurate debt notices. Consequently, these individuals were required to pay back the Federal Government for debts they did not owe.

'The Australian Unemployed Workers' Union (AUWU) represents and advocates for unemployed workers navigating [Australia's] brutal welfare system... The ongoing brutality of colonial violence is readily observable in [Australia's] welfare system, where various government programs such as Robodebt precisely target Indigenous communities for surveillance, punishment and austerity.'

—Australian Unemployed Workers' Union

'I have suffered severe mental health issues my whole life... as a result I have been a long term centrelink recipient... Centrelink still believe I owe \$1150 of which interest is being applied - which is currently under review. This has made me ashamed to be Australian where my government treats its citizens and most vulnerable this way. I want an apology - and not anything like the correspondence I have received so far.'

—Matthew Thompson (Community member)

'[A]s long as this saga is prolonged and as the Centrelink correspondence continues, I am taken back to the horrific night of my father's passing, which is the reason I turned to Centrelink in my time of distress. This is a form of PTSD that is being continually triggered and the impact on my mental health has been severe, especially in conjunction with the fear that I may well be considerably in debt for monies I don't believe I owe. This whole episode has been extremely traumatic and I feel as if I am running out of people to turn to.'

—Shelly P (Community member)

Figure 1 Submissions provided by community members to the Robodebt Royal Commission

LEGAL VOCABULARY

Frontbencher a parliamentary minister who has been provided with an area of responsibility.

The Robodebt Scheme persisted until November 2019, when it was announced the debts would no longer be calculated via the 'income averaging' process. In May 2020, the government announced it would be refunding individuals who paid debts they did not owe. The scheme initially reimbursed 381,000 affected individuals, totalling approximately \$746 million (The Royal Commission into the Robodebt Scheme, 2023). However, the refunds failed to address the significant emotional distress, pain, and trauma inflicted upon those subjected to the debt repayment process. A large proportion of individuals who were significantly impacted by the scheme were from vulnerable populations, including persons with a disability and First Nations peoples.

Terms of reference

The terms of reference required the Commission to look into the following aspects of the Robodebt Scheme, amongst other issues:

- The establishment, design, and implementation of the Robodebt Scheme, including:
 - who was responsible for the scheme and why they considered it necessary to establish
 - any concerns raised regarding the legality or fairness of the scheme.
- The use of third-party debt collectors under the scheme.
- Whether concerns had been raised by any individuals or groups just after the implementation of the scheme and, if concerns had been raised, how these were handled and what systems were in place to address public complaints against the scheme.
- The intended or actual outcomes of the scheme, particularly the impact of the scheme on individuals and their families, and its overall cost.

The investigative process

The government provided \$30 million of funding to establish the Robodebt Royal Commission. With this funding, the Commission gathered information and evidence through a range of different methods. It received 1,099 submissions, both written and oral, from individuals of each Australian state and territory. 72% of individuals making a submission had a Centrelink debt raised against them, or were making the submission on behalf of someone impacted by the scheme. Other submissions came from individuals who had a general interest in the scheme. Furthermore, the Commission held public hearings over 46 days with appearances by more than 100 witnesses.

The Royal Commission exercised its coercive powers of investigation by compelling witnesses, such as senior government officials, to appear at public hearings and provide evidence under oath. For example, witnesses called to give evidence in relation to the creation and implementation of the scheme included formal Liberal **frontbenchers**, such as Scott Morrison, Marise Payne, and Malcolm Turnbull. The Commission also required government departments to produce records related to the inquiry, which amounted to just under one million documents.

Report and recommendations

After conducting a thorough investigation, the Commission delivered a final report on 7 July 2023 that was over 900 pages. The report criticised the establishment and implementation of the Robodebt Scheme, labelling it a 'crude and cruel mechanism, neither fair nor legal'. It found that 'a number of senior department officers... did not understand the online compliance system or its effects' (The Royal Commission into the Robodebt Scheme, 2023). Additionally, when legitimate concerns were raised about the Robodebt scheme, they were ignored by the government. Therefore, the report contained 57 recommendations to address the effects of the Robodebt Scheme on individuals and prevent future failures in government administration.

WANT TO KNOW MORE?

You can find out more about the Robodebt Royal Commission by searching 'Royal Commission into the Robodebt Scheme' and clicking the relevant webpage (The Royal Commission into the Robodebt Scheme, 2023). On this webpage, you can learn more about the investigative process undertaken by the Commission by reading other submissions and viewing the transcripts of the conducted hearings.

Recommendations for law reform

Tick/Cross	Recommendations
☐	When designing policies and processes, Services Australia (the department that manages Centrelink) should emphasise the people such policies and processes are meant to serve.
☐	The Commonwealth should enact legislative reform to introduce a consistent legal framework in which automated government services can operate.
☐	Services Australia should be aware of and consider the vulnerable recipients that may be impacted by its programs.
☐	Services Australia should provide more face-to-face support for vulnerable recipients.
☐	Services Australia should develop a comprehensive debt recovery management policy.

Figure 2 Examples of recommendations made by the Royal Commission in relation to the Robodebt Scheme

Case study – Yoorrook Justice Commission 4.2.5.3

In May 2021, the Governor of Victoria approved the Victorian Government's establishment of a Royal Commission called the Yoorrook Justice Commission. The Commission provides First Nations peoples in Victoria with a formal truth-telling process to hear, acknowledge, and address the historical and ongoing injustices experienced since colonisation. Providing an opportunity for Aboriginal and Torres Strait Islander peoples to share their own experiences can assist the Commission in understanding the causes and effects of systemic injustices. The Commission, therefore, aims to ensure informed and meaningful recommendations for reform are made to address these injustices (Yoorrook Justice Commission, 2023).

Terms of reference

The terms of reference required the Commission to investigate and report on the following subject matter, among other issues:

- The historical and ongoing systemic injustices committed by government and non-government organisations since colonisation.
- The causes and consequences of systemic injustice experienced by First Peoples.
- Methods to acknowledge and address systematic injustices in a culturally appropriate manner.
- Methods to raise awareness and increase public understanding of the historical and ongoing experiences of First Peoples before and since the start of colonisation.

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, triggering language, and/or mentions of distressing events.

'The Alliance concludes that the Victorian system is failing Aboriginal families, children and young people and that systemic reform is needed. A new standalone Aboriginal Families, Children and Young People's Care Act is required to establish an Aboriginal-led, designed and delivered care system in Victoria.'

—Victorian Aboriginal Children and Young People's Alliance

'One of the most damaging consequences of the systemic injustice in the criminal justice system is the deaths in custody of First Nations people and the resulting devastation felt by First Nations families and communities. In the three decades since the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), despite numerous inquiries and reviews and their comprehensive recommendations for change, the number of deaths in custody has continued to increase.'

—Victoria Legal Aid

'It is my truth telling as a Warlpiri man and my experiences in Victoria... After practising at Aboriginal Legal Aid in the Northern Territory, I came down to do the Victorian Bar Readers Course, I met two ex-legal aid workers, and they told me I was not really "Aboriginal".'

—Anonymous

Figure 3 Submissions provided by community members to the Yoorrook Justice Commission

The investigative process

Since its establishment in 2021, the Yoorrook Justice Commission has gathered information and evidence through a range of different methods. In March 2022, the Commission held its first ceremonial public hearing, during which it outlined its scope and handed out information sheets about its approach to truth-telling. Furthermore, the Commission also prioritised meetings with First Nations Elders to hear their truth-telling. These meetings were conducted in a number of ways, including as yarning circles, where some or all Commissioners would meet with a small group of Elders. Elders were also able to meet through private, one-on-one meetings with the Commissioners. From March 2022 to June 2022, Commissioners visited 29 locations and met with 199 people, conducting most of these meetings through yarning circles in order to gain insight into First Nations' 'truths and priorities for Yoorrook'. During these visits, Commissioners learnt about:

- the history, meaning, and significance of local Victorian sites for First Nations peoples, such as sites of cultural importance and locations of massacres.
- the experiences and stories of Elders in relation to their families and ancestors.
- the frustration felt by Elders, and their cynicism towards historical government efforts which have attempted to address the injustices experienced by First Peoples.
- Elders' concerns and queries regarding the Yoorrook Justice Commission.

Additionally, the Commission held public hearings, referred to as 'wurrek tyerrang', whereby it heard from witnesses, including Elders, to understand their truth with respect to issues of importance. It also received a range of submissions about historic and ongoing injustices experienced by First Nations peoples. These submissions were submitted in a range of different formats, such as written, oral, or artistic pieces.

Like any other royal commission, the Yoorrook Justice Commission has the power to exercise its coercive powers of investigation, such as compelling witnesses to give evidence under oath or by compelling the government, if necessary, to produce documents and official records. However, this Commission is primarily focused on truth-telling and, therefore, did not exercise any of these powers when preparing its June 2022 interim report.

Report and recommendations

The Commission delivered its interim report on 30 June 2022, which outlined the progress of the investigation. In particular, the Commission found that historical injustices experienced by First Nations peoples continue to impact the present and contribute to the ongoing injustices faced by these communities. Examples of key findings revealed by the investigation include:

- Racism has impacted, and continues to impact, the everyday life of many First Nations peoples. This includes systemic discrimination, particularly when dealing with the state of Victoria.
- The significance of cross-generational trauma for First Nations peoples is caused by 'the breakup of families, loss of language and exclusion from economic or social networks'. Elders continuously stated the importance of youth knowing 'who they are, where they came from and who their people are'.
- Problems related to land and economic power stem from colonial dispossession. Being dispossessed of their land during colonisation attacked the fundamental dignity of Aboriginal and Torres Strait Islander peoples and undermined their autonomy and authority in shaping both their present and future life.

However, the interim report did not contain the full list of recommendations for law reform. The full list of recommendations will be published in its final report, set for release in December 2024. It did recommend that the Governor extend the due date for Yoorrook's final report to 30 June 2026. It also recommended that the government urgently enact law reform to allow First Nations peoples to choose how the information they provide to Yoorrook is to be 'stored, accessed and used in the future'.

Furthermore, the Commission released its 'Yoorrook for Justice Report' on 4 September 2023, containing 46 recommendations for law reform.

Recommendations for law reform	
Tick/Cross	Recommendations
☐	The Victorian Government must delegate its decision-making power, authority, control, and resources to First Nations peoples in the Victorian child protection system.
☐	The Victorian Government must upscale the capability, competence, and support in relation to human rights, including Aboriginal cultural rights, of all persons appointed to work or working in certain areas, such as in the child protection system.
☐	The Victorian Government must work with Aboriginal organisations to develop a consistent definition of early help, early intervention, and prevention that aligns with the perspectives of First Nations peoples.
☐	The Victorian Government must address barriers to Aboriginal and Torres Strait Islander peoples becoming carers for First Nations children in the child protection system.

Figure 4 Examples of recommendations made by the Yoorrook Justice Commission in its 'Yoorrook for Justice Report'

WANT TO KNOW MORE?

You can find out more about the Yoorrook Justice Commission by searching 'Yoorrook Justice Commission' and clicking the relevant webpage (Yoorrook Justice Commission, 2023). On this webpage, you can learn more about the investigative process undertaken by the Commission by reading the other submissions and viewing the transcripts of the conducted hearings.

You can find out more about royal commissions and recent inquiries by searching 'Recent Royal Commissions' and clicking the 'Royal Commissions' (n.d.) webpage.

The ability of royal commissions to influence law reform 4.2.5.4

Whilst royal commissions have a far-reaching ability to connect with the community and improve access to experts for further investigations into issues affecting the state or country, their ability to influence law reform is ultimately dependent on parliament enacting their recommendations by passing relevant legislation. Furthermore, the time and money involved in these investigations can be significant.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 VCE Legal Studies is to 'evaluate the ability of law reform bodies to influence a change in the law, using recent examples'. Table 2 shows the strengths and limitations of royal commissions in influencing law reform, with reference to the recent examples covered in this lesson. Therefore, this can help you answer higher-mark questions requiring an evaluation of the ability of royal commissions to influence a change in the law, using a recent example.

Table 2 Evaluating the ability of royal commissions to influence law reform

Strengths	Limitations
- Royal commissions are able to comprehensively investigate a particular incident, area of policy, or social, legal, or political issue in their research. Therefore, they can provide insightful recommendations for law reform that accurately and adequately address the issue at hand. For example, the Yoorrook Justice Commission, through its truth-telling process, was able to gain insight into the frustration felt by Aboriginal and Torres Strait Islander peoples and cynicism towards historical government attempts to address issues they experience. - Royal commissions are independent of the government, meaning their investigations are not influenced by political biases. - As a royal commission is established by the government, parliament may be more likely to act on and implement law reform based on the findings of the commission. For example, as the Yoorrook Justice Commission was established by the Victorian Government, it may be more likely to adopt the recommendations of the commission and implement law reform. - Royal commissions can allow the government of the day to determine the amount of public support for a contentious law reform matter. Therefore, if parliament observes there is broad support for a particular change, it may initiate law reform to remain popular with the public and gain re-election. - Royal commissions have coercive powers of investigation, including the ability to compel witnesses to give evidence under oath, allowing the whole truth to emerge. Consequently, parliament can better understand issues, facilitating effective law reform. For example, the Royal Commission into the Robodebt Scheme used its coercive powers to compel witnesses, such as senior government officials, to appear at public hearings and give evidence about the scheme under oath. - Hearings are often public and submissions can be made by the community, providing an indirect way for the public to influence law reform and put their concerns before parliament. For example, the Yoorrook Justice Commission conducted yarning circles across 29 locations with 199 First Nations Elders across Victoria to gain insight into their ‘truths and priorities for Yoorrook’. - The report developed by a royal commission is tabled in parliament, which ensures issues are directly presented before members of parliament, encouraging them to debate the recommendations, which could potentially prompt law reform.	- As royal commissions are the highest form of inquiry, they are only established in rare and exceptional circumstances. - Royal commissions can be very expensive because of the resources required, such as staff and the use of experts. For example, the Robodebt Royal Commission was given a budget of \$30 million to conduct its investigation. - The government is not obliged to follow the suggested recommendations by the commission, meaning the inquiry could be considered a waste of time and money. - Royal commissions can be time-consuming due to the extensive use of experts, hearings, examination of witnesses, reading through submissions, and consulting with the community. As such, law reform can be slow to respond to issues in society. For example, the Robodebt Royal Commission was established in August 2022 and the final report was tabled in July 2023. The government must then thoroughly analyse the over 900-page report and issue its response, delaying the enactment of law reform. - There is a lack of power if there are breaches of the <i>Royal Commission Act 1902</i> (Cth). The Australian Law Reform Commission lacks the power to investigate breaches of the Act and penalties for miscompliance are often inadequate. - Whilst royal commissions are independent, they are still dependent on the government’s willingness to have the issue investigated. The government of the day must decide to initiate a royal commission and establish its terms of reference, therefore it may limit or not introduce a royal commission that could be politically damning or produce recommendations it does not want to implement, consequently limiting law reform in areas a government wants to avoid.

LEGISLATION

*Royal Commissions Amendment
(Protection of Information) Act 2021* (Cth)

REAL WORLD EXAMPLE**Combatting confidentiality concerns**

The *Royal Commissions Amendment (Protection of Information) Act 2021* (Cth) was passed to enhance the protections available to people engaging with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. In response, the Attorney-General’s department conducted a review of the confidentiality protections in the *Royal Commissions Act 1902* (Cth). The main purpose of the review was to look into impediments within the Act that would prevent or discourage people from sharing information with a royal commission. In its 2022 report, the Attorney-General’s department recommended changes to be made to the Act, including the implementation of confidentiality protections for future royal commissions.

Continues →

REAL WORLD EXAMPLE

Combating confidentiality concerns – Continued

In response, the Federal Parliament passed the *Royal Commissions Amendment (Enhancing Engagement) Act 2023* (Cth), which ensures 'any sensitive, personal or confidential information disclosed to the commission, can be protected during and after the life of the inquiry'. Consequently, this can increase the likelihood of individuals engaging with future royal commission inquiries as their confidential statements are better protected.

Adapted from 'New laws boost protections for people to engage with Royal Commission' (Royal Commission into Defence and Veteran Suicide, 2023) and 'Review of confidentiality protections in the Royal Commissions Act 1902' (Attorney-General's Department, 2022)



Image: Jason Benz Bennee/Shutterstock.com

Figure 5 The Federal Parliament passed legislation to provide greater confidentiality protections for those engaging with royal commissions

Lesson summary

- Royal commissions can influence law reform through their ability to investigate matters of public importance at the request of the government.
- Royal commissions consider society's views on contentious issues via written submissions and hearings involving the general population. They also have coercive powers of investigation to gain insight into the issue being investigated and review all the evidence.
- Parliament is not obliged to implement law reform based on the recommendations of royal commissions, so not all commissions will lead to comprehensive law reform.
- The Royal Commission into the Robodebt Scheme and the Yoorrook Justice Commission are two examples of royal commissions.

LEGISLATION

Royal Commissions Amendment (Enhancing Engagement) Act 2023 (Cth)

9E Questions

Check your understanding

Question 1

Royal commissions are the highest form of public inquiry that may be established to explore an area of policy or to investigate a particular incident or allegation.

- A. True
- B. False

Question 2

Which of the following is **not** a role of a royal commission?

- A. Receive and analyse the terms of reference.
- B. Create law reform by passing legislation.
- C. Conduct hearings.
- D. Present a final report to parliament with recommendations for law reform.
- E. Seek submissions from the community.

Question 3

Which of the following statements are correct about the Royal Commission into the Robodebt Scheme?

(Select all that apply)

- A. The Commonwealth Government was obliged to adopt all 57 recommendations made by the Robodebt Royal Commission to address the effect of the Robodebt Scheme on individuals and prevent future failures in government administration.
- B. The Commission gained the perspectives of individuals impacted by the Robodebt Scheme, including those who had a Centrelink debt raised against them.
- C. The Royal Commission exercised its coercive powers of investigation by compelling witnesses, such as senior government officials, to appear at public hearings and provide evidence under oath.
- D. The Robodebt Royal Commission is not independent of political influences and, therefore, its report contained biased recommendations that did not address the establishment and implementation of the Robodebt Scheme.

Question 4

Which of the following statements is **not** correct about the Yoorrook Justice Commission?

- A. For its interim report, the Yoorrook Justice Commission exercised coercive powers of investigation by forcing 199 Aboriginal Elders to provide their view on the 'truths and priorities for Yoorrook'.
- B. The Yoorrook Justice Commission's terms of reference required it to investigate the causes and consequences of systemic injustice experienced by Victoria's First Nations peoples.
- C. The Commission held public hearings, referred to as 'wurrek tyerrang', where it heard from witnesses, including Elders, about their truth with respect to issues of importance.
- D. The interim report did not contain substantial recommendations for law reform as these will be released in its final report and were partially released in the September 2023 report.

Question 5

Tick to the box to indicate whether the following statements are **strengths** or **limitations** of a royal commission's ability to influence law reform.

Statement	Strengths	Limitations
I. As royal commissions are the highest form of inquiry, they are only established in rare and exceptional circumstances.	☐	☐
II. The report developed by a royal commission is tabled in parliament, which ensures issues are directly presented before members of parliament which may encourage debate.	☐	☐
III. Whilst royal commissions are independent, they are still dependent on the government's willingness to initiate a royal commission about a particular issue.	☐	☐
IV. Royal commissions are able to comprehensively investigate a particular incident, area of policy, or social, legal, or political issue in their research. Therefore, they can provide insightful recommendations for law reform to accurately and adequately address the issue at hand.	☐	☐

Question 6

Royal commissions may be established at both the Commonwealth and state level.

- A. True
- B. False

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

(3 MARKS)

Explain **one** strength of royal commissions in influencing law reform, referring to **one** recent royal commission.

Adapted from VCAA 2020 exam Section A Q7

Question 8

(4 MARKS)

The high costs and long delays associated with hearing cases in Victorian courts have raised concerns regarding the need for law reform to address these issues. In particular, the Victorian Government is concerned that the costs and time involved in hearing cases is limiting the achievement of justice.

Explain how a royal commission could influence law reform in relation to the costs and delays of the Victorian courts.

Adapted from VCAA 2018 exam Section B Q3a

Extended response

Use your answer to question 9 to support your response to questions 10 and 12.

Question 9

Tick to the box to indicate whether the following statements are **strengths** or **limitations** of a royal commission's ability to influence law reform.

Statement	Strengths	Limitations
I. Royal commissions have coercive powers of investigation, such as compelling witnesses to give evidence under oath, that ensure the whole truth emerges. Consequently, this enables the issue to be better understood by parliament and facilitates effective law reform, as more adequate measures can be recommended by the commission.	☐	☐
II. The government is not obliged to follow the suggested recommendations made by the commission, meaning the inquiry could be considered a waste of time and money, and have no influence on law reform.	☐	☐
III. As a royal commission is established by the government, it may be more likely to act on and implement law reform based on the findings of the commission, as it opened itself up to criticisms and recommendations for law reform by initiating the commission.	☐	☐
IV. Royal commissions are able to comprehensively investigate a particular incident, area of policy, or social, legal, or political issue in their research. Therefore, they can provide insightful recommendations for law reform to accurately and adequately address the issue at hand.	☐	☐
V. Whilst royal commissions are independent, they are still dependent on the government's willingness to initiate a royal commission.	☐	☐

Question 10

(6 MARKS)

Referring to **one** recent royal commission, explain **one** strength and **one** limitation of a royal commission in influencing a change in the law.

Adapted from VCAA 2020 exam Section A Q7

Use your answers to questions 9 and 11 to support your response to question 12.

Question 11

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the Yoorrook Justice Commission to influence a change in the law.

Statement	Strengths	Limitations
I. The Yoorrook Justice Commission was established by the Victorian Government. Therefore, members of parliament may be more likely to adopt the recommendations of the Commission and implement law reform.	☐	☐
II. Whilst the Yoorrook Justice Commission gained valuable insights, parliament is under no obligation to act on these findings.	☐	☐
III. The Yoorrook Justice Commission, through its truth-telling process, was able to gain insight into the frustration felt by Victoria's First Peoples, and cynicism towards historical government attempts to rectify issues that have stemmed from colonisation.	☐	☐

Question 12

(7 MARKS)

'Royal commissions serve a number of valuable purposes in influencing law reform.'

Evaluate the ability of royal commissions to influence a change in the law, with reference to **one** recent inquiry that you have studied.

Adapted from VCAA 2022 exam Section A Q4b

Linking to previous learning

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

Question 13

Which of the following statements are correct about the Victorian Law Reform Commission (VLRC) and royal commissions? **(Select all that apply)**

- A. The VLRC is independent of political parties and is able to review laws on controversial matters objectively, unlike royal commissions which, whilst independent, are still dependent on the government's willingness to initiate a royal commission about a particular issue and ensure its scope is sufficiently wide.
- B. Royal commissions can investigate smaller issues, such as community law reform projects, without a terms of reference. Therefore, their investigations may be more effective than the VLRC as this body cannot investigate issues without such terms.
- C. Royal commissions may be more effective as they have coercive powers of investigation, such as being able to compel witnesses to give evidence under oath, to ensure the whole truth emerges, whilst the VLRC does not have these powers.
- D. Parliament is obliged to create law reform based on the recommendations made by royal commissions, whereas this is not the case for the VLRC given that it is an independent body.

Question 14

(8 MARKS)

'There are other bodies that are more effective than the VLRC in influencing law reform.'

With reference to royal commissions, discuss the extent to which you agree with this statement.

VCAA 2018 Sample exam Section B Q1c

9F Parliamentary committees

STUDY DESIGN DOT POINTS

- the role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- one recent Royal Commission inquiry or parliamentary committee inquiry

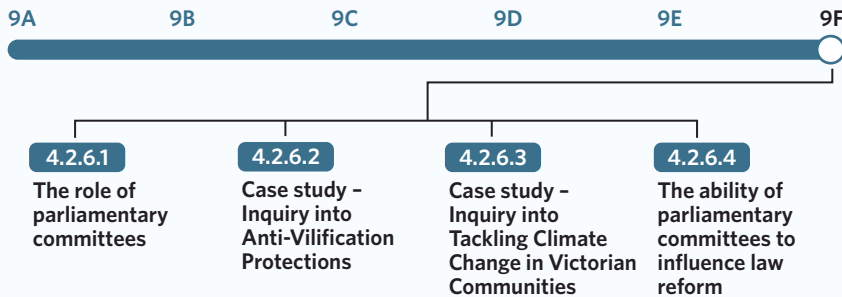


Image: aslysun/Shutterstock.com

Members of parliament do not have superpowers. They cannot simply click their fingers and know exactly what areas of law need to be improved and how these improvements should be implemented. Therefore, there are bodies that are responsible for investigating areas where law reform may be required.

Lesson introduction

Parliamentary committees are composed of members from both state and federal parliament and they play an important role in investigating the need for law reform. During their investigations, parliamentary committees consult with the community to better understand society's perspective on particular issues and laws, before recommending law reform. Therefore, parliamentary committees bridge the gap between parliament and the people to ensure greater representation of society's views throughout legislative reform, whilst also protecting democratic values in Australia.

The role of parliamentary committees 4.2.6.1

Parliamentary committees are composed of approximately six to 10 members from one or both Houses of Parliament. These members investigate issues and review laws, proposing necessary legislative amendments in particular areas. There are different types of parliamentary committees that perform specific roles. Some parliamentary committees may fall under more than one category.

KEY TERM

Parliamentary committee a group of members of parliament who undertake work on behalf of parliament and investigate the need for law reform.

Table 1 Types of parliamentary committees

Type of committee	Explanation	Examples
Standing committees	Appointed for the life of parliament and are usually re-established in successive parliaments to continuously investigate issues relating to particular subjects.	- Standing Committee on Employment, Education and Training - Standing Committee on Procedure
Select committees	Created for a specific purpose to investigate a policy issue.	- Select Committee into the Provision of and Access to Dental Services in Australia - Select Committee on the Cost of Living
Joint committees	Composed of members from both Houses of Parliament. They may be standing or select.	- Joint Standing Committee on Aboriginal and Torres Strait Islander Affairs - Joint Select Committee on National Anti-Corruption Commission Legislation



Figure 1 The general role of parliamentary committees

LEGAL VOCABULARY

Terms of reference a document that details the issues that need to be investigated, as well as the specific scope and purpose of an inquiry.

Interest group a group of people who seek to influence public policy on an issue or concern they believe requires change.

Parliamentary privilege the special legal rights and immunities that apply to the Houses of Parliament, its committees, and members.

Generally, all types of parliamentary committees conduct similar investigative procedures to ensure they research an area comprehensively. After conducting a thorough investigation, recommendations will be openly and transparently made to parliament for law reform.

Table 2 The role of parliamentary committees

Role	Explanation
Receive and analyse the terms of reference	When parliament determines an issue or policy that needs to be investigated, it must provide the parliamentary committee with the terms of reference to set out the scope of the inquiry. This document contains information about: - the purpose of the committee - the particular issue or policy being investigated - the final report due date.
Invite written submissions from the community	During each investigation, parliamentary committees conduct research and consult with the community to ensure the law-making process effectively reflects the views of society. Therefore, parliamentary committees provide an avenue through which: - individuals or organisations can express their opinions regarding parliamentary issues to instigate legislative reform. - experts can provide their opinion on complex social issues to inform proposed changes to the law. interest groups can express their stance on issues where they seek to influence law reform.
Conduct public committee hearings	Parliamentary committees conduct public hearings where members of the public can observe or give evidence on the issue being investigated. These hearings may be conducted over several days during which parliamentary committees are required to: - listen to the evidence presented by individuals - cross-examine these witnesses - review written submissions. Parliamentary committees have various powers that allow them to gain a vast range of perspectives to ensure the whole truth emerges when attempting to solve complex social issues. These powers to seek truth include: - being able to summon witnesses, such as experts, to appear before a committee hearing - protecting evidence given during a hearing through parliamentary privilege to ensure witnesses provide accurate information, knowing they cannot be sued or prosecuted for what is said. By using these powers to uncover as much truth as possible, committees are able to holistically suggest changes to the law that are more likely to be effective in solving the social issue in question.
Present a final report to parliament with recommendations for law reform	After the conclusion of the public hearing, parliamentary committees must write a report of their findings, as revealed by the investigation, and provide their recommendations for law reform.

After the committee presents a final report recommending areas for law reform, parliament is required to respond to this report within six months and indicate whether it supports any recommendations. Therefore, parliament must show it has actually considered each of the recommendations and only rejected recommendations on a valid basis.

Case study – Inquiry into Anti-Vilification Protections 4.2.6.2

In 2019, the Legislative Assembly Legal and Social Issues Committee launched its Inquiry into Anti-Vilification Protections which sought to research current protections in place to prevent vilification in Victoria, while also making recommendations for law reform that should occur in Victoria related to this issue (Parliament of Victoria, 2021).



Figure 2 The Legislative Assembly Legal and Social Issues Committee conducted an inquiry into Anti-Vilification Protections

Terms of reference

The terms of reference required the committee to consider various aspects of the *Racial and Religious Tolerance Act 2001* (Vic), which makes racial and religious **vilification** unlawful. This included investigating:

- the effectiveness and enforcement of this legislation in Victoria.
- comparisons between this legislation with other state and Commonwealth legislation.
- the role of state legislation in addressing online vilification.
- any evidence of increasing vilification in Victoria.
- possible protections to classes of people not currently protected under the Act.
- any actions already underway to work with social media and technology companies to combat vilification.

Submissions

The committee received 62 submissions from individuals, organisations, experts, and interest groups in the community, including the Jewish Community Council of Victoria, the Australian Discrimination Law Experts Group, the Victorian Disability Advisory Council, and the Victorian Government.

Committee hearing

During seven days of public hearings, broad consultations with the community occurred in metropolitan areas and via video conference. Oral evidence was provided at the hearings and transcripts were taken and published publicly.

Report and recommendations

After conducting a thorough investigation, the committee tabled a final report in parliament on 3 March 2021. The report contained 36 recommendations for law reform to minimise Victorian citizens' exposure to vilification. In particular, the report found that hate conduct was more prevalent towards First Nations people, members of the LGBTIQ+ community, people from culturally and linguistically diverse backgrounds, women, people with disabilities, and people from particular faiths.

CONTENT WARNING This section mentions content that is sensitive in nature, relating to anti-semitism

LEGAL VOCABULARY

Vilification when an individual says or does something in public that incites hatred, serious contempt, revulsion, or severe ridicule against a particular group of people.

LEGISLATION

Racial and Religious Tolerance Act 2001 (Vic)

'Regardless of the nature of antisemitism, its impact can be significant... abuse, either verbal or physical, or via emails, can lead to loss of self-esteem and, in extreme circumstances, negative health outcomes. Antisemitism can lead to fear of people expressing their Jewish identity in public, either through dress, or particular practices.'

—Jewish Community Council of Victoria

'No vilification laws. My concern is that these laws will only serve to protect the powerful from scrutiny. That religious organisations, sects, cults, law enforcement agencies and governments could possibly hide from scrutiny and the law behind this type of legislation. A slippery slope.'

—Mr Geoff Lambourne, local community member

'History shows that gay, lesbian, bisexual, transgender and intersex (or LGBTI) people are frequently vilified and that this vilification has a significant impact on our mental health.'

—Mr Sean Mulcahy, Committee Member, Victorian Gay and Lesbian Rights Lobby

Figure 3 Submissions and oral evidence provided by community members to the Anti-Vilification Protections Inquiry

Recommendations for law reform

Tick/Cross	Recommendations
☐	Strengthen existing laws, regulations, and penalties associated with discrimination of characteristics including sexual orientation and gender identity.
☐	Promote education and awareness of vilification to encourage a greater understanding of respect and diversity.
☐	Strengthen community engagement in combating vilification, such as encouraging social media platforms to adopt policies and practices that minimise hate speech.
☐	Increase support for victims of vilification or establish a legal assistance fund to support victims in pursuing legal action.

Figure 4 Examples of recommendations for anti-vilification law reform in the parliamentary committee's report to the Victorian Parliament

Influence of the inquiry on law reform

On 2 September 2021, in its response to the inquiry, the Victorian Government expressed its support of 34 of the 36 recommendations. However, it was under no obligation to implement law reform based on these recommendations. Additionally, parliament 'support[ed] in principle' 24 of these recommendations, meaning it aligned with the broad idea of them, but was unable to create law reform immediately due to certain circumstances, such as the requirement for further funding or investment.

Since then, the Victorian Government has initiated actions that aim to address hate conduct, while it is also identifying future priorities to respond to the recommendations. For example, the committee recommended that the Victorian Government establish a criminal offence prohibiting the display of symbols of Nazi ideology, including the Nazi swastika, with appropriate religious and cultural exceptions. In response to this, the government passed the *Summary Offences Amendment (Nazi Symbol Protection) Act 2022* (Vic), which criminalises the intentional display of a Nazi symbol, or symbols that closely resemble these, in public, with the exception of displays which are for a genuine educational, scientific, or artistic purpose.

LEGISLATION

Summary Offences Amendment (Nazi Symbol Protection) Act 2022 (Vic)

DEEP DIVE

Inquiry into Anti-Vilification Protections

If you choose to focus on this inquiry, search 'Inquiry into Anti-Vilification Protections' and click the Victorian Parliament (2021) webpage to find out more about the investigative process undertaken by the Legislative Assembly Legal and Social Issues Committee. On this site, you will also be able to read all the other submissions and hearings that the inquiry considered.

Case study – Inquiry into Tackling Climate Change in Victorian Communities 4.2.6.3

In 2019, the Legislative Assembly Environment Committee launched its Inquiry into Tackling Climate Change in Victorian Communities which sought to research the Victorian Government's current policies related to combating climate change, while also making recommendations for law reform that could occur to tackle climate change (Parliament of Victoria, 2021).

Terms of reference

The terms of reference required the committee to investigate the existing actions being taken to combat climate change in urban, rural, and regional communities of Victoria and how the Victorian Government could support these communities.

Submissions

The committee received 162 submissions from individuals, organisations, experts, and interest groups in the surrounding community, including Eastern Climate Action Melbourne, Energy Australia, Greater Shepparton City Council, RMIT University, and the Victorian Farmers Federation.

Committee hearing

Over 15 days, broad consultations with the community occurred in metropolitan and regional areas, and via video conference. Oral evidence was provided at the hearings and transcripts were taken and published publicly.

Report and recommendations

After conducting a thorough investigation, the committee tabled a final report in parliament on 25 November 2020. The report contained 72 recommendations for law reform to mitigate climate change in Victorian communities.



Image: nicostock/Shutterstock.com

Figure 5 The Legislative Assembly Environment Committee conducted an inquiry into tackling climate change in Victorian communities

'I live in the East Gippsland forests, the trees are already dying. Burnt by heat waves during Summer, then hardly any rain in Autumn means they are struggling enough without the added pressures of logging and burning.'

—Lisa McKenna, Resident of the East Gippsland forests

'The Yallourn mine and power station in the Latrobe Valley employs over 500 workers, doubling to 1000 workers every 18 months for major maintenance works. The power station provides 20 per cent of Victoria's electricity supply, enough to power over two million Victorian homes.'

—Energy Australia

'In recent years the City of Greater Bendigo has registered an increasing level of concern amongst our community about climate change as weather events previously thought of as extreme become more commonplace and sobering statistics about species decline have become available.'

—Councillor Dr Jennifer Alden, City of Greater Bendigo

Figure 6 Submissions and oral evidence provided by community members to the Tackling Climate Change in Victorian Communities Inquiry

Recommendations for law reform

Tick/Cross	Recommendations
☐	Develop a statewide emissions reduction target of net zero by 2050 and establish an independent Climate Change Commission to provide advice on how to achieve this goal.
☐	Increase public education and awareness about the impacts of climate change and the actions individuals and communities can take to reduce emissions.
☐	Increase investment in public transport, walking, and cycling infrastructure to reduce reliance on cars, and support the transition to electric vehicles.
☐	Strengthen the government's approach to community engagement under the <i>Climate Change Act 2017</i> (Vic).
☐	Amend the <i>Planning and Environment Act 1987</i> (Vic) and/or the <i>Climate Change Act 2017</i> (Vic) to ensure that consideration of climate change receives stronger emphasis in the Victorian planning system.
☐	Increase funding for research and development into new technologies and solutions for tackling climate change.

Figure 7 Examples of recommendations for climate change law reform in the parliamentary committee's report to the Victorian Parliament

Influence of the inquiry on law reform

In its response to the inquiry on 24 June 2021, the Victorian Government stated that it fully supported, supported in part, or supported in principle 67 of the 72 recommendations. However, it was under no obligation to implement law reform based on these recommendations. Additionally, parliament 'support[ed] in principle' 34 of these recommendations, meaning it aligned with the broad idea of them, but was unable to create law reform immediately.

LEGISLATION

Planning and Environment Act 1987 (Vic)
Climate Change Act 2017 (Vic)

WANT TO KNOW MORE?

You can find out more about parliamentary committees, as well as current and past inquiries by searching 'Parliament of Victoria Committees' on the internet and clicking the Parliament of Victoria (2023) webpage.

LEGISLATION

Local Government Act 2020 (Vic)

USEFUL TIP

The VCE Legal Studies Study Design indicates you only need to know one recent inquiry by one parliamentary committee OR one royal commission. This is your choice, so pick something you are interested in or one that your teacher suggests is appropriate. VCAA requires examples of 'recent inquiries' to be from the past four years, so make sure your chosen inquiry occurred within this timeframe.

LESSON LINK

You learnt about the reasons for law reform in **9A Reasons for law reform**.

Since then, the Victorian Government has initiated responses to these recommendations, including through:

- the preparation of a five-yearly Adaptation Action Plan (AAP) under the *Climate Change Act 2017* (Vic), to improve the resilience of seven key systems vulnerable to climate impacts.
- the introduction of reforms to remove barriers to household participation and expand opportunities for local councils to offer the Environmental Upgrade Finance (EUF) mechanism via legislative amendments in the *Local Government Act 2020* (Vic).
- increased investment in public transport infrastructure and supporting the transition to electric vehicles.
- increased funding for research and development into new technologies and solutions for tackling climate change.

DEEP DIVE**Inquiry into Tackling Climate Change in Victorian Communities**

If you choose to focus on this inquiry, search 'Inquiry into Tackling Climate Change in Victorian Communities' and click the Victorian Parliament (2021) webpage to find out more about the investigative process undertaken by the Legislative Assembly Environment Committee.

The ability of parliamentary committees to influence law reform 4.2.6.4

Whilst parliamentary committees conduct investigations to make recommendations for law reform, parliament is under no obligation to implement this advice.

Table 3 The strengths and limitations of parliamentary committees in influencing law reform

Strengths	Limitations
• Parliamentary committees can investigate specific matters of policy or government performance in-depth, ensuring parliament has a thorough understanding of the issue in question. • Parliamentary committees can invite submissions from members of the community and listen to their evidence at hearings. This can ensure the committee's proposed recommendations for law reform are reflective of community views and attitudes and consequently, more likely to be accepted and appreciated by society. • Expert opinions obtained during investigations may encourage parliament to adopt a parliamentary committee's recommendations for new laws. • Parliamentary committees have coercive powers that can ensure the greatest degree of truth is obtained, potentially increasing the likelihood of parliament adopting given recommendations. • Parliamentary committees are created by, and operate under, the authority of parliament, meaning their recommendations may be more influential in law reform. • Parliament is required to respond to a committee's final report within six months and indicate whether it supports any recommendations. Therefore, parliament must demonstrate its consideration of each recommendation and that it has only rejected suggestions on a valid basis.	• Parliament has no obligation to implement law reform based on the recommendations made by the committee. • Parliamentary committees may be unable to analyse all issues or concerns, due to limited government funding. • Parliamentary committees may not be independent, meaning biases could exist where the committee is predominantly composed of members from the same political party, or where members are split along political party lines and do not provide a uniform set of recommendations. • Parliamentary committees are limited by the terms of reference and can only investigate issues within the scope of these conditions. • Parliamentary committees can be costly. For example, there are often high costs associated with paying experts for their opinions on particular issues. • The process of conducting thorough investigations is time-consuming, especially in situations where the committee receives a large number of submissions. • As the community is not always aware of the existence of parliamentary committees, the number of public submissions received by a committee may be limited. Therefore, the recommendations may not accurately reflect societal views.

REAL WORLD EXAMPLE

Who would not want to expand Melbourne's free tram zone?

In November 2020, the Legislative Council Economy and Infrastructure Committee presented its final report into its inquiry on expanding Melbourne's free tram zone. The standing committee received 405 submissions from members of the community, including students and regular tram travellers. A significant number of these submissions requested an extension of the free tram area around the University of Melbourne and other universities in the CBD. The committee also conducted three days of public hearings to hear from witnesses.

As a result, the committee made 11 recommendations, including to provide free public transport to full-time students and Senior Card holders, which is highly reflective of and consistent with community views and attitudes expressed during the inquiry.

In its response in September 2021, the Victorian Government supported four of the recommendations and supported in part two of the recommendations. The government supported in part the recommendation to provide free public transport for full-time students and Senior Card holders, expressing that school students already receive additional subsidies on public transport trips in Victoria. However, the government refused to support five of the recommendations made by the committee, including the expansion of the free tram zone to include the 'Arts Precinct St Kilda Road', therefore demonstrating that parliament has no obligation to implement law reform based on committee recommendations, even if they reflect societal views.

Adapted from 'Inquiry into expanding Melbourne's free tram zone' (Parliament of Victoria, 2021)



Image: matias planasShutterstock.com

Figure 8 The Legislative Council Economy and Infrastructure Committee conducted an inquiry into expanding Melbourne's free tram zone

Lesson summary

- Parliamentary committees can influence law reform through their inquiries, which demonstrate society's views on contentious issues via written submissions and public hearings involving the general population.
- Parliament is not obliged to implement law reform based on the recommendations of parliamentary committees, so not all inquiries will lead to comprehensive law reform.
- The Inquiry into Anti-Vilification Protections and the Inquiry into Tackling Climate Change in Victorian Communities are two examples of inquiries from Victorian parliamentary committees.

USEFUL TIP

An important key skill in Area of Study 2 of Unit 4 VCE Legal Studies is to 'evaluate the ability of law reform bodies to influence a change in the law, using recent examples'. Table 3 shows the strengths and limitations of parliamentary inquiries in influencing law reform, with reference to the recent examples covered in this lesson. Therefore, this can help you answer higher-mark questions requiring an evaluation of the ability of parliamentary inquiries to influence a change in the law, using a recent example.

9F Questions

Check your understanding

Question 1

Parliamentary committees bridge the gap between parliament and the people to ensure greater representation of society's views throughout legislative reform.

- A. True
- B. False

Question 2

Fill in the blanks with the following terms:

standing

select

- A committee is appointed for the life of parliament, whereas,
 a committee is created for a specific purpose to investigate a policy issue.

Question 3

Which of the following is **not** a role of parliamentary committees?

- A. Receive and analyse the terms of reference.
- B. Create law reform by passing legislation.
- C. Conduct a public hearing.
- D. Present a final report to parliament containing recommendations for law reform.
- E. Invite written submissions from the community, experts, and interest groups.

Question 4

Tick to the box to indicate whether the following statements are **strengths** or **limitations** of a parliamentary committee's ability to influence law reform.

Statement	Strengths	Limitations
I. Recommendations of law reform proposed by parliamentary committees are more likely to reflect community attitudes and, consequently, parliament may be more willing to accept them.	☐	☐
II. Parliament does not have to implement law reform based on the recommendations made by the committee.	☐	☐
III. Parliamentary committees can only investigate issues within the scope of the terms of reference.	☐	☐
IV. Parliament may be more likely to adopt recommendations for new laws that are based on expert opinions obtained during the investigations.	☐	☐

Question 5

Which of the following statements are correct about the Legislative Assembly Legal and Social Issues Committee's Inquiry into Anti-Vilification Protections? **(Select all that apply)**

- A. The committee received 62 submissions from individuals, organisations, experts, and interest groups in the community.
- B. The committee created laws based on their own recommendations, such as banning the display of symbols of Nazi ideology, such as the Nazi swastika.
- C. The committee was influential in its recommendations for law reform as the Victorian Government supported, or supported in principle, 34 of the 36 recommendations made by the committee.
- D. The committee did not conduct a public hearing as it received enough information from community submissions.

Question 6

Which of the following statements are correct about the Legislative Assembly Environment Committee's Inquiry into Tackling Climate Change in Victorian Communities? **(Select all that apply)**

- A. During its investigation into climate change law reform in Victoria, the committee also investigated the need for law reform in relation to climate change throughout Australia, as the members of the committee were passionate about climate change.
- B. The terms of reference limited the committee to investigating the actions being taken to combat climate change in urban, rural, and regional communities of Victoria and how the Victorian Government could support these communities.

- C. The committee conducted 15 days of public hearings to obtain evidence from witnesses in order to determine areas for law reform.
- D. In its response, the government only accepted approximately half of the 72 recommendations for law reform and thus, the inquiry was a waste of time.

Question 7

Parliamentary committees cannot consist of members from both Houses of Parliament.

- A. True
- B. False

Preparing for exams

Standard exam-style

Question 8

(3 MARKS)

Explain **one** strength of parliamentary committees in influencing law reform, referring to **one** recent parliamentary committee inquiry.

Adapted from VCAA 2020 exam Section A Q7

Question 9

(4 MARKS)

The increased use of social media among young people has raised concerns about the need for greater protection of youth. The Australian Government is particularly concerned about teenagers being exposed to inappropriate content, as well as an increase in cyberbullying.

Explain how a parliamentary committee could influence law reform to implement greater protections for youth in relation to social media.

Adapted from VCAA 2018 exam Section B Q3a

Extended response

Use your answer to question 10 to support your response to questions 11 and 13.

Question 10

Tick the box to indicate whether the following statements are **strengths** or **limitations** of a parliamentary committees in influencing law reform.

Statement	Strengths	Limitations
I. Parliamentary committees can invite submissions from members of the community and hear their evidence at hearings, ensuring recommendations for law reform are reflective of community views and attitudes.	☐	☐
II. Parliament does not have to implement law reform based on the recommendations made by the committee.	☐	☐
III. Parliamentary committees are limited by the terms of reference and can only investigate issues within the scope of these terms.	☐	☐
IV. Parliament may be more likely to adopt recommendations for new laws if they have been supported by expert opinions obtained during the investigations.	☐	☐
V. Parliamentary committees can investigate specific matters of policy or government performance and these investigations can be in-depth and thorough.	☐	☐
VI. As the community is not always aware of the existence of parliamentary committees, the number of public submissions received by a committee may be limited. Therefore, the recommendations may not accurately reflect societal views.	☐	☐

Question 11

(6 MARKS)

Referring to **one** recent parliamentary committee inquiry, explain **one** strength and **one** limitation of parliamentary committees in influencing a change in the law.

Adapted from VCAA 2020 exam Section A Q7

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 the Legislative Assembly Environment Committee (LAEC) influencing a change in the law in its inquiry into Tackling Climate Change in Victorian Communities.

Statement	Strengths	Limitations
I. The LAEC was only able to investigate issues within the scope of the actions being taken to combat climate change in urban, rural, and regional communities of Victoria and how the Victorian Government could support these communities.	☐	☐
II. The committee received 162 submissions from the community. Therefore, its recommendations for law reform were reflective of community views.	☐	☐
III. The LAEC conducted an in-depth and thorough investigation as it received 162 submissions and conducted 15 days of public hearings.	☐	☐
IV. Whilst parliament supported 67 of the 72 recommendations for law reform, the Victorian Government was under no obligation to implement law reform based on the recommendations.	☐	☐

Question 13

(7 MARKS)

'Parliamentary committees serve a number of valuable purposes in influencing law reform.'

Evaluate the ability of parliamentary committees to influence a change in the law, with reference to **one** recent inquiry that you have studied.

Adapted from VCAA 2022 exam Section A Q4b

Linking to previous learning

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

Question 14

Which of the following statements are correct about the Victorian Law Reform Commission (VLRC) and parliamentary committees? **(Select all that apply)**

- A. The VLRC is independent of political parties and is able to review laws on controversial matters objectively, unlike parliamentary committees which may not be independent if the committee is composed predominantly of members of government, for example.
- B. Parliamentary committees can investigate smaller issues, such as community law reform projects, without terms of reference. Therefore, their investigations may be more effective than the VLRC as this body cannot investigate issues without terms of reference.
- C. Parliamentary committees are created by, and operate under, the authority of parliament, meaning their recommendations may be more influential on law reform compared to the VLRC as this body is independent of the government.
- D. Parliament is obliged to create law reform based on the recommendations made by parliamentary committees, whereas this is not the case for the VLRC given that it is an independent body.

Question 15

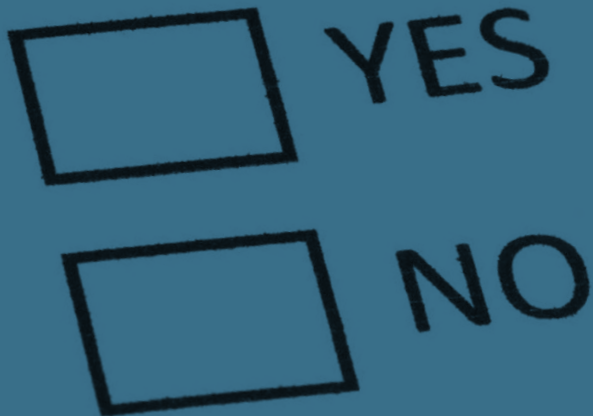
(8 MARKS)

'There are other bodies that are more effective than the VLRC in influencing law reform.'

With reference to parliamentary committees, discuss the extent to which you agree with this statement.

Adapted from VCAA 2018 Sample exam Section B Q1c

10



CHAPTER 10

Constitutional reform

LESSONS

- 10A** Reasons for constitutional reform
- 10B** Referendums
- 10C** Factors that affect the success of referendums
- 10D** The 1967 referendum
- 10E** Possible future constitutional reform

Image: Rasdi Abdul Rahman/Shutterstock.com

KEY KNOWLEDGE

Constitutional reform

- reasons for constitutional reform
- the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum
- factors affecting the success of a referendum
- the significance of the 1967 referendum about First Nations people
- possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution.

Study design information It is advised that teachers and students refer to the latest version of the VCE Legal Studies Study Design (VCAA, n.d.-b) for the most up-to-date information about key knowledge dot points, particularly in relation to those in Chapter 10. This textbook reflects the curriculum as of November 2023. However, VCAA indicated at this time there was potential for some amendments to the curriculum, such as in relation to the 2023 First Nations Voice to Parliament referendum. You can refer to the online version of this textbook for any Edrolo updates to content that reflects any potential changes to the Study Design for this chapter.

10A Reasons for constitutional reform



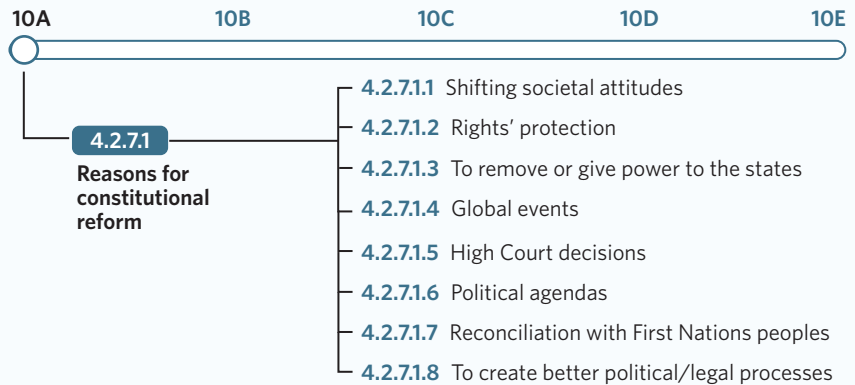
Image: Africa Studio/Shutterstock.com

'Progress is impossible without change, and those who cannot change their minds cannot change anything.'—George Bernard Shaw (Irish playwright and political activist)

Change is necessary for every society, but what factors inspire constitutional change? Does public pressure play a role in driving alterations to the law in Australia, or is it up to politicians to make changes as they see fit?

STUDY DESIGN DOT POINT

- reasons for constitutional reform



LESSON LINKS

You learnt about the Australian Constitution in **7C The division of powers**.

You will learn more about referendums in **10B Referendums**.

CONSTITUTION

Section 128

KEY TERMS

Australian Constitution the founding document of Australia that sets out the composition of the Australian Parliament, its function and layout, and its powers.

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

Constitutional reform alterations made to the Australian Constitution through the process of a successful referendum.

Lesson introduction

As the Australian Constitution was drafted at the end of the 19th century, just before Federation in 1901, certain clauses have become outdated over time or more additions to the Constitution have been required. As a result, the founding document of Australia has required amendments over the past century. These proposed alterations to the Constitution have occurred due to a variety of reasons.

Reasons for constitutional reform 4.2.7.1

The **Australian Constitution** is the founding document of Australia, created at the time of Federation. According to s 128 of the Constitution, a **referendum** must be held in order for the Constitution to be amended. In the past century, 44 referendums have been conducted, however **constitutional reform** resulting from these referendums has only occurred eight times. There are various reasons why the Constitution may be altered, or why alterations may at least be proposed, which include:

- shifting societal attitudes
- rights' protection
- to remove or give power to the states
- global events
- High Court decisions
- political agendas
- reconciliation with First Nations peoples
- to create better political/legal processes.

Shifting societal attitudes 4.2.7.1.1

The views and values held by the majority of Australian society are constantly shifting. In a globalised world, Australia has become a more religiously and ethnically diverse nation. Citizens of Australia have also become exposed to different cultures and ways of life, shifting their values. For example, since 1971, the proportion of the Australian population identifying as a Christian has declined from 86.2% of the population to just 43.9% of the population by 2021 (Australian Bureau of Statistics, 2022). As a result of these changes in societal attitudes, constitutional reform has been initiated.

Shifts in societal values have been a driver for constitutional reform regarding First Nations rights. For example, as colonised, white Australian society increasingly began to perceive First Nations peoples as equals, the 1967 referendum was initiated to reflect this societal change in the Constitution.

LESSON LINK

You will learn more about the 1967 First Nations referendum in
10D The 1967 referendum

REAL WORLD EXAMPLE

Calls to abandon the monarchy

In 1999, a referendum was held asking Australian citizens whether they wanted Australia to become a **republic** instead of a **constitutional monarchy**. Whilst the referendum failed in 1999, there has remained consistent debate surrounding whether Australia should transition away from its colonialist past by cutting all ties to the British monarchy. 2022 figures revealed 37% of Australians support keeping Australia as a monarchy, whilst 43% support Australia becoming a republic. This is a significant increase from the 15% of Australians who favoured Australia being a republic in 1953.

Currently, one of the main arguments for Australia becoming a republic is to demonstrate clear contempt for the racist and imperialist actions of the British Monarchy. In 2022, Adam Bandt, leader of the Greens Party, asserted he could not 'mourn the leader of a racist empire built on stolen lives, land, and wealth of colonised peoples' following Queen Elizabeth II's death. He argued Australia 'needed to become a republic' to strive for reconciliation with First Nations peoples.

Adapted from 'Australia 'needs to become a republic': Bandt calls for change in wake of Queen's death' (Butler, 2022)



Figure 1 Shifting societal attitudes was a cause for the proposed constitutional reform for Australia to become a republic

WANT TO KNOW MORE?

In 1999, the Australian Constitutional Referendum Study (ACRS) was conducted by the Australian Election Study to investigate Australian attitudes regarding the 1999 referendum. The 1999 ACRS analysed the political attitudes and behaviour of the Australian public in the lead up to the referendum, 'investigating the patterns of public opinion concerning the republic'.

You can find out more about their findings and discover the attitudes and knowledge of people in 1999 regarding the referendum by searching 'ACRS Study 1999' and clicking the 'Australia Election Study' webpage.

LEGAL VOCABULARY

Republic a form of government whereby a state is ruled by representatives from the population's citizens.

Constitutional monarchy a system in which the Crown is the Head of State, and a parliament makes laws and manages government departments.

Rights' protection 4.2.7.1.2

One of the roles of the Constitution is to ensure rights' protection through both express rights enshrined in the Constitution and implied rights which have been interpreted by the High Court as being intended for protection by the Constitution. Adding to these rights' protection in order to ensure certain rights are guaranteed for all Australians has acted as one of the drivers for constitutional reform.

LESSON LINK

You learnt about express rights in
7K The Constitution as a check on parliament - express protection of rights.

REAL WORLD EXAMPLE

Proposed expansion of freedom of religion right

In 1988, a referendum was held after the Constitution Alteration (Rights and Freedoms) Bill 1988 was passed through the Commonwealth Houses of Parliament. The proposed reform aimed to guarantee Australians various civil rights, in relation to trials by jury, freedom of religion, and compulsory acquisition of property. Bob Hawke, the prime minister who initiated the Constitutional revision, said the reform was intended to extend the express right of 'freedom of religion' to ensure that 'Australians [could] follow their own religious beliefs subject to the laws which govern us all'.

However, there was much debate surrounding the referendum with many believing it aimed to abolish religions. The referendum was ultimately unsuccessful due to the Australian public broadly believing the proposed changes could impede on the protection of human rights, such as the right to freedom of religion.

Adapted from 'Prime Minister's Speech to the Victorian State Parliamentary Press Gallery Thursday 1 September 1988' (Department of the Prime Minister and Cabinet, 1988)



Figure 2 Bob Hawke aimed to expand the express right to freedom of religion

LESSON LINK

You learnt about concurrent, exclusive, and residual powers in **7C The division of powers**.

To remove or give power to the states 4.2.7.1.3

The Australian Constitution establishes which matters the Commonwealth Parliament has the power to make laws about. Constitutional reform may occur in order to make exclusive powers into residual or concurrent powers so that the states can legislate on matters which the Commonwealth previously had sole control over. The reverse situation may occur too, in which constitutional reform is enacted to take power away from the states and ensure only the Commonwealth Parliament can make laws on certain issues. State leaders, specifically the leaders of smaller states, often oppose a 'yes' vote to these kinds of referendums which seek to remove power from the states.

REAL WORLD EXAMPLE

Figure 3 The 1973 prices and income referendums aimed to change prices and income from being controlled solely by the states

Reform to increase economic powers of the Commonwealth

In 1973, prime minister Gough Whitlam posed two questions to the public in a referendum. The first sought to provide the Commonwealth Parliament with the power to make laws with respect to the prices of goods and services, such as by implementing a Prices Tribunal. The second question asked whether the Commonwealth Parliament should have the power to make laws with respect to income. At the time, rising inflation in Australia concerned Whitlam and he sought to rectify this by allowing the Commonwealth to legislate on prices and income, enabling them to make anti-inflationary policies. He made specific promises that the Commonwealth would introduce income legislation to ensure equal pay for women and introduce a quarterly cost of living adjustment to wages.

The Labor government supported the 'yes' vote for both referendum questions as they believed the control of prices and incomes should be concentrated in the Commonwealth Parliament, so that the Federal government could make effective economic policies.

Both referendum questions failed, likely due to the strong 'no' campaign led by the Liberal opposition government, who claimed the Labor government was 'power hungry' and that the referendums, if successful, would lead to excessive government control.

Adapted from 'Prices and incomes referendum 1973: The pattern of failure' (Rydon, 1974)

Global events 4.2.7.1.4

Major global events rapidly shift the desires, needs, and values held by members of society. International wars, and their subsequent effects on the economy and society, can highlight the potential need for constitutional reform in Australia due to the needs of Australians shifting after such catastrophes. Wars also may cause shifts in the ideologies of citizens, again promoting a push for constitutional changes.

REAL WORLD EXAMPLE

Image: Australian War Memorial

Figure 4 The Curtin government proposed constitutional reform to allow Australia to better address post-war reconstruction

Rectifying the impact of World War II

In 1944, the 'Post-war Reconstruction and Democratic Rights' referendum aimed to give the Commonwealth the power to legislate on 14 different matters, including the rehabilitation of ex-servicemen, national health, employment and unemployment, and 'the people of the Aboriginal race'. If implemented, these powers would expire five years after Australia stopped participating in World War II.

The Curtin government was compelled to introduce this constitutional reform in order to have extra powers to fully administer its plans for post-war reconstruction. The constitution alteration bill stated that the 14 matters it sought to legislate on intended to 'achieve economic security and social justice' in order to rectify issues the war had placed on aspects of Australian society, such as employment. The Attorney General at the time, Dr Evatt, stated that 'social and economic disorganisation, chaos in production, mounting unemployment, wide-spread social insecurity - in short, anarchy', would occur without the amendments.

The referendum was unsuccessful with just 45.99% of the Australian population voting 'yes' to the proposal, likely due to fears that the Commonwealth would gain too many powers from the constitutional change.

Adapted from 'The opposition and the "powers" referendum, 1944' (Waters, 1969)

REAL WORLD EXAMPLE

The fight against communism's spread

Following the surrender of Nazi Germany in 1945, the wartime alliance between the United States (US) and the Soviet Union (USSR) quickly began to unravel. The Soviet Union had begun installing left-wing governments in Eastern European states, creating the Hungarian People's Republic and Polish People's Republic, for example. The US opposed this, believing it needed to safeguard its own interest and protect these states against Soviet expansion. The Cold War commenced under the Marshall Plan which intended to fight against the communist regimes being installed by the USSR.

The Cold War had repercussions on Australia. Membership numbers of the Communist Party peaked in Australia at an estimated 20,000 people during the Second World War. In 1949, Robert Menzies became prime minister after running a campaign promising to ban the Communist Party as fears rose around the impact communism would have on Australia.

Menzies created the *Communist Party Dissolution Act 1950* (Cth) which declared the Communist party to be unlawful. This Act was ruled by the High Court, in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, to be unconstitutional. Therefore, Menzies put the issue to a constitutional referendum in 1951, seeking to give the Commonwealth Parliament the power to ban the Communist Party. The proposed amendment did not succeed as only 49.44% of the Australian population voted in favour to this constitutional reform. However, it is clear from the attempted referendum that global events greatly influence constitutional reform.

Adapted from 'The Communist Party Dissolution Act 1950' (Australian Prime Ministers Centre, n.d.)



Figure 5 The Cold War between the Soviet Union and the US resulted in members of the Australian government opposing communism and any supporters of it

High Court decisions 4.2.7.1.5

The High Court has been able to recognise deficiencies of the Australian Constitution and, in turn, influence its reform on multiple occasions. A case may be brought to the High Court, which the court then makes a decision about, exposing areas where constitutional reform is required. This proposed reform is either rejected or accepted by Australians in a referendum.

In relation to the 1951 referendum, which was previously discussed, this arose as the Australian Communist Party brought a case in the High Court against a new piece of legislation introduced by the Commonwealth, the *Communist Party Dissolution Act 1950* (Cth). The High Court declared the *Communist Party Dissolution Act 1950* (Cth) to be unconstitutional and therefore invalid. As a result, Robert Menzies initiated the referendum in order to ensure the communist party could still be banned following the High Court's ruling against the decision.

LEGAL CASE

Attorney-General (Vic); Ex rel Dale v Commonwealth (Pharmaceutical Benefits case)* (1945) 71 CLR 237*Facts**

In 1944, the Commonwealth Parliament passed the *Pharmaceutical Benefits Act 1944* (Cth). However, its validity was challenged in the High Court by the Victorian Attorney-General, on behalf of officers of the Medical Society of Victoria.

Legal issue

The main issue was whether the *Pharmaceutical Benefits Act* was authorised under s 81 of the Australian Constitution, which allowed the Commonwealth Parliament to use money 'for the purposes of the Commonwealth'. The Attorney-General, for the State of Victoria, argued the Commonwealth only had the power to devote money to areas of exclusive power, not for issues within the State's 'field of legislative power'. The responsibility for health care at the time, including the control of the general practice of medicine, was retained by the states.

Continues →

LEGAL CASE

Attorney-General (Vic); Ex rel Dale v Commonwealth (Pharmaceutical Benefits case) (1945) 71 CLR 237 – Continued**Decision**

The majority of Justices found that the *Pharmaceutical Benefits Act* was invalid on the basis that it had the power to supersede state laws, violating citizens' rights. He contended the Commonwealth had no power to legislate on public health issues. Section 51 of the Constitution did not extend to pharmaceutical benefits, so the Act was not authorised.

Significance

The High Court decision cast doubt on the validity of a number of Acts that the Commonwealth Parliament had already passed, or intended to pass in the future with regard to social services, such as unemployment benefits and widows' pensions.

To address this issue, in 1946, the *Constitution Alteration (Social Services) Act 1946* (Cth) was passed by the Houses of Parliament which, if approved at a referendum, would add a paragraph to s 51 of the Constitution that stated:

'(xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.'

The referendum was successful. This led to a new Pharmaceutical Benefits Scheme being established which ultimately led to the creation of Medicare, the government-subsidised health care system in Australia.

Political agendas 4.2.7.1.6

Constitutional reform may be instigated in order for a politician to push their own political agenda. Often, this reason for constitutional reform is criticised by the public or the opposition party, leading to a 'no' vote as the public does not want to support a change solely being pushed for self-serving objectives.

REAL WORLD EXAMPLE



Figure 6 Those campaigning for a 'no' result claimed that John Howard's proposed preamble to the Constitution was initiated as part of his own political game

A politician's preamble?

In 1999, John Howard initiated the Preamble referendum which called to add a preamble into the Constitution that would make specific references to God, democracy, Indigenous 'custodianship', and the equality of men and women. A preamble is an introduction designed to communicate the intention of the Constitution. Howard claimed that his proposal would enhance 'the national unity of [the] country'.

Criticisms about the proposed preamble quickly surfaced. In the 'no' campaign, published in the Official Referendum Pamphlet by the Australian Electoral Commission, advocates against the Preamble declared the Preamble was 'part of a political game' and a 'politicians' preamble'. Many claimed that the referendum was designed to make John Howard appear to be an advocate for change or politically 'woke'.

Whether political agendas played a role in influencing this attempt at constitutional change can be argued from both sides, but the example nevertheless indicates that there may be potential for some referendums to be influenced by political agendas.

Adapted from 'Your official Referendum pamphlet' (Australian Electoral Commission, 1999) and 'With Hope in God, the Prime Minister and the Poet: Lessons from the 1999 Referendum on the Preamble' (McKenna et al., 2001)

Reconciliation with First Nations peoples 4.2.7.1.7

Considering its establishment in 1901, the Australian Constitution has required changes as Australian society has aimed for reconciliation with First Nations peoples.

The 2023 Voice to Parliament referendum is indicative of the influence that a desire for reconciliation with the Aboriginal and Torres Strait Islander community has on constitutional reform. It was once deemed acceptable for First Nations peoples to be stripped of fundamental rights in a democracy, such as the right to be counted as a citizen in a census. There is now a broad understanding in Australia that this racial discrimination is unacceptable, and goes against the protection of human rights and equality in our communities.

As a result of society pressuring the government to enact changes to better protect Aboriginal and Torres Strait Islander's rights and promote reconciliation, constitutional reform has occurred in the past.

LESSON LINK

You will learn more about the Voice to Parliament in **10E Possible future constitutional reform**.

REAL WORLD EXAMPLE

Addressing reconciliation by constitutional reform

In 1967, there was a referendum conducted that sought to ensure First Nations peoples were counted in the national census and to allow the Commonwealth to pass Acts on Aboriginal and Torres Strait Islander peoples so that their rights were better protected. The referendum was successful, with 90.77% of Australians voting in favour for the reform, the highest percentage of 'yes' votes in referendum history in Australia. Following the constitutional amendment, the Commonwealth Parliament was able to make laws regarding First Nations peoples.

One of these Acts was the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)* which enabled the Commonwealth to protect cultural heritage under threat in the case that state or territory laws had failed to protect it. This helped to protect the cultural rights of First Nations peoples and aided in efforts for reconciliation.

Adapted from 'Aboriginal and Torres Strait Islander Heritage Protection Act 1984 - General Guide and Application Form' (Department of Climate Change, Energy, the Environment and Water, 2023)



Image: Brooke Ottley/Shutterstock.com

Figure 7 The Constitution was reformed to allow the Commonwealth Parliament to create laws that better protected First Nations rights

LEGISLATION

Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

To create better political/legal processes 4.2.7.1.8

The Constitution establishes political and legal processes that must be followed. Therefore, considering it is centuries old, some of these processes have required reform in order to improve the efficiency and ability of the political and legal systems to create and adjudicate just laws. Some of the proposed changes to Australia's political system would require substantive alterations to the current system, such as transforming Australia into a republic, as previously discussed. Other changes, such as introducing a compulsory retirement age for judges, have less transformative effects on Australian society.

Past referendums seeking to alter the political and legal processes in Australia include:

- the 1977 Retirement of Judges referendum, which sought to establish a retiring age of 70 years for judges of federal courts. This proposal was viewed as necessary as allowing younger judges to enter the courts would ensure 'new ideas and fresh social attitudes' were upheld in the judicial branch of government, and would prevent a situation where a judge, who was declining in health but unwilling to resign, would continue deciding cases despite no longer being the most suitable person to do so (Parliament of Australia, 2010). This referendum proposal was successful, and the mandatory retirement of judges at 70 years old was enshrined in the Constitution.
- the 1984 Terms of Senators referendum, which sought to alter the terms of senators so they were no longer fixed and to mandate House of Representatives and Senate elections being on the same day. Bob Hawke contended the referendum, if successful, would 'save the Australian taxpayers a good deal of money, [...] reduce the disruption to business and the community generally caused by too frequent elections, [and] mean simply, better government' (1984). This referendum was unsuccessful.
- the 1988 Parliamentary Terms referendum, which sought to increase the terms served by members of the Houses of Representatives from three years to four years, whilst decreasing Senate terms from a six-year fixed term to a four-year fixed term, allowing for elections for members of both Houses of Parliament to occur simultaneously. Bob Hawke argued the proposed change would result in less costly and more stable 'good government'. He believed 'elected governments deserve a fair go and enough time to implement their policies', which introducing this change would allow. This referendum was also unsuccessful.

Lesson summary

For a referendum to be initiated, multiple reasons for constitutional reform usually apply to the specific issue in question, all in conjunction with one another. The Constitution will likely continue to require reform to ensure the legal system is able to keep up with alterations in society.

Table 1 Reasons for constitutional reform

Reason for constitutional reform	Australian referendum examples
Shifting societal attitudes	1999 Republic referendum 1967 First Nations referendum 2023 Voice to Parliament referendum
Rights protection	1988 Rights and freedoms referendum 1967 First Nations referendum
To remove or give power to the states	1973 Prices and income referendum
Global events	1944 Post-war reconstruction referendum 1951 Communist party referendum
High Court decisions	1951 Communist party referendum 1946 Social services referendum

Continues →

USEFUL TIP

Whilst it is useful to have an understanding of the many reasons that could lead to referendums and possible constitutional reform, it may be helpful to focus on understanding two or three reasons in detail. Choose two to three reasons for constitutional reform that you find to be most compelling, along with their given Australian referendum examples, so you can use these in your responses to exam questions and in School Assessed Coursework (SAC).

Table 1 Continued

Reason for constitutional reform	Australian referendum examples
Political agendas	1999 Preamble referendum
Reconciliation with First Nations people	1967 First Nations referendum 2023 Voice to Parliament referendum
To create better political/ legal processes	1977 Retirement of judges referendum 1984 Terms of senators referendum 1988 Parliamentary terms referendum

10A Questions

Check your understanding

Question 1

There is only one reason for constitutional reform: for politicians to gain political leverage against the opposition.

- A. True
- B. False

Question 2

Which of the following statements are examples of reasons for constitutional reform?

(Select all that apply)

- A. Advances in technology have caused the Constitution to be changed as the introduction of IVF technology, for example, has made certain sections of the Constitution redundant in current society.
- B. Global events, such as wars, have caused constitutional reform to be initiated with the intent of allowing the Federal government to better protect the Australian people and ensure post-war recovery.
- C. Changes in societal values have led to alterations in the Constitution as behaviours that were once seen as acceptable, such as discrimination against First Nations people, are now broadly frowned upon by society.
- D. Improving the legal system has acted as a reason for constitutional reform. For example, the Constitution was altered to establish the Koori Courts in order for the principles of justice to be better achieved.

Question 3

The 1973 prices and income referendums were driven by:

- A. a desire to give the power to the Commonwealth Parliament to make laws with respect to prices and income to better control inflation.
- B. a change in societal values which prioritised income equality for men and women to defeat the gender pay gap.

Question 4

One of the reasons that contributed to the 1951 Communist Party referendum was:

- A. societal concerns about the communist ideology at the time due to the Cold War.
- B. to provide power to the states to legislate on matters relating to the Communist Party.

Question 5

The *Pharmaceutical Benefits Case* 1945 was a High Court decision that led to:

- A. the Court establishing legislation that allowed the government to make laws related to health care, such as laws subsidising certain medicines.
- B. a referendum to take place to provide the Commonwealth Parliament with the power to legislate on social services, such as health care, which subsequently led to the system of Medicare being established.

Question 6

Fill in the blanks with the following terms:

1999 Preamble referendum

1999 Republic referendum

One possible reason, claimed by the 'no' campaign, for the [] was for John Howard

to push his own political agenda and appear politically woke. On the other hand, one reason for the

[] was to better reflect societal values as there had been shifts in Australian society, with many citizens no longer wanting to be tied to Australia's colonialist past.

Question 7

A number of reasons for constitutional reform can contribute to a single referendum proposal.

- A. True
- B. False

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

(3 MARKS)

Prior to 1967, the Australian Constitution explicitly excluded Aboriginal and Torres Strait Islander peoples from being counted as part of the Australian population. The pressure for change built rapidly in the 1960s as Aboriginal and Torres Strait Islander activists, as well as non-indigenous activists, drew attention to the denial of civil rights and discrimination against First Nations peoples. In 1967, a referendum took place which gave the Commonwealth the power to legislate on matters concerning Aboriginal and Torres Strait Islander peoples and which included them in the national census.

Referencing the 1967 First Nations referendum, explain **one** reason for constitutional reform.

Adapted from VCAA 2022 Section A Q2

Question 9

(3 MARKS)

Other than changes in societal attitudes, explain **one** reason why the Constitution may need to be changed.

Adapted from VCAA 2012 Q1b

Question 10

(4 MARKS)

With reference to two examples, outline **two** reasons for constitutional reform.

Adapted from VCAA 2020 Section A Q1

Question 11

(4 MARKS)

Referring to a past referendum in Australia, justify **one** reason why the referendum took place.

Adapted from VCAA 2016 Q9a

Extended response

Use your answers to question 12 and 13 to support your response to question 14.

Question 12

The only reason the Australian Constitution might need to change in the future is if attitudes and values of the Australian population change.

- A. True
- B. False

Question 13

Which of the following examples represent a possible reason for constitutional reform?

(Select all that apply)

- A. The need for the Commonwealth to have power to legislate over income and prices in order to combat rampant inflation in 1973.
- B. The outcome of a civil trial involving defamation in the Supreme Court of Victoria.
- C. Shifts in the core values held by society, such as the broad desire of current society to better support First Nations people and condemn the colonialist past of Australia.
- D. The 1945 High Court decision in the *Pharmaceutical Benefits Case*, where it was found the Constitution did not give power to the Commonwealth to legislate on pharmaceutical benefits.
- E. The desire of a political party in power to pursue a political agenda so as to increase their approval among voters.

Question 14

(5 MARKS)

'The Constitution was well written in 1900, so the only reason for constitutional reform is progressions in societal values.'

In your view, to what extent do you agree with this statement? Justify your answer.

Adapted from VCAA 2019 Section A Q2

Use your answer to question 15 to support your response to question 16.

Use the following information to answer questions 15 and 16.

In 1950, the events of the Cold War between the United States and the Soviet Union sparked concern regarding the threat that communism posed to Australia's security and defence. Many people did not agree with the communist political ideology. The Commonwealth Parliament passed the *Communist Party Dissolution Act 1950* (Cth) in an attempt to prevent the spread of communism in Australia. The Act was declared unconstitutional by the High Court. This led to a referendum which sought to alter the Constitution to ban the communist party. The 1951 referendum was unsuccessful.

Question 15

Which of the following statements are true about reasons for the 1951 Communist Party referendum?

(Select all that apply)

- A. Shifting societal attitudes were a reason for the referendum, as there were fears about the growing presence of communism in Australia, with many people disagreeing with the communist political ideology.
- B. The global political climate and the events of the Cold War in 1950 led to concern that increasing support for communism in Australia would be prejudicial to Australia's security and defence.
- C. The desire to take power away from the State Parliaments and concentrate the power to ban political organisations in the Commonwealth Parliament.
- D. A High Court decision declared the *Communist Party Dissolution Act 1950* (Cth) to be unconstitutional.

Question 16

(6 MARKS)

Analyse the reasons for attempted constitutional reform associated with the 1951 Communist Party referendum.

Linking to previous learning**Question 17**

(5 MARKS)

In 1988, the Constitution Alteration (Rights and Freedoms) Bill 1988 was passed through the Houses of Parliament and the Australian public had to vote on whether they approved alterations to the express rights set out in the Constitution. Prime minister Bob Hawke contended the proposed constitutional reform aimed to extend the express right of 'freedom of religion' to ensure that 'Australians [could] follow their own religious beliefs subject to the laws which govern us all.'

- a. With reference to the 1988 Rights and Freedoms referendum, explain the term 'express rights'. 3 MARKS
- b. With reference to the 1988 Rights and Freedoms referendum, outline **one** reason for this proposed constitutional reform. 2 MARKS

10B Referendums



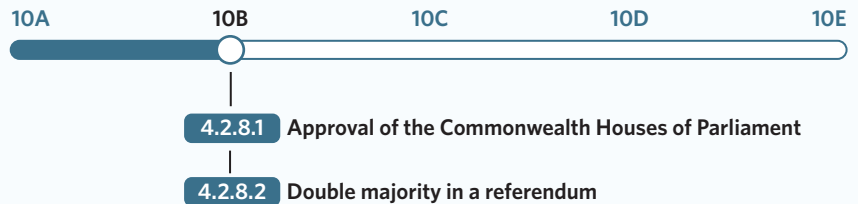
Image: AlexLMX/Shutterstock.com

'There is nothing permanent except change'
—Heraclitus (Greek philosopher, 535-475 BCE)

Change is vital to our lives and, more broadly, society. So if this is the case, why do Australians seem so reluctant to support constitutional change? Is the lack of success of past referendums due to the Australian public resisting change, or is the process of changing the Constitution too difficult to amount to successful change?

STUDY DESIGN DOT POINT

- the requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum



CONSTITUTION

Section 128

Lesson introduction

Section 128 of the Australian Constitution protects the wording of the Constitution from being arbitrarily changed in order to protect the rights of Australians. =The Constitution cannot be changed by members of parliament in the same way legislation can be changed. Since 1901, 45 proposed changes to the Constitution have been put to voters in a referendum. Of these, only eight have resulted in changes to the wording of the Constitution. The most recent referendum was in 2023 and the most recent successful referendum was in 1977.

Approval of the Commonwealth Houses of Parliament 4.2.8.1

Section 128 of the Constitution states the process of changing the words of the Australian Constitution. Before a change can be proposed to Australians in a **referendum**, both houses of the Federal Parliament must agree to put the change to the Australian people in a referendum.

This process begins with a member of parliament introducing a constitution alteration bill into either one of the Houses of Parliament; the Senate or the House of Representatives. Normally, the bill must then be passed by an **absolute majority** vote in both houses. However, in some circumstances, the bill only needs to be passed by an absolute majority in one house and the Governor-General may submit the bill to electors for a referendum to occur.

The passage of the bill through parliament is the same as a normal bill, with the exception of the absolute majority requirement.

KEY TERM

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution.

LEGAL VOCABULARY

Absolute majority a result that occurs when one person more than half of the total number of members in a House of Parliament, whether they are all present or not, vote in favour of a proposed reform.

WANT TO KNOW MORE?

The process of a constitution alteration bill passing with the absolute majority of only one House is:

1. The originating house passes a bill that is rejected by the other house, or the other house includes amendments to the bill which the originating house does not agree with.
2. After three months, the originating house may pass the bill again in its original form or the form containing the suggested amendments.
3. If the other house rejects the bill again, or includes amendments that the originating house does not agree with, the Governor-General may submit the bill passed in the originating house, with or without amendments, to electors for a referendum to occur.
4. The Governor-General will typically be acting on the advice of ministers when doing so.

LESSON LINKS

You learnt about the Houses of Parliament in **7A The Commonwealth Parliament and the Crown in law-making**.

You learnt about the acquisition of property on 'just terms' in **7K The Constitution as a check on parliament – express protection of rights**.

REAL WORLD EXAMPLE**Kattastrophe! Property protection reform fails in parliament**

On June 21 2010, Bob Katter introduced the Constitution Alteration (Just Terms) Bill 2010 (Cth) to the House of Representatives. The bill aimed to reform s 51(xxxi) of the Australian Constitution which currently states that parliament has the power 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'.

The Constitution Alteration (Just Terms) Bill proposed that the Constitution should be extended to enforce the Commonwealth paying 'just terms' not just for the acquisition of property but also when laws are enforced, placing restrictions on the exercise of 'property rights'. The bill also proposed amendments to s 115A of the Constitution in order to prohibit state laws from acquiring property or restricting the exercise of property rights of any person, except on 'just terms'. This was suggested as state constitutions currently do not guarantee 'just terms' compensation.

On 19 July 2010, the bill was 'lapsed at dissolution'. This means that the House of Representatives was dissolved, so all proceedings came to an end and all bills on the Notice Paper lapsed. After the dissolution, the bill was not re-introduced into parliament and thus, never achieved the approval of parliament, preventing the constitutional change from occurring.

Adapted from "Property and acquisition of just terms" (Parliament of Australia, 2010)



Image: 89stroker/Shutterstock.com

Figure 1 A proposed amendment to the Constitution related to the protection of property rights failed after not receiving approval from the Commonwealth Houses of Parliament

CONSTITUTION

Section 51(xxxi)

Section 115A

Double majority in a referendum 4.2.8.2

Once the constitution alteration bill has been passed, the question on whether the Constitution should be amended is posed to the Australian people. For a referendum to be successful, the proposal must achieve a **double majority**, which means there is a national majority 'yes' vote in conjunction with the majority of voters in four or more states approving the proposed constitutional reform.

STEP 1	STEP 2	STEP 3	STEP 4	STEP 5
Legislation called the 'constitution alteration bill' outlining the proposed change to the wording of the Constitution passes through both Houses of the Commonwealth Parliament.	The proposed change is put to voters in a compulsory yes/no vote. This must take place within two to six months of the bill passing through parliament.	The majority of the Australian population, more than 50%, vote 'yes' to the proposed change.	The majority of the population in a majority of states (four or more states) vote 'yes'.	The legislation receives royal assent from the Governor-General and the Constitution is amended.

Figure 2 The steps for a successful referendum

KEY TERM

Double majority a voting system that requires a majority of voters Australia-wide to vote 'yes', and a majority of voters in the majority of states to vote 'yes'.

LESSON LINK

You learnt about constitutional reform in **10A Reasons for constitutional reform**.

REAL WORLD EXAMPLE



Image: New Africa/Shutterstock.com

Figure 3 The 1977 Simultaneous elections referendum was unsuccessful as the double majority requirement failed

State scheming! States undermine referendum's success

The Constitution Alteration (Simultaneous Elections) Bill 1977 proposed to introduce simultaneous elections for both Houses of Parliament so that Senate elections were held at the same time as elections for the House of Representatives. There was bipartisan support for the 'yes' vote in this proposed referendum.

The referendum received a 'yes' vote from 62.22% of the Australian population, passing the requirement of a national majority. However, New South Wales, Victoria, and South Australia were the only states where a majority of the state's population voted in favour. Hence, the requirement for a double majority was not achieved as only 3/6 states held a majority 'yes' vote.

The Prime Minister at the time, Malcolm Fraser, condemned the 'misleading campaign [that] was mounted against the simultaneous elections proposal' (1977). In the lead-up to the 1977 Simultaneous elections referendum, leaders of smaller Australian states, such as Queensland, spent 'huge amounts of taxpayers' funds to mount an advertising campaign which 'grossly distort[ed] the facts' according to Fraser. The Queensland state government believed simultaneous elections would reduce the power of the Senate, known as the state's house, subsequently limiting the protection of less populous states.

The 'no' vote campaigns pursued by state governments ultimately caused the 1977 Simultaneous elections referendum to be unsuccessful as the double majority requirement was not met.

Adapted from 'Prime Minister's Speech to Victorian Referendum Campaign Meeting' (Department of the Prime Minister and Cabinet, 1977)

LESSON LINK

You will learn more about bipartisan support in **10C Factors that affect the success of referendums**.

USEFUL TIP

When mentioning the requirement for a double majority, use the statistics to highlight your understanding of constitutional change. When talking about the requirement for a national majority 'yes' vote, use the statistic of more than 50% of the Australian population. When talking about the requirement for a majority of people in a majority of states to approve the change, use the statistic of 4/6 or more states.

DEEP DIVE

Lowering the hurdle for referendum success

In 1958, the Joint Committee on Constitutional Review made the recommendation that section 128 of the Australian Constitution should be amended so that referendums would be more likely to be successful. The proposal was that a constitutional change could occur so long as a bill achieved the approval of the Houses of Parliament, the majority of all electors voted 'yes' to the change, and a majority of the electors in at least one-half of the states, 3/6, voted 'yes'. This suggestion would remove the hurdle of the requirement for 4/6 states to have a majority of 'yes' votes, decreasing the requirement to just 3/6 states maintaining a majority.

In 1959, the 'Report from the Joint Committee on Constitutional Review' revisited this proposal. Reviewing the lack of success of past referendums, the Committee determined that 'the Constitution [was] exceedingly difficult to amend'.

Adopting the recommendation of the Constitutional Review Committee, in 1974, Gough Whitlam announced a referendum. The question asked to Australians at this referendum was whether the Constitution should be allowed to be altered if a majority of all the electors in Australia approved the reform and also a majority of the electors in 3/6 of the states. This referendum proposal in 1974 received neither a national majority nor a majority of states with a 'yes' vote, therefore the constitutional reform did not occur.

Many scholars have continued to argue that the current requirements for a successful referendum should be reformed to increase the likelihood of a successful referendum.



Figure 4 Prime Minister of Australia in 1974, Gough Whitlam, proposed amending the Constitution to increase the likelihood of successful referendums

Adapted from 'The Australian experience with constitutional review' (Saunders, 1994)

DEEP DIVE

Was the same-sex marriage vote in 2017 a referendum?

It is important to note that plebiscites, postal surveys, and referendums are all different examples of situations whereby the Federal Parliament consults Australians before legislating on matters.

In 2017, the Australian Marriage Law Postal survey was conducted, which put the question to Australians as to whether they approve that same-sex couples should be legally allowed to get married. It was voluntary and not binding, meaning that regardless of the outcome, parliament could still make their own decision as to whether approve of same-sex marriage or not.

A plebiscite, on the other hand, is compulsory for citizens to vote in. Once again, these have no legal force as parliament can still make its own decisions regardless of the outcome. Plebiscites have no relevance to the Australian Constitution.

Unlike both of these, a referendum is binding. Therefore, if the requirement of a double majority is made out, the proposed constitutional change must be put to royal assent. Referendums, like plebiscites, are compulsory for all members on the electoral roll to vote in. Contrary to postal votes and plebiscites which concern legislation, referendums solely pose questions to the Australian public related to altering the Constitution.



Image: lazyllama/Shutterstock.com

Figure 5 The vote conducted in 2017 asking Australians whether they approved of same-sex marriage was a postal survey, not a referendum

Adapted from 'Fact check: Is the same sex marriage survey a completely novel idea that is not actually a plebiscite?' (Das, 2018)

USEFUL TIP

You can remember the process of the Constitution being amended by breaking the steps up into the following categories:

- **Parliament:** Typically, an absolute majority in both Houses of Parliament must occur for a constitution alteration bill to be passed, allowing for a referendum to take place.
- **People:** Australian electors get to vote on whether they approve the proposed change to the Constitution. The double majority requirement must be met.
- **Governor-General:** The Governor-General provides royal assent to the constitutional change and the amendment is made.

Lesson summary

The process for successful constitutional reform in Australia is as follows:

1. A bill proposing constitutional reform must first be passed through both Houses of Parliament with an absolute majority.
2. The proposed alteration to the Constitution must gain a national majority 'yes' vote.
3. 4/6 or more of the states must have a majority 'yes' vote.
4. If this double majority requirement is fulfilled, the bill can be transferred to the Governor-General to gain royal assent.
5. The Constitution is altered.

Although this process can be rigid and has faced criticisms, it ensures the foundational document of Australia cannot be arbitrarily changed.

Table 1 The strengths and limitations of the process of referendums

Strengths	Limitations
• The voters are directly involved in Australia’s process of constitutional amendment. This democratic involvement of the people in changing the system of government makes Australia different to many other nations around the world. For example, in the USA and Canada, the Constitution is changed by elected law-makers, not by the voters. • Section 128 of the Constitution gives voters in Australia the power to reject changes to the Constitution after such changes have been approved by the Commonwealth Parliament. This empowers voters to approve or reject changes to the Constitution that politicians proposed. • The ‘yes ‘ and ‘no’ format of the referendum is very clear and simple to answer, reducing voter confusion. Therefore, votes are more likely to accurately reflect the views of Australians. • The requirement of a double majority for a referendum to be passed ensures the equal protection of states. For example, Tasmania has a smaller population than other states, but the opinion of its population is still considered as equally important as the consensus of a more populated state, like New South Wales.	• Referendums can be extremely expensive. For example, the 1999 Referendum cost \$66,820,894 according to the Australian Electoral Commission. This discourages prime ministers from wanting to hold a referendum and change the Constitution due to its expense. • Due to the double majority requirement, it can be difficult for referendums to be successful. Only 8 of the 45 referendums that have been proposed in Australia’s history have been successful. Five of the unsuccessful referendums achieved the national majority requirement, yet did not receive a ‘yes’ vote from the majority of the states. • Due to compulsory voting in Australia, people may vote not by choice, but because they have to, causing them to cast a vote at random. Therefore the result of a referendum may not necessarily reflect the views of all Australians. • Referendums can be a time-consuming process as a bill must be passed through both Houses of Parliament and a referendum must be held to receive a ‘yes’ vote from the majority of voters and the majority of electors in the majority of states. This may discourage a prime minister from initiating a referendum due to the time taken and the likelihood of the vote being unsuccessful due to the historical failures of Australian referendums.

10B Questions

Check your understanding

Question 1

This referendum would be successful: 61% of the Australian population voted ‘yes’ and 3/6 of the states had a majority of their population vote ‘yes’.

- A. True
- B. False

Question 2

Which of the following are requirements for the Australian Constitution to be altered? (Select all that apply)

- A. The constitution alteration bill typically must be passed through both Houses of Parliament with an absolute majority.
- B. The bill must receive royal assent from the Governor-General.
- C. The referendum proposal must achieve a national majority of electors voting ‘yes’ to the proposed change.
- D. The King must personally provide royal assent to constitutional changes.
- E. The referendum proposal must achieve a majority of electors in a majority of the states, so four or more states, voting ‘yes’ to the proposed change.

Question 3

The section of the Australian Constitution which prevents the wording of the Constitution from being arbitrarily changed is:

- A. section 128.
- B. section 1.
- C. section 54.

Question 4

Which of the following are correct about the strengths of the process of changing the Constitution in Australia?

(Select all that apply)

- A. Voters can reject changes to the Constitution that have been approved by the Commonwealth Parliament.
- B. There is only compulsory voting in Australia for federal and state elections, but not for referendums, so those who do not have an interest in changes made to the Constitution do not have to vote. This reduces the possibility of random votes being cast.
- C. The stance of smaller states is equally considered to that of larger states due to the double majority requirement.
- D. Referendums are conducted at the same time as federal and state elections so they are inexpensive as voting booths are already set up.

Question 5

One limitation of the constitutional alteration process in Australia is that:

- A. referendums are extremely costly for politicians to conduct which can discourage a prime minister from holding one.
- B. electors have to cast their vote by ranking the proposed constitutional amendments from the change they favour the most to the change they favour the least. This can cause confusion among electors and may result in the vote not accurately reflecting the views of Australians.

Question 6

All pieces of legislation in Australia, including the Constitution, are altered in the same way when modifications need to occur or sections need to be added or removed.

- A. True
- B. False

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

(2 MARKS)

Outline the role of the Houses of Parliament in constitutional reform.

Adapted from VCAA 2022 exam Section A Q1

Question 8

(3 MARKS)

'A majority of voters in Tasmania, Queensland, and South Australia as well as a majority of all voters in Australia have voted in favour of the proposed law to alter the Commonwealth Constitution.'

Explain why the proposed law would be unsuccessful.

Adapted from VCAA 2014 exam Q6b

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.

In 1977, a referendum was held to determine whether the Australian Constitution should be changed to introduce simultaneous elections, meaning elections for both the Senate and the House of Representatives would always be held at the same time. Despite the proposal receiving bipartisan support and 62.2% of Australian electors voting 'yes', the proposal still was unsuccessful as only three states, Victoria, New South Wales, and South Australia, had a majority of their population approve the proposed changes.

Question 9

Which of the following statements are correct about the double majority requirement in the Simultaneous Elections referendum 1977? **(Select all that apply)**

- A. The referendum received a 'yes' vote from 62.22% of the Australian population.
- B. Tasmania, Queensland, and Western Australia all had a majority of their population vote 'yes' to the proposed constitutional reform.
- C. The referendum was not successful, as only 3/6 of the states contained a majority of electors who voted in favour of the proposed change.
- D. The referendum was successful as a national vote was achieved and more than 3/6 of the states had a majority 'yes' vote, which is the new rule for the state majority following the Joint Committee on Constitutional Review 1958 findings.

Question 10

(5 MARKS)

Referring to **one** referendum, analyse the impact of the double majority requirement on the Commonwealth Constitution.

Adapted from VCAA 2013 exam Q12

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

Use the following information to answer questions 11 and 12.

In 1999, the question of whether the Constitution should be altered to establish the Commonwealth of Australia as a republic was put to voters. The question received 45.13% of 'yes' votes nationally and was carried by none of the states. The referendum cost the government \$66,820,894.

Question 11

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the process of altering the Constitution in reference to the 1999 Republic referendum.

Statement	Strengths	Limitations
I. The double majority requirement ensures that voters in Australia have the power to reject changes to the Constitution, even if these changes have been approved in both Houses of Parliament.	☐	☐
II. There is compulsory voting in Australia, so certain voters may have only voted because they were forced to, therefore casting a vote at random. This may have led to the 1999 Republic referendum not accurately reflecting the views of Australians.	☐	☐
III. In the 1999 republic referendum, only 45.13% of voters nationally voted 'yes', indicating a lack of public support for the change and showing the importance of the power to reject changes that the process of referendums provides to the Australian public.	☐	☐
IV. The 'yes' and 'no' format of all referendums make the voting process clear so that a majority of Australians vote in a way that accurately reflects their views, making the 1999 republic referendum a relatively true representation of the Australian public's values.	☐	☐
V. The referendum would have likely been time-consuming as time would have been spent advertising the referendum, preparing voting pamphlets, and sending out the question to different voting booths to conduct the referendum.	☐	☐

Question 12

(6 MARKS)

Referring to the 1999 Republic referendum, explain **one** strength and **one** weakness of the process of altering the Commonwealth Constitution.

Adapted from VCAA 2020 exam Section A Q7

Linking to previous learning**Question 13**

(6 MARKS)

Prime Minister Turnbull proposed the Constitution Alteration (Legal Studies) Bill 2016 to the electors of Australia to add a clause into s 51 of the Constitution which makes Legal Studies education a matter dealt with by the Commonwealth Parliament.

Fifty-nine per cent of all electors in Australia voted in favour of the change. A majority of voters in Victoria, New South Wales, and Western Australia also voted in favour of the proposal.

- a. Was the referendum successful? Justify your answer.

3 MARKS

Adapted from VCAA 2016 exam Q3

- b. Referring to the Constitution Alteration (Legal studies) Bill 2016, explain the division of powers.

3 MARKS

10C Factors that affect the success of referendums

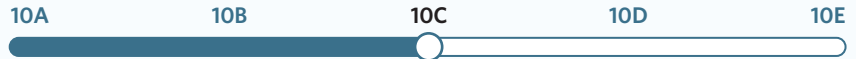


Image: Tolikoff Photography/Shutterstock.com

With just 30.79% of Australian citizens approving the proposed constitutional reform, the 1988 referendum proposal on rights and freedoms was the most unsuccessful referendum in Australian history (Australian Parliament House, n.d.). The proposal faced fierce backlash from the opposition party at the time, spearheaded by John Howard. So why did the proposal fail so significantly? Are there lessons to be learnt from this referendum to ensure future questions do not face such harsh rejection?

STUDY DESIGN DOT POINT

- factors affecting the success of a referendum



4.2.9.1

Factors that affect the success of referendums

4.2.9.1.1 Bipartisan support	4.2.9.1.4 Conservatism
4.2.9.1.2 Support from state governments	4.2.9.1.5 Views towards the politician/ party proposing the referendum
4.2.9.1.3 Complexity of the proposed amendment	4.2.9.1.6 Strength of the 'yes' and 'no' campaigns

Lesson introduction

Australia has a limited success rate when it comes to referendums, as only eight out of 45 referendum proposals that have been put to Australian electors since the establishment of the Constitution have been successful. It has now been more than 40 years since the Australian public approved amending the Constitution. Considering the high proportion of failed referendums, constitutional scholars have proposed there are a number of factors that a government should ensure are present if they want a referendum proposal to succeed.

Factors that affect the success of referendums 4.2.9.1

There are a number of factors that may impact the success of a referendum, either increasing or decreasing the likelihood of the double majority requirement being obtained. Such factors include:

- bipartisan support
- support from state governments
- the complexity of the proposed amendment
- conservatism
- views towards the politician/ party proposing the referendum
- strength of the 'yes' and 'no' campaigns.

Bipartisan support 4.2.9.1.1

Bipartisan support refers to endorsements for a proposed law or policy by both the government of the day and the opposition, as opposed to the parties having an adversarial view on a particular matter. An example of a matter that has garnered bipartisan support in recent years is both the Labor Party and the coalition's commitment, at the state level in New South Wales, to ban gay conversion practices.

LESSON LINK

You learnt about the double majority requirement in **10B Referendums**.

KEY TERM

Bipartisan support the agreement of the government of the day and opposition party on a particular issue.

In relation to a referendum, bipartisan support demonstrates a broad political consensus that what is being proposed will have positive impacts on people of all demographics in the Australian population. Vocal support from both the government of the day and the major opposition party also removes the threat of an opposition-led 'no' campaign. In the absence of bipartisan support, political disunity promotes a lower likelihood of a successful referendum because voters are likely to comply with the advice given by the political party they support as to whether they should vote 'yes' or 'no'.

In 1977, a referendum proposal was initiated asking Australians whether a retirement age should be introduced in the Constitution for judges of the Federal courts. According to Williams and Hume (2010), a constitutional lawyer and solicitor who reflected on the 1977 referendum's success, the proposal 'developed a spirit of agreement, had bipartisan support and [was] modest in import'. There was not a 'no' case published due to the broad support for the proposal by both major parties. The referendum passed with a large majority of Australians, 80.10%, voting 'yes' to the proposal, indicative of the influence that bipartisan support has on a referendum's success.

LESSON LINKS

You learnt about referendums in **10A Reasons for constitutional reform** and **10B Referendums**.

REAL WORLD EXAMPLE

Premature preamble! Labor slams Howard for his rushed referendum

In the 1999 Preamble referendum, it can be strongly argued that the lack of bipartisan support the proposal had was a core reason as to why the public rejected the proposal to edit the Constitution's preamble. The preamble proposal only achieved 39.34% of a national 'yes' vote and no states achieved a majority. The Howard government advocated for the preamble to be enshrined in the Constitution. The preamble that was proposed to be inserted into the Constitution if the referendum was successful read:

'With hope in God, the Commonwealth of Australia is constituted as a democracy ... We the Australian people ... [are] proud that a unity has been forged by Australians ... never forgetting the sacrifices of all who defended our country ... upholding freedom, tolerance, individual dignity and the rule of law; honouring Aborigines and Torres Strait Islanders, the nation's first people, for their deep kinship with their lands... recognising the nation-building contribution of generations of immigrants; mindful of our responsibility to protect our unique natural environment; supportive of achievement as well as equality of opportunity for all; and valuing... the national spirit which binds us together...'

The Australian Labor Party at the time opposed the preamble, believing it was a premature, rushed job and that it was part of Howard's political game. The lack of unity surrounding the major parties contributed to the proposed change being unsuccessful. The Labor Party's criticisms of the proposed constitutional alteration made many members of the Australian public sceptical of the true intent behind the referendum.

Adapted from 'Your official Referendum pamphlet' (Australian Electoral Commission, 1999)



Figure 1 The lack of bipartisan support for the 1999 Preamble referendum proposed by John Howard was a factor that contributed to its failure

REAL WORLD EXAMPLE

State uproar! When bipartisan support is not enough

In 1967, a referendum was held proposing two questions to the Australian public. The first question was known as the 'nexus' referendum, asking the Australian population whether they approved altering 'the Constitution so that the Number of Members of the House of Representatives may be increased without necessarily increasing the Number of Senators'.

The prime minister at the time, Harold Holt, advocated strongly for a 'yes' vote. He argued the range of matters being dealt with by members of the House of Representatives had increased, consequently increasing the burden on its members. Therefore, he asserted it was necessary to increase the number of members. Gough Whitlam, leader of the opposition party during the 1967 referendum, also supported the 'yes' vote, assuring Australians that '[his] party, in the parliament and outside the parliament, [would] support this bill and the referendum without reservation, equivocation, or qualification'.



Image: TonyNg/Shutterstock.com

Figure 2 The 1967 referendum proposing an increase in the number of members in the House of Representatives failed despite receiving bipartisan support

Continues →

REAL WORLD EXAMPLE**State uproar! When bipartisan support is not enough – Continued**

Scepticism about the proposal arose among the Australian public when several senators publicly advocated against the change, arguing increasing the number of members of the House of Representatives would decrease the influence of the Senate.

Following the failure of the nexus referendum proposal, Harold Holt asserted that 'the majority of electors chose to ignore the advice of those to whom they normally look to for guidance on political issues'.

Despite both leaders of the major parties urging voters to support the constitutional reform, this bipartisan support was insufficient to encourage the majority of Australians to vote 'yes'.

Adapted from 'The nexus clause: A peculiarly Australian obstacle' (Gorman & Melleuish, 2018)

LESSON LINK

You will learn more about the 1967 Aboriginal referendum in **10D The 1967 referendum**.

Table 1 Degree of influence of bipartisan support

How influential is bipartisan support?

Several referendums, such as the 1967 Nexus referendum about increasing the number of members of the House of Representatives, garnered bipartisan support and still failed, indicating that gaining bipartisan support does not definitively mean that a referendum will succeed.

Broadly, there is less trust in the two, primary political parties now, indicated by the increase in independent members of parliament (MPs) in the House of Representatives and the Senate following the 2022 federal election. Therefore, even if politicians tell the public to vote 'yes', the public may not listen to this advice.

The most successful referendums, such as the 1967 Aboriginal referendum and the 1977 Judges referendum, garnered bipartisan support, suggesting this may be a requirement for referendums to experience broad success. Furthermore, none of the eight successful referendum proposals did not have bipartisan support.

Support from state governments 4.2.9.1.2

Similarly to bipartisan support, the endorsement of proposed constitutional reform from state leaders, such as premiers, is crucial to the success of a referendum. The failure of the 1977 Simultaneous elections referendum proves that a lack of support from states can tarnish a referendum's success.

REAL WORLD EXAMPLE

Image: EQRoy/Shutterstock.com

Figure 3 State leaders fought against the constitutional reform to hold elections for the Senate, also known as the 'State's House', simultaneously with elections for the House of Representatives

State leaders fight to protect the Senate

In 1977, a referendum was held to change the Constitution to ensure that Senate elections were held at the same time as elections for the House of Representatives. Despite meeting the first requirement for a national majority, with 62.22% of the Australian population voting 'yes' to the proposal, the double majority requirement was not met as only 3/6 states had a state majority. This was a result of the strong opposition to the proposal which was maintained in less populated states, notably Queensland, Tasmania, and Western Australia. The premiers of Queensland and Western Australia at the time, Joh Bjulke-Petersen and Charles Court respectively, campaigned against their federal colleagues, suggesting the proposal was 'an attack on the states or the Senate'. Malcolm Fraser, the prime minister who initiated the 1977 referendums, condemned the state's opposition to the reform, suggesting it was 'completely unjustified' and that their arguments 'could not be further from the truth'.

Adapted from 'The 1977 'Simultaneous elections' referendum in Tasmania' (Roberts Thomson, 1977)

Table 2 Degree of influence of support from state governments

How influential is support from state governments?
People may turn to their state leaders for advice on referendum questions, rather than the government of the day. Therefore, if the advice of state leaders is incongruent with the advice of the current Commonwealth government, this may lead to mixed outcomes for the referendum.
There is usually a general consensus that states' legislative powers deserve to be protected, therefore, if a particular state or group of states feel as if they would not benefit from the proposal as it would deprive them of influence in the Commonwealth Parliament or reduce the subject matter which they have the sole power to legislate over, leaders may be quick to campaign 'no'.
When the prime minister advocating for a referendum belongs to the same political party as state leaders, there is a tendency for alignment between their values. As a result, disagreements between state and federal leaders of the same party concerning constitutional reform rarely occur.

Complexity of the proposed amendment 4.2.9.1.3

In referendums where the wording of the question being asked to the Australian public has been overly complex, the referendum has been subject to decreased success. Complexity often arises when a proposal's question contains legal jargon that is too difficult for Australians without political or legal knowledge to understand. Furthermore, if a layered question is asked that incorporates multiple elements of change all into the one question, the likelihood of a majority 'yes' vote can be hindered.

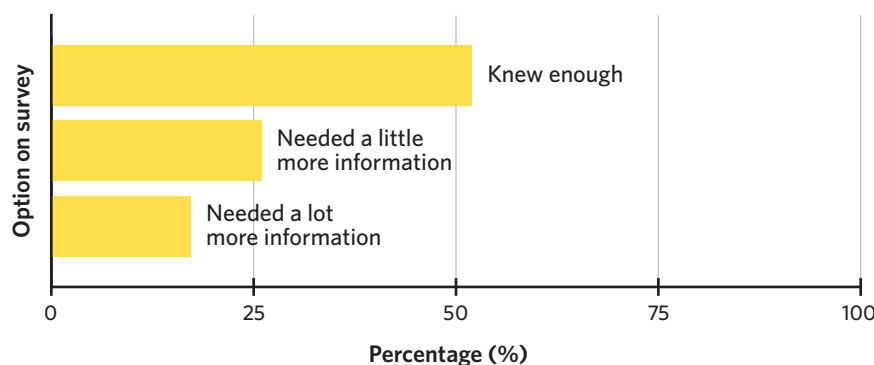
The understanding that the general public has about reforming the Australian Constitution or about the specific referendum proposal being asked has a large impact on the proportion of people who will vote 'yes'.

According to respondents from the 1999 Australian Constitutional Referendum Survey, 47.7% of respondents believed they needed more information about the issues of the 1999 referendum, whether that be a little or a lot more information. When asked about the role of the Governor-General in relation to the prime minister in Australia's current system, only 49.4% of respondents were able to correctly identify the Governor-General's role, meaning a majority of respondents were unaware of the function of the Governor-General in Australia's legal system. This highlights the confusion voters may experience when a referendum proposal asks about changing matters of the Constitution that are not well understood by the general population. As a result of this confusion, complex proposals are more likely to fail as people generally do not want to vote to approve a change that they do not fully comprehend.

LESSON LINK

You learnt about the role of the Governor-General in **7A The Commonwealth Parliament and the Crown in law-making**.

When you voted in the referendum, would you say that you knew enough about the issues, or would you have liked to have more information about them?



Adapted from '1999 Australian Constitutional Referendum Survey' (Australian Election Study, 1999)

Figure 4 The degree of knowledge of voters prior to the 1999 Referendum

REAL WORLD EXAMPLE



Image: Alessia Pierdomenico/Shutterstock.com

Figure 5 In 1999, Australia voted to remain as a monarchy instead of becoming a republic

Royals retain rule over Australia

In 1999, a referendum question was proposed to Australian electors asking whether Australia should become a republic. The exact wording of the question asked Australians whether they approved of:

'A proposed law: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.'

The referendum resulted in only 45.13% of electors voting 'yes' to Australia becoming a republic, whilst no state had a majority 'yes' vote to the change. Therefore, constitutional reform to become a republic was not enacted despite polling in prior years indicating the majority of Australians wanted Australia to become a republic.

Scholars have argued that the wording of this question led to its failure as it made voters believe that voting 'yes' would be approving an American-style republic in which the president would be appointed by politicians instead of the public. The idea that a president would be appointed by 'the Members of the Commonwealth Parliament' led Australians to believe they would no longer have a say in who the leader of the nation was.

The question lacked clarity as it effectively raised two questions within one question; the removal of the monarchy in Australia and the method of election of the president. The Australian Constitutional Referendum Survey, conducted by the Australian Election Study, found 53.9% of respondents would want a president to be directly elected by the people, whilst just 20% would want a president appointed by parliament. Therefore, the main flaw of this referendum question was that it combined multiple questions into the one proposal. The public was hesitant to support the second part of the question relating to the way the president would be chosen, causing the referendum to fail.

Adapted from '1999 Australian Constitutional Referendum Study' (Australian Election Study, 1999)

LESSON LINK

You will learn more about the 2023 Voice to Parliament referendum in **10E Possible future constitutional reform.**

LEGISLATION

Referendum (Machinery Provisions) Act 1984 (Cth)

Table 3 Degree of influence of the complexity of the proposed arrangement

How influential is the complexity of the proposed arrangement?

Most referendums deal with complex issues regarding the structure of parliament which several Australians have a 'disturbing lack of knowledge about' according to George Williams, a constitutional lawyer, yet these proposed reforms have still been successful at times in the past, such as in the 1906 Senate elections referendum.

In both the 2023 Voice to Parliament referendum and the 1999 Republic referendum, the 'no' campaign argued 'if you don't know, vote no', persuading Australian voters to decline the proposed constitutional reform if they were confused by the proposal or found it to be ambiguous. Considering both of these referendum proposals failed, it is likely many Australians follow this idea and decline proposals that they do not understand, demonstrating how important it is that proposals are clear, written in plain English, and thoroughly explained by the politician proposing the change or the 'yes' campaign supporting the change.

Section 11(1) of the *Referendum (Machinery Provisions) Act 1984 (Cth)* requires the electoral commissioner to send out an official pamphlet to each household within 14 days of polling day for each referendum. This can help educate all voters about the issues and make the proposal more clear for electors, reducing the number of people who struggle to understand a complex proposal.

However, these pamphlets can be flawed as they often aim to push a political agenda and contain information that is not based on fact but rather opinion.

WANT TO KNOW MORE?

The House of Representatives Standing Committee on Social Policy and Legal Affairs released its 'Report of its Inquiry into Constitutional Reform and Referendums' in December 2021. The report contains many recommendations including those relating to improving public awareness, engagement, and education in relation to constitutional reform. You can find out more about this inquiry and its recommendations by searching 'Inquiry into constitutional reform and referendums' and clicking the 'Parliament of Australia' (2021) webpage.

Conservatism 4.2.9.1.4

Conservatism is a school of thought demonstrating an opposition to societal change or progressive ideas. Traditionally, a desire to reject change and maintain the status quo in Australia has inspired a ‘no’ vote to constitutional reform, which is why most referendums have failed. Generally, Australians fear that certain changes to the Constitution could significantly alter the traditional values of Australia.

During the 1999 Republic referendum, John Howard was a champion for conservatism as he avidly opposed Australia becoming a republic. He asserted himself as being an ‘advocate [for] a no vote because [he] didn’t believe Australia would be better off under the model put forward’. He argued that Australia, under the monarchy, had a ‘very safe, stable, workable system’ which would be ‘worse..., less predictable, and less secure’ if Australia became a republic. His conservative views were shared among many voters and ultimately influenced the republic referendum’s failure.

KEY TERM

Conservatism a political philosophy committed to traditional ideas and values, therefore opposing change and innovation.

REAL WORLD EXAMPLE

Conservative values upheld to reject change

Conservatism was an influential factor that caused the majority ‘no’ vote that was cast in all of the 1988 referendum proposals, particularly on the question regarding parliamentary terms. This question proposed changing the Constitution to change the terms of members of both Houses of Parliament to four-year maximum terms. This would have been a shift from the current, three-year maximum terms for House of Representatives members and six-year terms for Senators.

The Liberal and National parties appealed to conservative values in Australia, launching a ‘no’ campaign against this proposed referendum by suggesting it was promoting centralism and attempting to reduce the rights of states. The right-wing parties of Australia went on to suggest that the proposed amendments would emasculate the Senate in order to increase the power of the central government, which was controlled by the Labor Party at the time. The parliamentary terms referendum ended up receiving a ‘yes’ vote from only 32.92% of Australians, one of the lowest ‘yes’ vote percentages in Australia’s referendum history.

Adapted from ‘The 1988 referendums and Australia’s record on constitutional change’ (Galligan, 1990)



Image: Tom Reeves Photo/Shutterstock.com

Figure 6 The 1988 Parliamentary terms referendum received one of the lowest ‘yes’ votes in history as conservative values encouraged Australians to reject change to the status quo

Table 4 Degree of influence of conservatism

How influential is conservatism?

The 2022 federal election indicates that Australia is becoming more progressive and is moving away from conservative values traditionally upheld by the Liberal-National coalition. This is indicated by the coalition winning significantly fewer seats than the Australian Labor Party in the House of Representatives after the 2022 federal election. Therefore, in future referendums, conservative values are likely to hold a lot less weight than they traditionally have in Australia’s past referendums.

According to a 2019 Australian Election Study (Muller, 2019), 60% of people born before 1945 preferred the coalition first in the 2019 federal election whilst less than 30% of millennials (born 1981 to 1996) voted in favour of the coalition. Rather, the Labor Party received the highest percentage of first-preference votes among millennials. This indicates older generations more predominantly hold conservative views. It is likely that progressive ideas will be more influential in future referendums, making conservatism a less influential factor in modern society.

Views towards the politician/party proposing the referendum 4.2.9.1.5

If the prime minister, or the political party that the prime minister represents, is experiencing low popular support at the time of a referendum, the referendum is less likely to succeed. Furthermore, if during the referendum campaign, the majority of the Australian population perceives the referendum as political power grab as opposed to a genuine attempt by the politician to change Australia for the better, the referendum is also unlikely to achieve success. The Australian population's view of the party proposing the referendum may cloud their judgement when voting on the matter at hand.

REAL WORLD EXAMPLE



Figure 7 The unpopularity of Gough Whitlam's economic policies was one of the causal factors leading to some of the 1973 referendum proposal's failures

Whitlam's woes

In 1973, the Australian public was asked to vote on two referendum proposals, one question concerned giving the Commonwealth the power to control prices, and the other related to giving the Commonwealth the power to legislate on incomes. The referendum was conducted under Gough Whitlam, Australia's prime minister at the time who was a member of the Australian Labor Party (ALP). Whitlam led Australia during the 1973 oil crisis, a time of significant economic strain. Unemployment levels increased from two to five per cent in Australia during 1974 and the post-war economic boom came to an end.

This economic decline led to many Australian citizens perceiving Whitlam poorly, accusing him of financial mismanagement and blaming him for the nation's economic decline. Whitlam himself had a perceived lack of economic sophistication, making Australians believe he was uneducated on how to help the Australian economy.

Both referendums conducted in 1973 ended up failing, with the prices referendum receiving a 'yes' vote from 43.81% of Australians whilst the income referendum received support from only 34.42% of Australians, indicating the lack of popularity of these referendums.

Adapted from 'Platypus and Parliament: The Australian Senate in theory and practice' (Bach, 2003)

USEFUL TIP

You may notice that several of the referendum examples mentioned in this lesson are the same referendums referred to in **10A Reasons for constitutional reform**. Choose two to three factors that affect the success of referendums which you find most interesting, or which cross over with the referendum examples for the reasons for constitutional reform you have chosen to focus on, as this will limit the amount of examples you need to understand and memorise for your end-of-year exam.

Note that you will not be expected to know all of these factors and all of their respective referendum examples, so just focus on understanding a few of the factors.

Strength of the 'yes' and 'no' campaigns 4.2.9.1.6

During most of Australia's past referendums, politicians or interest groups from civil society have launched 'yes' or 'no' campaigns that seek to persuade Australian voters to either vote in favour of, or reject, a proposed constitutional reform. A 'no' campaign may be particularly successful where it:

- creates compelling arguments
- is supported by reputable people who the public believes to be particularly informed on the proposed constitutional reforms, such as former High Court Justices
- plays on the fears of the Australian people for what consequences changing the Constitution may bring.

In referendums where a 'no' campaign has not been published against the proposed constitutional reform, such as in the 1967 referendum about First Nations peoples, constitutional change has occurred as the Australian public is not told reasons against supporting the change.

REAL WORLD EXAMPLE

CONTENT WARNING Aboriginal and Torres Strait Islander readers should be aware that some material in this section may be culturally sensitive.

The 2023 Voice to Parliament referendum: Lessons from its failure

In 2023, the Voice to Parliament referendum asked Australian voters whether they approved of changing the Constitution to introduce an Aboriginal and Torres Strait Islander Voice to Parliament. The Voice was proposed as being an advisory body that would provide the Commonwealth Parliament and the executive government with opinions from First Nations elected members about proposed laws and policies, so that Aboriginal and Torres Strait Islander peoples could help shape these laws to 'close the gap' in Australia. The referendum was unsuccessful, achieving neither a national majority nor a majority from voters in any state.

Scholars have reflected upon the reasons for the referendum's failure, theorising the factors that produced its failure, including:

- a lack of bipartisan support
- misunderstandings of voters about what the proposed change was
- a strong 'no' campaign.

The opposition leader, Peter Dutton, did not support the proposed change, rather campaigning for Australians to reject the change. This lack of bipartisan support immediately concerned those wanting the referendum to succeed, considering all successful referendum proposals in Australian history have received bipartisan support. Therefore, the political divisions caused by the lack of bipartisan support the Voice received likely was a contributing factor to the referendum's failure.

Furthermore, many Australian voters did not understand the concept of the Voice, what powers it would have, and how it would have functioned, or at least felt this was explained ambiguously by the government, creating voter confusion. According to Marcus Stewart, a Victorian 'yes' campaigner, 'the general Australian community couldn't comprehend exactly what [the Voice] was'.

Additionally, the 'no' campaign against the Voice to Parliament has been regarded as particularly strong. According to La Trobe University political communication professor, Andrea Carson, 'the 'no' campaign 'seem[ed] to be much more effective on social media than the 'yes' campaign', proposing more persuasive and clear arguments as to why Australian voters should reject the change than the arguments initiated by the 'yes' campaign.

Adapted from 'Why the Voice failed' (Wellauer et al., 2023) and 'Could the No Voice campaign be winning over Australia's 'most progressive' state?' (Ashton, 2023)



Image: Tom Reeves Photo/Shutterstock.com

Figure 8 Before the 2023 Voice to Parliament referendum, there were a number of factors pointing away from the proposal being successful, such as a convincing 'no' campaign

Lesson summary

There are no two referendums that are the same. There is also no set of prerequisite factors that can be fulfilled to ensure a referendum's success. However, achieving certain factors has the capacity to increase the likelihood of a successful outcome to a referendum proposal.

Table 5 Factors that affect the success of referendums

Factor that affects the success of a referendum	Example of referendum proposals
Bipartisan support	1967 Aboriginal referendum 1977 Retirement of judges referendum
Support from state governments	1977 Senate elections referendum
Complexity of the proposed amendment	1999 Republic referendum 2023 Voice to Parliament referendum
Conservatism	1988 Parliamentary terms referendum 1999 Republic referendum
Views towards the politician/party proposing the referendum	1973 Prices referendum
Strength of the 'yes' and 'no' campaigns	1967 First Nations referendum 2023 Voice to Parliament referendum

10C Questions

Check your understanding

Question 1

More than half of Australian referendum proposals have been successful due to a variety of factors influencing Australians to vote 'yes'.

- A. True B. False

Question 2

If a proposed referendum has the support of both the major parties, the referendum will be successful as Australians who vote in favour of the Liberal Party or the Labor Party will all support the proposed change.

- A. True B. False

Question 3

Bipartisan support refers to:

- A. both the government and the opposition agreeing on a particular issue, as opposed to having an adversarial view on a particular matter.
B. when a referendum receives a majority of national support, as well as more than 4/6 states having the majority of their population vote in favour of a constitutional change.

Question 4

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

complex

simplistic

If the wording of the referendum question is too [], or there are multiple questions within the one question, the referendum is less likely to be successful. This was shown in the 1999 referendum relating to Australia becoming a republic.

Question 5

Conservatism may decrease the likelihood of a referendum's success due to:

- A. people with a more traditional, conservative school of thought opposing any changes to the Australian Constitution as they fear alterations to the status quo.
B. all people with a more traditional school of thought only ever supporting initiatives from the Liberal party, so if the referendum is conducted under a Labor Party government in power, they will automatically vote 'no'.

Question 6

The 1973 Prices and income referendums, conducted by Gough Whitlam indicated:

- A. that the popularity of the prime minister who proposes the referendum can influence the result of the referendum as the Australian public may have preconceived ideas about the constitutional change based on the person proposing it.
B. economic referendums always fail in Australia as Australians prioritise the protection of their money.

Question 7

Which of the following factors may have contributed to the failure of the 2023 Voice to Parliament referendum? **(Select all that apply)**

- A. Lack of bipartisan support.
B. Lack of support from all state premiers to vote 'yes'.
C. Lack of knowledge by Australian voters regarding what the Voice was, how it would function, and what powers it would have.
D. Lack of voter turnout as Australians were not compelled to vote on this matter.

Question 8

Only one factor affecting the success of a referendum will apply to each referendum as the factors do not intersect and cannot apply simultaneously.

- A. True B. False

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

(2 MARKS)

Referring to **one** referendum in Australia, describe **one** factor that may influence the success of a referendum.

Question 10

(3 MARKS)

Referring to **one** successful Australian referendum, explain **one** factor that could have affected the success of this referendum.

Adapted from VCAA 2015 exam Q6

Question 11

(4 MARKS)

Outline **two** factors that may cause a referendum to not succeed.

Question 12

(6 MARKS)

In 1999, a referendum asking Australians to vote 'yes' or 'no' to become a republic was proposed. The referendum question asked whether voters approved of a proposed law:

'To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.'

The referendum was unsuccessful, with 45.13% of the Australian population voting 'yes'.

Explain **two** factors that may have affected the failure of this referendum.

Extended response

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

Question 13

Which of the following statements are correct about the influence of bipartisan support on the success of a referendum? **(Select all that apply)**

- A. In the 1967 Aboriginal referendum, there was broad bipartisan support for the change to occur, leading to over 90% of the Australian population voting 'yes'.
- B. If a constitutional reform proposal has bipartisan support, it will always be successful according to historical data.
- C. In the 1967 nexus referendum, both the leaders of the Labor party and the coalition advocated for the Australian public to vote 'yes' but the referendum still failed.
- D. There has been a broad movement away from supporting the two, major political parties in Australia with more Australians aligning with the values of independents and minor parties.

Question 14

(5 MARKS)

Evaluate the extent of the influence of **one** factor that affects the success of referendums.

Linking to previous learning**Question 15**

(9 MARKS)

In 1967, a referendum was held to change the Constitution in order to allow Aboriginal peoples to be counted in Australia's census and be considered part of the Australian population. In addition, the referendum also sought to reform the Constitution to allow the Commonwealth Parliament to make laws on issues concerning Aboriginal and Torres Strait Islander peoples. The referendum received a 'yes' vote from 90.77% of the Australian population.

- a. Explain **one** factor that influenced the success of the 1967 referendum. 3 MARKS
- b. Analyse **two** reasons behind the 1967 constitutional reform regarding First Nations peoples. 6 MARKS

10D The 1967 referendum



Image: Pic Media Aus/Shutterstock.com

'The one word 'Yes' on May 27 will open the door for real reform. It will tell the world at large that there is only one Australian, and his colour doesn't matter at all.'—Faith Bandler (Civil rights activist and campaigner, 1967)

At the turn of the 20th century, when the Australian Constitution was first written, Caucasian, colonially-influenced Australian views towards Aboriginal and Torres Strait Islander peoples were highly discriminatory. Hence, by the 1960s, constitutional change was required to adequately reflect the general shift in the values of the Australian people.

STUDY DESIGN DOT POINT

- the significance of the 1967 referendum about First Nations people

10A 10B 10C 10D 10E

4.2.10.1

The significance of the 1967 referendum

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, sensitive language, or distressing events.

Lesson introduction

On 27 May 1967, Australia experienced its most successful referendum in history, with 90.77% of Australian voters voting 'yes' to two changes to the Constitution which related to the rights of both Aboriginal people and Torres Strait Islander people (National Archives of Australia, n.d.). As a result, the Commonwealth was granted the power to legislate on matters concerning Australians identifying as either Aboriginal or Torres Strait Islander. In addition, Aboriginal peoples were now counted as part of the Australian population. As a result of the two constitutional changes, several laws were passed that sought to protect First Nations culture and rectify discriminatory practices that states had previously implemented against the First Nations people of this country. Despite this successful referendum, disproportionate incarceration rates of First Nations peoples and the disrespect some corporations demonstrate towards culturally significant sites and landmarks indicate the issues brought about by colonisation have not been resolved.

The significance of the 1967 referendum 4.2.10.1

The 1967 referendum and the laws that have since been introduced were a product of decades of Aboriginal and Torres Strait Islander peoples protesting against their unequal treatment and the injustices faced since colonisation. In the 1950s and 1960s, as the civil rights movement in the United States grew in influence, people increasingly took notice of, and sought to change, the racial discrimination occurring across Australia.

Table 1 Timeline of key events leading up to the 1967 referendum

Date	Event	Significance
1901	Federation	Upon federation of the states, the Constitution of Australia came into force, acting as a guiding, governing document for the newly established country. This document contained two provisions in particular that referred to the First Peoples of Australia: • s 51(xxvi), which gave the Commonwealth Parliament the power to make laws for people of any race, except for Aboriginal peoples. • s 127, which set out that Aboriginal peoples should not be counted in the Census as part of the Australian, or states', population.
1905	The first Act 'protecting' Aboriginal children was passed in Western Australia	• In 1905, the <i>Aborigines Act 1905</i> (WA) was passed, making the state's chief prosecutor the legal guardian of every Aboriginal child under 16 years old. • In the following years, other states and territories created similar Acts in order to assume full custody of any Aboriginal child if the child was found to be neglected. • In 1915, the <i>Aborigines Protection Amending Act 1915</i> (NSW) gave the Aboriginal Protection Board the power to separate Aboriginal children from their families, even if the court had not found the child was being neglected. • These laws remained in force until 1969, when all states repealed the legislation allowing for child removals. However, it was not until a few more years after these legislative changes that the practices in Australia actually reflected these legal changes. First Nations peoples who were victims of these policies are known as the 'Stolen Generations'. • These laws were valid as states had the residual power to legislate on matters concerning First Nations peoples whilst the Commonwealth did not have the power to do so.
1951	Australian Government implements a policy of assimilation	• At the 1951 Native Welfare Conference, it was agreed upon that assimilation was the aim of 'native welfare measures', meaning Aboriginal peoples should 'live like other white Australians do'. • The assimilation policies put in place, as a result, included further child removals and placing Indigenous children in non-Indigenous foster families where they adopted white values and practices.
1957	Petition circulated to change the Australian Constitution	• A petition, led by the Aboriginal-Australian Fellowship (AAF), was circulated, calling for amendments to s 127 and s 51(xxvi) of the Constitution. • The petition received just over 100,000 signatures and resulted in the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) being introduced the following year.

Continues →

LEGAL VOCABULARY

Federation the process of uniting states into a cohesive group under centralised authority.

CONSTITUTION

Section 51 (xxvi)

Section 127

LEGAL VOCABULARY

Assimilation the process of individuals who belong to one ethnic group being acclimatised and made more similar to the dominant culture of the society they are within as aspects of their original ethnic culture decline.

Table 1 Continued

Date	Event	Significance
1957	Petition circulated to change the Australian Constitution	Leslie Haylen, a member of the House of Representatives at the time, presented this petition to the House of Representatives in May 1957.
1958	Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) formed	- The FCAATSI campaigned for changes to the lives of First Nations Australians, and included several influential Aboriginal and Torres Strait Islander activists, such as Faith Bandler and Sir Douglas Nicholls. - Throughout the 1960s, the group campaigned for equal wages and working conditions. - By 1967, the group turned their efforts to the 1967 referendum, campaigning for the 'yes' vote.
1965	Freedom Ride	- In February 1965, a student movement, led by Charles Perkins, undertook a 15-day 'freedom ride' which involved the bus stopping in several New South Wales towns. - They drew attention to the segregation and living conditions of many Aboriginal peoples by surveying Aboriginal peoples in the towns they visited.
1966	Wave Hill walk-off	- In 1965, the North Australian Workers Union sought to obtain employment rates for First Nations labourers employed as wards of the state equal to the rate awarded to all other workers fulfilling the same role. - Limited progress was made to increase First Nation peoples' wages during 1966. - On 23 August 1966, 200 Gurindji employees and their families, led by Vincent Lingiari, went on strike at Wave Hill station in the Northern Territory. Whilst the strike was, in part, about increasing wages, the employees were also campaigning for greater land rights to the land which they had been dispossessed of despite their tens of thousands of years possessing it and their strong cultural connection to the land. - In April 1967, the Gurindji sent a petition to the Governor-General, asking for their tribal land to be returned to them so they could establish their own cattle station. - This action again demonstrated the growing resentment of Aboriginal and Torres Strait Islander peoples towards the discriminatory laws the states were legislating which prevented them from receiving adequate wages and land rights.
1967	Harold Holt, the Prime Minister of the day, announced a referendum on 23 February 1967	After the FCAATSI delegation travelled to Canberra to seek the support of both major political parties in a referendum, the <i>Constitution Alteration (Aboriginals) Act 1967</i> (Cth) was passed in the Federal Parliament. All members of the Commonwealth Parliament voted in favour of it.

USEFUL TIP

The 'key skill' relevant to this lesson is to 'discuss the ability of the Australian people to change the Australian Constitution, including in relation to the 1967 referendum about First Nations people and possible future constitutional reform'. This key skill combines multiple Study Design Dot Points, and may therefore require you to combine information from this lesson with information from other lessons within your answers. You may be required to draw upon some of the means by which individuals and groups influence law reform when discussing the 1967 referendum. These means of influencing law reform could include:

- petitions, for example, the 1957 petition that sought to change the Constitution and received 100,000 signatures.
- demonstrations, such as the 'Freedom Rides' or the 'Wave Hill walk-off'.

DEEP DIVE

Freedom rides

In 1961, a series of political protests occurred across the United States of America as part of the civil rights movement, in which African Americans and Caucasian people rode buses together to fight against the segregated conditions of the US. Inspired by such activism, in 1965, a group of students from the University of Sydney who were in a group called 'Student Action For Aborigines (SAFA)' embarked on a similar journey. They were led by Charles Perkin who was the president of the SAFA and was one of only two Aboriginal students at the university in 1965.

The following are quotes by leaders of the Freedom Rides, reflecting on the information they acquired from surveying Aboriginal peoples within New South Wales towns:

'We noticed a sign above the doorway ... 'Aborigines not allowed in the lounge without the Licensee's permission'—Ann Curthoys

As the group of students stood outside a Returned & Services League (RSL) restaurant that had banned Aboriginal peoples, the people who passed by 'either laughed at [them] or spat at [them] or on the banners'—Charles Perkins

'We learnt there was a partition in the picture theatre separating the aborigines from the whites. The aborigines had to buy their tickets separately and could only enter the theatre after the picture had started.'—Ann Curthoys

The Freedom Rides gained publicity, with the New York Times writing about the racial segregation and discrimination occurring in Australia. It exposed the conditions Aboriginal peoples were experiencing due to discriminatory policies designed by the states. In doing so, the Australian public became more aware of the necessity for change regarding the treatment of Aboriginal and Torres Strait Islander peoples.

Adapted from '1965 Freedom Ride' (Australian Institute of Aboriginal and Torres Strait Islander Studies, 2022)



Figure 1 The 1965 Freedom Rides in Australia exposed the discriminatory treatment of Aboriginal peoples in New South Wales, leading the Australian population to understand the need for legal reforms

The two aspects of the Constitution that the referendum sought to amend were:

- Section 51(xxvi), known as the 'race power' which provided the Commonwealth the right to make laws about any race except for Aboriginal peoples. Therefore, the ability to make laws affecting Aboriginal peoples was solely in the hands of each of the states, making it a residual power. This allowed laws, such as legislation allowing the state to remove Aboriginal children without providing evidence any neglect had occurred, to be passed.
- Section 127, which prevented Aboriginal and Torres Strait Islander peoples from being counted in a national Census. Therefore, trends about their health, incarceration, geographic location, and more, could not be produced and evaluated, as no data to create these trends was available.

WANT TO KNOW MORE?

There is a widespread misconception that the 1967 referendum granted First Nations peoples the right to vote in Australian elections. However, it was in 1962 when the Commonwealth Parliament passed a law granting Aboriginal and Torres Strait Islander peoples the option to vote in federal elections, 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 Aboriginal and Torres Strait Islander peoples, making it mandatory to vote in federal elections.

You can find out more about Aboriginal peoples' right to vote in Australia by searching 'Indigenous Australians' right to vote' and clicking the 'National Museum of Australia' (2023) webpage.

LESSON LINK

You learnt about the 1967 Nexus referendum and bipartisan support in **10C Factors that affect the success of referendums**.

51 (xxvi). The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

Figure 2 Aspects of the Australian Constitution the 1967 referendum sought to amend

If successful, the referendum would change the Constitution by:

- removing the part of s 51(xxvi) that suggested the Commonwealth could make laws with respect to race for people 'other than the aboriginal race in any State'.
- removing the entirety of s 127 so it was completely eliminated from the Constitution.

51 (xxvi). The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws.

~~127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.~~

Figure 3 How the 1967 referendum sought to amend the Constitution

LEGAL VOCABULARY

Bipartisan support the agreement of the government of the day and the opposition party on a particular issue.

In the lead-up to the vote, the FCAATSI led the 'yes' campaign. There was no official 'no' campaign, which is unique for Australian referendums. There was also **bipartisan support** for the proposal, meaning both the Prime Minister, Harold Holt, and the opposition leader, Gough Whitlam, supported a 'yes' vote to the proposal. 10 days prior to the referendum, Prime Minister Harold Holt described s 127 as being 'completely out of harmony with our national attitudes and modern thinking. It has no place in our Constitution in this age' (Department of the Prime Minister and Cabinet, 1967).

On the day of the referendum, Australian electors had to vote on two questions that were entirely separate from each other. Multiple proposals to change the Constitution are often asked on the same day to save the government time and money. The first question, referred to the 1967 Nexus referendum, asked voters whether they agreed to the Constitution being altered to increase the number of members of the House of Representatives without necessarily increasing the number of Senators. This question did not receive a majority 'yes' vote and therefore the change was not introduced. The other question, known as the 1967 Aboriginals referendum, or the 1967 referendum about First Nations peoples, asked whether the Australian electors approved of:

'A proposed law to alter the Constitution so as to omit certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in the reckoning of the Population.'

On 27 May 1967, 90.77% of voters in Australia voted 'yes' to the proposed changes related to the 1967 First Nations referendum, the largest majority in Australian referendum history, which has remained unbeaten by any other referendum that has occurred since. This referendum took place prior to the 1977 referendum where electors in territories were allowed to vote in constitutional referendums. Therefore, the only Australian jurisdictions considered in the results were the six states, but not the two territories.

USEFUL TIP

In 1967, Australian voters were asked to vote on two, separate proposals to change the Constitution. The 1967 Nexus referendum, which you learnt about in Lesson 10C, is not relevant to this Study Design Dot Point; the significance of the 1967 referendum about First Nations people. It is important you do not talk about the 1967 Nexus referendum in questions asking about the 1967 referendum about First Nations peoples in the exam, as these two proposals were entirely separate.

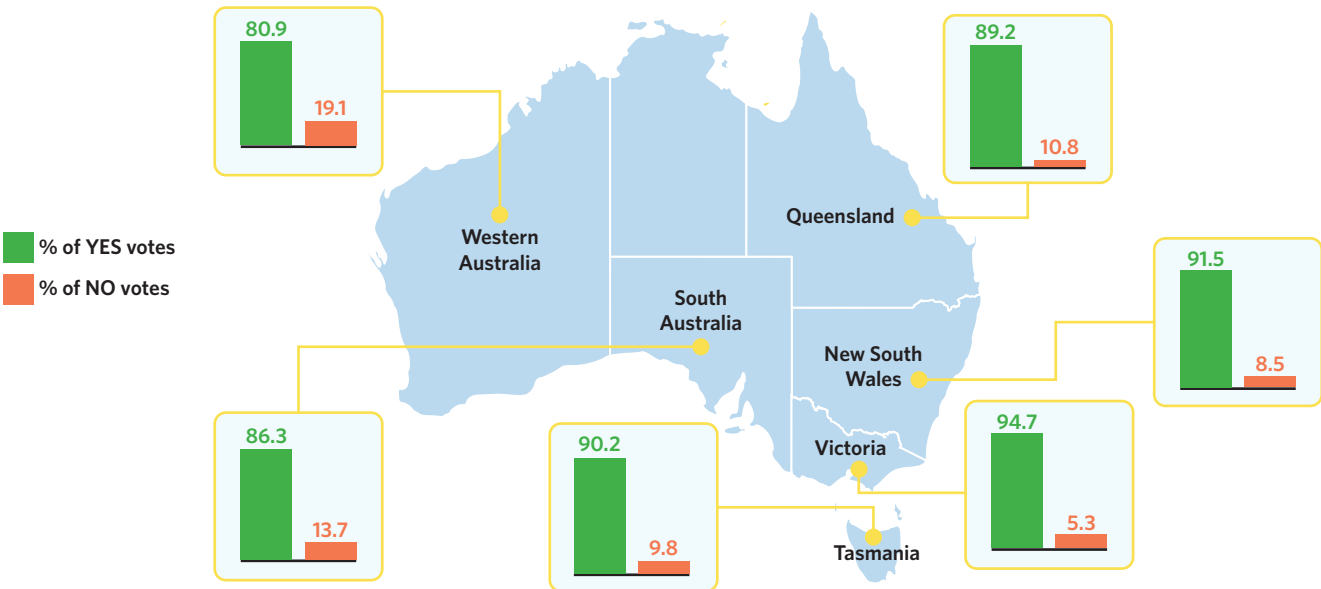


Figure 4 The 1967 First Nations referendum results across Australia (National Archives of Australia, n.d.)

Table 2 Significance of the 1967 referendum

Reason	Explanation
Commonwealth Parliament was able to override discriminatory legislation made by the states	- The ability to legislate in relation to Aboriginal and Torres Strait Islander peoples is a concurrent power, whereas prior to the referendum it was a residual power. This means that now both the state and Commonwealth parliaments can legislate on matters relating to First Nations people. However, under s 109 of the Constitution, the Commonwealth Parliament is able to override state laws where the laws of the Commonwealth conflict with one of the states. - For example, in the High Court case of <i>Mabo v Queensland (No 1)</i> (1988) 166 CLR 186, the High Court held the <i>Queensland Coast Islands Declaratory Act 1985</i> (Qld) was invalid because it was inconsistent with the <i>Racial Discrimination Act 1975</i> (Cth). The Queensland Act sought to abolish any of the rights and interests the Meriam people may have had with the Murray Islands under native title and thus, discriminated against a group on the basis of race.
Commonwealth Parliament was able to legislate Acts that uplifted and protected First Nations rights	- The <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> (Cth) enables the Australian government to protect cultural heritage sites if under threat and if there is failed action by the state or territory governments to protect these sites. - The <i>Racial Discrimination Act 1975</i> (Cth) prohibits actions of discrimination on the basis of ethnicity or race.
Policies were able to be created that more accurately reflected the issues of First Nations peoples	- Five months after the successful referendum, Harold Holt set up an Office for Aboriginal Affairs that intended to receive advice on issues impacting Aboriginal and Torres Strait Islander peoples. However, this office was condemned by Aboriginal and Torres Strait Islander peoples due to its ‘political and bureaucratic apathy and a paucity of empathy, understanding of, and commitment to improving Indigenous lives’ (Taylor, 2017). - The Department of Aboriginal Affairs was established in 1972. It no longer exists, replaced by the National Indigenous Australian Agency, which focuses on Indigenous affairs by working with the Minister for Indigenous Australians.

Continues →

CONSTITUTION

Section 109

LEGISLATION

Racial Discrimination Act 1975 (Cth)
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)

LESSON LINKS

You learnt about concurrent and residual powers in **7C The division of powers**.

You learnt about s 109 of the Constitution in **7D Section 109 of the Australian Constitution**.

LEGAL VOCABULARY

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.

WANT TO KNOW MORE?

‘We took the traditional lands and smashed the traditional way of life. We brought the diseases. The alcohol. We committed the murders. We took the children from their mothers.’

Paul Keating’s 1992 Redfern Speech admitted to the atrocities committed by British settlers during colonisation against Aboriginal and Torres Strait Islander peoples. You can watch the speech in full by searching ‘The Redfern Speech: 30 Years On’ and clicking the ANTAR (2022) webpage.

Table 2 Continued

Reason	Explanation
Policies were able to be created that more accurately reflected the issues of First Nations peoples	• In 2019, Kenneth George Wyatt AM became the first Aboriginal Minister for Indigenous Australians. • Allowing First Nations peoples to be counted in the Census was also critical in enabling more beneficial public policies to be created, as information from the Census could be drawn upon to better understand the key areas where reform was required for Aboriginal and Torres Strait Islander peoples. • For example, Census data has revealed Aboriginal and Torres Strait Islander peoples experience disproportionately high incarceration rates. Therefore, policies aimed at reducing this rate have been introduced, such as the Koori Courts in Victoria.
Symbolic shifts in the values of Australian society	• The unprecedented success of the referendum as well as the fact that a ‘no campaign’ did not exist during the lead-up to the referendum indicated the widespread support among Australians for greater equality in society, especially in relation to First Nations peoples and white Australians. • Russell Taylor (2017) describes the impact as having a ‘tangible, transformative nature, and [being] both symbolic and substantial in its historical influence’. • Taylor reported the referendum provided comfort to a majority of First Nations Australians, giving them confidence in the rest of the Australian population’s morality.
Greater developments in Indigenous affairs	• Since 1967, a number of steps have been taken towards reconciliation which likely would not have happened had the referendum not occurred. • In 1992, the <i>Mabo v Queensland (No 2)</i> (1992) 175 CLR 1 decision resulted in the High Court recognising the fact that Indigenous peoples had lived in Australia for thousands of years, abolishing the idea that Australia was ‘terra nullius’ (land belonging to no one) when colonisers first arrived to Australia. • In 1992, Paul Keating made his ‘Redfern speech’ in which he acknowledged the genocide of Aboriginal and Torres Strait Islander peoples, the Stolen Generations, and the ongoing oppression of Aboriginal and Torres Strait Islander peoples. He reported ‘It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing’ (Keating, 1993). • In 2008, Kevin Rudd, the Prime Minister of Australia at the time, issued a national apology to the Stolen Generations.

Although the referendum was significant, immediate changes were not experienced for a number of Aboriginal and Torres Strait Islander peoples. Russell Taylor, a Kamilaroi man raised in NSW, on the 50th anniversary of the 1967 referendum, reported ‘in the short term, the 1967 referendum had very little impact whatsoever’ (Taylor, 2017). Faith Bandler, a leading campaigner for the referendum, similarly reported that ‘changes following the referendum were disappointingly slow’. However, Russell went on to report the ‘longer-term impact [of the referendum] to be both positive and extremely profound.’

The referendum was also not an absolute fix for the issues facing First Nations peoples in Australia. For example, the reformed Constitution now makes no formal reference to Aboriginal and Torres Strait Islander peoples, which the Voice to Parliament referendum in 2023 called to reform. Russell Taylor (2017), for example, suggested ‘if we concur that the Constitution is truly the foundation document of Australia, that it provides the structural basis for our system of government ... then I believe as Australians we must support the need for amendment’. Furthermore, in 2007, Australia voted against the *United Nations Declaration on the Rights of Indigenous Peoples* alongside four other countries; Canada, New Zealand, and the United States. However, Australia did then formally endorse the Declaration in 2009.

LESSON LINK

You learnt about the *United Nations Declaration on the Rights of Indigenous Peoples* in **7G Parliament's ability to make law - international pressures**.

USEFUL TIP

When discussing the reasons for constitutional reform from Lesson 10A, or the factors that affect the success of referendums from Lesson 10C, you may want to use examples of past referendums to explain your reasons and factors. Since you now understand what the 1967 Aboriginal referendum was about, and the results of the referendum, you may want to consider how some of the reasons for constitutional reform, or factors affecting the success of referendums, are relevant when analysing the 1967 referendum. That way, you do not have to remember the facts of as many referendums before your exam.

Factors that affect the success of referendums relevant to the 1967 referendum about First Nations peoples include:

- bipartisan support, as there was not a ‘no’ campaign by the opposition in this referendum and both the prime minister and the opposition leader at the time of the referendum endorsed voting ‘yes’ to the Aboriginal proposal.
- the knowledge of voters, as the campaigns of the ‘yes’ campaign in 1967 informed voters about the need for constitutional reform.

Reasons for constitutional reform relevant to the 1967 referendum about First Nations peoples include:

- shifting societal attitudes, as Australia's values had broadly moved away from a prejudiced past.
- rights' protection, as by allowing the Commonwealth to legislate on matters concerning Aboriginal peoples, their rights could be better protected by the Commonwealth.
- to remove power from the states, as by allowing the Commonwealth parliament to pass legislation under the ‘race power’ for Aboriginal peoples, Commonwealth legislation could now override laws of states regarding First Nations peoples, therefore limiting states' abilities to pass discriminatory legislation.
- reconciliation with First Nations people, as the referendum sought to eliminate the elements of the Constitution that were most discriminatory against First Nations peoples.

Lesson summary

The 1967 referendum saw an overwhelming majority of Australian citizens demonstrate their support for Aboriginal and Torres Strait Islander peoples. Although inequalities still remain in Australian society and issues regarding First Nations peoples' rights have persisted despite the 1967 referendum, the constitutional reform was still significant for many reasons, such as:

- allowing the Commonwealth Parliament to override discriminatory legislation made by the states.
- allowing the Commonwealth Parliament to legislate Acts that uplifted and protected First Nations rights.
- allowing policies to be created that more accurately reflected the issues of First Nations peoples.
- creating symbolic shifts in the values of Australian society.
- promoting greater developments in Indigenous affairs.

10D Questions

Check your understanding

Question 1

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

On 27 May 1967, [] of Australian voters voted 'yes' to the First Nations referendum proposal.

Question 2

The 1967 First Nations referendum resulted in one change to the Constitution: s 127 was removed so that Aboriginal peoples could now be counted in the national Census.

- A. True
- B. False

Question 3

The 1967 referendum:

(Select all that apply)

- A. gave Aboriginal and Torres Strait Islander peoples the right to vote.
- B. made legislating on issues concerning Aboriginal and Torres Strait Islander peoples an exclusive power of the Commonwealth under s 51(xxvi).
- C. removed s 127 of the Constitution so that Aboriginal peoples were not excluded when the Australian population was counted.
- D. allowed the Commonwealth Parliament to make laws on matters concerning First Nations peoples.

Question 4

Bob Hawke introduced the 1967 referendum after speaking with delegates from the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI), a group that campaigned for reforms surrounding First Nations' rights.

- A. True
- B. False

Question 5

The 'yes' campaign was led by the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) whilst the 'vote no' campaign was led by:

- A. no one, as there was no official 'no' campaign for the 1967 First Nations referendum.
- B. the opposition leader at the time, who believed the change would result in 'radical' changes to Australian society.

Question 6

Which of the following statements are reasons why the 1967 referendum about First Nations people was significant? (Select all that apply)

- A. It allowed the Commonwealth Parliament to override discriminatory legislation made by the states.
- B. It allowed only the Commonwealth Parliament to legislate Acts that uplifted and protected First Nations rights, and state parliaments were barred from passing legislation about such matters.
- C. It created symbolic shifts in the values of Australian society.
- D. It led to greater developments in Indigenous affairs.

Question 7

Fill in the blank with **one** of the following sections of the Constitution:

s 109

s 51(xxvi)

Under [] of the Constitution, the Commonwealth Parliament's legislation overrules state laws where the laws of the Commonwealth conflict with one of the states. Therefore, the 1967 referendum allowed the Commonwealth Parliament to override state legislation which was discriminatory and conflicted with Commonwealth legislation.

Question 8

The 1967 referendum was merely symbolic, and no actual legislative changes occurred after the referendum succeeded.

- A. True
B. False

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

(4 MARKS)

Describe **two** reasons why the 1967 referendum was significant.

Question 10

(3 MARKS)

In the High Court case of *Mabo v Queensland (No 1)* (1988) 166 CLR 186, the High Court held the *Queensland Coast Islands Declaratory Act 1985* (Qld) was invalid because it was inconsistent with the *Racial Discrimination Act 1975* (Cth). The Queensland Act sought to abolish the Meriam people's property rights over the Murray Islands. Therefore, the High Court declared the Act was invalid as it conflicted with the *Racial Discrimination Act 1975* (Cth) by discriminating against the Meriam people on the basis of their race.

Explain the significance of the 1967 referendum in relation to the High Court decision in *Mabo v Queensland (No 1)* (1988).

Extended response

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

Question 11

Tick the box to indicate whether each of the following statements are **positives** or **negatives** of the 1967 referendum's significance.

Statement	Positives	Negatives
I. The referendum allowed the Commonwealth Parliament to legislate Acts that uplifted and protected First Nations rights, such as the <i>Aboriginal and Torres Strait Islander Heritage Protection Act 1984</i> (Cth) which enabled the Australian government to protect cultural heritage sites.	☐	☐
II. Section 127 of the Constitution was removed by the referendum, therefore allowing First Nations peoples to be counted in the Census. This enabled more beneficial public policies to be created, as information from the Census could be drawn upon to better understand the key areas where reform was required for Aboriginal and Torres Strait Islander peoples.	☐	☐
III. The referendum was not an absolute fix to the issues facing First Nations peoples in Australia. For example, the reformed Constitution now makes no formal reference to Aboriginal and Torres Strait Islander peoples which many regard as invalidating the existence of Aboriginal and Torres Strait Islander peoples and a refusal of Australians to recognise Australia's colonialist past.	☐	☐
IV. The unprecedented success of the referendum as well as the fact that a 'no' campaign did not exist during the lead-up to the referendum, indicated the widespread support among Australians for greater equality in society.	☐	☐
V. In the short term, the 1967 referendum had little impact on First Nations peoples according to Russell Taylor in a 2017 report reflecting on the referendum.	☐	☐

Question 12

(5 MARKS)

Analyse the significance of the 1967 referendum.

Linking to previous learning**Question 13**

(4 MARKS)

Describe **two** reasons for the 1967 constitutional reform relating to First Nations peoples.

Question 14

(4 MARKS)

On 27 May 1967, Australia experienced its most successful referendum in history, with 90.77% of Australian voters voting 'yes' to two changes to the Constitution which related to Aboriginal and Torres Strait Islander peoples' rights.

Outline **two** factors that affected the success of the 1967 referendum about First Nations people.

Use your answer to question 15 to support your response to question 16.

Use the following information to answer questions 15 and 16.

In 1957, a petition spearheaded by the Aboriginal-Australian Fellowship (AAF) was circulated, calling for amendments to ss 127 and 51(xxvi) of the Constitution. The petition received just over 100,000 signatures and resulted in the Federal Council for the Advancement of Aborigines being introduced. Leslie Haylen presented this petition to the House of Representatives in May 1957.

In 1965, a student movement, led by Charles Perkins, undertook a 15-day 'freedom ride' through New South Wales towns in which they drew attention to the segregation being experienced by Aboriginal peoples in the towns they visited. The student group attracted international attention for exposing the difficult living conditions of Aboriginal people.

Question 15

Tick the box to indicate whether the following statements are **strengths** or **limitations** of the ability of the Australian people to change the Constitution with reference to the 1967 referendum.

Statement	Strengths	Limitations
I. The Australian people can change the Constitution through petitions. For example, the 1957 petition showed parliamentarians the general public's desire for the Constitution to be changed, influencing discussions in parliament which ultimately led to the referendum.	☐	☐
II. The Australian public can influence constitutional reform through demonstrations, such as the freedom rides in 1965 in the lead-up to the 1967 referendum.	☐	☐
III. The fact the petition was introduced to parliament in 1957, yet the referendum did not take place until 1967, indicates a limit to the public's ability to change the Constitution in that this process is time-consuming.	☐	☐
IV. For a referendum to be successful, a double majority must be achieved whereby a majority of Australian voters approve the constitutional change and 4/6 of the states have a majority of their voters vote 'yes'. Therefore, if minority groups are partaking in demonstrations about an issue that the rest of Australia is not as deeply invested in, demonstrations will be unsuccessful in influencing constitutional reform.	☐	☐

Question 16

(5 MARKS)

Discuss the ability of the Australian people to change the Constitution in reference to the 1967 referendum.

10E Possible future constitutional reform

STUDY DESIGN DOT POINT

- possible future constitutional reform, including reform to establish a First Nations Voice in the Australian Constitution.

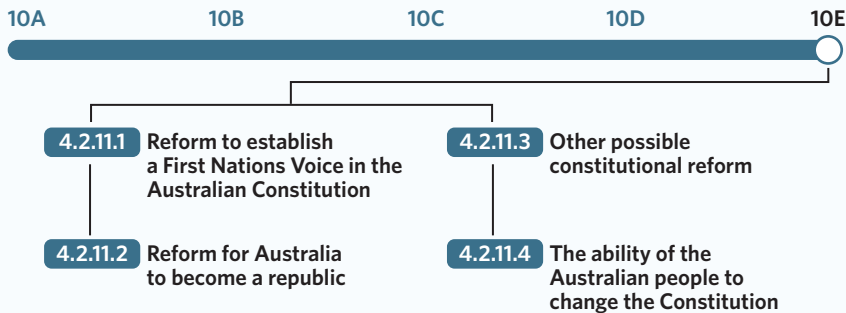


Image: tmp/ Shutterstock.com

'This is an opportunity for Australia to decide what kind of country we are, what our principles and values are.'—Pat Anderson (Co-Chair Uluru Dialogue group, 2022)

On October 14 2023, Australian voters decided whether to establish an Aboriginal and Torres Strait Islander Voice to Parliament. This referendum was unsuccessful. However, future constitutional reform is still possible. There may be future referendums that require Australians to consider other amendments or additions to the Constitution. In order to reflect the Australian people's attitudes and values, constitutional reform may need to occur so the Constitution can embody the diverse, multicultural, and democratic nature of Australian society.

Lesson introduction

Considering only eight referendums have been successful so far in Australia's history, and the last successful referendum occurred in 1977, the Constitution still contains sections that members of the Australian public argue are outdated and require change. Additionally, the Constitution still lacks provisions relating to certain matters that part of the population believes are necessary and must be introduced. The most recent proposed reform to the Constitution occurred on October 14 2023, when the Australian people were asked whether they wanted to introduce a First Nations Voice to Parliament. Other proposed reforms to the Constitution that members of the Australian public are urging should be made, which have been put to a referendum in the past yet have not been successful, include:

- Australia becoming a Republic.
- increasing the parliamentary terms of members of the House of Representatives from three to four years.

Additionally, other constitutional reform currently being pushed by Australians which have never been put to Australians in a referendum include:

- amending s 44 of the Constitution to change the eligibility requirements for federal members of Parliament.
- enshrining a Bill of Rights into the Australian Constitution.
- abolishing s 51(xxvi) of the Constitution, known as the 'race power'.

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, sensitive language, or distressing events.

Reform to establish a First Nations Voice in the Australian Constitution 4.2.11.1

KEY TERM

Voice to Parliament a proposed advisory body comprised of Aboriginal and Torres Strait Islander representatives chosen by local First Nations communities that would give independent advice to the Commonwealth government during the law-making process.

In 2023, Australian voters had to decide whether they approved of constitutionally enshrining a **Voice to Parliament**, which would be an advisory body that would give advice to parliament and the executive government about policies and laws affecting First Nations peoples. Prior to politicians putting forth the proposal to establish a First Nations Voice, consultations were held with Aboriginal and Torres Strait Islander people across Australia. These interactions revealed that a majority of Aboriginal and Torres Strait Islander communities agreed upon the Voice to Parliament as a means of constitutional recognition and greater representation for First Nations peoples in Australia. The Uluru Statement from the Heart, created in 2017, set out that a Voice to Parliament was a means of constitutional recognition broadly agreed upon by Aboriginal and Torres Strait Islander communities across Australia. It was written and endorsed by Aboriginal and Torres Strait Islander leaders selected as delegates to the First Nations National Constitutional Convention.

Although the 2023 Voice to Parliament referendum failed, there is still a chance for constitutional reform to occur in the future to address the absence of Aboriginal and Torres Strait Islander constitutional recognition and to further advance the rights of Aboriginal and Torres Strait Islander peoples in this country.

Table 1 Timeline of significant events leading up to the Voice to Parliament referendum

Year	Event	Explanation
1967	The 1967 referendum	The Constitution was changed in 1967 to alter two discriminatory sections related to Aboriginal peoples. Although these changes to the Constitution were broadly positive for First Nations peoples, there are now no references to Aboriginal and Torres Strait Islander peoples in the Constitution, despite them being Australia's traditional custodians with a connection to Australia for tens of thousands of years.
1995	'Recognition, Rights and Reform' report delivered	The Aboriginal and Torres Strait Islander Commission (ATSIC) delivered the 'Recognition, Rights and Reform' report to the prime minister at the time, Paul Keating. In this report, the group called for constitutional recognition, asserting this recognition to be 'central to the proper recognition of Aboriginal and Torres Strait Islander peoples in an inclusive way within Australian society' (ATSIC, 1995).
1999	1999 Preamble referendum	In 1999, John Howard initiated the 1999 Preamble referendum that sought to insert a preamble into the Constitution which referenced Indigenous 'custodianship'. This inclusion would provide Aboriginal and Torres Strait Islander peoples with some degree of recognition as being in Australia prior to colonisation. However, granting First Nations peoples constitutional recognition through a preamble was perceived by the Expert Panel on Constitutional Recognition of Indigenous Australians (2012) as 'tokenistic', meaning that it provided them recognition but made no changes to their rights or opportunities in Australia. Furthermore, the proposal did not gain a majority 'yes' vote, and therefore the Constitution continued to not make any formal recognition to Aboriginal and Torres Strait Islander peoples.
2000	'Reconciliation: Australia's challenge' report delivered	The Council for Aboriginal Reconciliation delivered a final report entitled 'Reconciliation: Australia's challenge'. In the report, a roadmap for reconciliation was laid out and constitutional reform was identified as 'unfinished business'.
2012	Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution delivered its final report	The Expert Panel on the Recognition of Aboriginal and Torres Strait Islander Peoples in the Constitution, which was established by former prime minister Julia Gillard, delivered its final report. It found strong public support for constitutional recognition and recommended a number of ways the Constitution could be reformed to remove any discriminatory aspects of this document and to provide First Nations peoples with meaningful recognition.

Continues →

Table 1 Continued

Year	Event	Explanation
2015	Referendum Council established	Prime minister Malcolm Turnbull and opposition leader Bill Shorten established the Referendum Council, which delivered its final report in 2017. From 2016 to 2017, the Referendum Council held 12 Dialogues, which were a series of meetings with Aboriginal and Torres Strait Islander peoples across the country that aimed to provide an opportunity for participants to discuss the main options for recognition. This allowed the council to gauge what the general consensus of the Aboriginal and Torres Strait Islander community was in relation to constitutional recognition.
2017	Uluru Statement from the Heart is produced	On the 50th anniversary of the 1967 referendum, in May 2017, a group of Indigenous Australians came together at the National First Nations Constitutional Convention in Uluru. At this convention, the Referendum Council shared the priorities gathered from each of the First Nations Dialogues. As a result of the Convention, the Uluru Statement from the Heart was produced, which called for: • a constitutionally entrenched First Nations Voice to Parliament • a Makarrata Commission to promote treaty and truth.
2018	Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples delivers its final report	In 2018, the Joint Select Committee released its final report. In this report, the Committee made a number of recommendations as to how the Voice to Parliament could be initiated and executed, including that the Australian Government should co-design the Voice with Aboriginal and Torres Strait Islander peoples. The Committee report made suggestions on how the Voice can be truly representative of First Nations peoples from all over Australia, how representatives should be chosen, and how the advisory body should be structured.
2023	Anthony Albanese announces Voice to Parliament referendum to take place in October 2023	In 2022, when Anthony Albanese was elected as Prime Minister of Australia, he reconfirmed his commitment to implement the Uluru Statement from the Heart and promised to hold a referendum regarding the Voice. In 2023, he announced the Voice referendum would occur on October 14 2023. This referendum proposal was unsuccessful.

WANT TO KNOW MORE?

In 2021, the Uluru Statement from the Heart won the 2021-22 Sydney Peace Prize. You can find out more about the timeline of events leading up to the 2023 Voice to Parliament referendum by searching 'Uluru Statement from the Heart: The Journey So Far' and clicking the relevant webpage (Uluru Statement from the Heart, 2023).

LESSON LINKS

You learnt about the 1967 Aboriginal referendum in **10D The 1967 referendum**.

You learnt about the 1999 Preamble referendum in **10A Reasons for constitutional reform**.

You learnt about bipartisan support in **10C Factors that affect the success of referendums**.

On October 14 2023, Australian electors had to decide whether they approved of changing the Constitution to add s 129, which would establish the Aboriginal and Torres Strait Islander Voice to Parliament.

In recognition of Aboriginal and Torres Strait Islander peoples as the First Peoples of Australia:

- i. there shall be a body, to be called the Aboriginal and Torres Strait Islander Voice;
- ii. the Aboriginal and Torres Strait Islander Voice may make representations to the Parliament and the Executive Government of the Commonwealth on matters relating to Aboriginal and Torres Strait Islander peoples;
- iii. the Parliament shall, subject to this Constitution, have power to make laws with respect to matters relating to the Aboriginal and Torres Strait Islander Voice, including its composition, functions, powers and procedures.

Figure 1 The provision the 2023 Voice to Parliament referendum sought to add to the Constitution

LEGAL VOCABULARY

Bipartisan support the agreement of the government of the day and the opposition party on a particular issue.

Upon the referendum being announced, the coalition opposition, led by Peter Dutton, launched a ‘no’ campaign against the Voice to Parliament. Considering the importance of **bipartisan support** to a successful referendum, the lack of support by the coalition immediately raised concerns about the referendum’s ability to succeed. The ‘official referendum 2023 pamphlet’ published the arguments for both the ‘yes’ and ‘no’ campaigns, with these arguments being authorised by the members of parliament who voted for and against the Voice to Parliament when it was a bill being passed through parliament.

Table 2 Arguments raised by the ‘yes’ and ‘no’ campaign in relation to the Voice to Parliament (Australian Electoral Commission, 2023)

Yes campaign	No campaign
• The Voice to Parliament would be able to make a practical, positive difference to Aboriginal and Torres Strait Islander peoples’ lives as it would ensure the government can make better decisions about First Nations peoples by receiving their direct advice about policies. • It could allow practical progress in the health, education, employment, and housing of First Nations peoples to occur. • It allows for constitutional recognition, whereby Aboriginal and Torres Strait Islander peoples are recognised and have respect paid for their tens and thousands of years of culture and tradition. • The current approach by the government to creating policies for Aboriginal and Torres Strait Islander peoples clearly is not working considering First Nations peoples still experience: – shorter life expectancies – higher suicide rates – worse rates of disease and infant mortality – fewer education opportunities. • The idea for the Voice originated directly from Aboriginal and Torres Strait Islander peoples and a majority of Aboriginal and Torres Strait Islander peoples support the Voice. • It will save money as the government has previously invested billions into programs that are not adequately addressing the problems experienced by First Nations peoples, however, a Voice would be able to advise the government so they do not continue to make these ill-fitted policies.	• The Voice is risky as it covers all areas of the executive government, suggesting it will have a broad reach that will be determined by the High Court, not the parliament. • The details of the Voice are unknown, such as which representatives would be chosen or how it would operate. • Constitutionally enshrining the Voice would mean that it is permanent and future generations will be forced to experience any negative repercussions it creates. • The Voice would permanently divide Australians as it goes against the democratic system of Australia which suggests everyone and every race is equal before the law. • It will not help Aboriginal and Torres Strait Islanders, as there are already many First Nations representative bodies that seek to advise the government about laws. • It could cause the Commonwealth Parliament to experience delays if the Voice has to review legislation before it can be passed. The Voice may take a while to consult the legislation and make a decision, slowing the process of legislation being made. • Once there is a Voice, further activism efforts may occur. For example, First Nations peoples may seek to abolish Australia Day, change the flag, or seek reparations and compensation for past injustices.

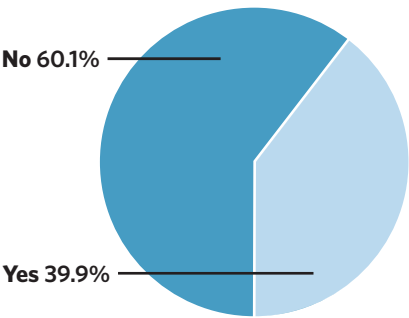


Figure 2 The national vote in the 2023 Voice to Parliament referendum (AEC, 2023)

The referendum was unsuccessful as all six states failed to achieve a majority ‘yes’ vote and just 39.9% of the Australian electors overall voted ‘yes’. On the night of the referendum, when it was clear it had failed, Prime Minister Anthony Albanese addressed the Australian public, reporting that ‘constitutional change may not have happened tonight, but great change has happened in our nation’ (9 News Australia, 2023).

WANT TO KNOW MORE?

In the electorate of ‘Melbourne’, almost 80% of voters voted ‘yes’ to the Voice to Parliament referendum. On the other hand, the electorate of Maranoa in Queensland received a ‘yes’ vote of less than 20%. You can find out more about how each electorate in Australia voted in the Voice to Parliament referendum by searching ‘How did your electorate vote in the voice referendum? Check out our interactive map’ and clicking the The Guardian webpage (Evershed, 2023).

DEEP DIVE

Are Nordic parliaments a step ahead of Australia?

Australia is not the only country to have proposed introducing a Voice to Parliament to consider the perspectives of Indigenous peoples. In Norway, Finland, and Sweden, elected bodies have been designed to ensure the perspectives of the Sámi people, the Indigenous peoples of the three countries, are considered in law-making.

In 1989, Norway established a Sámi Parliament, which does not fulfil the normal, law-making role of a parliament and cannot vote on bills. Instead, the Sámi Parliament is a body that makes representations to the Norwegian government on issues concerning the Sámi people. It seeks to ‘improve the Sámis’ political position and promote their interests’ (Sámediggi, n.d.). The body is comprised of 39 representatives who are re-elected every four years. However, the Sámi Parliament and other Nordic bodies were created by legislation, not constitutionally enshrined. This is different to the proposed Voice to Parliament in Australia which would have involved amending the Constitution if the 2023 referendum had been successful.

Sweden and Finland introduced similar bodies in 1993 and 1996 respectively. A Voice to Parliament in Australia could have operated in a similar manner to these bodies.

Adapted from ‘Could these Nordic parliaments give a glimpse of what to expect from the Voice?’ (Orr, 2023)



Image: INTREEGUE Photography/Shutterstock.com

Figure 3 The Sámi Parliament in Norway is a body that makes representations to the Norwegian government about matters concerning Norway’s First Peoples

Reform for Australia to become a republic 4.2.11.2

Australia, like Britain, is a constitutional monarchy meaning the King is Australia’s head of state, who delegates his power as monarch to the Governor-General. However, there have been persistent debates over the past decades to change Australia’s structure of government so that Australia instead becomes a **republic**.

Although an unsuccessful referendum was held in 1999 about whether Australia should become a republic, debates surrounding whether Australia should or should not become a republic have remained prevalent over the past two decades. Leading the push for Australia to become a republic is the Australian Republic Movement. Additionally, certain federal and state political parties campaign for this change, such as the Australian Greens Party, which is committed to Australia being declared a republic.

LEGAL VOCABULARY

Republic a form of government whereby a state is ruled by representatives from the population’s citizens.

Table 3 Arguments for and against Australia becoming a republic

For	Against
• Australia should have an Australian as our head of state, not a British King or Queen. • Australians should be able to choose who represents them to fulfil important constitutional roles. • Choices about Australians’ futures should be in the hands of Australians, not a foreign monarch. • It is undemocratic for the important role of ‘head of state’ to be passed down through a family and not awarded to someone based on their merit or number of votes. • An independent country deserves to elect its own head of state.	• Australia should maintain the status quo. The current system has certainty and stability, therefore it is unlikely an alternative system could be just as good, or better, than the current system of a constitutional monarchy. • Changing Australia to become a republic would require 69 changes to the Constitution all at once, whereas since the Constitution was formed, only 13 separate amendments have been made to it, showing just how fundamental and significant the change would be. • The changes are unpredictable as there is no way of knowing how making such substantial changes to the Constitution could affect the courts, parliament, the system of government, and Australia as a whole.

Continues →



Image: Christie Cooper/Shutterstock.com

Figure 4 Adam Bandt, the current leader of the Australian Greens Party, campaigns for Australia to become a republic

Table 3 Continued

For	Against
The Greens (2023) have described the British monarchy as ‘an outdated, colonial, and racist institution built on the blood, backs, and stolen wealth of brown and black people’. Therefore, reconciliation with First Nations peoples in Australia can only occur if colonialist ties to the monarchy are severed.	- There are divisions among republicans themselves as different groups propose different models for becoming a republic. - Australia is already an independent nation as all legal links with Britain were cut in 1986 when the <i>Australia Act 1986</i> (Cth) was introduced. Australia is legally and internationally recognised as a sovereign country, therefore no further independence will be gained from becoming a republic.

LEGISLATION

Australia Act 1986 (Cth)

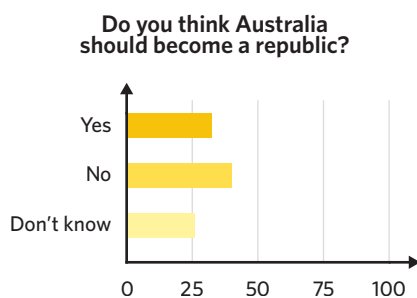


Figure 5 Respondents answers to a 2021 IPSOS survey asking 1222 Australians whether they think ‘Australia should become a republic’ (Topsfield, 2021)

WANT TO KNOW MORE?

You can find out more about Australia becoming a republic by searching ‘Why should Australia become a republic?’ and clicking the Australian Republic Movement (2022) frequently asked questions webpage.

LESSON LINKS

You learnt about the principle of representative government in **7H Parliament’s ability to make law – representative nature**.

You learnt about the bicameral nature of parliament in **7F Parliament’s ability to make law – the bicameral structure**.

CONSTITUTION

Section 44

In 1999, the question of whether Australia should become a republic was put to the people. However, the proposal only received support from 45.13% of voters and therefore, change to the constitution did not occur.

This question proposed whether Australia should install a two-party preferred, bipartisan style of government with a president as the head of the state, similar to America. However, this is not the only way a country can become a republic. Australia could choose to retain the current system of parliament with a prime minister elected by a public majority who exercises day-to-day authority. The Republic of Ireland, for example, made a transition to this style of government in 1949 when it declared itself a republic.

In the two decades following this proposal, surveys have been conducted to determine if the Australian public’s attitude towards becoming a republic has remained the same. Due to a large portion of people surveyed often responding that they ‘do not know’ or are ‘unsure’ how they would vote, it is difficult to determine whether a republic referendum would be successful, should it occur within the next few years.

Do you approve of this proposed alteration?

A proposed law: To alter the Constitution to establish the Commonwealth of Australia as a republic with the Queen and Governor-General being replaced by a President appointed by a two-thirds majority of the members of the Commonwealth Parliament.

Figure 6 The question asked to Australian voters in the 1999 republic referendum

Other possible constitutional reform 4.2.11.3

Considering that the Constitution came into effect in 1901 and there have been relatively few amendments since, there are a number of other provisions it contains that people argue should be removed or amended, or sections that should be added. Some Australians argue such changes need to occur to uphold the principle of representative government and to better reflect the modern, multicultural country Australia has become.

In 2019, the Australian Law Reform Commission (ALRC) summarised reforms to the Constitution that had been raised by parties in recent years, including:

- changing the eligibility requirements for members of the Commonwealth Parliament set out in s 44
- changing the parliamentary terms of members of the House of Representatives from three to four years.

Other reforms have been proposed by interest groups seeking to enhance human rights protection in Australia, including:

- entrenching an Australian ‘Bill of Rights’ into the Constitution to protect human rights
- removing the ‘race power’ from the Constitution.

Table 4 Other possible constitutional reforms

Proposed reform	Section of Constitution the reform seeks to change	Explanation
Changing the eligibility requirements for the Commonwealth Parliament	Section 44, which sets out a number of disqualifications that apply to becoming a member of the Commonwealth Parliament, one of which is that a person is ineligible to become a member of Federal Parliament if they have dual citizenship.	- It has been argued that the Constitution preventing people with dual citizenship from working as a politician goes against the multicultural nature of Australian society. - Migration has resulted in a number of people living in Australia being born overseas and having citizenship in another country. In 2020, more than 7.6 million people living in Australia were born overseas (Australia Bureau of Statistics, 2021). - A number of politicians have been referred to the High Court to have their eligibility to be a federal member of Parliament determined after allegations of foreign citizenship, causing the court to have to hear more cases than it would have to hear if this provision was removed. If parliament is to be truly representative of the people it governs, people with dual citizenship should be able to be elected as members of the Commonwealth Parliament to represent the millions of migrants in modern Australia. - If parliament is to be truly representative of the people it governs, people with dual citizenship should be able to be elected as members of the Commonwealth Parliament to represent the millions of migrants in modern Australia. - In 1998, the Constitution Alteration (Right to Stand for Parliament-Qualification of Members and Candidates) Bill 1998 was introduced into the Senate seeking to remove this qualification requiring members of parliament to not have dual citizenship. However, the bill did not receive support from parliament. Therefore, a referendum was never put to the Australian people asking whether they agreed with this constitutional change.
Changing the parliamentary terms of members of the House of Representatives from three to four years	Section 28, which states the House of Representatives will have a three-year duration, but may also be dissolved sooner by the Governor-General.	- In Australia, members of the Commonwealth Parliament serve three-year 'fixed terms' meaning it is not the role of the government to call an election but rather elections are automatically called at the end of the three-year term. - In other Commonwealth countries, such as India, South Africa, and Ireland, members of parliament have five-year fixed terms, whilst in Canada they have four-year fixed terms, as opposed to in Australia where a member only has a shorter fixed term of three years. - All state parliaments in Australia have four-year fixed terms. - Arguments for changing the terms of members of the House of Representatives from three to four years include it would be cheaper since fewer elections would be required, politicians would have greater time to focus on creating legislation instead of merely campaigning for the next election, and governments would be able to plan policies better and execute longer-term policies as they would have a greater number of years to do so. - However, arguments against this change include that it will make politicians less accountable to face electors more infrequently, it may result in unpopular governments having power for longer, and it would take longer for voters to be able to express their disapproval of the government of the day's policies. - The question of whether the parliamentary terms of members of the House of Representatives should be changed has been put to the people in several referendum proposals in the past, all of which have failed.

Continues →

CONSTITUTION

Section 44

Table 4 Continued

Proposed reform	Section of Constitution the reform seeks to change	Explanation
Entrenching an Australian 'Bill of Rights' into the Constitution to protect human rights	No section currently establishes a Bill of Rights in the Constitution, so a new section would need to be added.	- Countries such as Canada, the United States, and South Africa all have a Bill of Rights in their constitution, protecting certain rights. However, Australia does not have one. - Arguments for enshrining a Bill of Rights in the Constitution suggest that 'without a Bill of Rights, many of our basic freedoms, possibly even including the right to vote of some section of the community, can be taken away by federal, state, and territory parliaments' (Williams, 2001). - For example, in 1901 the Commonwealth Parliament was able to pass an Act implementing the 'White Australia' policy, designed to limit non-British migration to Australia, whilst in 1950, it passed an Act banning the Communist Party in Australia (although the High Court later declared the Act invalid), clear infringements on civil liberties that would be avoided if Australia had a Bill of Rights protecting such liberties. - It has been argued a Bill of Rights 'would enhance Australian democracy by expressing the core rights of the Australian people' (Williams, 2001). - However, arguments against constitutionally enshrining a Bill of Rights suggest it will limit the powers of parliament to legislate on certain matters. Arguments also suggest that the system of representative government in Australia should ensure laws unfairly infringing on people's rights are not passed, as a politician will likely be voted out at election if they make draconian laws violating human rights.
Removing the 'race power' from the Constitution	Section 51 (xxvi), which gives the Commonwealth Parliament the power to make laws for 'the people of any race for whom it is deemed necessary to make special laws'.	- Former NSW Chief Justice, James Spigelman, suggested the race power, when initially written into the Constitution, was 'a racist power'. - He believes the race power should no longer be in the Constitution as it is a 'dangerous power'. - The Expert Panel on Constitutional Recognition of Indigenous Australians recommended in 2012 that the section should be removed and replaced with a power for the Commonwealth to make laws that only apply to Aboriginal and Torres Strait Islander peoples. - Former Chief Justice Robert French suggests the Federal Parliament should still have the power to make laws for Aboriginal and Torres Strait Islander peoples, not on the basis of their race, but because of their connection with Australia as the traditional owners of the land (Lee, 2020). - Mick Gooda informed the Joint Select Committee on Constitutional Recognition that the race power 'permits' racial discrimination (Allam, 2018).

LEGAL VOCABULARY

Bill of Rights a list of rights that are most important to the citizens of a country, and which many common law countries have enshrined in their Constitution.

USEFUL TIP

The study design dot point of this lesson requires students to understand 'possible future constitutional reform', as well as the Voice to Parliament proposed reform. Therefore, there is no requirement that you understand and memorise each of the proposed reforms mentioned in this lesson. Read through the reforms mentioned in this lesson and determine which two reforms you find most interesting, then just focus on understanding the arguments and information related to these reforms!

CONSTITUTION

Section 51(xxvi)

WANT TO KNOW MORE?

You can find out more about arguments for and against Australia having an enshrined Bill of Rights in its Constitution by searching 'Should Australia Have a Bill of Rights?' and clicking the Go To Court webpage (Taylor, 2018).

DEEP DIVE

Parliamentary terms change rejected by the people

In 1988, a referendum took place which asked Australian voters whether they approved of the terms of members of the House of Representatives being changed from three years to four. The proposal received support from just 32.92% of Australian voters and did not receive a majority 'yes' vote in any of the states.

Although the referendum was unsuccessful in 1988, over 30 years on from this decision, the attitude of the Australian public may now swing in favour of changing the Constitution to extend the terms of members of the House of Representatives.

Adapted from 'History of Australian Referendums' (Australian Parliament House, n.d.)



Image: EQRoy/Shutterstock.com

Figure 7 In 1988, a majority of Australian voters did not support changing the Constitution to extend the fixed terms of parliamentarians in the House of Representatives from three to four years

The ability of the Australian people to change the Australian constitution 4.2.11.4

Considering that only eight out of the 45 referendums that have taken place have been successful, it is clear the ability of the Australian people to change the Constitution can sometimes be challenged. This is often due to the rigid, double-majority requirement that must be met in order for the constitutional change to occur. However, the actions of Australians prior to successful referendums indicate that when the public comes together and campaigns for change, such reform can occur.

LESSON LINKS

You learnt about the double majority requirement in **10B Referendums**.

You learnt about petitions and demonstrations in **9B Influences on law reform**.

Table 5 Evaluating the ability of the Australian people to change the Australian Constitution

Strengths	Limitations
The Australian people can pressure the government into introducing a constitution alteration bill or can elect a government into power that is promising to hold a referendum. One of the initial steps to a referendum is the passing of a constitution alteration bill in parliament, which can be encouraged by public pressure. After the bill is passed, a referendum will be held, giving the Australian people the power to change the Constitution. For example, considering Anthony Albanese promised trying to introduce a Voice to Parliament during his federal election campaign in 2022, by voting in Anthony Albanese as Prime Minister of Australia in 2022, the Australian people increased their chances of changing the Constitution as Albanese fulfilled his promise and initiated a referendum.	People must be given the opportunity to vote for constitutional change. Even if a majority of members of the Australian public want a constitutional change, if the majority of members of parliament do not introduce or pass a constitutional alteration bill, there will not be a referendum. For example, the proposed reform to alter the eligibility requirements for parliamentarians under s 44 of the Constitution has support from a number of Australians. However, the Constitutional Alteration bill introduced in 1998 seeking to change s 44 did not pass through parliament, meaning a referendum did not take place.
Methods such as petitions and demonstrations can drive constitutional reform. By engaging in these mass, public efforts, members of the Australian public can show politicians that there is broad support for constitutional change. For example: - the 1957 petition, led by the Aboriginal-Australian Fellowship (AAF), called for amendments to s 127 and s 51(xxvi) of the Constitution. It received over 100,000 signatures and is one of the reasons why the bill to change the constitution was then passed in parliament to initiate the 1967 referendum about First Nations peoples. - the Uluru Statement from the Heart was signed by a number of First Nations peoples, indicating the desires of some Aboriginal and Torres Strait Islander communities to gain constitutional recognition. Additionally, in the lead-up to a referendum, petitions and demonstrations can be used by the Australian people to influence the way other Australians vote on a referendum, and ultimately constitutional change. For example: - in 2023, 'yes' campaign marches took place across Australia, calling for Australians to vote yes during the Voice to Parliament referendum.	Referendums are complex, expensive, and time-consuming. Parliament must first pass a constitution alteration bill, the referendum process must then take place which is lengthy as it requires planning and campaigning, and a successful referendum is difficult to achieve as the double majority requirement must be satisfied. The double majority requirement means 4/6 states must vote 'yes' as well as the majority of voters in the entirety of Australia. Only eight out of 45 referendums held in Australia have been successful, demonstrating that the ability of the people to change the Constitution can be limited. This can be seen in the 2023 Voice to Parliament referendum where, despite there being numerous petitions, demonstrations, and bodies supporting the change, the double majority requirement was not achieved and the referendum proposal failed.

Continues →

Table 5 Continued

Strengths	Limitations
When factors all point towards the referendum being successful, the Australian people have a greater likelihood of voting 'yes' to changes to the Constitution. For example, in the 1967 referendum about First Nations peoples, many factors pointed in favour of the 'yes' vote succeeding from the outset as there was: • a lack of a published 'no' campaign. • bipartisan support for a 'yes' vote to the proposal. • strong knowledge by voters of what aspects of the Constitution they were changing and what the effects of this were, as the question was written clearly and there was a lot of publicity surrounding the proposal.	When factors affecting the success of a referendum all point in favour of the referendum failing, it is highly likely to not succeed. For example, if in the lead-up to a referendum, there is a lack of bipartisan support, a lack of voter knowledge, a strong 'no' campaign, and an unpopular politician leading a campaign, the referendum is likely to be unsuccessful. The ability of these factors to produce an unsuccessful referendum can be observed in the Voice to Parliament referendum, as there was: • no bipartisan support with the opposition leader, Peter Dutton, advocating for the 'no' vote. • voter confusion as the campaigns in the lead-up to the Voice to Parliament referendum were 'flooded with misinformation, disinformation, and outright lies' (Allam, 2023). • a strong 'no' campaign led by various groups and people, including 'Fair Australia' which argued 'we are one together, not two divided'. • accusations of politicians supporting the 'yes' campaign to advance their political objectives, instead of supporting the change for the benefit of Australia. For example, Fair Australia (2023) accused the Voice of being a 'pet project of the politicians in Canberra'.
Bodies established by the government and activist groups can influence constitutional reform. Through their specialised work, such parties can thoroughly research specific matters and present their findings to the Australian public, which may spark public outcry and campaigning for constitutional reform. For example, the Referendum Council, which was established in 2015, conducted extensive research in order to advise the prime minister and opposition leader on steps that should be taken to allow for Aboriginal and Torres Strait Islander constitutional recognition. Through National Dialogues, the perspectives of many First Nations communities across Australia were taken into consideration. Therefore, the panel was able to condense the priorities of First Nations communities into a core list of recommendations, including a Voice to Parliament. By participating in these National Dialogues, members of the Australian public could influence constitutional change by sharing their opinions on what should be done.	The proposed changes to the Constitution are drafted by politicians. This means that the Australian people do not have a role in approving the final wording of the alterations and such changes may not reflect the true or specific desires of the peoples' intentions for constitutional reform.
Referendum voting is compulsory. All eligible voters are able to have their say in whether the Constitution should be changed. For example, in 1967, 90.77% of Australian voters approved the constitutional change in relation to Aboriginal and Torres Strait Islander peoples' rights, demonstrating how the Australian people can change the Constitution by exercising their right to vote.	Although voting is compulsory in Australian referendums, there are certain people who are ineligible to vote in referendums. Therefore, not all Australian citizens have the ability to have their say on changing the Constitution. Currently, 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.

LEGISLATION

Migration Act 1958 (Cth)

Lesson summary

- Considering the 2023 Voice to Parliament referendum was the first referendum since 1999, the Australian people have had a very restricted opportunity to change the Constitution in recent decades. Therefore, there are a number of reforms to the Constitution that people argue must occur.
- The most recent proposed reform to the Constitution that was sent to a referendum was the 2023 Voice to Parliament referendum, however, this referendum was unsuccessful.
- Other proposed reforms include:
 - changing Australia to become a republic.
 - changing the eligibility requirements for the Commonwealth Parliament set out in s 44.
 - changing the eligibility requirements for members of the Commonwealth Parliament set out in s 44.
 - entrenching an Australian 'Bill of Rights' into the Constitution to protect human rights.
 - removing the 'race power' from the Constitution.
- As seen by the success of the 1967 referendum, the Australian people are able to change the Constitution, however, the failure of the 2023 Voice to Parliament referendum and the fact that other proposed reforms have not yet been put to a referendum indicates this ability to change the Constitution is often limited.

USEFUL TIP

The relevant key skill related to this lesson requires students to 'discuss the ability of the Australian people to change the Australian Constitution, including in relation to the 1967 referendum about First Nations people and possible future constitutional reform'. Therefore, you can refer to Table 5 to remember the ways in which Australians have been both able to and unable to change the Constitution.

10E Questions

Check your understanding

Question 1

Considering the high proportion of failed referendums in Australia's history, the Australian public has stopped advocating for constitutional reform in recent years.

- A. True
- B. False

Question 2

The Aboriginal and Torres Strait Islander Voice to Parliament was:

- A. created by Anthony Albanese as he believed this idea would allow him to win the 2022 federal election.
- B. articulated in the Uluru Statement from the Heart in 2017 after National Dialogues were conducted by the Referendum Council to determine how Aboriginal and Torres Strait Islander peoples wanted constitutional recognition.

Question 3

The Voice to Parliament was proposed to be a:

(Select all that apply)

- A. third chamber of Parliament that would get to vote on bills and reject any legislation passed through the Commonwealth Houses of Parliament.
- B. an advisory body to allow Aboriginal and Torres Strait Islander peoples to make representations on matters relating to First Nations peoples.
- C. composed of half Aboriginal and Torres Strait Islander peoples, and half members of parliament (MPs), regardless of whether those MPs were of Aboriginal and Torres Strait Islander descent or not.
- D. an independent body not affiliated with any particular party that would be comprised of Aboriginal and Torres Strait Islander representatives.

Question 4

Fill in the blanks with the following terms:

becoming a republic

introducing a Voice to Parliament

In 1999, a referendum was held asking Australian voters whether they agreed to .

However, after this proposal failed calls for this referendum to happen again have occurred. On the other hand, for the

first time in 2023, a referendum was put to voters asking whether they supported Australia

.

Question 5

Which of the following statements are arguments in support of Australia becoming a republic?

(Select all that apply)

- A. Australia should have an Australian as our head of state, not a British King or Queen.
- B. Australia should maintain the status quo. The current system has certainty and stability, therefore it is unlikely an alternative system could be just as good, or better, than the current system.
- C. An independent country deserves to elect its own head of state.
- D. A republic will make us more similar to the United States, autocratic model of governance.

Question 6

There is now popular support for Australia becoming a republic, with recent polling suggesting 95% of Australians want to become a republic.

- A. True
- B. False

Question 7

Which of the following are proposed reforms to the Australian Constitution that members of the Australian public have suggested? **(Select all that apply)**

- A. Changing the eligibility requirements for the Commonwealth Parliament so that every member of the House of Representatives must have dual citizenship to become a member of Parliament.
- B. Entrenching an Australian 'Bill of Rights' into the Constitution to protect human rights.
- C. Changing the parliamentary terms of members of the House of Representatives from three to six years.
- D. Removing the 'race power' from the Constitution.

Question 8

The Australian public has no role in changing the Constitution. As long as a majority of parliament agrees with the constitutional change, constitutional reform can occur.

- A. True
- B. False

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

(2 MARKS)

Describe **one** possible future constitutional reform.

Question 10

(4 MARKS)

'The only way for the Australian people to influence constitutional reform is through demonstrations.'

Do you agree with this statement? Justify your response by referring to the 2023 Voice to Parliament referendum.

Question 11

(6 MARKS)

Referring to **one** proposed constitutional reform, explain **one** strength and **one** limitation of the Australian people in influencing constitutional reform.

Adapted from VCAA 2020 exam Section A Q7

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 the Australian people's ability to change the Constitution with reference to the First Nations Voice to Parliament referendum.

Statement	Strengths	Limitations
I. The Australian people are able to change the Constitution by pressuring governments to introduce and pass a constitution alteration bill through parliament so that the public can decide on whether the Constitution should be changed during a referendum. For example, Anthony Albanese ran his 2022 federal election campaign on the promise he would try to implement a Voice to Parliament, therefore, since the public indicated they wanted this by electing him as Prime Minister, he was compelled to initiate constitutional reform in parliament.	☐	☐
II. The Australian public can utilise various tools, such as petitions, to drive constitutional reform. For example, the Uluru Statement from the Heart was signed by a number of First Nations peoples, indicating the desires of Aboriginal and Torres Strait Islander communities to gain constitutional recognition.	☐	☐
III. For a referendum to take place and be successful, a lengthy and difficult process must occur. Considering only eight out of 45 referendums in Australia's history have been successful, it is clear the double majority requirement is difficult to achieve. Despite the advocacy by some Australians for a Voice to Parliament to be established, the double majority requirement was not achieved during the referendum as no state had a majority 'yes' vote. Additionally, the majority of Australians voted 'no' therefore the national majority requirement also was not achieved.	☐	☐
IV. When factors affecting the success of a referendum all point in favour of the referendum failing, it is highly likely to not succeed regardless of certain efforts by the public. For example, in the lead-up to the Voice to Parliament referendum, there was a lack of bipartisan support, a lack of voter knowledge, and a strong 'no' campaign. Therefore, this referendum was unlikely to be successful from the beginning.	☐	☐
V. A referendum allows all Australian voters to have their say on whether they approve constitutional change. In the 2023 Voice to Parliament referendum, this resulted in Australians not changing the Constitution since a majority rejected the change. Therefore, even when there is a large group of people advocating for constitutional change, their ability to change the Constitution is contingent on the rest of the Australian public.	☐	☐

Question 13

(6 MARKS)

Analyse the ability of the Australian people to change the Australian Constitution by referring to the First Nations Voice to Parliament referendum.

Adapted from VCAA 2022 exam Section A Q5

Linking to previous learning

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 the Australian people's ability to change the constitution.

Statement	Strengths	Limitations
I. The Australian people are able to change the Constitution by pressuring governments to introduce and pass a constitution alteration bill through parliament so that the public can decide on whether the Constitution should be changed during a referendum. For example, prior to the 1967 referendum, there were a number of activist efforts, such as the Freedom Rides, which sought to compel parliament to take the first steps in removing the discriminatory provisions of the Constitution.	☐	☐
II. All eligible voters have to vote in a referendum, therefore, all these individuals are able to have their say on whether the Constitution should be changed. For example, in 1967, 90.77% of Australian voters approved the constitutional change in relation to Aboriginal and Torres Strait Islander peoples' rights, demonstrating how the Australian people can change the Constitution by exercising their right to vote.	☐	☐
III. The Constitution can only be changed by a referendum, which requires parliament to initiate and pass a bill for the referendum to occur. Despite a number of Australians wanting Australia to become a republic, no parliamentarian in recent years has tried to introduce a constitution alteration bill on this issue to parliament. Therefore, the ability of the people to change the Constitution is limited as they cannot vote in a referendum if parliament fails to initiate a referendum.	☐	☐
IV. When factors all point towards the referendum being successful, the Australian people have a greater likelihood of voting yes to changes to the Constitution. For example, in the 1967 referendum about First Nations peoples, many factors pointed in favour of the 'yes' vote succeeding from the outset as there was no, published 'no' campaign and bipartisan support for a 'yes' vote to the proposal.	☐	☐
V. For a referendum to take place and be successful, a lengthy and difficult process must occur. In 1999, when the question of whether Australia should become a republic was first put to the people, the double majority requirement was not achieved as the national 'yes' vote was below 50%, therefore constitutional change could not occur regardless of some of the Australian public's strong advocating for this change.	☐	☐

Question 15

(7 MARKS)

Referring to the 1967 referendum about First Nations peoples and **one** proposed constitutional reform, discuss the ability of the Australian people to change the Constitution.

ANSWERS

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Image: chrupka/Shutterstock.com

1A Key principles of the criminal justice system

Check your understanding

- True: I; IV; V
False: II; III
- A. True. **Explanation:** Summary offences are less severe criminal offences generally heard in the Magistrates' Court.
- B; D; E. **Explanation:** Indictable offences can be heard summarily when the offender is eligible, the court agrees, and the accused consents.
- B. **Explanation:** Offences found in the *Crimes Act 1958* (Vic) are generally indictable offences.
- The burden of proof refers to the **responsibility** of a party to prove the facts of a case. In a criminal case, the burden of proof rests with the **prosecution**. On the other hand, **the standard of proof**, which is beyond reasonable doubt in criminal cases, refers to the degree to which the **facts** of the case must be proven in court in order to find the accused guilty.
- A. True. **Explanation:** The accused's right to silence upholds the presumption of innocence as the prosecution is required to prove the facts of the case. *The Charter of Human Rights and Responsibilities Act 2006* (Vic) ensures the accused has the right to remain innocent until proven guilty.
- A; B. **Explanation:** An accused is likely to have their case heard summarily, if possible, as it is less costly and time consuming, whilst the maximum sentence imposed in the Magistrates' Court is less severe.
- B. **Explanation:** The offence of theft can be heard summarily if the value of the goods stolen is under \$100,000.
- C. **Explanation:** The accused's right to be presumed innocent is upheld by ensuring the prosecution has the responsibility of proving the facts of the case and the accused cannot be found guilty unless it is proven that they committed the crime(s) beyond reasonable doubt.

Preparing for exams

Standard exam-style

- [Burning rubbish shavings or other materials is found in the *Summary Offences Act 1966* (Vic), therefore, it is considered a summary offence as it is a minor criminal offence.¹] [This crime would likely attract a less severe sanction, like a small fine. This is unlike indictable offences, which are heard by a judge and/or jury in superior courts and carry more severe sanctions.²]

✓ ✗ I have provided information about summary offences with reference to the *Summary Offences Act 1966* (Vic).¹

✓ ✗ I have provided information about why burning rubbish shavings or other materials is considered a summary offence.²

- [The prosecution has the burden of proof in Acacia's case, meaning they have the responsibility of proving the facts of the case.¹] [However, in order for Acacia to be found guilty and convicted of culpable driving causing death, the prosecution must prove that Acacia is guilty beyond reasonable doubt, which is the standard of proof in a criminal case.²]

✓ ✗ I have identified that the prosecution has the burden of proof.¹

✓ ✗ I have provided information about the standard of proof in a criminal case.²

✓ ✗ I have used connecting words, such as 'However'.

- a. [Kavi has been charged with an indictable offence.¹] [Murder is a serious indictable offence that is heard and determined in the Supreme Court, where cases are heard by a judge and jury.²]

✓ ✗ I have identified that Kavi has been charged with an indictable offence.¹

✓ ✗ I have provided information about the indictable offence of murder.²

- b. [Kavi's friend is incorrect as murder is a serious indictable offence that cannot be heard summarily.¹] [Given the nature of the crime, Kavi's case would be heard in the Supreme Court, which hears indictable offences and can also conduct trials by jury.²] [Moreover, as murder is an extremely serious crime, severe sanctions are imposed upon those found guilty of the offence and the Supreme Court can hand down the appropriate sanction.³]

✓ ✗ I have identified that Kavi's friend is incorrect.¹

✓ ✗ I have provided one reason why these offences cannot be heard summarily.²

✓ ✗ I have provided information about why it would not be appropriate to have this case heard summarily.³

✓ ✗ I have used connecting words, such as 'Moreover'.

- [The presumption of innocence and the burden of proof have a complementary relationship, as the burden of proof facilitates the right of the accused to be presumed innocent until proven otherwise.¹] [The responsibility to prove the facts of a case in criminal proceedings is on the prosecution. Therefore, the accused does not need to prove the case or validate the charges against them.²] [Rather, they are legally understood to be innocent until the prosecution can prove them guilty beyond reasonable doubt.³]

✓ ✗ I have provided information about the relationship between the presumption of innocence and the burden of proof.¹

✓ ✗ I have provided information about one aspect of the relationship between the presumption of innocence and the burden of proof.²

✓ ✗ I have provided information about a second aspect of the relationship between the presumption of innocence and the burden of proof.³

✓ ✗ I have used connecting words, such as 'Therefore' and 'Rather'.

14. [The burden of proof is the responsibility of a party to prove the facts of a case. In a criminal case, the burden of proof rests with the prosecution.¹] [On the other hand, the standard of proof refers to the degree to which the facts of the case must be proven in court. The standard of proof in criminal proceedings is beyond reasonable doubt.²] [One key difference between these two concepts in Olive's case is that the burden of proof requires the prosecution to prove the facts of the case, whereas the standard of proof requires the prosecution to prove that there is no reasonable doubt that Olive is guilty of these crimes.³]

✓ ✗ I have provided information about the burden of proof in this scenario.¹

✓ ✗ I have provided information about the standard of proof in this scenario.²

✓ ✗ I have provided one key difference between the burden of proof and the standard of proof and linked it to the scenario.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.

Extended response

15. A; D; E

16. [The criminal justice system upholds the presumption of innocence to a large extent. There are various mechanisms and rights available to the accused to ensure they are presumed innocent until proven otherwise, although, this can be limited in certain circumstances.¹]

[Firstly, the right to silence is a provision of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) that ensures an accused individual does not have the obligation to answer any questions and cannot be pressured to give evidence to prove their innocence or guilt.²] [While this can prevent self-incrimination, the effectiveness of this right could be reduced if an accused is subject to prolonged interrogation and feels threatened or pressured by authorities to speak.³]

[Moreover, the right to apply for bail upholds the presumption of innocence as accused individuals have the right to remain in the community whilst awaiting trial and should not be imprisoned until proven guilty.⁴] [However, bail is not an automatic right and if there are reasonable grounds, such as the accused is a threat to society, bail can be denied.⁵]

[Finally, if the accused is found guilty but believes it is a wrongful conviction, they also have the right to appeal the verdict and uphold their innocence.⁶] [Yet, the success of an appeal is dependent on a range of factors, and there are cases where individuals remain wrongfully convicted after failed appeals.⁷]

[Therefore, while there are features of the criminal justice system that uphold the presumption of innocence, there can be limitations in ensuring all accused individuals are presumed innocent until proven otherwise.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the presumption of innocence is upheld by the Victorian criminal justice system.²

✓ ✗ I have provided one limitation of the Victorian criminal justice system in upholding the presumption of innocence.³

✓ ✗ I have provided a second way the presumption of innocence is upheld by the Victorian criminal justice system.⁴

✓ ✗ I have provided a second limitation of the Victorian criminal justice system in upholding the presumption of innocence.⁵

✓ ✗ I have provided a third way the presumption of innocence is upheld by the Victorian criminal justice system.⁶

✓ ✗ I have provided a third limitation of the Victorian criminal justice system in upholding the presumption of innocence.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 'Finally'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'However'.

1B Rights of an accused

Check your understanding

- A; D. **Explanation:** An accused is presumed innocent unless proven guilty, whilst the right to trial by jury is not applicable for summary offences, as these are decided by a magistrate alone or are sanctioned by an infringement notice.
- B. False. **Explanation:** There is no exact definition in statute or common law regarding what an 'unreasonable' delay is. Rather, the courts decide on a case-by-case basis, considering a number of different factors.
- A; B; D. **Explanation:** The length of the delay, the complexity of the case, and the number of offences committed by the accused are all considered by a court when determining whether a delay was 'unreasonable'.
- The right to **silence** ensures a person is not obliged to supply information to a person in authority, whereas the right to **be tried without unreasonable delay** ensures an accused person's case is heard in a timely manner.
- A. **Explanation:** The right to silence upholds the presumption of innocence as an accused person is not required to prove their innocence, this is presumed.
- B. **Explanation:** A judge may make a direction that a jury should not perceive an accused's silence as an admission of guilt.
- A; C; D. **Explanation:** Generally, a unanimous verdict must be reached, meaning all 12 jurors must agree on the same verdict. However, in some circumstances, a majority verdict of 11/12 jurors will be accepted.

8. B. False. **Explanation:** There are several pieces of legislation, both Commonwealth and Victorian, that protect the rights of an accused.

Preparing for exams

Standard exam-style

9. [One right of an accused is the right to be tried without unreasonable delay.¹] [Another right of an accused is the right to be tried by jury for certain offences.²]

✓ ✗ I have identified one right of an accused in the Victorian criminal justice system.¹

✓ ✗ I have identified a second right of an accused in the Victorian criminal justice system.²

✓ ✗ I have used signposting in my response, such as 'One right' and 'Another right'.

10. [The right of an accused to be tried without unreasonable delay is the entitlement accused people possess to have their case heard in a timely manner, unless the court considers delays to the trial to be 'reasonable'.¹] [This right aims to ensure an accused receives a fair trial, reducing the likelihood that witnesses' memories fade over time and ensuring the accused does not endure the stress and anxiety of waiting for a trial for an extended duration.²]

✓ ✗ I have defined an accused's right to be tried without unreasonable delay.¹

✓ ✗ I have provided information about an accused's right to be tried without unreasonable delay.²

11. [The right of an accused to trial by jury ensures a person accused of an indictable offence who pleads not guilty can have their guilt determined by members of the community chosen at random, meaning they are more impartial, thus promoting the achievement of fairness.¹] [Jury members are selected at random, however, if a juror has personal connections to either the prosecution or the accused, they are unable to participate as a jury member, preventing people with biases against a party from contributing to the final decision about the accused's guilt.²] [Fairness is therefore promoted as jurors are impartial and can determine their verdict based on the facts of the case, as opposed to their own personal biases or ideas about the case.³]

✓ ✗ I have provided one way the right to trial by jury upholds the principle of fairness.¹

✓ ✗ I have provided information about my chosen way the right to trial by jury upholds the principle of fairness.²

✓ ✗ I have provided further information about my chosen way the right to trial by jury upholds the principle of fairness.³

12. [Marika does not necessarily have to give evidence at her trial, although she can do so if she chooses to.¹] [This is because Marika is the person accused of committing the crime, therefore she has a right to silence, and to not give evidence in the courtroom if she does not want to do so.²] [Marika's right to silence when in the courtroom contributes to the presumption of innocence as she does not have to prove her innocence in relation to her alleged attack on Piper. Rather, it is the role of the prosecution to prove that Marika is guilty beyond reasonable doubt.³]

✓ ✗ I have provided an answer the question.¹

✓ ✗ I have provided information about the right to silence to justify my answer.²

✓ ✗ I have provided an example from the scenario and linked it to the right to silence.³

Extended response

13. Upheld: I; III
Limited: II; IV

14. [The principle of fairness can be promoted in Chirag's criminal case due to the rights he retains as a person accused of a crime. However, certain aspects of these rights are limited, preventing fairness from being entirely achieved.¹]

[One way fairness could have been achieved in Chirag's case is the fact that he was tried by jury, a right he had as he was being accused of murder, which is an indictable offence, and pleaded not guilty.²]

[A jury is an impartial group of citizens that would not contain anyone that personally knows Chirag. This ensures jury members would not have any bias for or against Chirag before the trial began, promoting fairness as his guilt would be decided by the jury based solely on the facts, rather than prejudices.³] [However, jury members are still people, therefore they may base decisions off their emotions or inherent biases they hold against certain races, ethnicities, and occupations, instead of solely making their decision according to the facts. This would therefore prevent jurors from being entirely impartial, limiting fairness.⁴]

[Another way fairness could be achieved is by Chirag exercising his right to silence and refusing to speak at his trial for murder.⁵]

[When an accused person is silent, their lawyer can request that a judge directs the jury to not make any inferences from the accused's silence. This promotes fairness as jurors would know to remain impartial, and not allow Chirag's silence to sway their verdict about the accused's guilt.⁶] [However, just because a judge gives such a direction to jury members, this does not mean they will not view an accused unfavourably as a result of their silence. Jury members may view Chirag's silence as an admission of guilt, possibly unconsciously without even realising they are doing so. This may lead to an unfair result if jurors base their decision on their own ideas, instead of deciding the verdict on the facts.⁷]

[Ultimately, although jury members may be impacted by their own feelings and emotions, fairness will be upheld in this case as Chirag has exercised his right to silence and trial by jury.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the principle of fairness is upheld in Chirag's criminal case.²

✓ ✗ I have provided information about my chosen way.³

✓ ✗ I have provided one way the principle of fairness is limited in Chirag's criminal case.⁴

✓ ✗ I have provided a second way the principle of fairness is upheld in Chirag's criminal case.⁵

✓ ✗ I have provided information about my chosen way.⁶

- ✓ ✗ I have provided a second way the principle of fairness is limited in Chirag's criminal case.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 way' and 'Another way'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Ultimately'.

Linking to previous learning

15. [No, Lucia does not have a right to trial by jury as she has committed a summary offence, not an indictable offence and has pleaded guilty.¹] [Firstly, for an accused to have a right to trial by jury, they must plead not guilty to an offence. If they pleaded guilty there will be no trial, just a sentencing process.²] [Secondly, a driving offence is usually a summary offence, not an indictable offence. Summary offences are generally heard in the Magistrates' Court, or may result in a person receiving an infringement notice, therefore no jury is used to decide an accused's guilt for summary offences, even where the accused pleads not guilty.³]

- ✓ ✗ I have stated that Lucia does not have a right to a trial by jury.¹
- ✓ ✗ I have provided one reason why Lucia does not have a right to trial by jury.²
- ✓ ✗ I have provided a second reason why Lucia does not have a right to trial by jury.³
- ✓ ✗ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

16. [The right to silence is a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.¹] [The presumption of innocence is the right for all accused persons to be presumed not guilty until it is proven they are guilty beyond reasonable doubt.²] [Therefore, the right to silence upholds the presumption of innocence as an accused person is able to remain completely silent in a court of law instead of defending their innocence, demonstrating that it is not the accused's responsibility to prove their innocence, but rather it is the prosecution's responsibility to prove the guilt of the accused beyond reasonable doubt.³]

- ✓ ✗ I have provided information about the right to silence.¹
- ✓ ✗ I have provided information about the presumption of innocence.²
- ✓ ✗ I have provided one way the right to silence upholds the presumption of innocence.³
- ✓ ✗ I have used connecting words, such as 'Therefore'.

1C Rights of victims

Check your understanding

- A. True. **Explanation:** The *Victims' Charter Act 2006 (Vic)* creates various rights for victims regarding how crimes are prosecuted and how offenders are sanctioned.
- B. False. **Explanation:** Witnesses giving evidence in relation to sexual offences, family violence, and some other offences can often do so via alternative arrangements and not in a publicly accessible courtroom.
- C. **Explanation:** Road traffic offences are not a category of offences for which witnesses have the right to give evidence using alternative arrangements in Victoria.
- A; B; D. **Explanation:** Armed robbery and road traffic offences are not offences for which witnesses can give evidence using alternative arrangements.
- The ***Victims' Charter Act 2006 (Vic)*** provides that the police or Office of Public Prosecutions may give information concerning an offender to a person included on the **Victims Register**. This could include information such as, the length of the **sentence**.
- B. **Explanation:** Victims of crime will be provided with information about the proceedings by the Office of Public Prosecutions or the police.
- B. False. **Explanation:** Only victims of 'criminal acts of violence' have the right to be informed about the likely release date of the offender.
- A. **Explanation:** A burglary is not defined as a 'criminal act of violence' under the legal provisions that outline the eligibility for a victim to be placed on the Victims Register.
- Strengths: II; III
Limitations: I; IV

Preparing for exams

Standard exam-style

- [One right that all victims have in the Victorian criminal justice system is the right to be informed about the proceedings.¹] [Another right that some victims have is the right to be informed of the likely release date of the offender.²]
- ✓ ✗ I have provided one right of victims in the Victorian criminal justice system.¹
- ✓ ✗ I have provided a second right of victims in the Victorian criminal justice system.²
- ✓ ✗ I have used signposting in my response, such as 'One right' and 'Another right'.
- a. [Seiko will be able to give evidence using alternative arrangements because the offences she witnessed are the types of offences mentioned in the *Criminal Procedure Act 2009 (Vic)* that allow for the use of alternative arrangements.¹] [The provisions in this Act apply to summary offences involving the use of obscene or indecent language, as well as summary offences involving sexual exposure.²] [Since the accused shouted at Seiko using indecent language and obscenities, whilst also indecently exposing himself to her, it is likely he has been charged with applicable summary offences that would allow Seiko to give evidence using alternative arrangements.³]

- ✓ ✗ I have stated that Seiko will be able to give evidence via alternative arrangements.¹
- ✓ ✗ I have provided information to justify my answer.²
- ✓ ✗ I have provided an example from the scenario and linked it to giving evidence via alternative arrangements.³
- ✓ ✗ I have referred directly to relevant legislation in my response.

- b. [Another right Seiko has is the right to be informed about the proceedings, which is a right outlined in the *Victims Charter Act 2006* (Vic), afforded to all victims of crime.¹] [It provides victims of crime with the right to be given information about the case in which they are involved, such as the offences with which the accused has been charged, details about whether these charges are withdrawn or changed, key developments in the case, and outcomes of a trial, including any sanctions imposed by the court.²] [The young man has been charged with a number of summary offences, so Seiko would have the right to be informed about these, as well as other information about the proceedings, and the outcome of his trial.³]

- ✓ ✗ I have identified one right, besides the right to give evidence via alternative arrangements, that Seiko has as a victim of crime.¹
- ✓ ✗ I have provided information about my chosen right.²
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen right.³
- ✓ ✗ I have referred directly to relevant legislation in my response.
- ✓ ✗ I have used signposting in my response, such as 'Another right'.

Note: The right to be informed of the likely release date of the offender is not a valid answer since the summary offences mentioned in the scenario do not meet the definition of 'criminal acts of violence'. Therefore, Seiko would not be an eligible victim for the Victims Register.

12. [One reason why the right to be informed of Bob's likely release date is beneficial for Makani is that, as she is eligible to be on the Victims Register, she has the opportunity to make a submission to the Adult Parole Board to express the effects that Bob's release may have on her.¹] [Makani's right to safety can be considered when a decision is made about Bob's parole, enabling her to have some influence on this decision.²]

[Another reason why having this right is beneficial to Makani is because she genuinely feared for her life at the time of the offences, so she may feel safer if she is prepared for Bob's potential release by ensuring he is unable to contact her.³] [Makani can apply for, or extend, an intervention order that will prevent Bob from approaching her, whilst she may take other precautions to protect her own safety.⁴]

- ✓ ✗ I have provided one reason why the right to be informed is beneficial for Makani.¹
- ✓ ✗ I have provided information about my chosen reason.²
- ✓ ✗ I have provided a second reason why the right to be informed is beneficial for Makani.³

- ✓ ✗ I have provided information about my chosen reason.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

13. Strengths: I; IV; V
Limitations: II; III

14. [I agree to a moderate extent that victims are supported and protected in the criminal justice system because various rights are provided in Victorian statute, however, these rights are not applicable to all victims.¹]

[There are several ways in which victims are supported and protected in Victoria, by the provision of various victims' rights in legislation.²]

[Firstly, victims of crime have a right to be informed about the proceedings, such as being provided with information about the case in which they are involved. This is important as victims often have a strong desire to observe the provision of justice.³] [Additionally, victims of serious crimes have a right to be notified of the likely release date of the offender, which can provide certainty for victims and the opportunity to ensure an intervention order is applied for if they fear being contacted.⁴] [Further, the *Criminal Procedure Act 2009* (Vic) contains provisions that allow some witnesses to give evidence using alternative arrangements. This includes witnesses in trials involving sexual offences and family violence, thus protecting victims from having to face their offender in court or from being intimidated by the process of giving evidence.⁵]

[However, there are limitations to these victims' rights.⁶] [Under the *Victims' Charter Act 2006* (Vic), only victims of criminal acts of violence can apply to be on the Victims Register for information about the offender's release date, meaning not all victims have the right to know when the offender is released.⁷] [Another limitation of victims' rights is that the right to give evidence via alternative arrangements is not available to all victims or witnesses. It is only available in trials for sexual offences, family violence offences, and summary offences involving sexual exposure or the use of obscene or indecent language.⁸]

[Therefore, while there are some provisions that provide rights to victims that somewhat protect them, support may not be adequately available as these provisions do not apply to all victims.⁹]

- ✓ ✗ 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 a topic sentence to introduce the main idea of the paragraph.²
- ✓ ✗ I have provided one way in which the rights of victims are protected in the Victorian criminal justice system.³
- ✓ ✗ I have provided a second way in which the rights of victims are protected in the Victorian criminal justice system.⁴
- ✓ ✗ I have provided a third way in which the rights of victims are protected in the Victorian criminal justice system.⁵
- ✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.⁶
- ✓ ✗ I have provided one limitation of the Victorian criminal justice system in protecting victims of crime.⁷

- ☒ ☐ I have provided a second limitation of the Victorian criminal justice system in protecting victims of crime.⁸
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁹
- ☒ ☐ I have referred directly to relevant legislation in my response.
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used signposting in my response, such as 'Firstly', and 'Another limitation'.
- ☒ ☐ I have used connecting words, such as 'Additionally' and 'Further'.

Linking to previous learning

15. [One right that Leina had as an accused was the right to silence, which is a common law right that allows a person to remain silent when questioned or asked to supply information by a person in authority.¹] [This right protects accused people, such as Leina, from self-incrimination and is designed to prevent oppression by the police or other authorities.²] [Alternatively, one right that Nick has as a victim is the right to be informed about the likely release date of Leina, which includes information, such as the earliest possible release date, when Leina applies for or is released on parole, and whether that parole is cancelled.³] [This victims' right is provided to victims of 'criminal acts of violence', which includes assault, so Nick would be eligible for the Victims Register to receive information about the likely release date of Leina.⁴]

- ☒ ☐ I have identified and defined one right of an accused person.¹
- ☒ ☐ I have provided information about my chosen right of an accused person.²
- ☒ ☐ I have identified and defined one right of a victim.³
- ☒ ☐ I have provided information about my chosen right of a victim.⁴
- ☒ ☐ I have linked my answer to the scenario where appropriate.
- ☒ ☐ I have used signposting in my response, such as 'One right'.
- ☒ ☐ I have used connecting words, such as 'Alternatively'.

16. B; C; D

17. [I agree with this statement because the standard of proof in a criminal trial is 'beyond reasonable doubt', which is a high threshold of guilt. Hence it may be difficult for the prosecution to prove an accused's guilt beyond reasonable doubt, without evidence from the victim.¹]

[Firstly, alternative arrangements enable witnesses who may otherwise be too intimidated to participate in a trial, a means by which they can still be involved. This can prevent a trial from being discontinued due to a victim's fear of giving evidence.²] [For example, victims of crime who have been traumatised by their experience are more likely to give evidence as a witness, in the accused's trial, if they can do so via CCTV, without physically seeing the accused.³] [This also ensures victims do not present unreliable evidence as a result of feeling intimidated by the accused.⁴]

[Furthermore, a victim's evidence is often crucial for the prosecution to prove an offender's guilt beyond reasonable doubt, so it is important that this evidence is heard by the judge and/or jury.⁵]

[Therefore, because a victim's evidence can be essential for proving the guilt of an accused, I agree that it is crucial for victims to be able to give evidence using alternative arrangements.⁶]

- ☒ ☐ I have provided an introduction to state whether I agree or disagree, and a brief reason for my answer.¹
- ☒ ☐ I have provided one reason why alternative arrangements are crucial in criminal trials.²
- ☒ ☐ I have provided an example of an alternative arrangement and linked it to my chosen reason.³
- ☒ ☐ I have provided a second reason why alternative arrangements are crucial in criminal trials.⁴
- ☒ ☐ I have provided a third reason why alternative arrangements are crucial in criminal trials.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 'Firstly'.
- ☒ ☐ I have used connecting words, such as 'Furthermore' and 'Therefore'.

2A The principles of justice during a criminal case

Check your understanding

1. A. **Explanation:** The justice system must be accessible to all individuals, everyone must be treated the same, and a fair trial should occur.
2. B. **Explanation:** Whilst all accused people are entitled to seek legal representation, they may not be able to afford it. This limits the achievement of fairness as a self-represented accused may be unable to present their case in the best possible light.
3. The principle of **equality** is upheld when all people are able to engage with the justice system without disparity or disadvantage.
4. A; C; D. **Explanation:** The principle of equality requires all people engaging with the justice system to be treated the same, although, if the same treatment results in disadvantage, an accused may be treated differently to ensure equal outcomes for all individuals.
5. A. True. **Explanation:** An accused who understands their rights and legal processes may be able to engage more comprehensively with the justice system, improving their access.
6. A; B; C. **Explanation:** Criminal processes and procedures that increase engagement with the justice system help achieve the principle of access.
7. A. True. **Explanation:** Equality can be attained by treating people differently to ensure an equal result, which achieves fairness by promoting a just outcome for an accused.

Preparing for exams

Standard exam-style

8. [Fairness is the principle that all people can participate in the justice system and its processes should be impartial and open.¹] [Birrani's decision to represent himself can limit the achievement of fairness as he may be unable to present his case in the best possible light.²] [As Birrani speaks very little English and is not familiar with the justice system, this may lead to an unjust outcome in his case, limiting the achievement of fairness.³]

✓ ✗ I have defined fairness as a principle of justice.¹

✓ ✗ I have provided one reason why fairness may not be achieved in this case.²

✓ ✗ I have provided an example from the scenario and linked it to fairness as a principle of justice.³

9. [One reason why Theo's trial may not achieve access is that the trial was delayed significantly, causing Theo to feel stressed and anxious.¹] [This limits the achievement of access as the case is not being heard in a timely manner, reducing Theo's ability to engage with the justice system as an alleged victim of crime.²] [Furthermore, another reason why Theo's case may not achieve access is that he was not informed of the proceedings related to the trial.³] [This limits the achievement of access as Theo has a right to be involved in court proceedings as a victim of crime. Therefore, by not being informed about proceedings, he is unable to adequately engage in the justice system.⁴]

✓ ✗ I have provided one reason why Theo's trial may not achieve the principle of access.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided a second reason why Theo's trial may not achieve the principle of access.³

✓ ✗ I have provided information about my chosen reason.⁴

✓ ✗ I have used signposting in my response, such as 'One reason' and 'another reason'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

10. Strengths: II; III; IV
Limitations: I; V

11. [The principles of fairness and equality may be achieved in Axel's case, subject to certain limitations.¹]

[One way fairness can be achieved in Axel's case is that, as an accused, he will be presumed innocent until proven guilty. This means the prosecution will attempt to prove his guilt, as they initiated the case against Axel, ensuring a just outcome is achieved.²] [However, fairness can be limited by Axel's self-representation as he may be unable to present his case in the best possible light.³] [Axel does not know how to properly present his evidence and is worried he might say something that incriminates himself. His lack of legal presentation experience, when compared to the skill of the prosecution, could jeopardise the achievement of a just outcome.⁴]

[On the other hand, one way equality may be achieved is that the judge and jury in Axel's case must be independent and unbiased, basing their decisions solely on the facts of the case and not the characteristics of the prosecution or the accused.⁵] [Although, despite this, equality may not be achieved if the judge has an unconscious bias in favour of the prosecutor, given they appear to be friends. If this is the case, the achievement of equality may be jeopardised as Axel and the prosecutor are unlikely to be treated in the same way.⁶]

[Overall, the requirement of the presumption of innocence and an independent judge and jury assist in upholding the principles of fairness and equality. However, as Axel is representing himself and the judge appears to be friendly with the prosecutor, the achievement of fairness and equality may be limited in this case.⁷]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the principle of fairness may be achieved in Axel's criminal case.²

✓ ✗ I have provided one way the principle of fairness may be limited in Axel's criminal case.³

✓ ✗ I have provided an example from the scenario and linked it to the achievement of fairness.⁴

✓ ✗ I have provided one way the principle of equality may be achieved in Axel's criminal case.⁵

✓ ✗ I have provided one way the principle of equality may be limited in Axel's criminal case.⁶

✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

- ☒ ☐ 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'.
- ☒ ☐ I have used connecting words, such as 'However' and 'On the other hand'.

Linking to previous learning

12. a. [One right of victims, such as Dewei, is the right to be informed about the proceedings.¹]

☒ ☐ I have identified one right of victims in the Victorian criminal justice system.¹

☒ ☐ I have used signposting in my response, such as 'One right'.

- b. [The right to be informed about the proceedings ensures victims of crime, such as Dewei, are able to engage with the justice system as they are provided with information about the case in which they are involved, achieving access to justice.¹] [Another way access is upheld by this right is that it ensures the police and prosecutors minimise suffering experienced by victims, such as Dewei, by keeping victims informed, promoting access.²]

☒ ☐ I have provided one way a victim's right to be informed about the proceedings upholds the principle of access.¹

☒ ☐ I have provided a second way a victim's right to be informed about the proceedings upholds the principle of access.²

☒ ☐ I have used signposting in my response, such as 'Another way'.

13. [The burden of proof is the responsibility of a party to prove the facts of a case. In a criminal case, the burden of proof rests with the prosecution.¹] [The principle of fairness is upheld by the burden of proof as the prosecution is pursuing the case against the accused, and therefore, the onus is on them to prove the facts and claims against the accused.²] [It is not the responsibility of the accused to prove their own innocence, as this would be unfair.³]

☒ ☐ I have defined the burden of proof.¹

☒ ☐ I have provided one way in which the burden of proof upholds the principle of fairness.²

☒ ☐ I have provided information about the relationship between the burden of proof and the principle of fairness.³

2B Victoria Legal Aid and community legal centres

Check your understanding

- A. True. **Explanation:** Both VLA and CLCs have the shared goal of providing affordable legal advice for accused people and victims of crime.
- C. **Explanation:** Counselling services are not provided by VLA as they focus on legal information, advice, and support.
- A; B; C. **Explanation:** Grants of legal assistance are provided by VLA.
- Strengths: I; IV
Limitations: II; III
- The **income** test requires an accused to demonstrate that their income is limited or their main source of income is welfare payments from the government in order to receive duty lawyer assistance. On the other hand, the **means** test considers an accused's income, assets, and expenses to determine whether they are eligible for a grant of legal assistance
- A; C. **Explanation:** Whilst VLA's eligibility requirements prioritise those most in need, others who are in the middle ground, whose circumstances are not considered dire enough to warrant help, are unable to receive legal assistance, limiting the achievement of equality.
- B. **Explanation:** CLCs are less accessible to those who live in remote areas as there are fewer regional CLC locations, therefore limiting access to legal resources and support for individuals within those communities.

Preparing for exams

Standard exam-style

8. [One role of Victoria Legal Aid (VLA) in assisting an accused person is providing free information.¹] [General information about the law and legal matters is readily available on the website, in brochures, and over the phone.²] [These resources are free, available in different languages, and are accessible to everyone. They aim to educate accused individuals and the community about legal matters, criminal law procedures, and provide general legal support.³]

☒ ☐ I have identified one role of Victoria Legal Aid in assisting an accused person.¹

☒ ☐ I have provided information about my chosen role of Victoria Legal Aid.²

☒ ☐ I have provided further information about my chosen role of Victoria Legal Aid.³

☒ ☐ I have used signposting in my response, such as 'One role'.

9. a. [Community legal centres (CLCs) are independent organisations that aim to enhance access to justice for members of the community by providing free general and specialist legal services.¹] [CLCs enhance individuals' access to the justice system by allowing them to engage with legal matters in an informed manner and with relevant legal support.²]

✓ ✗ I have provided information about the main purpose of community legal centres.¹

✓ ✗ I have provided further information about the purpose of community legal centres.²

- b. [Community legal centres (CLCs) uphold the principle of fairness by providing high quality, free legal support and education to members of the community, including the accused.¹] [This enables accused individuals to adequately participate in legal proceedings, understand the case against them, and present their cases in the best light, hence encouraging just outcomes.²] [Moreover, CLCs can provide legal representation in limited circumstances, further assisting accused individuals in achieving fair outcomes by assisting them to navigate the complex criminal justice system.³]

✓ ✗ I have provided one way community legal centres uphold the principle of fairness when assisting accused people.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have provided a second way community legal centres uphold the principle of fairness when assisting accused people.³

10. [One role of community legal centres (CLCs) is to help victims, such as Charles, navigate the legal process by providing free legal information.¹] [General legal information can be provided in person and online, whilst specialist CLCs can ensure relevant resources and legal support are available for specific legal matters, such as discriminatory crimes.²] [Therefore, a disability-focused CLC could provide relevant legal support and assistance to Charles, enabling him to receive justice for his attack.³]

✓ ✗ I have identified one role of community legal centres in assisting Charles.¹

✓ ✗ I have provided information about the role of community legal centres.²

✓ ✗ I have provided an example from the scenario and linked it to the role of community legal centres.³

✓ ✗ I have used signposting in my response, such as 'One role'.

11. [Victoria Legal Aid (VLA) would be more appropriate for Kai as they are set to appear in the Magistrates' Court and may need tailored advice to assist them in resolving the matter.¹] [Unlike community legal centres (CLCs), VLA has duty lawyers available in the Magistrates' Court to assist people charged with summary offences, and can provide advice and representation to accused individuals on the day of their hearing.²] [Given Kai's matter is a summary offence, if they satisfy the requirements of the income test, they may be eligible for duty lawyer assistance which would be beneficial given they do not have knowledge of the criminal justice system and English in their second language.³]

✓ ✗ I have identified that VLA would be more appropriate in Kai's scenario.¹

✓ ✗ I have provided information about the role of VLA in assisting accused individuals.²

✓ ✗ I have provided information about why Victoria Legal Aid would be more appropriate than a community legal centre in this scenario.³

Extended response

12. Strengths: I; II
Limitations: III; IV

13. [Victoria Legal Aid (VLA) and community legal centres (CLCs) can uphold the principle of access to a moderate extent. However, they are limited in their ability to do so due to available resources and funding.¹]

[Firstly, VLA's legal services can be accessed in multiple ways. For example, it offers assistance in person, over the phone, and online, meaning that individuals are provided with multiple avenues through which they can access legal support.²] [Similarly, CLCs are located across metropolitan Melbourne and in some regional areas, with some providing legal assistance over the phone, therefore promoting access to legal information and advice for members of the community.³]

[Moreover, access to legal representation and the ability to engage with the legal system is facilitated by VLA and CLCs. VLA provides duty lawyers and grants of legal assistance to eligible clients, increasing their access to the criminal justice system, and ensuring they can participate in the processes in an informed manner.⁴] [CLCs can also provide legal representation for accused individuals and duty lawyers for victims in some circumstances, enhancing access to legal representation for those in disadvantaged circumstances.⁵]

[However, though VLA and CLCs can both provide legal representation and tailored advice to varying degrees, this support is not widely available.⁶] [CLCs usually provide assistance for relatively minor criminal matters and therefore, do not promote access to resources for those charged with very serious criminal matters. Moreover, CLC representation for accused individuals is very limited and difficult to acquire, for example, it can only be provided to an accused if they have a grant of legal assistance which is also hard to obtain.⁷] [Likewise, VLA duty lawyers and grants of legal assistance can only be provided if the accused satisfies the income and means test, respectively, and duty lawyers are only available in the Magistrates' Court and not for indictable offences.⁸]

[Finally, both VLA and CLCs are limited in their abilities to facilitate access to legal resources and support due to a lack of funding.⁹]

[The demand for legal services is greatly disproportionate to the assistance available. Therefore, more individuals may be left uninformed and unable to adequately engage with the criminal justice system and achieve justice.¹⁰]

[In conclusion, whilst VLA and CLCs can promote access to legal services and support to the community in many different ways, their ability to do so is limited by available resources and financial restrictions.¹¹]

✓ ✗ I have provided an introduction to summarise my answer.¹

✓ ✗ I have provided one way VLA upholds the principle of access.²

✓ ✗ I have provided one way CLCs uphold the principle of access.³

- ✓ ✗ I have provided a second way VLA upholds the principle of access.⁴
- ✓ ✗ I have provided a second way CLCs uphold the principle of access.⁵
- ✓ ✗ I have provided one way VLA and CLCs are limited in their ability to uphold the principle of access.⁶
- ✓ ✗ I have provided information about my chosen way and linked it to CLCs.⁷
- ✓ ✗ I have provided information about my chosen way and linked it to VLA.⁸
- ✓ ✗ I have provided a second way VLA and CLCs are limited in their ability to uphold the principle of access.⁹
- ✓ ✗ I have provided information about my chosen way.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' and 'Finally'.
- ✓ ✗ I have used connecting words, such as 'Therefore' and 'Moreover'.

Linking to previous learning

14. [Community legal centres (CLCs) could help Sonia understand her rights as a victim by providing her with information about trial and her rights when giving evidence.¹] [Given that Sonia was a victim of a sexual assault offence, she has the right to give evidence using alternative arrangements.²] [Therefore, CLCs can assist her in understanding the different ways she could give evidence, such as via CCTV, which may ease her stress and enable her to adequately participate in the proceeding and achieve a fair outcome.³]
- ✓ ✗ I have provided one way CLCs could assist Sonia in understanding her rights as a victim.¹
- ✓ ✗ I have provided examples from the scenario and linked them to the rights of victims.²
- ✓ ✗ I have provided information about CLCs and their ability to assist Sonia as a victim.³

2C Plea negotiations

Check your understanding

1. B. False. **Explanation:** Plea negotiations may be initiated by either the prosecution or the accused.
2. A. **Explanation:** It is the role of the court to impose an appropriate sentence upon the accused. Plea negotiations merely result in the parties agreeing to the charges to which the accused will plead guilty, not the sentence.

3. A; B; D. **Explanation:** Plea negotiations secure a conviction by ensuring the accused pleads guilty to a charge(s), avoiding the costs, time, and stress associated with a criminal trial. However, a penalty is not decided at this time.
4. B; D. **Explanation:** Plea negotiations may be appropriate in circumstances where the prosecution is unsure if they can secure a verdict of guilty at trial.
5. If a plea negotiation results in the accused pleading guilty to a charge that does not adequately reflect the crime, this prevents the achievement of **fairness**.
6. B. False. **Explanation:** There are circumstances where plea negotiations are not appropriate, including if the accused is not willing to plead guilty to the charge(s) against them.

Preparing for exams

Standard exam-style

7. [One participant in the plea negotiation process is the accused.¹]
[Another participant is the prosecution.²]
- ✓ ✗ I have identified one participant in the plea negotiation process.¹
- ✓ ✗ I have identified a second participant in the plea negotiation process.²
- ✓ ✗ I have used signposting in my response, such as 'One participant' and 'Another participant'.
8. [Plea negotiations may be appropriate in cases where victims and witnesses are reluctant to give evidence, or where giving evidence will be particularly traumatic for the victim or witnesses.¹] [In these circumstances, the prosecution may decide to enter into plea negotiations with the accused to avoid going to trial altogether so victims and witnesses do not have to present their evidence in court.²]
[Plea negotiations may also be appropriate where the accused or prosecution wishes to avoid the costs and time associated with a criminal trial.³] [In these circumstances, either party may enter into plea negotiations to ensure a prompt resolution of the case without the need for a full criminal trial.⁴]
- ✓ ✗ I have identified one reason why plea negotiations may be appropriate in determining a criminal case.¹
- ✓ ✗ I have provided information about my chosen reason.²
- ✓ ✗ I have provided a second reason why plea negotiations may be appropriate in determining a criminal case.³
- ✓ ✗ I have provided information about my chosen reason.⁴
9. [One reason why a plea negotiation would be appropriate is that it will result in an early determination of the case by avoiding the trial that is more than 14 months away.¹] [This is appropriate as Lottie wants the case to be resolved quickly and engaging in successful plea negotiations can avoid the trial process in the County Court. Therefore, Lottie's case can be resolved far quicker than if a trial were conducted, avoiding court delays.²] [However, one reason why a plea negotiation may not be appropriate is that Nico's family wants to see Lottie punished severely.³] [Plea negotiations may result in Lottie pleading guilty to a lesser charge than culpable driving and therefore, this may lead to Nico's family believing Lottie has been 'let off' too easily.⁴]

- ✓ ✗ I have provided one reason why a plea negotiation would be appropriate in this scenario.¹
-
- ✓ ✗ I have provided information about my chosen reason.²
-
- ✓ ✗ I have provided one reason why a plea negotiation would not be appropriate in this scenario.³
-
- ✓ ✗ I have provided information about my chosen reason.⁴
-
- ✓ ✗ I have used signposting in my response, such as 'One reason'.
-
- ✓ ✗ I have used connecting words, such as 'Therefore' and 'However'.
-

Extended response

10. A; C; D

11. [Plea negotiations may be appropriate in Tabitha's case as she can avoid having to represent herself in a criminal trial, which is particularly beneficial due to her limited case presentation skills.¹] [Therefore, plea negotiations could result in Tabitha pleading guilty in return for a concession from the prosecution, such as a lesser charge that potentially results in a reduced sentence.²] [Additionally, plea negotiations may also be appropriate in securing a conviction for the prosecution. This is because Aria is reluctant to give evidence at trial as she does not want to relive the traumatic experience by presenting evidence, potentially reducing the likelihood of Tabitha being convicted if a trial were to proceed.³]

[However, as Joe's parents wish to see justice served at trial, plea negotiations may not be appropriate, as such negotiations could result in the prosecution providing a concession to Tabitha in return for a plea of guilty.⁴] [This could cause Joe's parents to believe Tabitha has 'gotten off lightly' considering the seriousness of the offence.⁵]

[Overall, despite the potential perception that Tabitha has been 'let off', plea negotiations are appropriate in securing a conviction and avoiding a full criminal trial in this case.⁶]

- ✓ ✗ I have provided one reason why plea negotiations are appropriate in this scenario.¹
-
- ✓ ✗ I have provided information about my chosen reason.²
-
- ✓ ✗ I have provided a second reason why plea negotiations are appropriate in this scenario.³
-
- ✓ ✗ I have provided one reason why plea negotiations are not appropriate in this scenario.⁴
-
- ✓ ✗ I have provided information about my chosen reason.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 'Therefore' and 'Additionally'.
-

Linking to previous learning

12. Strengths: I; II
Limitations: III; IV

13. [Plea negotiations achieve fairness and access to a large extent by securing a conviction in cases where the evidence may not be strong enough, whilst also avoiding the costs and time associated with trial.¹]

[Firstly, one way plea negotiations achieve fairness is because they may result in the accused pleading guilty to a charge that adequately reflects the crime, leading to a just outcome to the case.²] [However, where plea negotiations result in the accused pleading guilty to a charge that does not adequately reflect the crime, this may result in the community feeling an accused has been 'let off'. This could lead to the impression that the outcome was unfair, limiting the achievement of fairness.³] [Another way fairness may be achieved is in cases where witnesses are reluctant to give evidence, or if some evidence is inadmissible in court, as successful plea negotiations can secure a conviction, providing an alternative avenue for securing a conviction, without the need for the matter to proceed to trial.⁴]

[Furthermore, plea negotiations achieve the principle of access as they save the courts time and resources by allowing cases to be resolved before going to trial. This minimises delays and frees up court resources to make the legal system more accessible for cases that do go to trial.⁵] [However, plea negotiations are conducted in private, meaning victims, their families, and society cannot engage in this process, reducing the achievement of access.⁶] [Access may also be limited for some accused persons as the prosecution has to agree to conduct plea negotiations.⁷]

- ✓ ✗ I have provided an introduction to summarise my answer to the question.¹
-
- ✓ ✗ I have provided one way plea negotiations promote the achievement of fairness.²
-
- ✓ ✗ I have provided one way plea negotiations limit the achievement of fairness.³
-
- ✓ ✗ I have provided a second way plea negotiations promote the achievement of fairness.⁴
-
- ✓ ✗ I have provided one way plea negotiations promote the achievement of access.⁵
-
- ✓ ✗ I have provided one way plea negotiations limit the achievement of access.⁶
-
- ✓ ✗ I have provided a second way plea negotiations limit the achievement of access.⁷
-
- ✓ ✗ I have used paragraphs to organise my response.
-
- ✓ ✗ I have used signposting in my response, such as 'Firstly, one way' and 'Another way'.
-
- ✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.
-

2D The Victorian court hierarchy and criminal cases

Check your understanding

1. A. **Explanation:** The courts are ordered from least to most superior.
2. B. False. **Explanation:** The Magistrates' Court does not have appellate jurisdiction.
3. B. **Explanation:** Parking fines are summary offences and are heard in the Magistrates' Court.
4. Specialisation refers to a court's ability to develop **expertise** in a particular area of criminal law, and in dealing with specific criminal **cases** as a result of the **court** hierarchy.
5. B; C; E. **Explanation:** Parties can only appeal a case on valid grounds, such as appealing on a question of law, appealing the conviction, or appealing the sanction imposed.
6. C. **Explanation:** The Court of Appeal only has the legal authority to hear cases on appeal.
7. B. False. **Explanation:** Courts can only hear cases explicitly within their jurisdiction.
8. B. False. **Explanation:** It is not guaranteed that a party can appeal a case as they may need leave to appeal.
9. A. **Explanation:** The Victorian court hierarchy facilitates specialisation and the process of appeals in criminal cases.

Preparing for exams

Standard exam-style

10. [One reason for the Victorian court hierarchy is appeals. This means that, if a party is dissatisfied with the outcome of a case, they can seek to have the decision reviewed by a higher court.¹] [Therefore, the court hierarchy allows more superior courts to review the decisions of lower courts, however, a party may need leave to appeal as it is not an automatic right.²]

☒ ☐ I have identified one reason for the Victorian court hierarchy.¹

☒ ☐ I have provided information about my chosen reason.²
11. [Specialisation is facilitated by the Victorian court hierarchy as it allows each court to develop expertise in a particular area of criminal law.¹] [This means the court hierarchy allows each court to become familiar with hearing certain types of criminal cases, and the laws and procedures, relevant to these cases.²] [For example, the Supreme Court – Trial Division specialises in hearing murder cases.³]

☒ ☐ I have stated how specialisation is facilitated by the Victorian court hierarchy.¹

☒ ☐ I have provided information about how specialisation is facilitated by the Victorian court hierarchy.²

☒ ☐ I have provided an example of specialisation to support my answer.³

12. a. [In order to appeal her case, Kaya must have valid legal grounds. This could include appealing her conviction and guilty verdict, appealing her five year imprisonment sentence, or appealing on a question of law.¹] [If Kaya determines she has valid grounds for an appeal, she may also need leave to appeal, which is permission from the Court of Appeal to appeal a case.²]

☒ ☐ I have identified the three grounds for an appeal.¹

☒ ☐ I have provided information about the appeals process.²

☒ ☐ I have linked my answer to the scenario where appropriate.
- b. [Given that armed robbery is an indictable offence heard in the County Court, the appeal would be heard in the Court of Appeal.¹] [The Court of Appeal's appellate jurisdiction includes the hearing and determination of all appeals for crimes originally heard by a judge and jury in the County Court or Supreme Court – Trial Division.²] [Appeals heard by the Court of Appeal can be based on any valid grounds, including appeals against the sanction imposed, on questions of law, or the appeal of a conviction.³]

☒ ☐ I have identified that the appeal would be heard in the Court of Appeal.¹

☒ ☐ I have provided information about the appellate jurisdiction of the Court of Appeal.²

☒ ☐ I have provided further information about the appellate jurisdiction of the Court of Appeal.³

13. [No, I do not agree with this statement. Appeals uphold the principle of access and ensure all individuals are afforded access to a fair trial in circumstances where the original ruling may have been unjust.¹] [If a party is dissatisfied with the outcome of a case, they have the right to apply for leave to appeal a case and, if successful, have a higher court review the decision of the lower court.²] [If all rulings were final and there were no opportunities to appeal, the criminal justice system would be ineffective as any mistakes or inconsistencies in the original ruling could not be rectified by a superior court.³] [Therefore, appeals enhance a party's access to bodies that can deliver justice and a fair outcome when engaging with the criminal justice system.⁴]

☒ ☐ I have stated whether I agree or disagree with the statement and provided an introduction to my response.¹

☒ ☐ I have provided information about the process of appeals.²

☒ ☐ I have provided one way appeals uphold my chosen principle of justice.³

☒ ☐ I have provided information about my chosen way appeals uphold the principle of justice.⁴

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

Extended response

14. B; E

15. [I do not agree with this statement as the efficiency and effectiveness of the Victorian courts are dependent on its hierarchical structure.¹]

[Firstly, the court hierarchy facilitates specialisation and expertise.²]
[This means that, as a result of the ordering of the courts, judges of the respective courts are experienced and skilled in dealing with particular areas of criminal law and the relevant court procedures.³][If there was only one level of courts, it would be difficult to determine which court should hear particular matters as the judges would not be specialised in any specific areas of law. Resultantly, this could lead to delays and inconsistencies in court rulings.⁴]

[Moreover, the appeals process is reliant on the courts being ranked from least to most superior.⁵][If a party is unsatisfied with the outcome of a case, they have the right to apply for leave to appeal and have the final decision reviewed by a superior court, as a result of the court hierarchy.⁶][Therefore, if the court hierarchy did not exist, there would be no opportunity for potential errors to be reconsidered by a higher court and more experienced judge.⁷]

[Hence, it is imperative that the Victorian courts are hierarchically ordered to ensure the functional and smooth delivery of justice.⁸]

✓ ✗ 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 a topic sentence to introduce the main idea of the paragraph.²

✓ ✗ I have provided one reason why the court hierarchy should or should not exist.³

✓ ✗ I have provided one consequence of not having a court hierarchy.⁴

✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.⁵

✓ ✗ I have provided a second reason why the court hierarchy should or should not exist.⁶

✓ ✗ I have provided a second consequence of not having a court hierarchy.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'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'Hence'.

Linking to previous learning

16. [The Victorian court hierarchy promotes accused individuals' right to be tried without unreasonable delay.¹][As the court hierarchy facilitates specialisation, each court has expertise in dealing with certain types of criminal matters and proceedings.²][This means knowledgeable judges are familiar with hearing and determining specific cases, reducing the likelihood of delays as judges would be familiar with the effective case management of the types of matters they preside over.³]

✓ ✗ I have identified one way in which the Victorian court hierarchy promotes one right of an accused individual.¹

✓ ✗ I have provided information about the court hierarchy.²

✓ ✗ I have provided information about the relationship between the court hierarchy and one right of an accused individual.³

2E Judges, magistrates, and juries in a criminal case

Check your understanding

1. C. **Explanation:** In VCE Legal studies, phrasing and details are very important to obtain full marks. So whilst the other answers have partially correct elements, they are not entirely accurate or acceptable.
2. B. False. **Explanation:** The jury only determines the verdict. It is the role of the judge to hand down a sentence.
3. B; D. **Explanation:** There is no jury in the Magistrates' Court, thus magistrates never direct a jury. Further, questioning witnesses is a role of the prosecution and defence lawyers, not the magistrate.
4. C. **Explanation:** Jurors are not allowed to have relations with the parties. Therefore, Axin, Cora, and Ethan have committed juror misconduct that could lead to a mistrial. Bellamy's pact with the other jurors is also considered juror misconduct, and a mistrial would be ordered in this case.
5. B. False. **Explanation:** Though the judge may clarify and assist the jury in understanding different areas of law, the judge cannot assist the jury in determining a verdict.
6. B. False. **Explanation:** The jury cannot conduct external research and must make their decision based on the evidence presented in court alone.
7. Judges and magistrates rely on the parties to present all relevant evidence during a trial. If an accused person has no legal representation, this may prevent the principle of **fairness** from being achieved.
8. A trial by one's peers protects democracy, ensuring decisions are based on the facts and reflect community values. This promotes **access** by engaging citizens in and informing them about the legal system.

Preparing for exams

Standard exam-style

9. [One role of the jury is to carefully consider the evidence presented and weigh it against the legal standards communicated in the judge's instructions.¹][The jury must determine its verdict 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, where justice is served.³]

✓ ✗ I have identified one role of the jury in a criminal case.¹

✓ ✗ I have provided information about my chosen role of the jury in a criminal case.²

✓ ✗ I have provided further information about my chosen role of the jury in a criminal case.³

✓ ✗ I have used signposting in my response, such as 'One role'.

10. [In Aayush's case, the judge is responsible for managing courtroom proceedings and ensuring the trial is conducted in a fair and efficient manner.¹] [This involves making decisions on what evidence can be presented, and what is relevant and admissible.²] [The judge will also act to ensure both the prosecution and defence have an equal opportunity to present their case, Aayush is given a fair trial, and justice is served.³]



I have identified one aspect of the role of the judge in a criminal case.¹



I have provided information about my chosen role of the judge in a criminal case.²



I have identified a second aspect of the role of the judge in a criminal case.³



I have linked my answer to the scenario where appropriate.

11. [A judge is the umpire of a courtroom who oversees all personnel, and evidence, whilst upholding rules and procedure.¹] [A magistrate performs the same roles as a judge, but only in the Magistrates' Court.²] [One key difference between a magistrate and a judge is that magistrates hear and determine summary offences, such as traffic offences. Contrary to this, judges deal with more serious criminal offences, such as homicide, as they have the expertise to do so and reside in more superior courts.³]



I have provided information about the role of the judge in a criminal case.¹



I have provided information about the role of the magistrate in a criminal case.²



I have provided one key difference between judges and magistrates in a criminal case.³



I have used signposting in my response, such as 'One key difference'.



I have used comparison words, such as 'Contrary to this', when distinguishing.

Extended response

12. B; C

13. [The role of the judge in a criminal case is crucial to achieving the principle of fairness. However, there are limitations that hinder fairness from being achieved in all cases.¹]

[One way a judge promotes the achievement of fairness is by informing the jury on the laws relevant to the case and providing guidance on the facts and evidence that must be considered in their deliberations. This promotes fairness as the jury is well-informed and capable of reaching a just and fair verdict.²] [Judges also uphold fairness by acting impartially towards both parties and conducting the trial in a manner that is in accordance with the rules of evidence and procedure.³]

[However, there are limitations in the judge's ability to promote fairness in a criminal case. Inherently, each person holds subconscious biases and this may be reflected in a judge's rulings, impacting the achievement of a fair trial.⁴] [Another way the achievement of fairness is limited by the judge is that they rely on the parties to present all the evidence and present their case in the best light. If an accused is self-represented and unable to adequately present their case, the

judge is unable to provide them with legal advice or assistance beyond explaining basic legal procedures. This limits a judge's ability to ensure a fair trial and facilitate the administration of justice.⁵]

[Overall, the judge's impartiality, and legal expertise are essential in ensuring justice is served in the criminal justice system. However, it is also important to recognise and address the limitations in the judge's ability to promote fairness.⁶]



I have provided an introduction to summarise my answer to the question.¹



I have provided one way a judge promotes the achievement of fairness in a criminal case.²



I have provided a second way a judge promotes the achievement of fairness in a criminal case.³



I have provided one way a judge limits the achievement of fairness in a criminal case.⁴



I have provided a second way a judge limits the achievement of fairness in a criminal 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 way' and 'Another way'.



I have used connecting words, such as 'However'.

14. Strengths: I; II; V; VI

Limitations: III; IV; VII

15. [I agree with this statement to a moderate extent, because even though judge's have more experience and expertise than juries, juries may be less subject to political bias and they represent a cross-section of the community.¹]

[Firstly, judges have extensive legal expertise and training, allowing them to interpret complex legal concepts and apply them correctly to a criminal case.²] [They are also familiar with legal precedents and the principles of legal reasoning, which allows them to make justified rulings that ensure a fair trial.³] [However, as ordinary and randomly selected individuals, jurors may not be equipped with these skills and their verdict may be incorrectly informed or lack consideration of key legal principles.⁴]

[Moreover, judges have experience in setting aside their personal beliefs so as to remain impartial and unbiased in their rulings.⁵]

[Jurors, on the other hand, are more likely to be influenced by personal prejudices and emotions, increasing the risk of an unfair verdict that is based on their biases as opposed to the facts of the case.⁶]

[However, there are also arguments against judges deciding verdicts.⁷]

[One of the main criticisms is that judges are government-appointed officials and may be subject to political pressure or biases. This can potentially compromise their impartiality and lead to unfair or unjust verdicts.⁸]

[Another limitation of judges deciding verdicts is that it limits the participation of ordinary citizens in the legal process.⁹] [Juries are comprised of a cross-section of the community that represents a diverse range of views. The use of juries helps ensure the legal system is accountable to the people.¹⁰]

[In conclusion, whilst judges may have more legal expertise and experience in remaining impartial in their decisions, the use of juries to determine verdicts is a valuable means of public participation in the criminal legal system.¹¹]

✓ ✗ 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 strength of judges determining the verdict in criminal cases.²

✓ ✗ I have provided information about my chosen strength of judges determining the verdict in criminal cases.³

✓ ✗ I have provided one limitation of juries determining the verdict in criminal cases and linked it to my chosen strength of judges determining the verdict.⁴

✓ ✗ I have provided a second strength of judges determining the verdict in criminal cases.⁵

✓ ✗ I have provided a second limitation of juries determining the verdict in criminal cases and linked it to my chosen strength of judges deciding the verdict.⁶

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁷

✓ ✗ I have provided one limitation of judges determining the verdict in criminal cases.⁸

✓ ✗ I have provided a second limitation of judges determining the verdict in criminal cases.⁹

✓ ✗ I have provided one strength of juries determining the verdict in criminal cases and linked it to my chosen limitation of judges determining the verdict.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' and 'Another limitation'.

✓ ✗ I have used connecting words, such as 'However' and 'Moreover'.

Linking to previous learning

16. [The *Jury Directions Act 2015* (Vic) is designed to ensure juries understand the concept of the standard of proof of 'beyond reasonable doubt' in criminal cases. This standard requires the prosecution to prove its case to a high level of certainty, which is intended to protect the rights of the accused and prevent wrongful convictions.¹][Section 63 of the Act provides that the trial judge must explain the meaning of the phrase 'proof beyond reasonable doubt' to the jury. Section 64 then sets out several ways in which the judge may explain this concept, ensuring the jury clearly understands the standard of proof.²][The judge may explain that reasonable doubt is not an imaginary or fanciful doubt or an unrealistic possibility, but rather a doubt that a reasonable person might have, based on the evidence presented in court.³]

✓ ✗ I have identified one way the *Jury Directions Act 2015* (Vic) ensures the jury understands the concept of the standard of proof.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have provided an example from the Act and linked it to my chosen way the *Jury Directions Act 2015* (Vic) ensures the jury understands the concept of the standard of proof.³

✓ ✗ I have linked my answer to the stimulus material where appropriate.

2F The parties in a criminal case

Check your understanding

- A. True. **Explanation:** The prosecution is the party that brings the criminal case to court, whilst the accused is the party who is charged with a criminal offence.
- B. **Explanation:** Whilst the accused is not required to do so, they are able to call witnesses to present evidence at trial.
- B; C. **Explanation:** It is the role of the accused to determine whether they wish to plead guilty or not guilty and determine which, if any, lawful defences they wish to raise.
- Where a witness is questioned by the party who called them to give evidence, this is referred to as **examination-in-chief**.
- A; B; C. **Explanation:** The prosecution is not allowed to speak to members of the jury outside of presenting evidence to them in the courtroom.
- Strengths: I; III
Limitations: II; IV
- A. True. **Explanation:** The role of the prosecution is to convince the jury the accused is guilty beyond reasonable doubt. Alternatively, the accused only has to place doubt in the jurors' minds, rather than prove their innocence beyond reasonable doubt.

Preparing for exams

Standard exam-style

8. [One role of the prosecution is to present evidence at trial to convince the jury the accused is guilty beyond reasonable doubt.¹][One role of the accused is to enter into a plea of 'guilty' or 'not guilty' to the charges against them.²]

✓ ✗ I have identified one role of the prosecution in a criminal case.¹

✓ ✗ I have identified one role of the accused in a criminal case.²

✓ ✗ I have used signposting in my response, such as 'One role'.

9. [One role of Aki in his criminal case is to present evidence and decide which witnesses to call, such as the witness Aki believes will support his case.¹][Whilst Aki, as the accused, is not required to present evidence, as he does not have the burden of proof, he may choose to do so, such as by calling on a witness.²][This will assist in disproving the prosecution's case as he would be providing evidence or questioning witnesses that contradict the prosecution's argument.³]

- ✓ ✗ I have identified one role of Aki in his criminal case.¹
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen role of the accused.²
- ✓ ✗ I have provided information about my chosen role of the accused.³
- ✓ ✗ I have used signposting in my response, such as 'One role'.

10. [One role of the prosecution is to present evidence at trial to convince the jury the accused is guilty beyond reasonable doubt.¹] [This role achieves the principle of fairness as it means the accused is not required to prove their innocence beyond reasonable doubt, as they are not the party bringing the charge.²] [Alternatively, one role of the accused is to decide whether to use a legal representative when presenting their case.³] [This achieves the principle of fairness as the law is highly complex and therefore, the decision to use legal representation can ensure a just outcome to the case.⁴]

- ✓ ✗ I have identified one role of the prosecution in a criminal case.¹
- ✓ ✗ I have provided one way my chosen role achieves the principle of fairness.²
- ✓ ✗ I have identified one role of the accused in a criminal case.³
- ✓ ✗ I have provided one way my chosen role achieves the principle of fairness.⁴
- ✓ ✗ I have used signposting in my response, such as 'One role'.
- ✓ ✗ I have used connecting words, such as 'Alternatively'.

Extended response

11. A; C; D

12. [The prosecution and accused have a broad range of roles in presenting and proving a criminal case.¹]

[One role of the prosecution is to determine which witnesses to call upon for evidence during Callum's trial. This may include calling witnesses to prove that Callum caused the collision with Lorenzo.²] [However, the prosecution must call all relevant witnesses to assist in the emergence of the full truth, and not just witnesses that will help secure a guilty verdict at all costs.³] [Therefore, if there is a witness that claims Callum did not cause the collision with Lorenzo, the prosecution must call this witness even though their evidence may lead a jury to have doubts about the guilt of the accused.⁴]

[On the other hand, one role of Callum as the accused is to present evidence and call upon any witnesses that help create reasonable doubt as to his guilt in the jurors' minds. As Callum believes he has a witness to support his innocence in the collision with Lorenzo, he may choose to question this witness to disprove the prosecution's case.⁵] [However, Callum is representing himself, as he cannot afford legal representation, therefore, he may not question the witness properly, potentially damaging his case.⁶] [This is because Callum is unsure about legal processes and procedures, particularly in relation to the best way to question his witness.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have identified one role of the prosecution in Callum's criminal case.²

- ✓ ✗ I have provided one limitation of my chosen role of the prosecution in Callum's criminal case.³
- ✓ ✗ I have provided an example from the scenario and linked it to the role of the prosecution in Callum's criminal case.⁴
- ✓ ✗ I have identified one role of the accused in Callum's criminal case.⁵
- ✓ ✗ I have provided one limitation of my chosen role of the accused in Callum's criminal case.⁶
- ✓ ✗ I have provided an example from the scenario and linked it to the role of the accused in Callum's criminal case.⁷
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One role'.
- ✓ ✗ I have used connecting words, such as 'Therefore' and 'On the other hand'.

Linking to previous learning

13. Strengths: II; IV

Limitations: I; III

14. [The role of the parties and the judge in a criminal case upholds the principle of equality to a large extent, subject to some limitations.¹]

[Firstly, both the prosecution and accused have an equal opportunity to present their case, as both parties can present evidence and call upon witnesses.²] [However, a self-represented accused may be at a disadvantage to the prosecution as a result of not understanding court processes and being unable to present all relevant evidence to prove their case, therefore limiting equality.³]

[Alternatively, judges have a role in ensuring rules of evidence and procedure apply equally to both parties during a criminal trial, achieving the principle of equality as neither party is disadvantaged.⁴]

[Although, whilst judges are impartial judicial officers, they are still subject to personal bias and therefore, may unconsciously discriminate against certain parties, hindering equality.⁵]

- ✓ ✗ I have provided an introduction to summarise the extent to which the role of the parties and the judge in a criminal case upholds the principle of equality.¹
- ✓ ✗ I have provided one strength of the role of the parties in upholding the principle of equality.²
- ✓ ✗ I have provided one limitation of the role of the parties in upholding the principle of equality.³
- ✓ ✗ I have provided one strength of the role of the judge in upholding the principle of equality.⁴
- ✓ ✗ I have provided one limitation of the role of the judge in upholding the principle of equality.⁵
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'Firstly'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Alternatively'.

2G Legal practitioners in a criminal case

Check your understanding

1. B; C. **Explanation:** The judge and/or jury decide on the accused's guilt and legal practitioners have no say in determining this guilt. Furthermore, barristers are legal professionals with experience in the legal field and will, therefore, have a strong understanding of possible defences to raise in a criminal case.
2. A. **Explanation:** The rule of law aims to ensure everyone is equal before the law. Therefore, judges cannot favour a lawyer and provide their clients with 'not guilty' verdicts due to personal connections or relationships as this goes against the impartiality promoted by the rule of law.
3. B. False. **Explanation:** Under s 197 of the *Criminal Procedure Act 2009* (Vic) a trial may be adjourned so an accused can gain legal representation from VLA. However, if the accused voluntarily chooses not to hire lawyers despite having the financial means to do so, the court is under no obligation to adjourn the trial for the accused.
4. A legal practitioner may help an accused by providing **objectivity**, as they have a greater ability to look at the facts of the case from an impartial point of view, allowing them to identify weaker or stronger points in the prosecution's evidence. This can enable a stronger defence case to be built.
5. Strengths: I; III
Limitations: II; IV
6. If an accused engages legal practitioners, this ensures **equal** legal representation for both the prosecution, which will likely have a team of expert legal practitioners, and the accused.
7. B. False. **Explanation:** In a criminal case, there is a significant need for legal practitioners in order for accused persons to receive a fair trial. Parties who represent themselves are often disadvantaged due to their lack of legal knowledge.

Preparing for exams

Standard exam-style

8. [One reason legal practitioners may be needed in a criminal case is to question witnesses, such as the victim of the crime, on behalf of the accused. This can ensure procedural rules of questioning witnesses are complied with and potential victim traumatisation by an accused's personal questioning is avoided.¹] [Another reason why legal practitioners are needed in a criminal case is to present their client's case in the best possible light, by making arguments based on points of law and legal research.²]
☒ ☐ I have provided one reason why legal practitioners are needed in a criminal case.¹
☒ ☐ I have provided a second reason why legal practitioners are needed in a criminal case.²
☒ ☐ I have used signposting in my response, such as 'One reason' and 'Another reason'.
9. [One reason why an accused person may seek assistance from a legal practitioner is due to a lack of legal expertise. An everyday person would likely not possess the legal knowledge to defend their own

case in court or to understand the complex criminal proceedings that occur.¹] [Solicitors and barristers gather evidence, research laws, craft arguments, and question witnesses on behalf of their client, removing any pressures associated with an accused presenting their own arguments in court.²]

- ☒
- ☐
- I have provided one reason why an accused person may seek legal representation in a criminal case.
- ¹
-
- ☒
- ☐
- I have provided information about my chosen reason.
- ²
-
- ☒
- ☐
- I have used signposting in my response, such as 'One reason'.

10. [One reason why Cindy may require legal practitioners if her case goes to trial would be to uphold the rule of law.¹] [The rule of law requires accused persons to receive a fair and impartial trial. By receiving legal advice or representation in a trial, fairer outcomes can be promoted as Cindy can ensure her case is represented in the best possible light through her lawyer's articulation of relevant evidence and appropriate legal principles.²] [Furthermore, by gaining legal advice, the law can be presented to Cindy in a more certain and clear manner as legal practitioners are experts in law, therefore allowing Cindy to better understand her rights, such as her right to remain silent when being questioned by the police.³]

- ☒
- ☐
- I have provided one reason why Cindy may need a legal practitioner.
- ¹
-
- ☒
- ☐
- I have provided information about my chosen reason.
- ²
-
- ☒
- ☐
- I have provided an example from the scenario and linked it to the need for legal practitioners.
- ³
-
- ☒
- ☐
- I have used signposting in my response, such as 'One reason'.
- ☒
- ☐
- I have used connecting words, such as 'Furthermore'.

Extended response

11. Upheld: I; III
Limited: II; IV
12. [Fairness is often achieved to a minimal extent when the accused does not have legal representation, as legal practitioners help an accused present their case in the best possible light.¹]
 [Firstly, legal practitioners can uphold the principle of fairness by giving advice to their clients that allows them to participate in criminal proceedings on an informed basis.²] [By providing accused persons with legal information, legal practitioners can assist accused persons to better understand the pre-trial and court processes, leading to fairer outcomes as they can participate in certain aspects of the criminal justice process on a more informed basis.³]
 [Another way legal practitioners achieve fairness is by remaining objective when looking at the facts of an accused's case. Therefore, they can make impartial decisions on behalf of the accused, such as rejecting unjust plea negotiations or raising certain defences they believe will be successful, to ensure a fair outcome is reached.⁴]
 [However, if the accused does not have legal representation they may not receive a fair trial. This is because a self-represented person may struggle to participate in criminal proceedings without receiving legal advice. For example, they may not understand how to appeal their conviction or sentence after a guilty verdict has been decided, limiting fairness.⁵]

[Furthermore, where both parties have legal representation, this can still be unfair. If representation for the accused is unequal, such as having a less experienced legal practitioner, this may lead to an unfair outcome, as the accused cannot prepare and present a case of equal quality to that of the expert legal practitioners of the prosecution.⁶]

[Overall, if an accused person does not have legal representation, they are less likely to receive a fair trial. Legal practitioners aim to ensure their client's case is presented in the best possible light with legal expertise to validate their arguments.⁷]

✓ ✕ I have provided an introduction to summarise my answer to the question.¹

✓ ✕ I have provided one way in which legal representation contributes to the achievement of fairness.²

✓ ✕ I have provided information about my chosen way in which legal representation contributes to the achievement of fairness.³

✓ ✕ I have provided a second way in which legal representation contributes to the achievement of fairness.⁴

✓ ✕ I have provided one limitation of legal representation contributing to the achievement of fairness.⁵

✓ ✕ I have provided a second limitation of legal representation contributing to the achievement of fairness.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 way'.

✓ ✕ I have used connecting words, such as 'However' and 'Furthermore'.

Linking to previous learning

13. [Legal practitioners, such as solicitors and barristers, can be hired by an accused to provide advice or representation throughout criminal proceedings, such as police questioning and a trial. Therefore, legal practitioners can advise accused persons about their rights under Victorian law.¹][For example, a solicitor could sit with an accused as they are being questioned in police interviews and inform them of their right to silence, as an accused person may be unaware of this right's existence prior to being informed by a skilled lawyer.²]

✓ ✕ I have provided one way legal practitioners uphold the rights of an accused.¹

✓ ✕ I have provided information about my chosen way legal practitioners uphold the rights of an accused.²

2H The impact of costs and time – criminal case

Check your understanding

- B. False. **Explanation:** Criminal cases can be impacted by costs and delays, just as civil cases are.
- C. **Explanation:** Barrister fees, solicitor fees, and court filing fees are all likely to be incurred by an accused when trying to assert their innocence in a criminal case. However, an accused does not have to pay any arrest warrant fee.
- An offender may incur costs when ordered to pay the **victim** a sum of money due to the injury caused or the loss they incurred from the property being damaged, stolen, or lost.
- A. **Explanation:** An accused person who is found guilty in a lower court may not want to appeal this decision in a higher court, even if they believe they are innocent, on the basis that appealing the decision will cause them to incur significant costs, therefore limiting access to justice.
- Knowing about delays in the justice system may prevent victims from reporting a suspected crime to police as they may feel it's pointless to do so, limiting **access**. Delays may also cause some witnesses to produce unreliable or false evidence as their memory fades over time and they can no longer recall the exact events. This limits **fairness** as witnesses may be unable to provide impartial and truthful information.
- A; B; D. **Explanation:** A victim of crime may be adversely impacted by delays in the criminal justice system, as such delays could result in witnesses forgetting key details of the events, stress accumulating in the victim, and a victim remaining fearful if the accused is not on remand.
- A; C; D. **Explanation:** Alternative methods of dispute resolution are used in civil disputes where defendants and plaintiffs can discuss their issues. This would not occur in criminal cases and is thus, not a source of delay.
- B. False. **Explanation:** Although the impacts of time and costs are significant, the principles of justice are still achieved through some mechanisms of the criminal justice system, such as Victoria Legal Aid and the court hierarchy.

Preparing for exams

Standard exam-style

9. [One impact that costs have on a criminal trial is that they may cause an accused person to avoid appealing a decision made in a lower court, due to the costs associated with filing fees and legal representation for an appeal.¹][As a result, accused people of a lower socioeconomic status may accept a guilty verdict delivered by the court, even if they are innocent, as the expense of fighting to prove their innocence is high.²]

✓ ✕ I have identified one impact of costs during a criminal trial.¹

✓ ✕ I have provided information about my chosen impact.²

✓ ✕ I have used signposting in my response, such as 'One impact'.

✓ ✕ I have used connecting words, such as 'As a result'.

10. [Delays in the criminal justice system, particularly in the Magistrates' Court, may cause a victim to avoid seeking justice and reporting a crime.¹] [Therefore, the principle of access is limited as victims may not attempt to access justice due to being aware that it can take months or even years for the accused to be held accountable by the courts.²]

☒ ☐ I have provided one impact of time in a criminal trial.¹

☒ ☐ I have provided information on how my chosen impact limits the achievement of the principle of access.²

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

11. [One impact that time may have on the principle of fairness is that, if delays occur, Previn's trial may not be fair as key eyewitnesses, the two elderly people, may forget the events they saw transpire.¹] [The trial of Previn's attacker is set to occur in 18 months, meaning it is likely that the witnesses may forget certain events by the time they are called to the witness stand, or they may have passed away.²] [This limits the principle of fairness as it could result in false or unreliable statements being taken as evidence, impacting the fairness of the decided verdict. For example, the judge may be unable to determine whether Previn was attacked beyond reasonable doubt if witnesses cannot remember the exact facts of what they saw, causing the attacker to be declared not guilty despite their crimes.³]

☒ ☐ I have identified one impact of time on the achievement of fairness.¹

☒ ☐ I have provided examples from the scenario and linked them to time and the achievement of fairness.²

☒ ☐ I have provided further information about my chosen impact on time and the achievement of fairness.³

☒ ☐ I have used signposting in my response, such as 'One impact'.

Extended response

12. A; B; D

13. [Currently, the number of cybercrime cases that need to be resolved in the Magistrates' Court is placing a great burden on this court, indicated by the 12-month delay it is now facing due to a backlog of cases. This is limiting access. However, the presence of the Cyber Court could counteract this issue.¹]

[Firstly, the principle of access is currently impeded by the frequency of cybercrime hearings in Victoria. The 12 months of delays that exist due to cybercrimes have negative impacts on accused persons, such as causing stress for the accused when awaiting trial. Accused persons are forced to retain legal representation for an extended period of time as a result of these delays, limiting access to justice due to the cost, which may be inaccessible for accused persons of a lower socioeconomic status.²]

[Secondly, a victim's access to justice may also be limited by the current system. This is because they may see the lengthy delays regarding cybercrime and therefore, decide against reporting the crimes they have suffered. Therefore, this limits their access to obtaining justice for the damages the cybercrime inflicted.³]

[Thirdly, it is said that cybercrime cases typically require oral evidence from witnesses, however, delays may cause witnesses' evidence to distort overtime, limiting both the accused person and the victim's access to a fair trial.⁴]

[Finally, the introduction of the Cyber Court would reduce some of the delays experienced by the Magistrates' Court as the burden of cybercrimes would be removed from the court. Therefore, access to justice would be improved for victims of other summary offences and accused persons.⁵]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one impact of cybercrimes on the achievement of access.²

☒ ☐ I have provided a second impact of cybercrimes on the achievement of access.³

☒ ☐ I have provided a third impact of cybercrimes on the achievement of access.⁴

☒ ☐ I have provided a fourth impact of cybercrimes on the achievement of access.⁵

☒ ☐ I have used signposting in my response, such as 'Firstly' and 'Secondly'.

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

14. Strengths: I; III
Limitations: II; IV; V

15. [One factor that could affect the ability of the criminal justice system to achieve fairness is the costs involved in a criminal case.¹]

[One way the principle of fairness is limited in criminal cases as a result of costs is that if an accused person is of lower socioeconomic status, they may not be able to afford representation, leading to an unfair trial.²] [There are significant expenses which accompany a criminal case for an accused person, including solicitor and barrister fees for these individuals to prepare the case, review the evidence, and represent the accused in the courtrooms, as well as witness fees.³] [Furthermore, another way the principle of fairness is limited is that, even if an accused does pay for legal representation, the quality of legal representation will likely depend on how much the accused is willing, or able, to pay. Therefore, if the accused can only afford a relatively cheap and inexperienced lawyer, the facts of the case may not be presented in the best light for the accused, which is unfair on the poorly represented party.⁴] [Additionally, the principle of fairness is undermined by the cost of a criminal case, as an accused person may plead guilty to a criminal offence just because they are unable to afford the costs associated with defending a criminal case in the courts.⁵]

[Despite the ways in which the costs of a criminal case can limit the principle of fairness, there are mechanisms in place to ensure a fair trial can still be received by an accused. Firstly, VLA can provide duty lawyers or grant accused persons of low socioeconomic status, promoting fairness by ensuring these individuals still have representation in a criminal case.⁶] [Secondly, juries are independent decision-makers who may be used in serious criminal cases. For Commonwealth indictable offences, all accused persons have the right to trial by jury, and the cost of this is borne by the Commonwealth, therefore an accused person can have a trial by jury regardless of their financial situation, promoting fairness.⁷]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one way costs could limit the ability of the criminal justice system to achieve fairness.²

☒ ☐ I have provided further information about my chosen way costs could limit the ability of the criminal justice system to achieve fairness.³

- ✓ ✗ I have provided a second way costs could limit the ability of the criminal justice system to achieve fairness.⁴
- ✓ ✗ I have provided a third way costs could limit the ability of the criminal justice system to achieve fairness.⁵
- ✓ ✗ I have provided one way costs could strengthen the ability of the criminal justice system to achieve fairness.⁶
- ✓ ✗ I have provided a second way costs could strengthen the ability of the criminal justice system to achieve fairness.⁷
- ✓ ✗ I have used signposting in my response, such as 'One way' and 'another way'.
- ✓ ✗ I have used connecting words, such as 'Furthermore' and 'Additionally'.

Linking to previous learning

16. [Plea negotiations, which are discussions between the prosecution and the accused, in which the accused agrees to plead guilty to a lesser charge, or fewer charges altogether, may be able to reduce the negative impact of time on a criminal case.¹] [By having an accused plead guilty to a charge, the trial aspect of a criminal case does not have to occur, meaning that the time-consuming elements of a trial, such as jury empanelment, judges directions, and hung jury deliberations, can be avoided.²]
- ✓ ✗ I have provided one way plea negotiation impacts time during a criminal case.¹
- ✓ ✗ I have provided information about my chosen way.²
17. [One role of Victoria Legal Aid (VLA) in relation to costs in a criminal case is that they may be able to provide an accused person with a duty lawyer or a grant if they meet certain requirements, allowing the accused to gain legal representation without incurring significant costs.¹] [Attaining legal representation and having the representation complete all the relevant work for a trial, such as getting a solicitor to prepare for the trial, reviewing the prosecution's evidence, and plan which witnesses will be called if the matter goes to trial, will be a significant expense for the accused.²] [Therefore, if an accused can satisfy the relevant means test and income test conducted by the VLA, they may qualify for a grant for legal assistance which will mean some or all of their legal expenses will be covered.³]
- ✓ ✗ I have provided one role of Victorian Legal Aid in relation to costs in a criminal case.¹
- ✓ ✗ I have provided information about my chosen role.²
- ✓ ✗ I have provided further information about my chosen role.³

21 The impact of cultural differences – criminal cases

Check your understanding

- B. False. **Explanation:** Cultural differences can have an impact on the ability of the criminal justice system to achieve the principles of justice.
- A; B; C. **Explanation:** First Nations individuals may experience differences in the criminal justice system due to racial prejudices, overrepresentation in prison, and cultural differences. The sentencing in the Koori Court is no less or more severe.
- A. **Explanation:** If a person is unaware of their rights or the systems in place to protect their rights, access can be limited as a migrant or refugee may be unable to understand their rights and pursue justice.
- Fairness: III; IV
Equality: I; II
- A; B; D. **Explanation:** The accused does not have to pay for interpreter services. Rather, the court is responsible for organising and paying for this.
- A. True. **Explanation:** All three of the principles of justice are limited to some extent for individuals interacting with the criminal justice system who are culturally or linguistically diverse.

Preparing for exams

Standard exam-style

- [One way cultural differences can limit the principle of equality in a criminal case is that individuals from a non-English speaking background may be less able to present evidence as either a victim or an accused person.¹] [As a result, this undermines the opportunity for all individuals to be seen equally before the eyes of the law and, consequently, individuals may be more likely to be convicted of a crime or unable to seek justice if they cannot present their case to the same extent as the other party.²]
- ✓ ✗ I have identified one way cultural differences can limit the principle of equality from being achieved in a criminal case.¹
- ✓ ✗ I have provided information about my chosen limitation.²
- ✓ ✗ I have used signposting in my response, such as 'One way'.
- ✓ ✗ I have used connecting words, such as 'As a result'.
- [One way in which cultural differences impact the principle of access in a criminal case is through migrants or refugees who are unfamiliar with the legal system, their rights, and the services available to them as either victims or an accused.¹] [Victoria Legal Aid, for example, may help an accused person of a low socioeconomic status defend themselves in a criminal case. However, if individuals from culturally diverse backgrounds are unaware these services exist they may not utilise them.²] [This limits access to justice as cultural differences may, therefore, cause an accused to be unable to access a just outcome.³]
- ✓ ✗ I have provided one way in which cultural differences impact the principle of access in a criminal case.¹
- ✓ ✗ I have provided information about my chosen impact on the principle of access.²

✓ ✗ I have provided further information about my chosen impact on the principle of access.³

✓ ✗ I have used signposting in my response, such as 'One way'.

✓ ✗ I have used connecting words, such as 'However'.

9. [Firstly, the interpreter services of the Victorian courts can enhance the ability of the criminal justice system to achieve fairness by ensuring non-English speaking accused persons do not misunderstand the meaning of the questions being asked to them by police or courts.¹][Considering Ahmed has limited English-speaking skills, as he mainly speaks Arabic, he may misunderstand the questions being asked by police if asked without an interpreter.²][This may lead to an unfair outcome, as he could then answer the questions incorrectly or unintentionally provide false testimonies.³][Furthermore, an interpreter may be useful to interpret Ahmed's answers to certain questions so that there is a low possibility that Ahmed will accidentally self-incriminate and enter a guilty plea without understanding the nature of the situation.⁴]

✓ ✗ I have identified one way the interpreter services of the Victorian courts could enhance the ability of the criminal justice system to achieve fairness.¹

✓ ✗ I have provided an example from the scenario and linked it to interpreter services and the achievement of fairness.²

✓ ✗ I have provided information about my chosen way the interpreter services of the Victorian courts could enhance the ability of the criminal justice system to achieve fairness.³

✓ ✗ I have identified a second way the interpreter services of the Victorian courts could enhance the ability of the criminal justice system to achieve fairness.⁴

✓ ✗ I have use signposting in my response, such as 'Firstly'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

10. Strengths: II; IV
Limitations: I; III

11. [Cultural differences are one factor that may impact the ability of the criminal justice system to achieve the principle of equality, and can disproportionately affect culturally diverse populations when engaging with the criminal justice system.¹]

[Firstly, individuals from migrant or refugee backgrounds may be unable to speak English proficiently, therefore limiting their ability to answer questions at the stand as either an accused person or a victim.²][This can limit equality as it undermines all people being seen equally in the criminal justice system, since those who cannot present their evidence strongly, due to language barriers, may be more likely to be wrongly convicted.³][Secondly, equality is further limited due to the high incarceration rates among First Nations peoples, which point towards the existence of inherent prejudices within the Australian criminal justice system.⁴][Therefore, structural and systemic racism alongside biases among members of the justice system may lead to Aboriginal and/or Torres Strait Islander people being issued harsher penalties or being found guilty falsely on the basis of their race.⁵]

[However, certain mechanisms in Australia aim to uphold equality and counterbalance the impact of cultural difference.⁶][For example,

Victoria Legal Aid (VLA) can provide legal representation to accused persons when they meet certain eligibility criteria, including First Nations and migrant accused persons, and promotes its resources online in multiple languages, thus ensuring cultural differences do not significantly impact equality.⁷][Furthermore, interpreters are available to all accused persons in the courts, and the courts are required to pay for such services instead of an accused, thus promoting equality.⁸]

[Overall, although cultural differences may limit equality, mechanisms are in place to continue to uplift individuals in the criminal justice system.⁹]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way equality is limited for culturally diverse people in the Victorian criminal justice system.²

✓ ✗ I have provided information about my chosen way.³

✓ ✗ I have provided a second way equality is limited for culturally diverse people in the Victorian criminal justice system.⁴

✓ ✗ I have provided information about my chosen way.⁵

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁶

✓ ✗ I have provided one way equality is upheld for culturally diverse people in the Victorian criminal justice system.⁷

✓ ✗ I have provided a second way equality is upheld for culturally diverse people in the Victorian criminal justice system.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 'Therefore' and 'However'.

12. Strengths: I; II; III
Limitations: IV

13. [Firstly, the use of the Koori Courts can increase equality in the Victorian criminal justice system as it allows culturally-relevant sentencing practices to be used when determining the appropriate sentence for an offender, therefore uplifting First Nations peoples to achieve equality before the law.¹][Furthermore, the Koori Court has proven to be an effective mechanism in reducing rates of recidivism. Therefore, equality can be improved as the over-incarceration of First Nations peoples may decline.²][A third way the Koori Court can improve equality is that it involves Community Elders or Respected Persons having open discussions with offenders. Therefore, language barriers are reduced as these discussions can occur using Aboriginal English, promoting equality as the motives and remorse of the offender will likely be better understood and reflect more adequate sentencing.³]

[However, Community Elders and Respected Persons, which are required for the Court to function, may be unaware of the Court and their ability to participate. This limits the Court's effectiveness as the participation of these individuals is essential and the court would not have continued success if the number of Elders and Respected Persons available is insufficient.⁴]

[Ultimately, the Koori Court is an effective mechanism in promoting equality in the Victorian criminal justice system, despite certain limitations.⁵]

✓ ✕ I have provided one way the Koori Court can enhance the ability of the Victorian criminal justice system to achieve the principle of equality.¹

✓ ✕ I have provided a second way the Koori Court can enhance the ability of the Victorian criminal justice system to achieve the principle of equality.²

✓ ✕ I have provided a third way the Koori Court can enhance the ability of the Victorian criminal justice system to achieve the principle of equality.³

✓ ✕ I have provided one way the Koori Court is limited in its ability to achieve the principle of equality in the Victorian criminal justice system.⁴

✓ ✕ I have provided a conclusion to my response that links back to the question.⁵

✓ ✕ I have used paragraphs to organise my response.

✓ ✕ I have used signposting in my response, such as 'Firstly' and 'A third way'.

✓ ✕ I have used connecting words, such as 'Furthermore' and 'Therefore'.

Linking to previous learning

14. [Considering Arjun's financial struggles, the costs associated with defending himself in this criminal case may impact Arjun significantly, limiting his access to justice.¹][This is because the expense of legal fees, including paying a barrister and/or solicitor, is high. Therefore, due to these costs, Arjun may choose to self-represent, which could limit his ability to defend himself successfully and ensure he is not falsely found guilty if he did not commit a crime, given his minimal English.²][Secondly, as a migrant, cultural differences may also have an impact on Arjun when trying to defend himself.³][His limited ability to speak English could cause him to be unable to understand Australian court procedures or be able to articulate his evidence at trial.⁴]

✓ ✕ I have identified one impact of costs on Arjun's criminal case.¹

✓ ✕ I have provided information about costs in a criminal case.²

✓ ✕ I have identified one impact of cultural differences on Arjun's criminal case.³

✓ ✕ I have provided information about cultural differences in a criminal case.⁴

✓ ✕ I have used signposting in my response, such as 'Secondly'.

✓ ✕ I have used connecting words, such as 'Therefore'.

3A Purposes of sanctions

Check your understanding

1. A **sanction** is a penalty imposed by the court on an offender when they are found guilty of a crime.
2. B. **Explanation:** Rehabilitation, deterrence, and punishment are all purposes of sanctions.
3. B. False. **Explanation:** Protection seeks to remove dangerous offenders from the community to protect victims and society as a whole.
4. The purpose of rehabilitation is to sentence criminal offenders in a manner that aims to **break** the cycle of criminal behaviour. On the other hand, the purpose of punishment is to adequately **penalise** an offender and ensure they are held accountable for their crimes and their impact on the victims and society as a whole.
5. A; B. **Explanation:** Punishment is achieved if the sanction adequately punishes an offender and reflects the severity of the crime, while also delivering justice to the victims and society as a whole.
6. C. **Explanation:** Specific deterrence refers to the ability of a sanction to discourage an offender from reoffending and committing a similar offence to avoid receiving another sanction that may be similar to the original sanction.
7. A. True. **Explanation:** In their sentencing statement, the judge may seek to condemn and criticise an offender's actions to highlight how they have breached the social code of behaviour and ethics.
8. B. False. **Explanation:** Some sanctions are more likely to achieve specific purposes more than others. For example, fines can punish the offender however protection is unlikely to be achieved by a fine.

Preparing for exams

Standard exam-style

9. [General deterrence is 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.¹] [On the other hand, specific deterrence is a type of deterrence in which the offender themselves is discouraged from reoffending and committing offences of a similar nature.²] [Therefore, general deterrence seeks to deter the wider community from offending to avoid a possible sanction, whereas specific deterrence aims to discourage an individual offender from reoffending through the imposition of a sanction.³]

☒ ☐ I have defined general deterrence.¹

☒ ☐ I have defined specific deterrence.²

☒ ☐ I have provided one key difference between general and specific deterrence.³

☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

10. [Denunciation is a purpose of sanctions whereby the court publicly condemns or criticises the offender's criminal behaviour.¹] [The court denounces the offender's actions to highlight the extent to which the offender has violated the moral and ethical standards of society. The judge expresses denunciation in their final statements at the end of a hearing or trial.²] [The statement made by the sentencing judge in this instance clearly exemplifies the extent to which they denounce the offender's actions, especially through their use of the words 'heinous', 'extreme disdain', and 'disgraceful'.³]

☒ ☐ I have defined denunciation.¹

☒ ☐ I have provided information about denunciation as a purpose of sanctions.²

☒ ☐ I have provided examples from the statement and linked them to denunciation.³

11. [Rehabilitation should be a key consideration in Ezra's sanctioning as he has been convicted of the same offences multiple times.¹] [Therefore, in order to break the cycle of offending, the judge should consider a sanction that would address the underlying causes of his actions, such as alcohol abuse.²] [If Ezra is subjected to attending drug and alcohol rehabilitation programs, this may aid in resolving the root cause of his offending and discourage him from reoffending.³]

☒ ☐ I have identified one reason why rehabilitation should be considered when sanctioning Ezra.¹

☒ ☐ I have provided information about rehabilitation as a consideration in sentencing Ezra.²

☒ ☐ I have provided further information about rehabilitation as a consideration in sentencing Ezra.³

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

12. [No, I do not agree with this statement as punishment is not intended to be achieved by victims and their families personally.¹] [If an offender is found guilty, the judge should impose a sanction that reflects the nature of and severity of the offence committed, while also seeking retribution on behalf of the victim and the community.²] [Therefore, punishment is achieved through the imposition of an adequate sanction, not by victims seeking revenge themselves.³] [If victims or their families decide to take it upon themselves to seek 'justice' this could be dangerous for both parties and delay the delivery of justice through the criminal justice system.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 one reason why I agree or disagree with the statement.²

☒ ☐ I have provided information about my chosen reason.³

☒ ☐ I have provided further information about my chosen reason.⁴

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

13. [One purpose of sanctions that has been considered in Melanie's sentencing is rehabilitation.¹] [The judge has stated that the sanction should address 'Melanie's serious mental health conditions'. Therefore, it is likely that her sentence will include some form of rehabilitation, such as therapy or counselling, to address the underlying causes of her reoffending.²] [Another purpose of sanctions that has been considered in her sentencing is the need to protect the community.³] [Given that Melanie has been previously convicted of multiple dangerous driving offences, and is now being convicted of culpable driving causing death, it is important to make sure the safety of the community and road users is protected. Thus, the sentencing judge may consider disqualifying her license for a long period of time, alongside other sanctions, to ensure the roads remain safe.⁴]

- ✓ ✗ I have identified one purpose of sanctions that has been considered in Melanie's sentencing.¹
- ✓ ✗ I have provided information about my chosen purpose.²
- ✓ ✗ I have identified a second purpose of sanctions that has been considered in Melanie's sentencing.³
- ✓ ✗ I have provided information about my chosen purpose.⁴
- ✓ ✗ I have linked my answer to the scenario where appropriate.
- ✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.
- ✓ ✗ I have used connecting words, such as 'Thus'.

Extended response

14. B; C; E

15. [Gwenyth's 18-year prison sentence seeks to address multiple purposes of sanctions and adequately reflects the nature of the crimes committed.¹]
- [Firstly, Gwenyth's drug and alcohol issues may be addressed and treated through rehabilitation programs. As the judge has recommended that she partake in rehabilitation programs while in prison, it is possible that these underlying factors contributing to her offending will be resolved, decreasing the likelihood of reoffending upon release.²]
- [Moreover, Gwenyth may be specifically deterred from reoffending to avoid receiving a similar sanction in future, such as the lengthy sentence imposed by the judge for the current offences.³]
- [General deterrence could potentially occur in this case if individuals are aware of the sentences associated with drug trafficking and money laundering, although the nature of the crimes themselves would most likely deter ordinary citizens from committing the same offences.⁴]
- [Furthermore, during sentencing, the judge also denounced Gwenyth by reprimanding her behaviour, underscoring that she has breached the codes of acceptable and legal conduct within society.⁵]
- [Finally, though it is not stated that Gwenyth was physically harming other individuals, her removal from society can protect victims of drug trafficking and disrupt money laundering schemes.⁶]
- [Thus, all of the purposes of sanctions have been considered and achieved by Gwenyth's sentence to a certain degree.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one purpose of sanctions achieved through Gwenyth's sentence.²
- ✓ ✗ I have provided a second purpose of sanctions achieved through Gwenyth's sentence.³
- ✓ ✗ I have provided a third purpose of sanctions achieved through Gwenyth's sentence.⁴
- ✓ ✗ I have provided a fourth purpose of sanctions achieved through Gwenyth's sentence.⁵
- ✓ ✗ I have provided a fifth purpose of sanctions achieved through Gwenyth's sentence.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 'Finally'.
- ✓ ✗ I have used connecting words, such as 'Moreover' and 'Furthermore'.

Linking to previous learning

16. [Plea negotiations can influence whether an offender is adequately punished, as a plea deal may be reached which can see the offender plead guilty in exchange for a lesser sentence.¹] [Although the plea deal must still adequately reflect the severity of the crimes committed, the victim and wider society may feel that the offender has been 'let off' and not appropriately punished for their offending.²]
- ✓ ✗ I have provided one way plea negotiations can impact the achievement of punishment.¹
- ✓ ✗ I have provided information about my chosen way plea negotiations can impact the achievement of punishment.²
- ✓ ✗ I have used connecting words, such as 'Although'.

3B Types of sanctions

Check your understanding

- A. True. **Explanation:** Analysing whether a sanction has achieved its purposes will assist the court in determining whether imposing this particular sanction is appropriate.
- B. **Explanation:** A judge or magistrate may order a CCO if the offence is punishable by five penalty units or more, a fine is not appropriate, and if the offender has agreed to a CCO.
- If the court imposes **imprisonment**, the offender will be held in custody for a given period of time. Alternatively, if the court imposes a **CCO**, the offender can remain in the community.
- A. True. **Explanation:** Parole is the conditional early release of a prisoner after their minimum term of imprisonment is served and often involves certain conditions or supervisions that must be followed.
- A. **Explanation:** Courts may impose more than one type of sanction on an offender simultaneously.

6. B; D. **Explanation:** When imposing a fine, the courts consider the offender's ability to pay and whether the imposition of a fine will adequately punish or deter the offender.
7. A; B; C; F. **Explanation:** Imprisonment removes the offender from society, punishing them and protecting the community. Fines require the offender to pay a sum of money to the state, which may discourage further offending particularly where the offender cannot afford to receive another fine.

Preparing for exams

Standard exam-style

8. [One sanction that may be imposed on an offender is imprisonment, a sanction that removes an offender from the community and places them in a prison for a given period of time.¹] [When a court imposes a prison term, it will usually provide a minimum period of imprisonment, after which an offender can apply for parole.²]

✓ ✗ I have identified and defined one sanction that may be imposed on an offender.¹

✓ ✗ I have provided information about my chosen sanction.²

✓ ✗ I have used signposting in my response, such as 'One sanction'.

9. [The court has imposed a community correction order (CCO) on Wayne, which is a non-custodial sanction that is served by the offender in the community with certain conditions attached.¹] [This is evident as he is serving his sentence in the community and is required to complete 200 hours of community service and undertake medical treatment for his drug addiction.²]

✓ ✗ I have identified and defined a community correction order (CCO).¹

✓ ✗ I have provided an example relevant to the scenario and linked it to community correction orders.²

Extended response

10. A; C; E

11. [Fines achieve the purposes of punishment and deterrence to a large extent, as the offender is required to pay a sum of money to the state, which drains their own financial resources.¹]

[Firstly, one reason fines achieve punishment is because the offender must pay money to the state instead of using the amount to improve their own living standards, therefore penalising the offender.²] [Another reason why fines adequately punish the offender is that the court can set the size of a fine based on an offender's ability to pay it, meaning the court can try to ensure each offender feels punished in proportion to their personal or financial circumstances.³]

[Furthermore, fines may achieve specific deterrence as the economic loss caused by a fine will likely discourage an offender from reoffending.⁴] [Fines also achieve general deterrence as the economic loss caused by a fine discourages other members of the community from committing similar offences to avoid receiving a similar fine.⁵]

[Overall, fines achieve punishment and deterrence due to the drain in financial resources experienced by the offender, reducing the likelihood of reoffending by the offender or the community.⁶]

✓ ✗ 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 one reason why fines achieve the purpose of punishment.²

✓ ✗ I have provided a second reason why fines achieve the purpose of punishment.³

✓ ✗ I have provided one reason why fines achieve the purpose of deterrence.⁴

✓ ✗ I have provided a second reason why fines achieve the purpose of deterrence.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' and 'Another reason'.

✓ ✗ I have used connecting words, such as 'Firstly' and 'Furthermore'.

12. A; B

13. [Imprisonment may be effective in protecting the community and deterring Elias in the short term, however, there may be negative implications after Elias is released from prison.¹]

[Firstly, if Elias is sentenced to a term in prison, this will protect the community as he is removed from society and therefore, does not pose a significant risk to the welfare of the public or his victims.²]

[However, community protection in the long term may be limited as many prisoners, like Elias, who are released will reoffend. There are various reasons for reoffending, including that underlying reasons for offending were not addressed, such as mental health issues, or drug or alcohol addiction.³]

[Moreover, sentencing Elias to a term of imprisonment will likely deter him from reoffending out of fear he will receive a similar sentence, particularly as the offence of culpable driving causing death carries a maximum of 20 years imprisonment.⁴] [However, the rate of recidivism is high, as approximately 43.6% of those released from Victorian prisons reoffend to such a serious extent that they are in prison again within two years. This suggests prison is not an effective specific deterrent for many offenders, such as Elias.⁵]

[Therefore, whilst imprisonment may protect the community in the short term, Elias may not be deterred from reoffending after his release from prison, negatively impacting the community.⁶]

✓ ✗ I have provided an introduction to summarise my answer to the question.¹

✓ ✗ I have provided one reason why imprisonment achieves the purpose of protection.²

✓ ✗ I have provided one limitation of imprisonment achieving the purpose of protection.³

✓ ✗ I have provided one reason why imprisonment achieves the purpose of specific deterrence.⁴

✓ ✗ I have provided one limitation of imprisonment achieving the purpose of specific deterrence.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 signposting in my response, such as 'Firstly'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Moreover'.

Linking to previous learning

14. a. [One reason for the Victorian court hierarchy is appeals. For example, if Toby is dissatisfied with the outcome of his case, he can seek to have the decision reviewed by a higher court, such as the Court of Appeal.¹] [Therefore, the court hierarchy allows more superior courts to review the decisions of lower courts. Although, this still requires Toby to have leave to appeal as it is not an automatic right.²]

☒ ☐ I have identified one reason for the Victorian Court Hierarchy.¹

☒ ☐ I have provided information about my chosen reason.²

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

☒ ☐ I have used signposting in my response, such as 'One reason'.

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

- b. [Toby was likely sentenced to a term of imprisonment, which is a sanction that requires the offender to be held in custody for a given period of time, and it is the most severe penalty a court can impose.¹] [This is because Toby was charged with manslaughter, which is punishable by level 2 imprisonment.²]

☒ ☐ I have identified and defined imprisonment.¹

☒ ☐ I have provided an example relevant to the scenario and linked it to the theory.²

- c. [Imprisonment can achieve the purpose of rehabilitation to a moderate extent, however, this can depend on resource availability and the willingness of the individual offender.¹] [Imprisonment may be able to rehabilitate Toby as prisons provide some rehabilitation programs, such as alcohol and drug programs, which can address potential underlying causes of offending.²] [However, the success of rehabilitative programs will also be dependent on Toby's willingness to engage with and participate in the rehabilitative activities, and may be unsuccessful if Toby is not willing to address the causes of his offending.³] [Additionally, the prison population's need for rehabilitative services far exceeds the services provided, as there are often very long waiting lists for access to such services. As a result, Toby may leave prison without addressing the underlying causes for his offending and return to committing crimes.⁴]

☒ ☐ I have stated the extent to which I agree or disagree with the statement.¹

☒ ☐ I have provided one reason why imprisonment can achieve the purpose of rehabilitation.²

☒ ☐ I have provided one reason why imprisonment may be limited in its ability to achieve the purpose of rehabilitation.³

☒ ☐ I have provided a second reason why imprisonment may be limited in its ability to achieve the purpose of rehabilitation.⁴

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

☒ ☐ I have used connecting words, such as 'However' and 'As a result'.

3C Factors considered in sentencing

Check your understanding

- A. True. **Explanation:** The courts will consider both aggravating and mitigating factors when deciding on an appropriate sentence for an offender.
- B; C; D. **Explanation:** If a crime is premeditated, involves the use of a weapon, or is committed in front of a vulnerable person, these are all aspects of a crime that increase the seriousness of the offence and are therefore considered aggravating factors.
- If the offender committed a crime that was motivated by prejudice toward, or hatred of a particular group, such as a religious or ethnic group, this will be **an aggravating** factor considered by the courts in sentencing.
- A. True. **Explanation:** A victim impact statement (VIS) may be an aggravating factor if the crime has had a significant negative impact on the offender. Alternatively, a VIS can be a mitigating factor if the victim forgives the offender.
- A **guilty plea** may result in the court imposing a less severe sanction by applying a sentencing discount.
- B. False. **Explanation:** Whilst remorse is a mitigating factor, the courts will not consider a lack of remorse as an aggravating factor.

Preparing for exams

Standard exam-style

7. [A guilty plea is a full admission by an accused person of an offence for which they have been charged.¹] [One impact that a guilty plea may have on Stavros' criminal case is that the court may consider this as a mitigating factor, and consequently lessen the severity of the sanction it imposes.²] [By pleading guilty, Stavros demonstrates that he recognises his conduct was wrong and is willing to accept the consequences for his actions.³]

☒ ☐ I have defined the term 'guilty plea'.¹

☒ ☐ I have provided one impact of a guilty plea on Stavros' criminal case.²

✓ ✗ I have provided information about my chosen impact of a guilty plea on Stavros' criminal case.³

✓ ✗ I have used signposting in my response, such as 'One impact'.

8. [Mitigating factors are aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.¹][An example of a mitigating factor is where the offender shows remorse for their actions, as this illustrates they regret their actions.²][Alternatively, aggravating factors are aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence.³][An example of an aggravating factor is where the crime was motivated by prejudice toward, or hatred of a particular group, such as a religious or ethnic group.⁴][One key difference is that aggravating factors will increase the severity of the sanction imposed, whereas, mitigating factors will decrease the severity of the sanction imposed.⁵]

✓ ✗ I have defined the term mitigating factors.¹

✓ ✗ I have provided an example of a mitigating factor.²

✓ ✗ I have defined the term aggravating factors.³

✓ ✗ I have provided an example of an aggravating factor.⁴

✓ ✗ I have provided a key difference between mitigating factors and aggravating factors.⁵

✓ ✗ I have used signposting in my response, such as 'One key difference'.

✓ ✗ I have used comparison words, such as 'Alternatively', when distinguishing.

Extended response

9. A; C; D

10. [One factor the court would consider when sentencing Zuri are 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 Zuri committed the offence in a crowded park filled with young children and families, this is an aggravating factor that will likely render the offending more serious, leading to a more severe sentence.²][Another aggravating factor the court would consider when sentencing Zuri is the fact that she used a knife to threaten to injure the families and children at the park. The use of a weapon often renders the offending more serious.³]

[Furthermore, the court will also consider 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.⁴][For example, as Zuri pleaded guilty at the first available opportunity, this is a mitigating factor as it avoids the need for a full trial to take place, leading to a less severe sentence being imposed on Zuri.⁵][Additionally, as Zuri demonstrated remorse by stating that she regretted her actions and is willing to accept the consequences, this will render the offending less serious, leading to a less severe sentence.⁶]

✓ ✗ I have identified and defined one factor the courts would consider before sentencing Zuri.¹

✓ ✗ I have provided an example from the scenario and linked it to my chosen factor.²

✓ ✗ I have provided a second example from the scenario and linked it to my chosen factor.³

✓ ✗ I have identified and defined a second factor the courts would consider before sentencing Zuri.⁴

✓ ✗ I have provided an example from the scenario and linked it to my chosen factor.⁵

✓ ✗ I have provided a second example from the scenario and linked it to my chosen factor.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I used signposting in my response, such as 'One factor' and 'Another aggravating factor'.

✓ ✗ I have used connecting words, such as 'Furthermore' and 'Additionally'.

Linking to previous learning

11. Appropriate: II; III; IV
Not appropriate: I

12. a. [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][For example, the fact that Nathan fled the scene of the car crash is an aggravating factor, as it increases the seriousness of Nathan's actions, consequently, increasing the severity of the sentence imposed by the court.²][Alternatively, mitigating factors are aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence.³][For example, the court will consider the fact that Nathan has no prior criminal convictions as a mitigating factor as this shows he has no criminal history, which may decrease the severity of the sentence imposed on him.⁴]

✓ ✗ I have defined aggravating factors.¹

✓ ✗ I have provided an example from the scenario and linked it to the impact of aggravating factors.²

✓ ✗ I have defined mitigating factors.³

✓ ✗ I have provided an example from the scenario and linked it to the impact of mitigating factors.⁴

✓ ✗ I have used connecting words, such as 'Alternatively'.

- b. [Plea negotiations are appropriate in this case for both the prosecution and Nathan if both parties are willing to enter into negotiations.¹]

[One reason why plea negotiations are appropriate in Nathan's case is that they can relieve Bec of the stress and trauma associated with presenting evidence at trial, whilst it can also secure a guilty verdict for the prosecution.²]

[Additionally, another reason why plea negotiations may be appropriate is that they can allow Nathan to plead guilty to the charges against him. In return, Nathan may receive a lesser charge or fewer charges altogether.³][Plea negotiations can also allow both Nathan and the prosecution to avoid the costs and time associated with a criminal trial.⁴]

[However, plea negotiations may not be appropriate if Nathan is not prepared to plead guilty to the charges against him, particularly as he has already pleaded not guilty to each of the three offences he has been charged with.⁵]

[Overall, plea negotiations are largely appropriate in this case as they can secure a guilty verdict, avoid the costs and time associated with a trial, and may be beneficial to Nathan. However, Nathan must be willing to plead guilty.⁶]

- ✓ ✕ I have provided an introduction to my response.¹

- ✓ ✕ I have provided one reason why plea negotiations are appropriate in Nathan's case.²

- ✓ ✕ I have provided a second reason why plea negotiations are appropriate in Nathan's case.³

- ✓ ✕ I have provided a third reason why plea negotiations are appropriate in Nathan's case.⁴

- ✓ ✕ I have provided one reason why plea negotiations are not appropriate in Nathan'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 reason' and 'another reason'.

- ✓ ✕ I have used connecting words, such as 'Additionally' and 'However'.

4A Key principles of the Victorian civil justice system

Check your understanding

1. A. True. **Explanation:** The civil justice system provides a means of resolving private disputes between parties where there has been an alleged breach of rights.
2. A; B; D. **Explanation:** Both kidnapping and murder are criminal offences.
3. The **plaintiff** has the burden of proof in civil cases, meaning they are responsible for proving the facts of the case.
4. B. False. **Explanation:** The burden of proof in civil claims shifts from the plaintiff to the defendant if the defendant files a counterclaim.
5. C. **Explanation:** The plaintiff must prove the case on the balance of probabilities, meaning the plaintiff is required to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.
6. The standard of proof in civil cases is a **lower** threshold in comparison to the standard of proof in criminal cases.

Preparing for exams

Standard exam-style

7. [The standard of proof is the degree to which the facts of the case must be proven in court, and in civil cases, the standard of proof is on the balance of probabilities.¹] [This means the plaintiff is required to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.²]
☒ ☐ I have identified the standard of proof in civil disputes.¹
☒ ☐ I have defined the balance of probabilities.²
8. [In this case, the burden of proof lies with Beatrice as she is the plaintiff initiating a claim against Blues.¹] [As this is a civil case, the standard of proof is on the balance of probabilities, meaning Beatrice must prove that her version of the facts is more likely to be correct, and Blues, the defendant, is most likely liable for the breach of contract.²]
☒ ☐ I have identified the party that holds the burden of proof in Beatrice's case.¹
☒ ☐ I have provided information about the standard of proof in Beatrice's case.²
9. [The burden of proof refers to the responsibility of a party to prove the facts of a case. In a civil case, the burden of proof rests with the plaintiff.¹] [On the other hand, the standard of proof refers to the degree to which the facts of the case must be proven in court. The standard of proof in civil proceedings is on the balance of probabilities.²] [One key difference between these two concepts is that the burden of proof refers to which party is responsible for proving the facts of a case, whereas the requirement in relation to the standard of proof is about the degree to which that party must prove the facts.³] [Therefore, in Abigail's case, as the plaintiff, she has the burden of proof or the responsibility of proving her version of the facts of the case.

Alternatively, in relation to the standard of proof, the requirement is for Abigail to prove that her version of the facts is more likely to be correct than ProTimes' version of the facts.⁴]

- ☒
- ☐
- I have provided information about the burden of proof.
- ¹
-
- ☒
- ☐
- I have provided information about the standard of proof.
- ²
-
- ☒
- ☐
- I have provided one key difference between the burden of proof and the standard of proof.
- ³
-
- ☒
- ☐
- I have provided an example from the scenario and linked it to the burden of proof and the standard of proof.
- ⁴
-
- ☒
- ☐
- I have used signposting in my response, such as 'The key difference'.
-
- ☒
- ☐
- I have used connecting words, such as 'Therefore'.
-
- ☒
- ☐
- I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

10. [The first error in the scenario is that the burden of proof rested with Martha for breaching the contract.¹] [The burden of proof would lie with Imashi as she is the plaintiff who initiated a civil claim against Martha.²]

[The second error is that the case had to be proven beyond reasonable doubt.³] [For civil claims, the standard of proof is on the balance of probabilities, meaning Imashi would need to prove that her version of the facts is more likely to be correct, and that Martha is most likely liable.⁴]

[The third error is that Martha was later sentenced to a term of imprisonment.⁵] [In civil claims, where the plaintiff is successful, the defendant, may be ordered to pay damages to the plaintiff to compensate the loss but would never be imprisoned, as this is a sanction of the criminal justice system.⁶]

- ☒
- ☐
- I have identified the first error in the scenario.
- ¹
-
- ☒
- ☐
- I have provided the correct civil procedure for the first error in the scenario.
- ²
-
- ☒
- ☐
- I have identified the second error in the scenario.
- ³
-
- ☒
- ☐
- I have provided the correct civil procedure for the second error in the scenario.
- ⁴
-
- ☒
- ☐
- I have identified the third error in the scenario.
- ⁵
-
- ☒
- ☐
- I have provided the correct civil 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 'The first error' and 'The second error'.

Extended response

11. A; D; E

12. [The burden of proof refers to the responsibility of a party to prove the facts of a case, and in civil claims, this burden rests with the plaintiff.¹] [In its case against Hannah, Sleek Financial has the burden of proof as it is the party initiating the claim against its customer, Hannah.²] [However, if Hannah initiates a counterclaim against Sleek Financial, the burden of proof will shift to lie with her as she is initiating a separate claim against Sleek Financial, and is therefore responsible for proving her claim against the business.³]

[Furthermore, the standard of proof refers to the degree to which the facts of a case must be proven in court.⁴] [In civil disputes, the standard of proof is on the balance of probabilities, meaning the plaintiff is required to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.⁵] [Therefore, Sleek Financial must prove it is more probable than not that Hannah owes \$1000 in fees for financial services not completed in 2021.⁶] [Although, if Hannah initiates a counterclaim, she must prove that her version of the facts, that Sleek Financial has been charging her fees every year since 2012 but providing no service for these fees, is more likely to be correct.⁷]

- ✓ ✗ I have defined the burden of proof.¹
- ✓ ✗ I have provided information about who has the burden of proof in Sleek Financial's claim.²
- ✓ ✗ I have provided information about who has the burden of proof if Hannah initiates a counterclaim against Sleek Financial.³
- ✓ ✗ I have defined the standard of proof.⁴
- ✓ ✗ I have identified and defined the balance of probabilities.⁵
- ✓ ✗ I have provided information about the balance of probabilities in Sleek Financial's claim.⁶
- ✓ ✗ I have provided information about the balance of probabilities if Hannah initiates a counterclaim against Sleek Financial.⁷
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used connecting words, such as 'However' and 'Furthermore'.

Linking to previous learning

13. [In a criminal case, the standard of proof is beyond reasonable doubt, which requires the prosecution to prove there is no reasonable doubt that the accused is guilty of the crime they have been charged with.¹] [On the other hand, the standard of proof in civil cases is on the balance of probabilities, which requires the plaintiff to establish that their version of the facts is more likely to be correct, and the defendant is most likely liable.²] [Therefore, the key difference is that the civil standard of proof is a lower threshold of proof than the criminal standard of proof. This is because the consequences do not generally extend beyond the plaintiff and defendant in a civil case.³]

- ✓ ✗ I have identified and defined the standard of proof in a criminal case.¹
- ✓ ✗ I have identified and defined the standard of proof in a civil case.²

- ✓ ✗ I have provided information about how the standard of proof in a criminal case differs from the standard of proof in a civil case.³
- ✓ ✗ I have used connecting words, such as 'Therefore'.
- ✓ ✗ I have used comparison words, such as 'On the other hand', when distinguishing.

4B Initiating a civil claim

Check your understanding

- A. True. **Explanation:** Before initiating a civil claim, a potential plaintiff should consider if they can afford to do so, if they are within the legal-time frame for commencing a claim of that type, and if the defendant is in a position to fulfil their legal obligation to compensate the plaintiff.
- A; B; D. **Explanation:** Even if the plaintiff is successful in their civil claim, the defendant may not be in a position to fulfil financial obligations.
- A potential plaintiff should consider **enforcement issues** as this may indicate that the defendant is not in a position to pay, or will unlikely pay compensation to the plaintiff.
- A. True. **Explanation:** There are circumstances in which a plaintiff can commence a civil action after the limitation period as applications for extensions can be made in certain circumstances.
- Prior to initiating a civil claim, a potential plaintiff should consider **costs** due to the various expenses that are involved with a civil action, such as fees for legal representation. A potential plaintiff should also consider the **limitation of actions** because this may indicate that their claim falls outside the legal time frame in which they are allowed to initiate their civil action.
- A; C. **Explanation:** If a plaintiff is unsuccessful, an adverse cost order is often made by the courts to make them pay the defendant's legal cost, but not always. The opposite is applicable too, if a plaintiff is successful, the defendant often has to pay the plaintiff's legal expenses.
- A. True. **Explanation:** Initiating a civil claim may not be appropriate in all circumstances, for example, if the plaintiff cannot afford to bring a civil action against the defendant.

Preparing for exams

Standard exam-style

8. [One enforcement issue that Steve should consider is the fact that Kehlani is in jail, as this may make it difficult to enforce a payment.¹] [This may impact Steve's decision to sue Kehlani as she may be unable to pay compensation to Steve even if he is successful in his claim.²]
- ✓ ✗ I have provided one enforcement issue that Steve should consider.¹
- ✓ ✗ I have provided further information about my chosen enforcement issue.²

9. [One factor that should be considered before initiating a civil claim is the limitation of actions, which refers to the time frame restriction in which a plaintiff is able to initiate their civil action.¹] [For example, the limitation period for defamation is one year, meaning an individual must initiate a defamation claim within one year of the alleged breach occurring.²] [Therefore, before a potential plaintiff initiates a civil claim, they must ensure they do so in the legal time-frame for disputes of that type.³]

☒ ☐ I have identified and defined one factor that should be considered before initiating a civil claim.¹

☒ ☐ I have provided an example of my chosen factor.²

☒ ☐ I have provided further information about my chosen factor.³

10. [One factor that Leo and Kira would have to consider before initiating a civil claim is costs, which refers to the amount of money that has to be paid to resolve a legal dispute.¹] [The costs involved in initiating a civil claim are very high, as Leo and Kira may have to pay for various fees, such as fees for legal representation and court fees.²]

[Furthermore, another factor that should be considered is enforcement issues, which refers to a problem a plaintiff may need to consider regarding the capacity of a defendant to fulfil their legal obligation to compensate the plaintiff.³] [As the builder has moved overseas, it may be difficult for Leo and Kira to secure damages from overseas even if they are successful in their civil claim. Therefore, doing so may not be appropriate.⁴]

☒ ☐ I have identified and defined one factor that would have to be considered before initiating a civil claim.¹

☒ ☐ I have provided an example from the scenario and linked it to my chosen factor.²

☒ ☐ I have identified and defined a second factor that would have to be considered before initiating a civil claim.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen factor.⁴

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

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

Extended response

11. A; C; D

12. [One factor that Nyla should consider before initiating civil action against Healthy Foods is enforcement issues, which refers to a problem a plaintiff may need to consider regarding the capacity of a defendant to fulfil their legal obligation to compensate the plaintiff¹] [As Healthy Foods has been losing money and has limited assets, this may indicate that even if Nyla is successful in her claim, the company may be unable to pay compensation.²] [Therefore, Nyla should consider the likelihood of obtaining a legal remedy enforced by the court before initiating a claim against Healthy Foods.³]

[Moreover, another factor that Nyla should consider is costs, which refers to the amount of money that has to be paid to resolve a legal dispute.⁴] [Nyla should consider the high costs associated with a civil case, such as paying fees for legal representation to advise her on

whether she is entitled to a legal remedy for her injured hand, as well as helping prepare legal documents and represent Nyla if the matter proceeds to trial.⁵] [Additionally, Nyla should consider the possibility that if unsuccessful, the court may make an adverse cost order, adding to the financial burden of taking legal action by paying for some or all of Healthy Foods' legal costs.⁶]

[It will be important for Nyla to consider a variety of factors before initiating civil action against Healthy Foods as, if she doesn't, she may be in a worse-off financial position than she would have been had she not initiated the claim.⁷]

☒ ☐ I have identified and defined one factor that would have to be considered before initiating a civil claim.¹

☒ ☐ I have provided examples from the scenario and linked them to my chosen factor.²

☒ ☐ I have provided further information about my chosen factor.³

☒ ☐ I have identified and defined a second factor that would have to be considered before initiating a civil claim.⁴

☒ ☐ I have provided examples from the scenario and linked them to my chosen factor.⁵

☒ ☐ I have provided further information about my chosen factor.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 factor' and 'another factor'.

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

Linking to previous learning

13. a. [Ping has the burden of proof in this case as she is the one initiating the claim against Mimi.¹] [The standard of proof in this case is on the balance of probabilities, which requires Ping to establish that her version of the facts is more likely to be correct, and Mimi is most likely liable.²]

☒ ☐ I have identified who has the burden of proof in Ping's case.¹

☒ ☐ I have identified what the standard of proof is in Ping's case.²

- b. [Ping should consider costs before issuing a proceeding against Mimi because the costs involved in a civil dispute can be very high.¹] [For example, Ping may have to pay for various fees, such as fees for legal representation and court filing fees. Therefore, Ping should consider whether she is willing and able to afford these costs.²] [Additionally, Ping should consider the limitation of actions which restricts the legal time-frame for a defamation case, requiring a plaintiff to bring an action in defamation within one year of the defamation occurring, unless there are extenuating circumstances.³] [Therefore, Ping must initiate her claim within one year of when Mimi published the article. However, Ping's claim may fall outside the limitation period as the article claiming Ping is a liar and has a stunt double was published 'some time ago'.⁴]

-
- ✓ ✕ I have identified why Ping should consider costs.¹
-
- ✓ ✕ I have provided examples from the scenario and linked them to costs.²
-
- ✓ ✕ I have identified why Ping should consider the limitation of actions.³
-
- ✓ ✕ I have provided examples from the scenario and linked them to the limitation of actions.⁴
-
- ✓ ✕ I have used connecting words, such as 'Additionally' and 'Therefore'.
-

5A The principles of justice during a civil dispute

Check your understanding

1. B. False. **Explanation:** There are only three principles of justice; fairness, equality, and access.
2. B. **Explanation:** As the law is highly complex, a defendant may not understand how to best present their case which may lead to an unjust outcome to the case, limiting the achievement of fairness.
3. The principle of **fairness** ensures that all people can participate in the justice system and its processes should be impartial and open.
4. A; C. **Explanation:** Victim impact statements are only relevant to criminal law and would not be taken into account in civil proceedings. Additionally, if a juror demonstrated bias towards either party in a civil case due to knowing them personally, they would be disqualified from being part of the jury.
5. A. True. **Explanation:** Class actions promote engagement with the justice system and empower individuals to partake in a case they may not have been able to afford individually. This is because the expenses of a class action are covered by either the lead plaintiff or third-party litigation funders.
6. 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.
7. 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

8. [One way the civil justice system upholds the principle of fairness is through the use of an independent judge and/or jury to adjudicate civil disputes.¹][The judge and jury must be impartial and unbiased, basing their decisions solely on the facts of the case.²][Additionally, if a jury is used in civil cases, this contributes to fairness as they represent a cross-section of the community and should therefore, make a decision about liability that reflects community values.³]

☒ ☐ I have provided one way the civil justice system upholds the principle of fairness.¹

☒ ☐ I have provided information about my chosen way.²

☒ ☐ I have provided information about how my chosen way upholds the principle of fairness.³

☒ ☐ I have used signposting in my response, such as 'One way'.

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

9. [One way Baxter could gain better access to the legal system is through using alternate methods of dispute resolution, which 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.¹][This would allow Baxter to access a just resolution in a timely manner by avoiding the delays associated with the courts which he was becoming frustrated by.²][Another way Baxter could gain better access to a just resolution is through an alternate dispute resolution institution, such as VCAT.³][As VCAT aims to provide efficient dispute resolution services, this may allow Baxter to avoid the extensive delays in resolving his civil dispute in the courts.⁴]

☒ ☐ I have provided one way Baxter could better access justice.¹

☒ ☐ I have provided an example relevant to the scenario and linked it to my chosen way.²

☒ ☐ I have provided a second way Baxter could better access justice.³

☒ ☐ I have provided an example relevant to the scenario and linked it to my chosen way.⁴

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

10. [One reason why the *Politician Exemption Act* would hinder equality is that it breaches the rule of law.¹][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.²][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. Therefore, the *Politician Exemption Act* would hinder equality by treating politicians differently from the average person.³]

☒ ☐ I have identified one limitation of the *Politician Exemption Act* in upholding the principle of equality.¹

☒ ☐ I have provided information about the ability of the *Politician Exemption Act* to uphold the principle of equality.²

☒ ☐ I have provided further information about the ability of the *Politician Exemption Act* to uphold the principle of equality.³

☒ ☐ I have used signposting in my response, such as 'One reason'.

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

Extended response

11. Strengths: II; III
Limitations: I; IV
12. [The principles of fairness and equality may be achieved in Serena's case, subject to certain limitations.¹]

[Fairness is the principle that all people can participate in the justice system and its processes should be impartial and open.²][One way fairness is achieved in Serena's case is that both parties will have the opportunity to present their case. This means that Serena will be able to defend herself and rebut Blair's arguments against her.³][However, fairness may not be achieved because Serena is representing herself and may not be able to effectively present her defence.⁴]

[Equality refers to the principle that all people engaging with the justice system and its processes should be treated in the same way.⁵]

[Equality can also be achieved as the judge in Serena's case must remain independent and unbiased, basing its decisions solely on the facts of the case and not on the characteristics of the parties.⁶]

[However, equality may not be achieved because the judges cannot assist unrepresented parties to the extent a legal practitioner can, even if they recognise that the court proceeding is unequal. Judges can merely ensure that the parties understand the proceedings.⁷]

[Overall, the ability for both parties to present their case, and an independent judge and jury, assist in upholding the principles of fairness and equality.⁸]

✓	✗	I have provided an introduction to my response. ¹
✓	✗	I have defined fairness. ²
✓	✗	I have provided one way the achievement of the principle of fairness may be upheld in this case. ³
✓	✗	I have provided one way the achievement of the principle of fairness may be limited in this case. ⁴
✓	✗	I have defined equality. ⁵
✓	✗	I have provided one way the achievement of the principle of equality may be upheld in this case. ⁶
✓	✗	I have provided one way the achievement of the principle of equality may be limited in this case. 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 and topic sentences to organise my response.
✓	✗	I have used signposting in my response, such as 'One way'.
✓	✗	I have used connecting words, such as 'However'.

Linking to previous learning

13. [Enforcement issues refer to a problem a plaintiff may need to consider regarding the capacity of a defendant to fulfil their legal obligation to compensate the plaintiff.¹] [For example, if a plaintiff is awarded damages but the defendant is not in a financial position to compensate them for the wrongdoing, access to justice is unlikely to be achieved.²] [Therefore, prior to engaging with the civil justice system, a plaintiff should consider whether it is likely that the outcome will provide them access to the justice and damages they desire.³]

✓	✗	I have defined enforcement issues. ¹
✓	✗	I have provided one reason why enforcement issues hinder access. ²
✓	✗	I have provided further information about my enforcement issues and the achievement of access. ³
✓	✗	I have used connecting words, such as 'Therefore'.

5B Methods of resolving civil disputes

Check your understanding

1. A. **Explanation:** Where the parties want to avoid expensive legal fees and maintain privacy, alternative methods of resolving disputes, away from the courts, are optimal.
2. B. **False. Explanation:** The role of an arbitrator is to listen to both parties' sides of the issue and then make a final decision as to the outcome of the civil dispute.
3. Arbitration limits the principle of justice of **equality** from being achieved as parties may have to self-represent, therefore the two parties may be on unequal footing and the unrepresented party is likely to be disadvantaged.
4. Mediation: II
Arbitration: I; III
5. B; D. **Explanation:** Parties participating in mediation often choose to pursue this method of dispute resolution due to its private nature and because legal representation is not required, which can lower expenses.
6. A. **Explanation:** Paying for a mediator is far less costly than the expense of court proceedings, therefore increasing access to justice as individuals of lower socio-economic status can still pursue legal action to resolve a civil dispute.
7. A. **Explanation:** A conciliator has the right to offer information and advise parties by making personal suggestions on the dispute and facilitate conversations, whereas a mediator should not provide their own personal input or opinions.
8. A; B. **Explanation:** Conciliation is appropriate when parties show a willingness to discuss their issues with one another and compromise on the matter. It is also an ideal alternative to court proceedings when parties want their issues to remain private.
9. B; C; D. **Explanation:** When engaging in conciliation, a conciliator will provide suggestions to parties and ensure both parties' opinions are being heard.
10. B. **False. Explanation:** Mediation, conciliation, and arbitration are all alternative methods of dispute resolution that can be used by parties to resolve a dispute instead of the court system.

Preparing for exams

Standard exam-style

11. [One method of resolving a civil dispute that could be ordered by the courts is mediation. Mediation is a non-judicial dispute resolution method involving an independent third party that facilitates conversations between disputing groups.¹] [One feature of mediation is that the mediator, an unbiased individual who does not impose their opinion or provide resolution suggestions, facilitates the discussion between the parties and encourages a mutually agreed resolution.²] [Another feature of mediation is that it is non-binding. However, once parties reach an agreement they will often enter into a deed of settlement or a formal agreement setting out the resolution of the civil dispute that both parties are bound by.³]

✓ ✗ I have identified and defined one method of resolving civil disputes.¹

✓ ✗ I have provided one feature of my chosen method of resolving a civil dispute.²

✓ ✗ I have provided a second feature of my chosen method of resolving a civil dispute.³

✓ ✗ I have used signposting in my response, such as 'One method' and 'One feature'.

✓ ✗ I have used connecting words, such as 'However'.

12. [One similarity between conciliation and arbitration is that both of these methods of dispute resolution involve an independent third party listening to the dispute, with the cost of this unbiased conciliator or arbitrator being significantly less than the expense associated with paying for a court to conduct a civil hearing.¹]

[One difference between the two forms of dispute resolution is that the arbitrator makes the final decision on the resolution of the dispute, whilst a conciliator does not have the power to do so. Conciliators can only suggest to the parties how they believe the dispute should be resolved, providing advice but not a concrete decision.²]

[Furthermore, another difference between the two forms of dispute resolution is that, at the conclusion of arbitration, a legally-binding decision is made whilst the result of conciliation is not necessarily binding unless the parties both consent to make it binding through a deed of settlement.³]

✓ ✗ I have provided one similarity between conciliation and arbitration as methods of dispute resolution.¹

✓ ✗ I have provided one difference between conciliation and arbitration as methods of dispute resolution.²

✓ ✗ I have provided a second difference between conciliation and arbitration as methods of dispute resolution.³

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One similarity' and 'One difference'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

13. [One way the alternative methods of civil dispute resolution promote fairness is by allowing the parties to retain control over the arguments they present during informal discussions.¹] [As a result, parties can present their case in the best light and also have greater autonomy over the direction of the dispute. Therefore, parties are more likely to reach a resolution they believe is fair, particularly when mediation and conciliation are used, as they must compromise during the process and consent to the final decision or whether a deed of settlement will be used.²]

[Additionally, alternative methods of resolving civil disputes can contribute to the achievement of access as utilising these methods is often significantly less expensive than using the courts.³]

[This enhances a party's access to justice as individuals of a lower socio-economic status are still able to participate in the dispute resolution process and ideally achieve a resolution.⁴]

✓ ✗ I have provided one way alternative methods of resolving civil disputes achieve fairness.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have provided a second way alternative methods of resolving civil disputes achieve access.³

✓ ✗ I have provided information about my chosen way.⁴

✓ ✗ 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 'As a result' and 'Therefore'.

Extended response

14. A; B; C

15. [Conciliation may be an appropriate method for resolving this dispute, however, it will depend on a number of factors.¹]

[Conciliation may be appropriate for Daniel's dispute as it is an informal and less costly dispute resolution method. With the presence of an independent third party, the conciliator, Daniel and the landlord may be able to reach a mutually-agreeable solution to repair the roof and compensate Daniel for the loss and harm suffered.²] [Moreover, conciliation can produce a binding outcome if Daniel and the landlord sign a deed of settlement, meaning the parties can be reassured the agreement is legally enforceable if one party decides to go back on their end of the resolution.³]

[However, conciliation may not be appropriate for Daniel's claim as the landlord has not previously taken action. As conciliation is voluntary and dependent on the parties discussing the matter with one another, if the landlord is unwilling to negotiate, conciliation is unlikely to be successful.⁴] [Furthermore, the parties may prefer the formalities of a court trial and the binding nature of a court ruling, given conciliation agreements are not binding unless a deed of settlement is signed.⁵]

[For these reasons, provided the parties cannot agree on a resolution through informal negotiations, conciliation may be an appropriate means of dispute resolution for Daniel and the landlord.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one reason why conciliation may be appropriate in this instance.²

✓ ✗ I have provided information about the appropriateness of conciliation.³

✓ ✗ I have provided one reason why conciliation is not appropriate in this instance.⁴

✓ ✗ I have provided information about why conciliation may not be appropriate in this instance.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 'Moreover' and 'However'.

16. Strengths: I; III
Limitations: II; IV

17. [In certain circumstances, mediation has a greater capacity to facilitate and promote access to justice compared to arbitration, however, arbitration is not necessarily a less effective method of dispute resolution and has its own benefits.¹]

[Mediation is more informal than arbitration, and thus can be less intimidating for parties, allowing them to openly negotiate and discuss their side of events in a comfortable environment.²] [Furthermore, mediation provides parties with more control over the outcome of the dispute and the evidence they provide. As the disputing parties compromise and must be willing to see each others' point of view, the relationship between parties is more likely to be maintained.³]

[However, this is not always the case and it cannot be assumed that mediation will always be superior to arbitration. Arbitration can also be an effective method of resolving civil disputes.⁴] [Arbitrators can enforce a binding agreement, unlike mediators, which can guarantee a level of certainty in the outcomes. If parties do not sign a deed of settlement regarding the agreements made during mediation, the resolution they reach may not actually be maintained, making the process redundant.⁵] [Additionally, in circumstances where there is a history of violence between parties, mediation can be an inappropriate method of dispute resolution due to the potential unequal power dynamic between the two parties. Thus, the violent party may be unwilling to compromise and the victim may be scared and therefore, less likely to stand their ground.⁶]

[Although mediation may be appropriate in some circumstances, given its informality and less costly nature, it is not necessarily 'better than' arbitration as the process of arbitration can be more suitable to some disputes.⁷]

- ☒ ☐ I have provided an introduction to my response.¹
-
- ☒ ☐ I have provided one strength of mediation compared to arbitration.²
-
- ☒ ☐ I have provided a second strength of mediation compared to arbitration.³
-
- ☒ ☐ I have provided a topic sentence to introduce the main idea of the paragraph.⁴
-
- ☒ ☐ I have provided one limitation of mediation compared to arbitration.⁵
-
- ☒ ☐ I have provided a second limitation of mediation compared to arbitration.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 connecting words, such as 'Furthermore' and 'However'.
-

Linking to previous learning

18. True: II; IV
False: I; III
19. [Winter would need to consider the factors of cost and enforcement issues before initiating a civil claim against Summer.¹]

[Winter would need to consider the costs associated with a civil trial and court proceedings. This could be an issue for Winter and Summer as they both do not currently have the financial means to fund legal proceedings, given Winter has not been working and Summer is at risk of bankruptcy.²] [By making use of other methods of dispute resolution outside of the courts, such as conciliation, both parties can reduce the expense of resolving their dispute significantly as they may be able to self represent, as opposed to engaging legal representation.³]

[The cost of hiring a conciliator is also significantly less expensive than a court trial, and conciliators have specific knowledge regarding the subject matter of the dispute to assist Winter and Summer in reaching a resolution by providing suggestions and advice.⁴]

[A second factor Winter would need to consider before initiating a civil claim against Summer is enforcement issues. It is clear that Summer is likely to have significant difficulties in paying damages, if they are awarded, given Summer's prospects of bankruptcy.⁵] [This would limit her capacity to fulfil her legal obligation of compensating Winter and the court proceeding will have been ineffective in providing Winter with a remedy.⁶] [By engaging in an alternative dispute resolution process, such as mediation, the parties can both express their side of events and establish a compromise. For example, Summer could propose a more flexible resolution where she pays Winter in monthly instalments instead of compensating him with one lump sum, as this will give her a greater chance of paying the damages.⁷]

- ☒ ☐ I have identified two factors to consider when initiating a civil claim.¹
-
- ☒ ☐ I have provided one reason why the first factor would need to be considered.²
-
- ☒ ☐ I have provided information about my chosen reason.³
-
- ☒ ☐ I have provided further information about my chosen reason.⁴
-
- ☒ ☐ I have provided one reason why the second factor would need to be considered.⁵
-
- ☒ ☐ I have provided information about my chosen reason.⁶
-
- ☒ ☐ I have provided further information about my chosen reason.⁷
-
- ☒ ☐ I have used paragraphs to organise my response.
-
- ☒ ☐ I have used signposting in my response, such as 'A second factor'.
-

5C The Victorian court hierarchy and civil disputes

Check your understanding

- A. True. **Explanation:** The presence of a court hierarchy in Victoria establishes a ranking system where each court is assigned varying levels of legal authority to handle different disputes, thereby contributing to the effectiveness of the civil justice system.
- A. True. **Explanation:** Neither the Magistrates' Court nor the County Court possess appellate jurisdiction with regard to civil disputes.
- An **appeal** is the legal process that a **dissatisfied** party may pursue to have a court's decision reviewed by a **higher** court.

4. A. **Explanation:** Administrative convenience is achieved through the arrangement of courts in a hierarchy, which allows for the volume of complex and minor cases to be appropriately distributed between the courts according to their jurisdiction.
5. C. **Explanation:** The Supreme Court does not hear minor disputes or assist the Magistrates' Court.
6. D. **Explanation:** The high cost of an appeal can hinder all of the principles of justice. If a party cannot afford an appeal they may settle with an unfair outcome of their original case, limiting fairness. Equality may be hindered with differing socio-economic statuses, as legal expenses affect individuals differently. Access can be limited as the cost of appeals may stop people from applying for them even if they feel an outcome was unjust.
7. C. **Explanation:** An appellate jurisdiction refers to the power and ability of a court to hear a case on appeal
8. B. False. **Explanation:** It is important to recognise the limitations of the court hierarchy and the ways the principles of justice are not wholly achieved.

Preparing for exams

Short exam-style

9. [The ability to appeal is a benefit of the Victorian court hierarchy because this allows higher courts to review and correct errors in a decision made by lower courts in civil cases.¹][When a civil dispute is appealed, a higher court can review the decision of the lower court and determine if there were any legal errors or mistakes in the application of the law. This helps reduce the likelihood of unjust outcomes by allowing errors in a decision to be corrected before they become final.²][Furthermore, appeals promote transparency and accountability in the civil justice system, as decisions are subject to review and scrutiny by higher courts.³]

✓ ✗ I have identified one reason why a court hierarchy is beneficial.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 'Furthermore'.

10. [One reason for the civil court hierarchy is administrative convenience, as it allows the efficient and effective administration of justice.¹][The higher courts can spend time on serious, complex cases to avoid making hasty decisions in expensive or high profile cases, and can deliver a considered verdict.²][The Magistrates' Court hears thousands of less complex cases every year as they can resolve disputes in a timely manner, preventing a backlog of cases. This ensures people awaiting trial do not experience the stress of delays as disputes are resolved efficiently.³]

✓ ✗ I have identified administrative convenience as a reason the court hierarchy is beneficial.¹

✓ ✗ I have provided information about administrative convenience.²

✓ ✗ I have provided further information about administrative convenience.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

11. [One principle of justice that the court hierarchy in Victoria achieves is access as it provides different court levels, each of which can handle different types of disputes. For example, the Magistrates' Court is able to handle smaller civil disputes for claims under \$100,000, whilst the County Court and Supreme Courts are able to handle more complex and high-value disputes, such as class actions.¹][By offering different levels of courts, the Victorian court hierarchy helps ensure individuals have access to a legal system that is appropriate for their particular case.²][This helps ensure individuals are not excluded from the legal system due to the complexity or cost of their dispute, and that they are able to access the court to have their disputes resolved in a fair and effective manner.³]

✓ ✗ I have outlined one way the Victorian court hierarchy achieves the principle of access.¹

✓ ✗ I have provided information about how the Victorian court hierarchy achieves the principle of access to justify my answer.²

✓ ✗ I have provided further information about how the Victorian court hierarchy achieves the principle of access.³

12. a. [Alessio's case would likely be heard in the Magistrates' Court as the claim is under \$100,000.¹]

✓ ✗ I have identified the court that would hear Alessio's dispute.¹

- b. [One reason for the existence of a court hierarchy is administrative convenience. In Alessio's case, the court hierarchy can help ensure his dispute is resolved as quickly as possible, despite the backlog caused by COVID-19.¹][By having different levels of courts with different jurisdictions, the court hierarchy can ensure disputes are heard at the appropriate level and resolved as quickly and efficiently as possible.²][Alessio's case is eligible to be heard in the Magistrates' Court, and thus could be resolved much more quickly than if it were heard in another court, as it has the benefit of administrative convenience.³]

✓ ✗ I have provided one reason for the existence of the civil court hierarchy.¹

✓ ✗ I have provided further information about my chosen reason for the existence of the civil court hierarchy.²

✓ ✗ I have linked my reason for the existence of the civil court hierarchy to the scenario.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

13. [Aliza would appeal the decision on a question of law and her appeal would be heard in the Supreme Court – Trial Division.¹][In this particular case, the appeal would pertain to a legal matter involving the interpretation and application of laws or legislation by the magistrate during Aliza's initial debt claim case.²][For example, if the magistrate in Aliza's dispute had misinterpreted the legislation regarding debt claims, then there would be ground for an appeal on a question of law.³]

✓ ✗ I have identified the court that would hear Aliza's appeal.¹

✓ ✗ I have provided one reason that Aliza could appeal.²

- ☒ ☐ I have provided further information about the reason Aliza could appeal.³
- ☒ ☐ I have linked my answer to the scenario where appropriate.

14. [The first error is that Johnno is claiming the dispute will be heard in the Supreme Court – Trial Division.¹] [The Supreme Court generally only hears cases with a value of \$100,000 or more. As Johnno is only claiming \$50,000 in damages, the dispute would likely be heard in a lower court, such as the Magistrates' Court.²]

[The second error is that Jimmy believes he can automatically appeal the decision and have the decision reviewed in the High Court, even if he is found liable.³] [Appeals must meet certain criteria, such as the civil judgment allegedly not prescribing the appropriate remedy, whilst not all cases are eligible for appeal. In addition, appeals are not automatic, meaning a party must apply to the relevant court to seek leave to appeal.⁴]

[The third error is that Jimmy believes he can have the decision reviewed in the High Court.⁵] [The High Court is not a court of appeal for all civil disputes. It only hears appeals in limited circumstances, such as cases involving constitutional or federal law issues. In most disputes, appeals from the lower courts would be heard in the Court of Appeal, which is the next level of the Victorian court hierarchy above the Supreme Court – Trial Division.⁶]

- ☒ ☐ I have identified one error in the scenario.¹
- ☒ ☐ I have provided a correction to my chosen error.²
- ☒ ☐ I have identified a second error in the scenario.³
- ☒ ☐ I have provided a correction to my chosen error.⁴
- ☒ ☐ I have identified a third error in the scenario.⁵
- ☒ ☐ I have provided a correction to my chosen error.⁶
- ☒ ☐ I have used signposting in my response, such as 'The first error' and 'The second error'.

Extended response

15. Achieved: I; II
Limited: III
16. [Whilst the civil court hierarchy is designed to ensure disputes are heard in the appropriate court and there is a clear process for appeals, it is important to recognise that there are some situations in which the arrangement of the courts can potentially lead to unfairness in the legal process.¹]
- [Appeals are theoretically accessible to all parties, as long as they have valid legal grounds to do so. This ensures that any errors are rectified, promoting fairness.²] [Additionally, the court hierarchy helps to reduce delays by assigning cases to the appropriate court level based on their complexity. By minimising delays and streamlining the appeals process, the court hierarchy promotes fair treatment of parties, preventing prolonged stress.³]
- [However, it is important to note that the party seeking to appeal is responsible for the cost of the application and legal fees. This means some dissatisfied parties may be unable to afford the cost of lodging an appeal, resulting in unjust decisions not being rectified and leading to an unfair outcome.⁴]

[It is the responsibility of the legal system to work towards addressing these issues and ensuring the principle of fairness is upheld.⁵]

- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have outlined one way in which the Victorian civil court hierarchy upholds fairness.²
- ☒ ☐ I have outlined a second way in which the Victorian civil court hierarchy upholds fairness.³
- ☒ ☐ I have outlined one way in which the Victorian civil court hierarchy limits the achievement of fairness.⁴
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁵
- ☒ ☐ I have used paragraphs and topic sentences to organise my response.
- ☒ ☐ I have used connecting words, such as 'Additionally' and 'However'.

Linking to previous learning

17. [Alternative methods of dispute resolution, such as mediation, arbitration, and negotiation, can take the pressure off the court hierarchy by providing a more efficient and informal option for resolving disputes.¹] [Alternative dispute resolution methods provide a way for parties to resolve disputes without going through the formal court system. This means disputes can be resolved more quickly, and at a lower cost than if they were to go through the court system.²] [This reduces the number of cases that need to be heard in court, which can relieve pressure on the court hierarchy.³]
- ☒ ☐ I have identified one way alternative methods of dispute resolution can take the pressure off the courts.¹
- ☒ ☐ I have provided information about my chosen way alternative methods of dispute resolution can take pressure off the courts.²
- ☒ ☐ I have provided a link between alternative methods of dispute resolution and the court hierarchy.³

5D Judges, magistrates, and juries in a civil dispute

Check your understanding

- A. True. **Explanation:** Under the *Civil Procedure Act 2010* (Vic), a judge has the power to make orders and actively intervene in how parties conduct their disputes prior to a trial and during a trial.
- B. False. **Explanation:** Civil juries are only used upon request of the parties and must be paid for by the parties. They are rarely used in civil cases.
- A; C; D. **Explanation:** The case management powers of the judge in a civil case encompass the power to order mediation, make directions, and set the timeline of the case.
- A judge can improve the efficiency of a dispute by **limiting** the time spent on **cross-examination** and reducing the amount of topics that a witness may be questioned on.

5. A; B; C. **Explanation:** The jurors did not fulfil their obligations to remain alert and attentive to the evidence being presented as a number of them were playing Sudoku. Additionally, jurors must remain independent and unbiased, which was not demonstrated as they admitted to being influenced by external media reports, meaning they did not disregard the knowledge and information they obtained about the case outside of the courtroom.
6. Fairness: I
Equality: III
Access: II
7. B; D. **Explanation:** Juries are not used in the Magistrates' Court and therefore, magistrates do not have the responsibility of advising a jury. Furthermore, it is not the role of magistrates to assist a judge with high-profile cases upon request.
8. A; C. **Explanation:** The verdict in criminal and civil cases differ as a criminal jury needs to deliver a guilty or not guilty verdict, compared to a civil jury, which determines whether the defendant is liable or not liable. Additionally, criminal jurors never assist in determining the sanction of an accused, however, civil jurors may determine the damages a defendant is required to pay, in some circumstances.
9. B. False. **Explanation:** A civil jury is not an automatic right. If a party wishes to use a jury in a civil dispute they must receive approval to do so and fund the cost of the jury.

Preparing for exams

Standard exam-style

10. [One role of the judge in a civil trial is to apply the rules of evidence and procedure.¹] [This means they are required to make rulings relating to evidence and procedure, which can include ensuring only admissible evidence is presented in court, ensuring witnesses are examined and cross-examined lawfully, and giving directions on how evidence is to be presented and what documents the jury is permitted to see.²]

- ☒ ☐ I have provided one role of the judge 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'.

11. [One role of the jury in a civil trial is to remain objective.¹] [The jury should be independent and unbiased throughout the proceedings and when determining the verdict. If a juror believes they are unable to remain impartial throughout the trial, they must ask to be excused during the process of jury empanelment.²] [A second role of the jury is to listen to evidence, judge's directions, and submissions made by legal representatives.³] [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, take notes, and keep track of information throughout the trial. This involves listening to any directions given by the judge and explanations of key legal concepts.⁴]

- ☒ ☐ I have provided one role of the jury in a civil dispute.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have provided a second role of the jury in a civil dispute.³
- ☒ ☐ I have provided information about my chosen role.⁴

☒ ☐ I have used signposting in my response, such as 'One role' and 'A second role'.

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

12. [Under the *Civil Procedure Act 2010* (Vic), judicial powers of case management enable judges in civil cases to provide pre-trial orders and directions about the proceedings to the parties.¹] [The overarching aim of case management is to ensure justice is delivered swiftly, with judges using case management powers 'to facilitate the just, efficient, timely, and cost-effective resolution of the real issues in dispute'.²] [Using case management powers, judges can order parties to attend mediation, directions hearings, determine deadlines, and control the overall trial process. Additionally, if a party does not comply with the judge's directions, the court may dismiss the claims presented, reject certain evidence, or order an adverse cost order.³]

☒ ☐ I have provided information about case management powers.¹

☒ ☐ I have provided further information about case management powers.²

☒ ☐ I have provided examples of the use of case management powers in a civil dispute.³

☒ ☐ I have used connecting words such as 'Additionally'.

13. [One similarity between a judge's role in a criminal case and their role in a civil case is that, regardless of the type of case they are presiding over, a judge has the paramount role of acting as the independent umpire of the court and must remain impartial.¹] [Another similarity is that in both criminal and civil cases, judges have a role in ensuring correct procedures are followed, including the rules of evidence.²]

[One difference between a judge's role in a criminal case and a judge's role in a civil case is that for civil cases, judges have a role in pre-trial case management, such as ordering mediation or discovery, whereas judges in criminal cases do not have a role in pre-trial case management.³] [Another difference is that judges in civil cases may play a role in determining the outcome of a case, in that they will decide on the liability of the defendant. On the other hand, in a criminal case, the role of deciding a verdict is the role of the jury, unless it is a case in the Magistrates' Court, in which case the magistrate will decide.⁴]

☒ ☐ I have provided one similarity between the role of a judge in a criminal case and the role of a judge in a civil case.¹

☒ ☐ I have provided a second similarity between the role of a judge in a criminal case and the role of a judge in a civil case.²

☒ ☐ I have provided one difference between the role of a judge in a criminal case and the role of a judge in a civil case.³

☒ ☐ I have provided a second difference between the role of a judge in a criminal case and the role of a judge in a civil case.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 comparison words, such as 'whereas' and 'On the other hand', when distinguishing.

14. [I do not agree that the role of a jury in a criminal case is identical to the role of a jury in a civil case. Whilst there are many aspects of the role that are the same, there are also some differences.¹]

[One difference is the standard of proof that the jury is required to follow when making their decision.²][In a criminal case, it is the jury's role to determine the guilt or innocence of the accused. If determining that the accused is guilty, this must be beyond reasonable doubt. However, in a civil case, the jury must determine the defendant's liability, and this must be on the balance of probabilities.³]

[Another difference is that in some civil cases, the jury may play a role in determining the amount of damages to be awarded, whereas the imposition of a sanction for an accused who is found guilty is never the role of a jury in a criminal case.⁴]

✓ ✗ I have provided an introduction to answer the question.¹

✓ ✗ I have provided one difference between the role of juries in criminal cases and the role of juries in civil cases.²

✓ ✗ I have provided further information about my chosen difference.³

✓ ✗ I have provided a second difference between the role of juries in criminal cases and the role of juries in civil cases.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One difference' and 'Another difference'.

✓ ✗ I have used comparison words, such as 'However' and 'whereas', when distinguishing.

Extended response

15. Strengths: I; IV
Limitations: II; III

16. [The use of juries in a civil case can assist in achieving the principle of fairness to a moderate extent, however, there are some limitations in using a jury to determine the verdict, and potentially the remedy, of a civil dispute.¹]

[Firstly, jurors can promote fairness by encouraging a fair trial that is determined by a randomly selected and unbiased group of individuals. As jurors are randomly selected from the electoral roll, they represent a cross-section of the community and a diverse range of views, which promotes fairness in the determination and delivery of the verdict.²]

[Additionally, jurors must remain impartial, making their decisions solely on the facts and evidence presented. This ensures a fair and just outcome as jurors must disregard any personal opinions or external information, basing their verdict purely on what has been presented in the courtroom.³]

[However, given jurors are ordinary citizens, the risk of an unfair outcome may be enhanced due to the complexities of legal proceedings. Making decisions in legal cases is a difficult and complex task, and when undertaken by people with no legal training, there may be a risk that the final verdict is unfair if jurors have misunderstood or misinterpreted key facts or evidence.⁴][Moreover, jurors are not required to provide the rationale for their verdict. This means there is no guarantee the law has been correctly applied based upon the facts presented, which is disadvantageous to the parties and does not promote a fair resolution to the dispute.⁵]

[Therefore, although juries in civil cases can contribute to the achievement of fairness, in some instances, juries may serve to hinder fairness.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the use of juries in civil cases can enable the achievement of fairness.²

✓ ✗ I have provided a second way the use of juries in civil cases can enable the achievement of fairness.³

✓ ✗ I have provided one way the use of juries in civil cases can limit the achievement of fairness.⁴

✓ ✗ I have provided a second way the use of juries in civil cases can limit 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 'Firstly'.

✓ ✗ I have used connecting words, such as 'Additionally' and 'However'.

Linking to previous learning

17. [In a civil case, the standard of proof is on the balance of probabilities, whereas in a criminal case, the standard of proof is beyond reasonable doubt.¹][Therefore, in a civil case, the jury must determine the defendant's liability, and this must be on the balance of probabilities. This means the jury must be satisfied the plaintiff's version of facts is more likely to be correct, and the defendant is most likely liable.²][In contrast, in a criminal case, it is the jury's role to determine the guilt or innocence of the accused. If determining that the accused is guilty, this must be beyond reasonable doubt. This means the jury must be satisfied there is no reasonable doubt that the accused committed the crime they are charged with.³]

✓ ✗ I have identified the standard of proof required in a civil case and the standard of proof required in a criminal case.¹

✓ ✗ I have provided information about the role of a jury in a civil case with reference to the standard of proof.²

✓ ✗ I have provided information about the role of a jury in a criminal case with reference to the standard of proof.³

✓ ✗ I have used connecting words, such as 'Therefore'.

✓ ✗ I have used comparison words, such as 'whereas' and 'In contrast', when distinguishing.

5E The parties in a civil dispute

Check your understanding

- B. False. **Explanation:** In a civil case, the person who is alleged to have committed the civil breach is called the defendant.
- B; C. **Explanation:** Both parties are able to call witnesses and present evidence in court. The defendant has the option to present defences in court but they have no obligation to defend themselves.
- A, B, D. **Explanation:** The plaintiff does not present defences, this is the role of the defendant.

4. Unlike a criminal trial, parties in a civil trial have a degree of control over how the proceedings play out. This is called **party control**.
5. C; D. **Explanation:** The defendant does not explain points of law to the court or determine what evidence is admissible as these are roles of the judge.
6. Strengths: I; IV
Limitations: II; III
7. B. False. **Explanation:** In civil cases, the plaintiff initiates the claims and the defendant can choose to present defences, doing so with the aim of ensuring the plaintiff cannot prove the element of the civil breach on the balance of probabilities.

Preparing for exams

Standard exam-style

8. [A plaintiff's role in a civil trial is to initiate the claim and present their case against the defendant.¹][The parties must present all evidence to the judge throughout the trial, alongside the jury if one has been requested. In practice, the presentation of evidence and legal arguments is conducted by legal representatives on behalf of the plaintiff.²][A second role of the plaintiff is to ensure all relevant documents are disclosed and presented to the court in accordance with the *Civil Procedure Act 2010* (Vic).³]
☒ ☐ I have provided one role of the plaintiff in a civil trial.¹
☒ ☐ I have provided information about my chosen role of the plaintiff in a civil trial.²
☒ ☐ I have provided a second role of the plaintiff in a civil trial.³
☒ ☐ I have used signposting in my response, such as 'A second role'.
9. [One way the defendant's ability to present defences upholds the principle of fairness is that both parties are given the same opportunity to present their side of the story in court for civil disputes, increasing the likelihood of an outcome being achieved that both parties perceive as just.¹][The defendant is able to protect themselves from liability by presenting defences, allowing them to choose their own evidence and witnesses to call on so they are showcased in the best light.²][If the defendant was not given the ability to defend themselves, the civil trial process would be largely unbalanced. This could lead to many defendants being found unfairly liable as their evidence would not be considered, therefore, creating an unjust outcome.³]
☒ ☐ I have provided one way the defendant's ability to present defences upholds the principle of fairness.¹
☒ ☐ I have provided information about my chosen way the defendant's ability to present defences upholds the principle of fairness.²
☒ ☐ I have provided further information about my chosen way the defendant's ability to present defences upholds the principle of fairness.³
☒ ☐ I have used signposting in my response, such as 'One way'.

10. [One error in the scenario is that Jade is the defendant.¹][Jade is initiating the civil case against Fabio, the defendant, which makes her the plaintiff.²][A second error in the scenario is that Fabio would be allowed to withhold documents from the court.³][Both parties are obligated to provide all relevant documents to the court, so Fabio would likely face legal repercussions for withholding these key documents.⁴]
☒ ☐ I have identified the first error in the scenario.¹
☒ ☐ I have provided the correct civil procedure for the first error in the scenario.²
☒ ☐ I have identified the second error in the scenario.³
☒ ☐ I have provided the correct civil procedure for the second error in the scenario.⁴
☒ ☐ I have used signposting in my response, such as 'One error' and 'A second error'.

Extended response

11. A; C; E
12. [Risharb, the plaintiff, and Adam, the defendant, must fulfil their respective roles in a civil trial. Both parties are subject to overarching obligations. For example, the requirement to cooperate, disclose relevant documents at the earliest possible opportunity, and act honestly.¹]
 [Firstly, Risharb and Adam have the role of presenting their case to the judge and jury, if there is one.²][They can both question witnesses and summarise the facts of their case to the court with equal opportunity to present their case.³][However, since Risharb is representing himself, he may be disadvantaged, as Adam may have a proficient lawyer who can present his case in the best possible light. This means Adam and Risharb may not be on equal footing in relation to how their case is presented.⁴]
 [Furthermore, another role of Adam and Risharb in the civil case is both have party control.⁵][They are able to decide which witnesses to call, what evidence to present, and what legal representation they want, if any. This ensures both Adam and Risharb have full agency over their cases.⁶][However, this means they may receive minimal assistance from the court, which could be a disadvantage for Risharb who is unrepresented and may be unable to understand the evidence, rules, and procedures. Therefore, he may miss vital evidence, be under undue stress due to lack of understanding, and may cause further delays in the trial.⁷]
 [Overall, Risharb may be at a disadvantage as he is representing himself and must take on additional roles relative to Adam. Therefore, the role of the parties is strenuous in a civil trial due to the concept of party control.⁸]
☒ ☐ I have provided an introduction to my response.¹
☒ ☐ I have provided one role of Risharb and Adam in a civil trial.²
☒ ☐ I have provided information about my chosen role.³
☒ ☐ I have provided one limitation of my chosen role.⁴
☒ ☐ I have provided a second role of Risharb and Adam in a civil trial.⁵
☒ ☐ I have provided information about my chosen role.⁶

- ☒ ☐ I have provided one limitation of my chosen role.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 'Finally'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Furthermore'.

Linking to previous learning

13. [The primary role of the parties in a civil trial is to present their case to the court, ensuring they have complied with their overarching obligations under the *Civil Procedure Act 2010* (Vic).¹] [On the other hand, the role of the judge in a civil trial is to act as an impartial adjudicator and use their case management powers to ensure the case runs smoothly and efficiently.²] [One key difference between the role of the parties to a civil trial and the judge is that the judge enforces the rules of evidence and procedure, whereas the parties must comply with these rules as per the judge's direction.³]
- ☒ ☐ I have outlined the role of the parties in a civil trial.¹
 - ☒ ☐ I have outlined the role of the judge in a civil trial.²
 - ☒ ☐ I have provided a key difference between the role of the parties in a civil trial and the role of the judge.³
 - ☒ ☐ I have referred directly to relevant legislation in my response.
 - ☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.

5F Legal practitioners in a civil dispute

Check your understanding

- C. **Explanation:** A legal practitioner will often assist a client in presenting the relevant evidence in the best possible light to the court. It is the role of the judge in the case to determine the defendant's liability and decide the appropriate remedies to award the plaintiff.
- A; C. **Explanation:** One reason why a party may choose to engage legal practitioners in their civil dispute is they can confide in their lawyer and rely on them for comfort during the civil dispute, which may be an emotional experience for some parties.
- Solicitors** are the legal practitioners primarily responsible for the pre-trial necessities in a civil dispute. **Barristers**, on the other hand, present the facts and arguments about their client's case during the trial either in court or during other methods of civil dispute resolution, such as mediation.
- A. True. **Explanation:** For the principle of access to be achieved parties must understand the law and legal proceedings, which can be accomplished through the assistance of a lawyer.

- A. True. **Explanation:** In certain circumstances, such as where there is unequal representation between the two parties as one party can afford quality lawyers while the other is poorly represented, legal representation may reduce equality in a civil dispute.
- B. False. **Explanation:** The cost of legal representation is a significant restriction on the principle of access to justice as many plaintiffs and defendants often cannot afford the substantial fees.

Preparing for exams

Standard exam-style

- [One reason why legal practitioners are needed in a civil dispute is to present evidence at trial and cross-examine witnesses.¹] [When presenting evidence and cross-examining witnesses, there are procedural standards that must be followed to ensure irrelevant questions are not being asked. Therefore, a barrister who is familiar with such rules will be able to ask relevant questions to witnesses and present compelling evidence to support their client's case.²]
- ☒ ☐ I have provided one reason why legal practitioners are needed in a civil dispute.¹
- ☒ ☐ I have provided information about my chosen reason.²
- ☒ ☐ I have used signposting in my response, such as 'One reason'.
- [I do not agree with this statement as parties in a civil dispute will likely be unable to remain objective when self-representing, therefore, parties in a civil dispute require legal representation.¹]
- [Unlike the party in the civil dispute who may be emotionally invested in the dispute's outcome, especially if the civil dispute relates to sensitive matters such as discrimination or family issues, a lawyer will be able to look at the dispute through an impartial lens as they themselves are not emotionally impacted by its outcome.²] [This upholds fairness as the evidence that lawyers collate and their questions to witnesses can allow an impartial account of events to emerge. If a self-representing litigant questions witnesses, on the other hand, their emotions and biases may skew the examination process and prevent the truth from emerging, thus impacting the ability for a just outcome to the dispute to emerge.³]
- ☒ ☐ I have stated whether I agree or disagree with the statement.¹
- ☒ ☐ I have provided one reason why legal practitioners are needed in a civil dispute.²
- ☒ ☐ I have linked my chosen reason to a principle of justice.³
- [One reason why Kris may require legal practitioners, if the civil dispute goes to trial, is to present evidence on her behalf. The legal practitioners would be able to call upon witnesses that will speak favourably of Kris, presenting her case in the best light, whilst also cross-examining the witnesses that Kendall selects.¹] [The media outlets that Kendall is alleging Kris spoke to, for example, may be witnesses that Kendall's legal practitioners call upon to support the fact that Kris was breaching a confidentiality contract with Kendall by talking to them.²] [Therefore, Kris's barrister may need to cross-examine these witnesses or try and obtain evidence that is favourable for Kris. Legal practitioners will be beneficial as Kris may not understand the procedural rules to be followed when questioning witnesses, and may be unable to remain impartial when questioning them since she is emotionally invested in this case.³]

- ✓ ✗ I have provided one reason why Kris may need legal practitioners at trial.¹
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen reason why Kris may need legal practitioners.²
- ✓ ✗ I have provided information about my chosen reason.³
- ✓ ✗ I have used signposting in my response, such as 'One reason'.

Extended response

10. Achieved: I; IV; V; VI
Not achieved: II; III

11. [Legal practitioners in a civil dispute can facilitate the achievement of equality and access to a great extent, however, there are some limitations such as the associated costs and the quality of legal representation.¹]

[One way equality can be achieved in a civil dispute is through the parties' equal opportunity to choose their own legal representation. This means that parties have the same capacity to select and work with lawyers who are suited to their needs and able to assist them throughout the legal proceedings.²][Another way legal practitioners uphold the principle of equality is that judges or magistrates in a civil dispute have a duty to assist a self-represented litigant by informing them about legal practices and proceedings involved in the dispute. This can ensure a self-representing party is not at such a significant disadvantage to a party who has legal representation.³][However, some financially-disadvantaged parties may not be able to afford any legal representation, or may only be able to afford poor quality legal practitioners.⁴][Moreover, though judges and magistrates have a duty to assist self-represented parties, their assistance is limited as they cannot provide advice and must remain objective. Therefore, without legal representation, or low-quality representation, there may be unequal footing in the courtroom which can be disadvantageous to one party.⁵]

[Furthermore, legal practitioners can uphold access to justice as they assist parties in preparing and presenting their case. This enables a party to better understand the law and legal proceedings, allowing them to better engage with the justice system.⁶][Additionally, legal practitioners can promote access through their ability to assist with the appeals process. Lawyers can complete the paperwork for the appeal and can prepare and present arguments for the party during the appeal.⁷][However, the costs of legal practitioners for both parties are high, meaning legal representation is less accessible and parties may be forced to self-represent which can be difficult and limit access to justice.⁸]

[Therefore, although there are some limitations in obtaining legal practitioners, such as the associated costs, they can still promote the achievement of equality and access in a civil dispute by assisting their client to understand legal processes and present their client's case in the best light.⁹]

- ✓ ✗ I have provided an introduction to state the extent to which the use of legal practitioners upholds the principles of justice in civil disputes.¹
- ✓ ✗ I have provided one way in which equality is achieved by legal practitioners.²

- ✓ ✗ I have provided a second way in which equality is achieved by legal practitioners.³
- ✓ ✗ I have provided one way in which equality is not achieved by legal practitioners.⁴
- ✓ ✗ I have provided a second way in which equality is not achieved by legal practitioners.⁵
- ✓ ✗ I have provided one way in which access is achieved by legal practitioners.⁶
- ✓ ✗ I have provided a second way in which access is achieved by legal practitioners.⁷
- ✓ ✗ I have provided one way in which access is not achieved by legal practitioners.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 way' and 'Another way'.
- ✓ ✗ I have used connecting words, such as 'However', 'Furthermore', and 'Therefore'.

Linking to previous learning

12. [One reason why legal practitioners are needed in a civil dispute is to ensure documents are properly drafted and handled. In civil disputes, affidavits and subpoenas may be required to receive evidence relevant to the case. Therefore, a legal practitioner can ensure these documents are managed appropriately and according to procedural standards.¹][On the other hand, one reason why legal practitioners are needed in a criminal case is to help provide support to an accused when being questioned by police during an investigation or during a court hearing.²][One key difference between the need for legal practitioners in a criminal case, and the need for them in a civil dispute, is that whilst lawyers of an accused found guilty of an offence may have to inform the judge of mitigating factors that may reduce the severity of their client's sentence, a lawyer of a defendant in a civil dispute will not have to do so as a defendant will not receive a sanction for their civil wrong but may be ordered to fulfil a remedy, such as providing damages to the plaintiff, instead.³]

- ✓ ✗ I have provided one reason why legal practitioners are needed in a civil dispute.¹
- ✓ ✗ I have provided one reason why legal practitioners are needed in a criminal case.²
- ✓ ✗ I have provided one key difference between the need for legal practitioners in a civil dispute and a criminal case.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.

5G Class actions

Check your understanding

1. B. False. **Explanation:** Class actions are only used in civil cases, not criminal cases.
2. B. False. **Explanation:** Class actions are heard in the Federal Court and the Supreme Court of Victoria and are not heard in the County Court of Victoria.
3. The person who initiates the proceedings on behalf of the entire group is known as the **lead plaintiff**.
4. C. **Explanation:** Customer malpractice is not a type of case appropriate for a class action.
5. Strengths: I; II
Limitations: III
6. Class actions save the courts' time and resources by grouping together numerous claims, reducing the number of cases the court would have to hear individually and, thus, promoting **access**.

Preparing for exams

Standard exam-style

7. [One reason for using class actions is that joining a class action may be more appropriate than initiating an individual claim as it can be more cost effective.¹] [Group members of a class action are not responsible for the costs associated with the trial or adverse cost orders.²] [Therefore, class actions are significantly less expensive and stressful than an individual civil claim, whilst they provide more people with greater access to the civil justice system.³]

☒ ☐ I have provided one reason for using class actions.¹

☒ ☐ I have provided information about my chosen reasons.²

☒ ☐ I have provided further information about my chosen reason.³

☒ ☐ I have used signposting in my response, such as 'One reason'.

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

8. [The first criterion for a class action to be considered by the court is that there are seven or more group members who were harmed by the same defendant(s).¹] [Secondly, the claim must arise from the same or similar circumstances for all group members.²] [Finally, the third criterion for initiating a class action is that the claim must give rise to a common issue of law or fact, meaning the court will decide the same set of facts for all claims.³]

☒ ☐ I have provided one criterion for a class action.¹

☒ ☐ I have provided a second criterion for a class action.²

☒ ☐ I have provided a third criterion for a class action.³

☒ ☐ I have used signposting in my response, such as 'The first criterion', 'Secondly', and 'Finally'.

Extended response

9. Strengths: I; II; V
Limitations: III; IV
10. [Class actions uphold the principles of access and fairness to a large extent. Although, in certain circumstances, these principles may be limited.¹]

[One way class actions achieve fairness is by providing a potential remedy for those who have suffered a loss that would be too small to recover individually in the courts, thus, enabling these individuals to participate in the justice system, promoting fairness.²]

[Furthermore, another way fairness is achieved is class actions are managed by experienced and impartial judges consequently leading to and ensuring a fair trial.³]

[However, one way fairness is limited is it can depend on the settlement reached. If the amount of compensation received is less than anticipated, the group members may not be compensated sufficiently.⁴] [Another way fairness may be limited is the lead plaintiff is required to assume the risk and cost of the litigation on behalf of the entire group which may be seen as unfair.⁵]

[Furthermore, one way access is upheld by class actions is that individuals can still access justice and the legal system without all of the costs associated with a trial if they have a valid claim.⁶]

[Since the costs are bared by the lead plaintiff, or third-party litigation funders, this reduces the financial impact of a civil claim for the majority of plaintiffs, allowing members to access justice regardless of socioeconomic status.⁷] [Moreover, class actions save the court time and resources by grouping numerous claims together, reducing the number of cases the court would have to hear individually, and therefore, promoting access.⁸]

[However, one way class actions may limit the achievement of access is they can be extremely costly and third-party funders are often required. This results in a portion of the damages being provided to litigation funders, reducing the extent to which group members can access justice via compensation.⁹]

[Whilst class actions uphold the principles of fairness and access, some class actions may be hindered by cost factors.¹⁰]

☒ ☐ I have provided an introduction to summarise my answer to the question.¹

☒ ☐ I have provided one way fairness is upheld by class actions.²

☒ ☐ I have provided a second way fairness is upheld by class actions.³

☒ ☐ I have provided one way fairness is limited by class actions.⁴

☒ ☐ I have provided a second way fairness is limited by class actions.⁵

☒ ☐ I have provided one way access is upheld by class actions.⁶

☒ ☐ I have provided further information about my chosen way access is upheld by class actions.⁷

☒ ☐ I have provided a second way access is upheld by class actions.⁸

☒ ☐ I have provided one way access is limited by class actions.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 'another way'.

☒ ☐ I have used connecting words, such as 'Furthermore' and 'However'.

Linking to previous learning

11. [The first error in the scenario is that the class action will be heard in the Magistrates' Court.¹] [Class actions can only be heard in the Federal Court or the Supreme Court of Victoria.²]

[The second error in the scenario is that Slay on the Seas has the burden of proof.³] [The passengers are initiating the claim, and the lead plaintiff will have the onus to prove that Slay on the Seas is liable.⁴]

[The third error in the scenario is that the passengers are seeking to fine Slay on the Seas.⁵] [Fines are criminal sanctions that do not apply to any civil cases or class actions. The passengers would instead be seeking financial compensation in the form of damages.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 'The first error' and 'The second error'.

5H Consumer Affairs Victoria (CAV)

Check your understanding

- A. True. **Explanation:** CAV is capable of resolving certain types of civil disputes based on its given jurisdiction, established by various Victorian statutes.
- B. **Explanation:** CAV will not assist with disputes from businesses and landlords.
- C. **Explanation:** CAV's processes, such as directing parties to conciliation, aim to help the parties resolve the disputes themselves with the assistance of a conciliator, as this dispute resolution body has no power to impose a legally binding decision.
- A; D. **Explanation:** CAV provides free dispute resolution services to parties with a claim that falls within its jurisdiction. However, as CAV has limited resources, it will only assist with disputes that have a high chance of success and parties must have tried to resolve the dispute themselves.

- A; C. **Explanation:** CAV's website provides information that is accessible to all to promote a fair and competitive marketplace. However, it does not have the power to impose a legally binding decision on parties as it uses conciliation. CAV also has limited jurisdiction and can only assist with certain types of disputes.

- Strengths: III; V
Limitations: I; II; IV

- CAV predominantly uses **conciliation** as a method of resolving civil disputes that fall within its jurisdiction.

Preparing for exams

Standard exam-style

- [One reason why Consumer Affairs Victoria (CAV) may not be appropriate in Jordy's case is that CAV does not have the power to impose a legally binding solution.¹] [As CAV primarily uses conciliation to resolve disputes, Jordy and his landlord could only agree on a non-binding resolution to the dispute, unless a deed of settlement is entered into.²] [Therefore, as Jordy wants a legally binding solution, in relation to seeking compensation for his injuries, CAV may not be appropriate in resolving this dispute.³]

☒ ☐ I have identified one reason why CAV may not be the most appropriate body to resolve this dispute.¹

☒ ☐ I have provided information about my chosen reason why CAV may not be appropriate.²

☒ ☐ I have provided an example from the scenario and linked it to the theory.³

☒ ☐ I have used signposting in my response, such as 'One reason'.

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

- a. [One purpose of Consumer Affairs Victoria (CAV) is to provide information and advice to businesses, consumers, tenants, and landlords in relation to their rights and responsibilities, as well as any changes to relevant laws.¹] [CAV's website contains a detailed step-by-step guide on how individuals should attempt to resolve their complaints on their own, before seeking dispute resolution services from CAV.²]

☒ ☐ I have provided one purpose of CAV.¹

☒ ☐ I have provided information about my chosen purpose of CAV.²

☒ ☐ I have used signposting in my response, such as 'One purpose'.

- [One reason why Consumer Affairs Victoria (CAV) is appropriate in Atticus' case is that the dispute between Atticus and Caterina has a high chance of being resolved, as they have been friends for 10 years.¹] [CAV uses a conciliation process to resolve disputes and would involve Atticus and Caterina reaching an agreement themselves, with the help of a conciliator.²] [Another reason why CAV is appropriate is that the conciliation process offered by CAV is free.²] [As Atticus is an unemployed university student, he may not be able to afford alternative institutions, such as the courts, which can be expensive. Hence, CAV provides an accessible means of dispute resolution for Atticus.⁴]

✓ ✕ I have identified one reason why CAV is an appropriate institution to help Atticus resolve this dispute.¹

✓ ✕ I have provided information about my chosen reason why CAV is appropriate.²

✓ ✕ I have identified a second reason why CAV is an appropriate institution to help Atticus resolve this dispute.³

✓ ✕ I have provided information about my chosen reason why CAV is appropriate.⁴

✓ ✕ I have used signposting in my response, such as 'One reason' and 'Another reason'.

✓ ✕ I have used signposting in my response, such as 'One reason' and 'another reason'.

✓ ✕ I have used connecting words, such as 'Furthermore' and 'However'.

12. Strengths: II; III; VI
Limitations: I; IV; V

13. [CAV helps the civil justice system achieve the principles of fairness and equality to a large extent, as it directs parties to an impartial conciliator that facilitates dispute resolution. However, CAV is somewhat limited in its ability to achieve these principles of justice.¹]

[Firstly, CAV can promote the achievement of fairness as its conciliation process enables parties to attempt dispute resolution themselves with the assistance of a conciliator, which may lead to a fair outcome where both parties agree on a resolving decision.²]

[Another way CAV achieves fairness is through its free services, which can ensure parties that are unable to afford a court hearing are still able to receive a just outcome to their dispute.³][Moreover, CAV's use of conciliation can promote the achievement of equality, as the conciliator is required to facilitate discussions between parties, providing both parties with equal opportunity to present their perspective and reach a mutually beneficial resolution.⁴]

[However, CAV may limit the achievement of fairness as it cannot force parties to attend and participate in conciliation, which may be unfair if one party is willing to reach a resolution, whilst the other is not.⁵][Another limitation of CAV achieving fairness is that it cannot impose a legally binding resolution, meaning there is a risk that an agreement reached during conciliation will not be upheld, limiting the achievement of a fair outcome.⁶][Furthermore, the achievement of equality may also be limited as CAV's jurisdiction restricts it to only being used in a small proportion of civil matters. Thus, the ability to access CAV's services is not given equally to all civil parties.⁷]

[Overall, CAV's conciliation process helps achieve fairness and equality by assisting parties in resolving their dispute. However, CAV has no power to compel parties to attend conciliation and is unable to do so for all cases due to its jurisdiction, thus limiting the achievement of fairness and equality.⁸]

✓ ✕ I have provided an introduction to answer the question.¹

✓ ✕ I have provided one strength of CAV in achieving the principle of fairness.²

✓ ✕ I have provided a second strength of CAV in achieving the principle of fairness.³

✓ ✕ I have provided one strength of CAV in achieving the principle of equality.⁴

✓ ✕ I have provided one limitation of CAV in achieving the principle of fairness.⁵

✓ ✕ I have provided a second limitation of CAV in achieving the principle of fairness.⁶

✓ ✕ I have provided one limitation of CAV in achieving the principle of equality.⁷

✓ ✕ I have provided a conclusion to my response that links back to the question.⁸

✓ ✕ I have used paragraphs to organise my response.

Extended response

10. Appropriate: I; II
Not appropriate: III; IV

11. [As CAV is free and less time-consuming than taking the matter to the courts, it is appropriate for resolving the dispute between Ivy and Bedroom Bliss, unless it becomes a class action.¹]

[One reason why CAV is appropriate is that Ivy's dispute falls within CAV's jurisdiction, which has the power to assist with disputes between consumers and businesses, like Ivy and Bedroom Bliss.²]

[Furthermore, another reason why CAV is appropriate is that it is free and offers efficient dispute resolution processes, such as conciliation, whereby Ivy and Bedroom Bliss would attempt to resolve the dispute either in person or over the phone. This is beneficial for Ivy as she is hesitant about spending her time and money attempting to resolve the dispute.³]

[However, CAV may not be appropriate if the case becomes a class actions, as it is unable to resolve such disputes. As 15 other people have come forward with similar stories about Bedroom Bliss' refusal to offer refunds, Ivy may be able to initiate a class action, in which only the court has the jurisdiction to assist with these kinds of disputes.⁴][CAV may also not be appropriate in this case as it is unable to impose a legally binding decision, meaning CAV cannot force Bedroom Bliss to provide Ivy with a refund.⁵]

[Overall, Ivy's dispute is appropriate for CAV, unless it becomes a class action, as the dispute falls within its jurisdiction and it is free.⁶]

✓ ✕ I have provided an introduction to my response.¹

✓ ✕ I have provided one reason why CAV is appropriate to resolve the dispute between Ivy and Bedroom Bliss.²

✓ ✕ I have provided a second reason why CAV is appropriate to resolve the dispute between Ivy and Bedroom Bliss.³

✓ ✕ I have provided one reason why CAV is not appropriate to resolve the dispute between Ivy and Bedroom Bliss.⁴

✓ ✕ I have provided a second reason why CAV is not appropriate to resolve the dispute between Ivy and Bedroom Bliss.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 'Another way'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Moreover'.

Linking to previous learning

14. a. [One reason for using class actions is to reduce the costs for plaintiffs as multiple claims are made in one proceeding, rather than as separate proceedings.¹] [This means Daisy and the 10 other tenants can initiate one proceeding together, which avoids having multiple court cases that would each have to be defended.²] [As a result, Daisy and the 10 other tenants can split legal costs equally, rather than each individual having the burden of paying their own legal costs.³]

- ✓ ✗ I have provided one reason for using class actions.¹
- ✓ ✗ I have provided an example relevant to the scenario and linked it to class actions.²
- ✓ ✗ I have provided information about my chosen reason for using class actions.³
- ✓ ✗ I have used signposting in my response, such as 'One reason'.
- ✓ ✗ I have used connecting words, such as 'As a result'.

- b. [Although this dispute falls within CAV's jurisdiction, it is unlikely to be an appropriate body to help Daisy resolve this dispute if she decides to initiate a class action.¹]

[One reason CAV may not be appropriate is that it does not have the jurisdiction to resolve class actions, meaning, if Daisy commences a group proceeding with the other 10 tenants, she cannot use this institution to resolve the dispute with Max.²]

[However, if Daisy does not wish to initiate a class action against Max, CAV may be appropriate, as the dispute falls within CAV's jurisdiction of resolving disputes between landlords and tenants.³]

[Another reason why CAV may not be appropriate is it uses a conciliation process to encourage parties to resolve the dispute themselves with the assistance of a conciliator, meaning this institution does not have the power to impose a legally binding decision on her and Max.⁴]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one reason why CAV is not appropriate to help Daisy resolve her dispute.²
- ✓ ✗ I have provided one reason why CAV is appropriate to help Daisy resolve her dispute.³
- ✓ ✗ I have provided a second reason why CAV is not appropriate to help Daisy resolve her dispute.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.
- ✓ ✗ I have used connecting words, such as 'However'.

51 The Victorian Civil and Administrative Tribunal (VCAT)

Check your understanding

- B. False. **Explanation:** VCAT has a limited jurisdiction, meaning that it can only hear certain types of disputes, such as residential tenancies disputes.
- C. **Explanation:** VCAT does not have the jurisdiction to hear personal injury cases, meaning individuals must turn to an alternative institution, such as the courts.
- B; C. **Explanation:** If parties have not come to a resolution during mediation or a compulsory conference, VCAT will impose a legally binding decision on the parties.
- A; C. **Explanation:** VCAT provides low-cost and efficient dispute resolution processes and is less formal than the courts as parties do not require legal representation. Therefore, VCAT is less time-consuming and expensive.
- Strengths: I; IV; V
Limitations: II; III
- B. **Explanation:** VCAT is not suitable for large, complex cases, such as class actions or those involving complex legal issues.
- B. False. **Explanation:** VCAT only has the power to hear certain types of civil disputes, as all criminal matters are heard by the courts.

Preparing for exams

Standard exam-style

- [One purpose of the Victorian Civil and Administrative Tribunal (VCAT) is to provide low-cost dispute resolution services.¹]
[This is achieved as VCAT fees are low and there is no requirement for parties to have legal representation, reducing the costs involved in the civil dispute.²] [This upholds the principle of access as more people may be able to afford to access this institution that can provide justice and remedies for a civil dispute.³]
- ✓ ✗ I have provided one purpose of VCAT.¹
- ✓ ✗ I have provided information about my chosen purpose.²
- ✓ ✗ I have provided one way my chosen purpose upholds the principle of access.³
- [One reason why the Victorian Civil and Administrative Tribunal (VCAT) may not be appropriate is that Michael does not appear to be willing to negotiate with Kerry to try to resolve their dispute.¹]
[This indicates that VCAT may not be appropriate as the tribunal utilises mediation and compulsory conferences as dispute resolution methods, which both require the parties to discuss the dispute with one another.²] [Moreover, as neither of these methods involves VCAT imposing a legally binding decision on Kerry and Michael, it may be unsuccessful in providing a resolution to the dispute as Michael could go back on his word and not fulfil his promises.³]

- ✓ ✗ I have provided one reason why VCAT may not be an appropriate institution to resolve Kerry's dispute.¹
- ✓ ✗ I have provided an example from the scenario and linked it to the theory.²
- ✓ ✗ I have provided further information about my chosen reason.³
- ✓ ✗ I have used signposting in my response, such as 'One reason'.
- ✓ ✗ I have used connecting words, such as 'Moreover'.

10. [One method of dispute resolution that the Victorian Civil and Administrative Tribunal (VCAT) may use is mediation, which is a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups.¹] [VCAT may direct SuperHeroes R Us and Henry to resolve their dispute in the presence of a mediator, who may be a VCAT member or a mediator appointed by VCAT. The parties are in control of the process and the mediation facilitates a negotiated outcome.²] [Another method of dispute resolution is a compulsory conference, which is a private meeting between the parties to discuss ways to resolve their civil dispute with the assistance of a VCAT member.³] [The compulsory conference uses a conciliation process whereby the conciliator possesses specialised knowledge of the dispute between SuperHeroes R Us and Henry and therefore, is able to offer suggestions and solutions to the parties, who negotiate towards a settlement.⁴]

- ✓ ✗ I have identified and defined one method of dispute resolution that VCAT may use.¹
- ✓ ✗ I have provided information about my chosen method.²
- ✓ ✗ I have identified and defined a second method of dispute resolution that VCAT may use.³
- ✓ ✗ I have provided information about my chosen method.⁴
- ✓ ✗ I have linked my answer to the scenario where appropriate.
- ✓ ✗ I have used signposting in my response, such as 'One method' and 'Another method'.

Extended response

11. Appropriate: I; II; IV
Not appropriate: III
12. [The Victorian Civil and Administrative Tribunal (VCAT) is mostly appropriate for Brisa and Tony as it is cheaper and can offer a legally binding solution to parties. Although, both parties may still incur some costs from going to VCAT which may be difficult for Brisa given her financial circumstances.¹]
- [One reason why VCAT may not be appropriate is some fees for certain types of claims at VCAT remain high, often due to application and hearing fees.²] [This may make VCAT inaccessible for Brisa who may be unable to afford VCAT.³]
- [However, if Brisa and Tony fail to negotiate a resolution during mediation or a compulsory conference, VCAT may be appropriate as it can conduct a final hearing whereby a VCAT member will impose a legally binding solution on the parties.⁴] [Another reason

why VCAT is appropriate is that Brisa and Tony's dispute falls within VCAT's jurisdiction as it has the power to hear disputes between residential landlords and tenants. As Brisa is a tenant complaining about cracks in the wall to Tony, her landlord, this institution is appropriate for the dispute.⁵] [Finally, a third reason why VCAT is appropriate is it offers lower-cost dispute resolution services when compared with the courts for Brisa as she cannot afford to initiate her claim through the courts.⁶]

[Overall, despite Brisa possibly incurring some costs from taking her dispute with Tony to VCAT, this institution is appropriate as it imposes a final, binding decision, is lower cost than the courts, and the dispute falls within its jurisdiction.⁷]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one reason why VCAT may not be appropriate in resolving the dispute between Brisa and Tony.²
- ✓ ✗ I have provided further information about my chosen reason.³
- ✓ ✗ I have provided one reason why VCAT may be appropriate in resolving the dispute between Brisa and Tony.⁴
- ✓ ✗ I have provided a second reason why VCAT may be appropriate in resolving the dispute between Brisa and Tony.⁵
- ✓ ✗ I have provided a third reason why VCAT may be appropriate in resolving the dispute between Brisa and Tony.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 reason', 'Another reason', and 'a third reason'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Finally'.

Linking to previous learning

13. B; C

14. [I agree with the statement that the Victorian Civil and Administrative Tribunal (VCAT) is a more appropriate body than Consumer Affairs Victoria (CAV) to a large extent. This is because VCAT can impose a legally binding decision, is efficient, and is more formal than CAV.¹]

[Firstly, VCAT is more appropriate than CAV as Hazel and Kabir have already tried conciliation through the Domestic Building Dispute Resolution Victoria (DBDRV) which failed.²] [As CAV directs all matters to conciliation to help parties to resolve their dispute and does not hold hearings, it is unlikely that this will be effective for Kabir and Hazel, as Kabir has not previously taken negotiations seriously.³] [Alternatively, VCAT can offer Hazel and Kabir a legally binding solution to their dispute during a hearing, which will benefit Hazel who wishes to resolve the dispute as soon as possible.⁴] [Another reason why VCAT is more appropriate is in their final decision, the VCAT member conducting the hearing may impose an order, such as for Kabir to pay Hazel a sum of money for the number of errors, or requiring Kabir to fix the errors himself.⁵]

[This is more appropriate than CAV as this institution cannot impose orders on each party, as the conciliation process requires parties to negotiate a resolution to their dispute themselves, which is not legally binding unless a deed of settlement is entered into.⁶]

[Furthermore, a third reason why VCAT is appropriate is it provides efficient dispute resolution services, as delays are significantly less than other institutions such as the courts, which is suitable for Hazel who wants the dispute resolved as soon as possible.⁷]

[Finally, VCAT is more appropriate as the processes and procedures are more formal compared to CAV.⁸] [This is suitable as Kabir failed to take the conciliation seriously, meaning that a more formal hearing is appropriate as this requires the parties to present their case, such as by presenting evidence and legal arguments.⁹]

[Overall, VCAT is better suited to hear the dispute between Kabir and Hazel due to its ability to impose a legally binding decision and its efficient and more formal processes.¹⁰]

☒	☐	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 one reason why CAV is not an appropriate body to resolve this dispute. ²
☒	☐	I have provided information about my chosen reason. ³
☒	☐	I have provided one reason why VCAT is an appropriate body to resolve this dispute. ⁴
☒	☐	I have provided a second reason why VCAT is an appropriate body to resolve this dispute. ⁵
☒	☐	I have provided a second reason why CAV is not an appropriate body to resolve this dispute. ⁶
☒	☐	I have provided a third reason why VCAT is an appropriate body to resolve this dispute. ⁷
☒	☐	I have provided a fourth reason why VCAT is an appropriate body to resolve this dispute. ⁸
☒	☐	I have provided information about my chosen reason. ⁹
☒	☐	I have provided a conclusion to my response that links back to the question. ¹⁰
☒	☐	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 'Another reason' and 'a third reason'.
☒	☐	I have used connecting words, such as 'Firstly' and 'Alternatively'.

5J Resolving civil disputes in the courts

Check your understanding

1. A. True. **Explanation:** The main dispute resolution method used in the courts is judicial determination, which is when a judge or magistrate imposes a legally binding decision on the parties.

2. A; C; D. **Explanation:** Judges must remain impartial and independent, making decisions solely based on the evidence presented.
3. C. **Explanation:** If parties wish to have more control over the outcome of a dispute they should consider engaging in more informal and flexible dispute resolution methods, such as mediation or conciliation, given the courts impose legally binding resolutions that leave parties with little control over the outcome.
4. One purpose of the courts is to provide the disputing parties with a remedy. This can come in the form of **damages**, which is monetary compensation, or **an injunction**, which is a court order to do or not do something. Both are legally binding and enforceable.
5. Strengths: I; II; V
Limitations: III; IV
6. A. **Explanation:** Courts are not free and there are a range of fees associated with taking a case to court. Court hearings can also be time consuming due to the backlog of cases.

Preparing for exams

Standard exam-style

7. [One purpose of the courts is to provide access to a trial by jury. The courts are the only dispute resolution body where a jury may be used to determine liability.¹] [If parties wish to utilise a jury in a civil trial, they must fund the jury. However, the use of a jury can ensure the outcome of the case is determined by a cross-section of the community and reflects wider social views and values.²]
- | | | |
|-------------------------------------|--------------------------|---|
| ☒ | ☐ | I have provided one purpose of the courts in resolving civil disputes. ¹ |
| <hr/> | | |
| ☒ | ☐ | I have provided information about my chosen purpose. ² |
| <hr/> | | |
| ☒ | ☐ | I have used signposting in my response, such as 'One purpose'. |
| <hr/> | | |
8. [The courts may not be appropriate for Randy and Jeanie's dispute as Randy wishes to negotiate with Jeanie and reach a mutually agreed resolution.¹] [As the remedy of a civil court case is determined by the judge or magistrate, and is legally binding and enforceable, the courts are not appropriate for parties who wish to have more control and influence over the final outcome.²] [Rather, Randy should consider engaging with other dispute resolution bodies, like VCAT, that use dispute resolution methods, such as mediation, that are low cost and allow the parties to openly discuss and negotiate a resolution.³]
- | | | |
|-------------------------------------|--------------------------|---|
| ☒ | ☐ | I have provided one reason why the courts may not be appropriate for Randy and Jeanie's dispute. ¹ |
| <hr/> | | |
| ☒ | ☐ | I have provided information about my chosen reason. ² |
| <hr/> | | |
| ☒ | ☐ | I have provided an example from the scenario and linked it to my chosen reason. ³ |
| <hr/> | | |
| ☒ | ☐ | I have used connecting words, such as 'Rather'. |

9. a. [One purpose of the courts is to provide an avenue for class actions to be determined.¹] [Given Hiroshi is considering filing a class action against Gustro's Greek Gastronomy, the courts would be the only body that can resolve the dispute as class actions fall within the jurisdiction of the Supreme Court – Trial Division.²]

[Furthermore, the justices of the Supreme Court – Trial Division are equipped with the experience and knowledge to hear and determine class actions, which can ensure Hiroshi and the other group members access justice in an effective and efficient manner.³]

- ☒ ☐ I have provided one purpose of the courts that can assist in resolving civil disputes.¹
- ☒ ☐ I have provided information about my chosen purpose.²
- ☒ ☐ I have provided further information about my chosen purpose.³
- ☒ ☐ I have linked my answer to the scenario where appropriate.
- ☒ ☐ I have used signposting in my response, such as 'One purpose'.
- ☒ ☐ I have used connecting words, such as 'Furthermore'.

- b. [The courts would be the most appropriate body to hear and determine Hiroshi's case, as the courts are the only body that can resolve class action disputes.¹][Specifically, the Supreme Court – Trial Division has the jurisdiction to hear class actions and the judges of the court have the expertise and specialise in the laws and court procedures involved with such matters.²]
[Therefore, if Hiroshi decides to initiate a class action with the other complainants against Gustro's Greek Gastronomy, the courts are the only body that can determine the matter, as no other civil dispute resolution body has the power to preside over these types of proceedings.³]

- ☒ ☐ I have provided one reason why the courts would be the most appropriate body to hear Hiroshi's class action.¹
- ☒ ☐ I have provided information about the courts and class action lawsuits.²
- ☒ ☐ I have provided information about the appropriateness of the courts and Hiroshi's case.³
- ☒ ☐ I have used connecting words, such as 'Therefore'.

Extended response

10. Strengths: I; II
Limitations: III; IV
11. [The principles of fairness can be achieved to a moderate extent in Kapua and Jessie's dispute.¹]
[Firstly, fairness can be achieved if Kapua and Jessie decide to take their dispute to court as the matter will be decided by an independent and impartial judge, who can impose a fair and legally binding resolution on the parties.²][Given Jessie has not taken negotiations seriously, the courts may be the most appropriate body to resolve their dispute, as the judge can impose a legally enforceable remedy if Jessie is found liable, therefore delivering justice and a fair outcome to Kapua.³]
[Secondly, both Jessie and Kapua will have the opportunity to present evidence at a court trial and will be subject to the same laws and processes, encouraging procedural fairness.⁴][This means

Kapua will have the ability to present any evidence they have, such as photo evidence or receipts, of Jessie's unwillingness to cooperate, and the court will determine whether Jessie is liable even if he is unwilling to accept his responsibilities. The courts can ensure procedural fairness is upheld through their ability to give directions and responsibilities in managing the case.⁵]

[However, the achievement of fairness may also be limited due to the costly and time-consuming nature of a court trial.⁶][Given the formalities and procedures involved in a court case, this could delay justice for Kapua and result in a prolonged dispute, increasing the risk of an unfair trial.⁷]

[Additionally, if a jury is used, a fair outcome could be compromised due to the lack of legal knowledge and experience jurors possess.⁸]

[Although judges attempt to mitigate such risks through their directions and responsibilities, jurors may still be influenced by their subconscious biases and could be easily confused by the complex legal terminology and procedures. Jessie and Kapua may also have very skilled legal representatives that can easily influence a jury, if one is used, which can jeopardise the delivery of a fair outcome.⁹]

[Therefore, fairness can be achieved by the courts in Kapua and Jessie's dispute, however, there are also limitations in their ability to do so due to time and cost factors, as well as considerations of juror capabilities.¹⁰]

- ☒ ☐ I have provided an introduction to state the extent to which fairness can be achieved if Kapua and Jessie's dispute is resolved by the courts.¹
- ☒ ☐ I have provided one way fairness can be achieved by the courts.²
- ☒ ☐ I have provided information about my chosen reason.³
- ☒ ☐ I have provided a second way fairness can be achieved by the courts.⁴
- ☒ ☐ I have provided information about my chosen reason.⁵
- ☒ ☐ I have provided one way fairness may not be achieved by the courts.⁶
- ☒ ☐ I have provided information about my chosen reason.⁷
- ☒ ☐ I have provided a second way fairness may not be achieved by the courts.⁸
- ☒ ☐ I have provided information about my chosen reason.⁹
- ☒ ☐ I have provided a conclusion to my response that links back to the question.¹⁰
- ☒ ☐ 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 'Firstly' and 'Secondly'.
- ☒ ☐ I have used connecting words, such as 'However' and 'Additionally'.

Linking to previous learning

12. [One purpose of the courts is to provide a legally binding outcome to the disputing parties. This means the outcome of the case is legally enforceable, meaning a party that fails to comply with the ordered remedy could face legal consequences.¹] [On the other hand, one purpose of Consumer Affairs Victoria (CAV) is to provide information and advice to businesses, consumers, tenants, and landlords about their rights and responsibilities to assist them in resolving their disputes, whilst also conducting conciliation as a dispute resolution method.²] [Therefore, a key difference between the purposes of the courts and CAV is the extent to which they can impose a remedy. Whilst the courts can impose a legally binding decision, CAV facilitates discussion between the parties and provides them with advice that assists them in reaching an agreement. Such an agreement is not legally binding unless a terms of settlement is signed.³]

- ☒ ☐ I have provided information about one purpose of the courts.¹
-
- ☒ ☐ I have provided information about one purpose of CAV.²
-
- ☒ ☐ I have provided one key difference between the purposes of the courts and CAV as dispute resolution bodies.³
-
- ☒ ☐ I have used signposting in my response, such as 'One purpose' and 'a key difference'.
-
- ☒ ☐ I have used comparison words, such as 'On the other hand', when distinguishing.
-

13. [I agree with this statement to a moderate extent. Whilst the courts can be an effective means of resolving civil disputes, the Victorian Civil and Administrative Tribunal (VCAT) and Consumer Affairs Victoria (CAV) are more appropriate in certain circumstances.¹]

[Firstly, the courts are most appropriate for disputes where the parties prefer to have an independent and experienced judge, or magistrate, impose a legally binding decision.²] [Unlike the other dispute resolution bodies, which do not always impose a legally binding remedy, a magistrate or judge will hand down a final decision at the conclusion of the case that is legally enforceable.³] [The courts are also most appropriate for larger and more complex disputes, like class actions, as judges have the knowledge and experience to deal with such matters, or in cases where parties may wish to seek an appeal.⁴]

[However, VCAT can be more appropriate for resolving civil disputes in some circumstances as it is a low-cost, effective, and efficient tribunal. As it utilises various dispute resolution methods, VCAT may be more appropriate for parties who wish to access a more flexible process, but also want the option of a final hearing where a VCAT member can impose a final order.⁵] [VCAT also has exclusive jurisdiction in various areas, such as domestic building disputes, meaning it is the only body that can determine such matters.⁶]

[Additionally, CAV can also be an appropriate body, especially for disputes filed by tenants and consumers seeking a cost-free resolution. CAV utilises conciliation when resolving disputes, therefore it can be greatly effective in cases where parties wish to have greater control over the final outcome and have their negotiations assisted and informed by an independent conciliator.⁷] [CAV is also significantly less costly than the courts, so it may be most appropriate for parties seeking a low to no cost dispute resolution body that deals with consumer affairs.⁸]

[Therefore, whilst the courts can be the most appropriate body to resolve some civil disputes, VCAT and CAV are both less costly and more time-efficient bodies that can also effectively resolve

civil disputes.⁹]

- ☒ ☐ I have provided an introduction to summarise the extent to which I agree or disagree with the statement.¹
-
- ☒ ☐ I have provided one reason why the courts can be the most appropriate body to determine civil disputes.²
-
- ☒ ☐ I have provided information about my chosen reason.³
-
- ☒ ☐ I have provided a second reason why the courts can be the most appropriate body to determine civil disputes.⁴
-
- ☒ ☐ I have provided one reason why VCAT can be the most appropriate body to determine civil disputes.⁵
-
- ☒ ☐ I have provided a second reason why VCAT can be the most appropriate body to determine civil disputes.⁶
-
- ☒ ☐ I have provided one reason why CAV can be the most appropriate body to determine civil disputes.⁷
-
- ☒ ☐ I have provided a second reason why CAV can be the most appropriate body to determine civil disputes.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'.
-
- ☒ ☐ I have used connecting words, such as 'Additionally' and 'Therefore'.
-

5K The impact of cost and time – civil disputes

Check your understanding

- A. True. **Explanation:** High costs and extensive delays may discourage or prevent parties from initiating a civil claim, prohibiting the achievement of the principles of justice.
- A; B; D. **Explanation:** Witness fees are not a source of delay and they instead contribute to the costs of a civil dispute.
- Parties incur **high** legal costs when resolving civil disputes, such as barristers' fees for the presentation of a civil case at trial. Therefore, parties might consider pursuing their civil matter through **VCAT**, which provides less costly dispute resolution methods.
- Strengths: II; IV
Limitations: I; III
- A; C; E. **Explanation:** Access to legal representation is not readily available to the majority of the population as there are often significant financial constraints. Court backlogs exist, making it highly unlikely that a case would be heard and resolved within a week of being initiated. There are also a range of civil pre-trial procedures that must occur before a hearing, which take a considerable amount of time.
- As trials rely on oral evidence, court **delays** may impact the accuracy and reliability of evidence, increasing the chances of an unjust outcome.

Preparing for exams

Standard exam-style

7. [One impact of costs during a civil dispute is that they may deter or prevent individuals from initiating a civil claim.¹] [This is because not all individuals can afford the high expenses associated with a civil dispute, such as paying fees for legal representation and other court fees.²]

✓ ✗ I have identified one impact of costs during a civil dispute.¹

✓ ✗ I have provided information about my chosen impact.²

✓ ✗ I have used signposting in my response, such as 'One impact'.

8. [One reason for court delays in civil cases is due to court backlogs, which add to the time it takes for civil cases to be heard.¹] [Court backlogs are caused by the courts' caseload growing more rapidly than the availability of the resources needed to resolve a court case.²] [Furthermore, another reason for delays is due to slow trial procedures.³] [For example, legal practitioners' oral arguments and the examination of witnesses can be time-consuming, increasing the time involved in resolving a case.⁴]

✓ ✗ I have identified one reason for court delays in the civil justice system.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have identified a second reason for court delays in the civil justice system.³

✓ ✗ I have provided information about my chosen reason.⁴

✓ ✗ I have used signposting in my response, such as 'One reason' and 'another reason'.

✓ ✗ I have used connecting words, such as 'Furthermore'.

Extended response

9. A; B; C

10. [If successful, Cleopatra's 'Reduce Court Costs' campaign will significantly decrease the costs associated with a civil court proceeding, allowing more individuals to access justice.¹] [This is because a significant barrier to individuals pursuing civil claims is the cost associated with resolving a dispute.²] [Therefore, by reducing court fees, such as court filing fees and mediation fees by 20%, this campaign can improve the accessibility of the courts and provide more individuals with access to resolutions for their disputes.³]

[However, this campaign does not address fees for legal representation, which remain significant, meaning individuals may still be unable to or uncomfortable in pursuing a case without legal representation.⁴] [As a result, this limits access to justice as self-represented parties may be unable to present their case in the best possible light or could be deterred from initiating a claim and accessing justice in the first place.⁵]

✓ ✗ I have provided one impact of Cleopatra's campaign on the civil justice system in relation to costs.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided one strength of Cleopatra's campaign in its ability to achieve the principle of access.³

✓ ✗ I have provided one limitation of Cleopatra's campaign in its ability to achieve the principle of access.⁴

✓ ✗ I have provided information about my chosen limitation.⁵

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Therefore' and 'However'.

11. Strengths: I; III
Limitations: II; IV; V

12. [I agree with this statement to a large extent as, although judicial powers of case management reduce delays, the time it takes for a civil dispute to be heard may deter or prevent individuals from initiating a civil claim, or force parties to settle their dispute.¹]

[Firstly, judges can use their powers of case management to enhance access and fairness within the civil justice system.²] [By giving parties certain directions, judges can reduce the time taken to resolve a civil dispute and encourage procedural fairness, ultimately resulting in a swift and efficient resolution of the case.³] [Access to justice can also be facilitated by a judge's power to order mediation.⁴] [Attending mediation can result in the early determination of a case and save the parties and the courts resources, whilst also delivering justice in a more timely manner.⁵]

[However, the time it takes for a civil dispute to be heard may deter or prevent individuals from initiating their civil claim, limiting the achievement of access to justice.⁶] [Vulnerable parties are more likely to be affected by significant court delays as they may not have the ability to take time off work or other duties for an extended period if awaiting the resolution of their dispute.⁷] [This means parties may be forced to settle their case or withdraw their claim, potentially compromising the amount of compensation they receive, if any, and limiting access to a just outcome.⁸]

[Moreover, procedural fairness can be negatively impacted by court delays, hindering the achievement of a fair trial.⁹] [For more vulnerable populations, time delays are particularly detrimental and can increase the risk of an unfair trial if they are unable to adequately present their side of events due to limited resources.¹⁰] [Additionally, the credibility of evidence can be compromised over time, which inadvertently increases the risk of an unfair outcome.¹¹]

[Thus, despite judicial case management powers having the ability to minimise delays to a certain extent, court backlogs and time-consuming tasks can significantly impact the achievement of the principle of fairness and access.¹²]

✓ ✗ 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 one way the civil justice system upholds the achievement of fairness in relation to time.²

✓ ✗ I have provided information about my chosen reason.³

✓ ✗ I have provided one way the civil justice system upholds the achievement of access in relation to time.⁴

✓ ✗ I have provided information about my chosen reason.⁵

✓ ✗ I have provided one way the civil justice system limits the achievement of access in relation to time.⁶

-
-   I have provided information about my chosen reason.⁷
-
-   I have provided further information about my chosen reason.⁸
-
-   I have provided one way the civil justice system limits the achievement of fairness in relation to time.⁹
-
-   I have provided information about my chosen reason.¹⁰
-
-   I have provided a second way the civil justice system limits the achievement of fairness in relation to time.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'.
-
-   I have used connecting words, such as 'However' and 'Moreover'.
-

Linking to previous learning

13. [A class action is 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.¹] [Class actions reduce the costs associated with a civil dispute as the costs are divided among group members, or paid for by litigation funders.²] [Therefore, class actions uphold the principle of access as they allow those who cannot afford to pursue an individual civil claim to still access justice by joining a class action.³]
-
-   I have defined the term 'class action'.¹
-
-   I have provided information about how class actions can reduce costs.²
-
-   I have provided one strength of class actions in upholding the principle of access.³
-
-   I have used connecting words, such as 'Therefore'.
-

6A Damages as a remedy

Check your understanding

1. B. False. **Explanation:** The role of remedies is to return the plaintiff to their original position before the civil breach occurred.
2. A; C; D. **Explanation:** Nominal damages do not come under the umbrella of compensatory damages as their aim is not to compensate the plaintiff but to uphold their rights.
3. B. False. **Explanation:** General damages compensate for pain and suffering, factors that have no monetary value and thus cannot be calculated exactly.
4. C. **Explanation:** The medical costs of the broken arm can be compensated by specific damages. However, general damages, not specific damages, compensate for pain and suffering.
5. Aggravated damages aim to compensate for **humiliation**.
6. Nominal damages: II; III
Contemptuous damages: I; IV
7. C. **Explanation:** The main purpose of damages is to return the plaintiff to their original position before the civil breach occurred.

Preparing for exams

Standard exam-style

8. [The main purpose of damages is to return the plaintiff back to their original position before the civil wrong occurred.¹] [There are different types of damages that compensate for different types of loss, such as property damage, loss of income, pain and suffering, or medical expenses.²]
☒ ☐ I have provided one purpose of damages.¹
☒ ☐ I have provided information about my chosen purpose.²
☒ ☐ I have used signposting in my response, such as 'The main purpose'.
9. [One reason why a plaintiff may be seeking general damages is to compensate for an intangible loss.¹] [General damages aim to compensate for pain, suffering, and any other distress caused by a civil breach that cannot be precisely calculated into a monetary amount.²] [For example, if a person is physically injured, general damages would aim to compensate for the mental distress of not being able to perform day-to-day tasks, and the physical pain of the injury itself.³]
☒ ☐ I have identified one reason why a plaintiff would seek general damages.¹
☒ ☐ I have provided information about general damages.²
☒ ☐ I have provided an example of when general damages would be appropriate.³
☒ ☐ I have used signposting in my response, such as 'One reason'.

10. [One reason Sarala is seeking \$5 in damages is to prove that she is legally right.¹] [She is seeking \$5 in nominal damages, which is not a significant amount, and will not compensate her for any loss.²] [The main purpose of nominal damages is to prove a legal point, rather than to gain as much monetary compensation as possible.³]
☒ ☐ I have identified the purpose of damages in Sarala's case.¹
☒ ☐ I have provided an example from the scenario and linked it to the theory.²
☒ ☐ I have provided information about my chosen purpose.³
☒ ☐ I have used signposting in my response, such as 'One reason'.
11. [Compensatory damages refer to monetary damages that aim to restore the plaintiff to their original position had the breach not been committed.¹] [On the other hand, the main purpose of exemplary damages is to denounce the behaviour of the defendant and deter others from behaving in the same way.²] [One key difference between the two types of damages is that compensatory damages seek to compensate the plaintiff and restore them to their original position before the breach, whereas exemplary damages do not aim to compensate the plaintiff.³]
☒ ☐ I have provided information about compensatory damages.¹
☒ ☐ I have provided information about exemplary damages.²
☒ ☐ I have provided one key difference between compensatory damages and exemplary damages.³
☒ ☐ I have used comparison words, such as 'On the other hand' and 'whereas', when distinguishing.
12. [One type of damages that could be awarded to Desiree is general damages.¹] [This would compensate her for the mental suffering caused by having her private information shared by Niamh.²] [Another type of damages that could be awarded to Desiree is aggravated damages.³] [This would compensate her for the deliberate humiliation Niamh caused and would aim to denounce Niamh's actions.⁴]
☒ ☐ I have identified one type of damages the judge may award Desiree.¹
☒ ☐ I have provided information about my chosen type of damages and linked it to the scenario.²
☒ ☐ I have identified a second type of damages the judge may award Desiree.³
☒ ☐ I have provided information about my chosen type of damages and linked it to the scenario.⁴
☒ ☐ I have used signposting in my response, such as 'One type' and 'Another type'.

Extended response

13. Achieved: II
Not achieved: I; III

14. [Damages would achieve the purpose of remedies to a moderate extent as Valerie would likely receive both general and specific damages for her injury.¹]

[One way the purposes of damages would be achieved is through specific damages, as they would aim to return Valerie to her original position in terms of her finances, compensating her for her medical expenses. This can be calculated exactly and she would likely be able to recoup these funds and return to her original financial position before the injury occurred.²]

[A second way that specific damages could achieve the purpose of remedies is by accounting for lost wages. Valerie will be compensated for the time she spent out of work while she was recovering. Furthermore, since she can no longer coach, the time she spent searching for new work may be compensated as well.³]
[A third way Valerie could be returned to her original position before the civil wrong was committed is through general damages. These would aim to compensate for the pain and suffering she endured from the fall while in hospital, as well as the subsequent depression she has endured. As Valerie can no longer walk, this would also be taken into account when deciding the amount of damages.⁴]

[However, the pain and suffering incurred by Valerie can only be compensated partially as money cannot reverse what she has endured and pain and suffering cannot be quantified into a precise, monetary figure.⁵][Another limitation of damages in achieving their purposes is that Valerie may view the compensation as insufficient. Court proceedings are very costly and the damages may only cover the court filing fees and the cost of legal representation.⁶]

[Damages would partly compensate Valerie for her loss, but since pain and suffering cannot be quantified and monetary compensation cannot reverse the harm she endured, damages can likely not fully restore her to her original position prior to the civil breach.⁷]

- ✓ ✗ I have provided an introduction to summarise the extent to which I believe damages can achieve the purposes of remedies, and why.¹
-
- ✓ ✗ I have provided one way damages achieve the purposes of remedies.²
-
- ✓ ✗ I have provided a second way damages achieve the purposes of remedies.³
-
- ✓ ✗ I have provided a third way damages achieve the purposes of remedies.⁴
-
- ✓ ✗ I have provided one limitation of damages achieving the purposes of remedies.⁵
-
- ✓ ✗ I have provided a second limitation of damages achieving the purposes of remedies.⁶
-
- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁷
-
- ✓ ✗ I have linked my answer to the scenario where appropriate.
-
- ✓ ✗ I have used paragraphs and topic sentences to organise my response.
-
- ✓ ✗ I have used signposting in my response, such as 'One way' and 'A second way'.
-
- ✓ ✗ I have used connecting words, such as 'Furthermore' and 'However'.
-

Linking to previous learning

15. [Class actions refer to legal proceedings 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. In a successful class action, damages are likely to be awarded, however, they must be shared among the numerous plaintiffs of the class action.¹][Since there are more than seven plaintiffs in a class action, the damages paid by the defendant must be shared by all the plaintiffs.²]
[This means that each individual plaintiff may not receive enough financial compensation to restore them to their original financial position, thus failing to achieve the main purpose of damages.³]
[For example, in a class action where many plaintiffs have suffered financial losses due to large medical expenses, shared damages may not be enough to sufficiently cover these medical expenses, leaving each plaintiff to cover some of these costs themselves.⁴]

- ✓ ✗ I have identified the relationship between class actions and damages.¹
-
- ✓ ✗ I have provided one way class actions affect the ability of damages to achieve their purposes.²
-
- ✓ ✗ I have provided information about my chosen way class actions affect the ability of damages to achieve their purposes.³
-
- ✓ ✗ I have provided an example and linked it to the relationship between class actions and damages.⁴
-

6B Injunctions as a remedy

Check your understanding

- A. True. **Explanation:** Injunctions aim to remedy breaches that have already occurred, and prevent breaches that may occur in the future.
- C. **Explanation:** By ordering a restrictive injunction, this prevents someone from doing an action, such as prohibiting an individual from publishing a book.
- 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.
- D. **Explanation:** Although an interlocutory injunction may force a party to do an action, the key aspect of an interlocutory injunction is the fact that it is temporary.
- Interlocutory** injunctions prevent the defendant from acting in a way that would further the harm, for a specified time frame only.
- Damages: II; IV
Injunctions: I; III

Preparing for exams

Standard exam-style

7. [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 prevent further harm to the plaintiff.²] [Mandatory injunctions force the defendant to start or complete an action to prevent further harm to 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 defined the term 'injunction'.¹

✓ ✗ I have provided one purpose of an injunction.²

✓ ✗ I have provided information about my chosen purpose.³

8. [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 allow plaintiffs to protect their rights by preventing the defendant from continuing to infringe upon their rights.²]

✓ ✗ I have provided one purpose of remedies.¹

✓ ✗ I have provided a second purpose of remedies.²

✓ ✗ I have used signposting in my response, such as 'One purpose' and 'Another purpose'.

9. [The most appropriate remedy for Digby to seek in this instance is a restrictive injunction.¹] [Restrictive injunctions aim to prevent the defendant from acting in a way that would further the harm.²] [As the extension has not yet been built, a restrictive injunction would be most appropriate as this would prevent the extension from being built which would have disrupted Digby's enjoyment of his property.³]

✓ ✗ I have identified one appropriate civil remedy for Digby.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: Injunctions are the only appropriate civil remedy for this question.

Extended response

10. Strengths: I; IV
Limitations: II; III
11. [Injunctions main purpose is to return the plaintiff to their original position before their rights were infringed. However, there are limitations of injunctions.¹]
[Mandatory injunctions aim to achieve this purpose of remedies as they force the defendant to complete an action to prevent further harm to the plaintiff by stopping a breach or preventing a potential breach.²] [However, if mandatory injunctions cannot prevent harm from occurring, it can merely aim to reverse the harm or prevent future harm.³]

[Restrictive injunctions prevent the defendant from acting in a way that would further the harm. This aims to maintain the position of the plaintiff and prevent the infringement of their rights.⁴]

[Another way this purpose of injunctions is achieved is through interlocutory injunctions. These temporarily restrict the parties from potentially committing a civil breach until the final determination of a matter.⁵] [However, interlocutory injunctions are only temporary, meaning that further legal proceedings must take place for the injunction to become final or for the plaintiff to be awarded damages, therefore the plaintiff may not be restored to their original position if a final injunction is not ordered and the behaviours of the defendant are able to continue once the interlocutory injunction ceases.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way injunctions achieve their purpose.²

✓ ✗ I have provided one limitation of injunctions achieving their purpose.³

✓ ✗ I have provided a second way injunctions achieve their purpose.⁴

✓ ✗ I have provided a third way injunctions achieve their purpose.⁵

✓ ✗ I have provided a second limitation of injunctions achieving their purpose.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'Another way'.

✓ ✗ I have used connecting words, such as 'However'.

12. True: I; III
False: II; IV

13. [The main purpose of remedies is to return the plaintiff to their original position before the civil breach occurred.¹] [In the case of Rebel Wilson, the purpose of the remedy was to compensate her for the damage done to her reputation and career prospects as a result of the defamatory publication.²]

[In Wilson's case, damages were deemed to be 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 that the damage had already been done and the false information had already been widely disseminated, an injunction would not have been an effective remedy to address the harm already suffered by Wilson.⁴]

[Secondly, damages provide a more tangible and measurable form of compensation for the harm suffered by Wilson.⁵] [In this case, 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 that damages were ordered as opposed to an injunction.⁶]

- ✓ ✗ I have provided one purpose of remedies.¹
-
- ✓ ✗ I have provided information about my chosen purpose 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'.
-

Linking to previous learning

14. [The first error is that sanctions aim to restore the plaintiff to their original position.¹] [Criminal sanctions aim to punish the offender whilst civil remedies aim to restore the plaintiff to their original position.²]

[The second error is that injunctions can force a party to pay money.³] [The civil remedy that forces a party to pay money is damages, whereas injunctions force a party to make an action or prevent them from making an action.⁴]

[The third error is that damages cannot compensate for pain and suffering.⁵] [General damages aim to compensate the plaintiff for pain and suffering, although it is difficult to quantify this and damages may not fully restore a plaintiff to their original position before the pain and suffering.⁶]

- ✓ ✗ I have identified the first error in the scenario.¹
-
- ✓ ✗ I have provided the correct civil procedure for the first error in the scenario.²
-
- ✓ ✗ I have identified the second error in the scenario.³
-
- ✓ ✗ I have provided the correct civil procedure for the second error in the scenario.⁴
-
- ✓ ✗ I have identified the third error in the scenario.⁵
-
- ✓ ✗ I have provided the correct civil 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 'The first error' and 'The second error'.
-

15. Strengths: I; III
Limitations: II; IV; V

16. Strengths: I; III
Limitations: II; IV

17. [I disagree with this statement to a large extent because criminal sanctions and civil remedies are both able to achieve their purposes in some circumstances, even though they are both limited in this ability in some ways.¹]

[It is true that civil remedies are able to achieve their purposes to a large extent, but there are limitations to this ability.²] [Compensatory damages aim to restore the plaintiff to their original position, before the loss caused by the civil breach. I agree that specific damages are effective in achieving this purpose, in that they have a precise value and are easily quantifiable, meaning it is possible to restore the plaintiff to their original financial position.³] [An example of specific damages is money provided to the plaintiff to cover their medical bills and loss of income.⁴]

[On the other hand, general damages, which aim to compensate a plaintiff who has endured general pain and suffering, do not have a precise value and are not easily quantifiable. For this reason, their ability to achieve their purpose of restoring the plaintiff to their original position is limited.⁵] [For example, it is difficult for monetary damages to compensate a plaintiff for a shortened life expectancy resulting from a civil breach.⁶]

[Injunctions are another type of civil remedy that can achieve their purposes to a certain extent, but there are limitations.⁷] [One purpose of injunctions is to uphold the plaintiff's rights. By obtaining an injunction, the plaintiff can seek a court order to prohibit or require certain actions from the defendant, effectively safeguarding their rights.⁸] [However, initiating a civil action comes with high costs, so not all plaintiffs will be able to apply for this relief.⁹] [In addition, the court has a limited ability to monitor and ensure that 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.¹⁰]

[I do not agree that criminal sanctions rarely achieve their purposes, because, like civil remedies, criminal sanctions are able to achieve their purposes to a large extent, but there are also limitations to this ability.¹¹] [The purposes of sanctions are rehabilitation, punishment, deterrence, denunciation, and protection of the community. Two common types of sanctions, fines and imprisonment, are able to achieve some of these purposes to a moderate extent, even though neither of these sanctions can achieve all purposes.¹²] [For example, fines can achieve the purposes of punishment and deterrence quite effectively, but are not effective in achieving purposes such as rehabilitation and protection of the community.¹³] [Likewise, imprisonment achieves most purposes of sanctions quite effectively, but not all purposes are achieved. For instance, whilst protection is achieved for the period of imprisonment, many prisoners who are released will reoffend, so community protection is not achieved in the long term.¹⁴]

[In conclusion, I do not agree with the contention that civil remedies are always able to achieve their purposes and criminal sanctions rarely do. Although there are different types of both remedies and sanctions that can each be effective in achieving their respective purposes, there are also limitations of each type of remedy or sanction in relation to one or more of their purposes.¹⁵]

- ✓ ✗ I have provided an introduction to state the extent to which I agree with the statement, and a brief reason for my answer.¹
-
- ✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.²
-
- ✓ ✗ I have provided one argument in support of the statement.³
-

-
- ✓ ✕ I have provided an example relevant to my first argument in support of the statement.⁴
-
- ✓ ✕ I have provided one argument against the statement.⁵
-
- ✓ ✕ I have provided an example relevant to my first argument against the statement.⁶
-
- ✓ ✕ I have provided a topic sentence to introduce the main idea of the paragraph.⁷
-
- ✓ ✕ I have provided a second argument in support of the statement.⁸
-
- ✓ ✕ I have provided a second argument against the statement.⁹
-
- ✓ ✕ I have provided a third argument against the statement.¹⁰
-
- ✓ ✕ I have provided a topic sentence to introduce the main idea of the paragraph.¹¹
-
- ✓ ✕ I have provided a fourth argument against the statement.¹²
-
- ✓ ✕ I have provided an example relevant to my fourth argument against the statement.¹³
-
- ✓ ✕ I have provided a second example relevant to my fourth argument against the statement.¹⁴
-
- ✓ ✕ I have provided a conclusion to my response that links back to the question.¹⁵
-
- ✓ ✕ I have used paragraphs to organise my response.
-
- ✓ ✕ I have used connecting words, such as 'For example' and 'However'.
-

7A The Commonwealth Parliament and the Crown in law-making

Check your understanding

1. A. True. **Explanation:** Australia has retained royal ties to the United Kingdom since colonisation.
2. D. **Explanation:** The Governor-General is the Crown's representative in the Commonwealth Parliament and is therefore responsible for granting royal assent to bills that have successfully passed through both Houses of Parliament.
3. A. **Explanation:** The Senate traditionally acts to review and amend bills passed by the House of Representatives, as most bills are initiated by the lower house of the Commonwealth Parliament.
4. B. False. **Explanation:** The prime minister is the leader of the Commonwealth government and therefore sits in the House of Representatives.
5. B. **Explanation:** The prime minister is chosen by the Australian people and the government of the day, rather than by the Governor-General alone.
6. The political party that holds the **majority** in the House of Representatives will form the government of the day.
7. B; C; D; E. **Explanation:** Granting royal assent to bills so they can become law is a role of the Governor-General, not the House of Representatives.

Preparing for exams

Standard exam-style

8. [One role of the Governor-General is to grant royal assent, which involves the approval of a bill after it has passed through both Houses of the Commonwealth Parliament.¹] [Furthermore, another role of the Governor-General is to suggest required amendments to legislation, such as fixing mistakes.²] [In this scenario, if the bill does not contain mistakes, the Governor-General will grant royal assent, therefore, with the Crown's approval, the bill will become an Act and part of Australian law.³]
☒ ☐ I have provided one aspect of the role of the Governor-General.¹
☒ ☐ I have provided a second aspect of the role of the Governor-General.²
☒ ☐ I have provided an example from the scenario and linked it to the role of the Governor-General.³
☒ ☐ I have used signposting in my response, such as 'One role' and 'another role'.
☒ ☐ I have used connecting words, such as 'Furthermore'.
9. [One role of the House of Representatives is to represent the people in law-making.¹] [Members in the House of Representatives are elected as the spokespeople for around 100,000 Australians each. Therefore, they should reflect the opinions and perspectives of their electorate.²] [Members who do not act in the best interests of their electorate, perhaps due to their political party or other external pressures, risk being voted out of office at the next election.³]

- ☒
- ☐
- I have provided one role of the House of Representatives.
- ¹
-
- ☒
- ☐
- I have provided information about my chosen role of the House of Representatives.
- ²
-
- ☒
- ☐
- I have provided further information about my chosen role of the House of Representatives.
- ³
-
- ☒
- ☐
- I have used signposting in my response, such as 'One role'.

10. One of the roles of the Commonwealth Parliament is to pass legislation. This is a shared function of all three, major levels of the law-making process, as passing legislation allows for societal progression and reform.¹ [This is particularly applicable to the House of Representatives, which is where the majority of legislation is introduced as the government sits in this chamber.²] [Once a bill has successfully passed through both Houses of the Commonwealth Parliament, the Crown also upholds the role of passing legislation by providing royal assent via the Governor-General.³]

- ☒
- ☐
- I have provided one role of the Commonwealth Parliament.
- ¹
-
- ☒
- ☐
- I have provided information about my chosen role of the Commonwealth Parliament.
- ²
-
- ☒
- ☐
- I have provided further information about my chosen role of the Commonwealth Parliament.
- ³
-
- ☒
- ☐
- I have used signposting in my response, such as 'One of the roles'.

11. [The Senate has three main roles in the Commonwealth law-making process. The first is acting as a house of review. Primarily, the Senate will serve to scrutinise and amend bills passed by the House of Representatives.¹] [The second role is introducing legislation. Any member of the Senate may introduce a bill and, if it passes successfully through the Senate, it will move to the House of Representatives.²] [The third role of the Senate in law-making is to act as the states' house. As there are an equal number of senators across all states, senators aim to best serve their state and ensure all states have an equal ability to reject or approve Commonwealth laws.³]

- ☒
- ☐
- I have provided one aspect of the role of the Senate.
- ¹
-
- ☒
- ☐
- I have provided a second aspect of the role of the Senate.
- ²
-
- ☒
- ☐
- I have provided a third aspect of the role of the Senate.
- ³
-
- ☒
- ☐
- I have used signposting in my response, such as 'The first' and 'The second role'.

Extended response

12. Strengths: I; III
Limitations: II; IV
13. [One role of the Commonwealth Parliament in making the Cheaper Groceries Bill 2050 is through the Senate's function of acting as a house of review.¹] [This is especially true in this scenario as the government of the day does not hold a majority in the upper house and therefore the legislation will not automatically pass through the Senate.²] [Although, a diverse Senate and extra scrutiny may slow the progress of legislation passing through the Commonwealth Parliament. In this case, as the bill is in response to a current, societal issue, this is not ideal.³]

[Another role of the Commonwealth Parliament in relation to passing the Cheaper Groceries Bill 2050 is representing the states and the Australian people.⁴] [For this bill, it is essential for the government and elected representatives to respond to the conditions and needs of electorates across the country, which members seem to have done considering the public was pressuring the government to address the rising costs of household goods.⁵] [However, there is the chance that the House of Representatives, in the planning of the bill, prioritises the specific needs of the larger states instead of smaller states and territories, due to the distribution of MPs with there being more MPs in the House of Representatives from larger states than from the smaller states.⁶]

✓ ✗ I have identified one role of the Commonwealth Parliament.¹

✓ ✗ I have provided an example of how my chosen role of the Commonwealth Parliament may be beneficial in the scenario.²

✓ ✗ I have provided an example of how my chosen role of the Commonwealth Parliament may be a limitation in the scenario.³

✓ ✗ I have identified a second role of the Commonwealth Parliament.⁴

✓ ✗ I have provided an example of how my chosen role of the Commonwealth Parliament may be beneficial in the scenario.⁵

✓ ✗ I have provided an example of how my chosen role of the Commonwealth Parliament may be a limitation in the scenario.⁶

✓ ✗ I have used signposting in my response, such as 'One role' and 'Another role'.

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Although' and 'However'.

7B The Victorian Parliament and the Crown in law-making

Check your understanding

- B. False. **Explanation:** The main three components of the Victorian Parliament are the Crown, the Legislative Council, and the Legislative Assembly.
- A; B. **Explanation:** The Crown at the Victorian level is appointed on the advice of the Victorian premier and provides royal assent to all proposed legislation that has passed through both Houses of the Victorian Parliament.
- B. **Explanation:** The Governor is the Crown's representative in Victoria and therefore provides the final approval for all legislation.
- A. **Explanation:** The Legislative Assembly is the lower house comprised of MPs and therefore, this is where the premier sits, alongside the majority of seats in their party or coalition.
- A; B; D. **Explanation:** There is no limit to the number of ministers that may be appointed in the Legislative Assembly.
- The Victorian Parliament consists of two houses. The **Legislative Council** is the upper House of the Victorian Parliament and is comprised of 40 elected law-makers across Victoria whilst the **Legislative Assembly** is the lower house of Parliament.
- B. False. **Explanation:** The Legislative Council is made up of 40 members.
- Legislative Assembly: I; II; IV
Legislative Council: I; II
Crown: III
- [One role of the Legislative Assembly is to initiate and pass bills.¹] [Any member of the Legislative Assembly, of which there are 88, are able to introduce bills.²] [Most new laws are introduced in the Legislative Assembly, in particular, legislation that imposes taxation or spends Victorian Government revenue. These types of legislation must be introduced in the Legislative Assembly as the Victorian Constitution prohibits such bills from being introduced in the Legislative Council.³]
- I have identified one role of the Legislative Assembly.¹
- I have provided one feature of my chosen role.²
- I have provided a second feature of my chosen role.³
- I have used signposting in my response, such as 'One role'.
- [The primary role of the Legislative Council is to act as a house of review.¹] [This involves reviewing, debating, and amending bills introduced in the Legislative Assembly.²] [Another role of the Legislative Council in law-making is to initiate legislation. The Legislative Council, despite often acting as the second and final house to review legislation, can also be the first. Any upper house MP is able to introduce bills, except those regarding the expenditure of Victorian public money.³]
- I have identified one role of the Legislative Council.¹
- I have provided information about my chosen role.²
- I have identified a second role of the Legislative Council.³
- I have used signposting in my response, such as 'The primary role' and 'Another role'.
- [One role of the Governor in law-making is providing royal assent to proposed legislation.¹] [This process is the final approval for all Victorian bills and is the last action required before bills become legislation. It usually occurs on the advice of the premier.²] [A second role of the Governor is acting as Victoria's Head of State.³] [This involves holding and managing Victoria's highest legislative powers, as well as acting as the lead representative for Victoria.⁴]
- I have identified one role of the Governor.¹
- I have provided information about my chosen role.²
- I have identified a second role of the Governor.³

- ☒ ☐ I have provided information about my chosen role.⁴
- ☒ ☐ I have used signposting in my response, such as 'One role' and 'A second role'.

Extended response

12. Legislative Assembly: III; IV
Legislative Council: I
Crown: II
13. [A majority of new laws and proposed changes to existing laws begin in the Legislative Assembly. Although ministers initiate most legislation, this role is shared with all the members.¹] [Members are directly chosen by the people in their community and will often receive correspondence from those living within their district to guide their law-making priorities.²]
- [Once a bill passes the Legislative Assembly, it will move to the Legislative Council. The composition of the Legislative Council more commonly includes independents and members from smaller political parties. As a result, a wider range of perspectives can be considered when debating new bills at this stage.³] [The Legislative Council also can introduce legislation, except for legislation concerning the expenditure of Victoria's public money, if a member of the Legislative Council has a particular bill they want to implement. However, most legislation is introduced in the Legislative Assembly.⁴]
- [Once the bill passes both Houses of Parliament, the Governor, on behalf of the Crown will provide royal assent and the bill will become Victorian legislation.⁵]

- ☒ ☐ I have provided one role of the Legislative Assembly.¹
- ☒ ☐ I have provided information about my chosen role of the Legislative Assembly.²
- ☒ ☐ I have provided one role of the Legislative Council.³
- ☒ ☐ I have provided a second role of the Legislative Council.⁴
- ☒ ☐ I have provided one role of the Crown.⁵
- ☒ ☐ I have used paragraphs to organise my response.

Linking to previous learning

14. [One of the main roles of the Commonwealth Parliament is to create and amend Commonwealth legislation that applies to and affects all Australians.¹] [One role of the Victorian Parliament is to enact and manage state legislation for Victoria, ensuring the law-making needs of Victorians are met.²] [Whilst the Commonwealth Parliament creates laws that affect all Australians, and therefore Victorians, the Victorian Parliament is only responsible for law-making within the state of Victoria.³]
- ☒ ☐ I have provided one role of the Commonwealth Parliament.¹
- ☒ ☐ I have provided one role of the Victorian Parliament.²
- ☒ ☐ I have provided one key difference between the role of the Victorian Parliament and the role of the Commonwealth Parliament.³
- ☒ ☐ I have used signposting in my response, such as 'One of the main roles' and 'One role'.

7C The division of powers

Check your understanding

- D. **Explanation:** The Constitution establishes and divides law-making powers into exclusive, concurrent, and residual powers.
- A. True. **Explanation:** Concurrent powers allow both the Federal and state parliaments to legislate in the area of taxation.
- D. **Explanation:** Residual powers are not explicitly outlined in the Constitution as these law-making powers belong to the states and all areas of law-making not mentioned in the Constitution fall within the states' residual law-making power.
- Exclusive powers are law-making powers granted only to the **Commonwealth Parliament**, through ss 51 and 52 of the Australian Constitution.
- Concurrent powers: I; III; IV
Residual powers: II; V
- A. True. **Explanation:** Foreign affairs is an area that can only be legislated on by the Commonwealth Parliament as it is an exclusive power.
- A; B. **Explanation:** The division of powers exists so that law-making responsibilities are appropriately divided, whilst also ensuring one sole law-making body cannot abuse its powers as a law-maker.

Preparing for exams

Standard exam-style

8. [No, this bill will not be valid.¹] [As Calliope is part of the Legislative Assembly, she does not have the power to introduce a bill about currency, as that is an area of law-making falling within the category of exclusive powers and therefore is an area that the Victorian Parliament cannot make laws about.²]
- ☒ ☐ I have stated that Calliope's bill will not be valid.¹
- ☒ ☐ I have provided information about why Calliope's bill will not be valid.²
9. [The Constitution acts as a restriction on the states' ability to pass legislation over areas of certain subject matter, such as currency.¹] [This is because currency is an exclusive power and therefore is an area of law-making that belongs solely to the Commonwealth Parliament. Therefore, the state parliaments cannot establish their own laws about currency and are restricted in their power to pass laws on matters that inadvertently affect the entire nation.²]
- ☒ ☐ I have identified one way the Australian Constitution acts as a restriction on states' law-making powers.¹
- ☒ ☐ I have provided information about my chosen reason.²
10. [Exclusive powers are law-making powers granted only to the Commonwealth Parliament through ss 51 and 52 of the Australian Constitution.¹] [This means only the Commonwealth can legislate in certain areas, however, relatively few areas of Commonwealth law-making power are exclusive.²] [For example, laws for customs and border protection are exclusive law-making powers that can be exercised only by the Commonwealth Parliament.³]

☒ ☐ I have defined exclusive powers.¹

☒ ☐ I have provided information about exclusive powers.²

☒ ☐ I have provided an example of exclusive powers.³

☒ ☐ I have referred directly to the relevant section of the Constitution in my response.

11. [Yes, I agree with this statement.¹] [State parliaments can pass different laws regarding the same area of law as each state has the right to exercise residual powers.²] [For example, education is an area covered by residual powers and each state has differing legislation for its schooling and education system.³]

☒ ☐ I have stated whether 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 an example to support my answer.³

12. [Exclusive powers are vested in the Commonwealth Parliament according to ss 51 and 52 of the Constitution. This means only the Commonwealth Parliament can pass laws in certain areas.¹] [On the other hand, concurrent powers are granted to both the Commonwealth and state parliaments, meaning the Commonwealth and the states can pass laws about some matters.²] [Therefore, one key difference between exclusive and concurrent powers is that exclusive powers belong solely to the Commonwealth Parliament, whereas concurrent powers are shared between the Commonwealth and state parliaments. Most areas of law-making explicitly mentioned in the Constitution are concurrent, with relatively few areas of law-making belonging only to the Commonwealth.³]

☒ ☐ I have provided information about exclusive powers.¹

☒ ☐ I have provided information about concurrent powers.²

☒ ☐ I have provided one key difference between exclusive and concurrent powers.³

☒ ☐ I have referred directly to the relevant section of the Constitution in my response.

☒ ☐ 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.

Extended response

13. True: II; IV
False: I; III

14. [No, I do not agree with this statement as the Commonwealth and state parliaments can both exercise concurrent law-making powers and therefore, can both legislate in particular areas.¹]

[Firstly, the Constitution vests concurrent law-making powers in the Commonwealth and state parliaments, with most powers granted to the Commonwealth Parliament by s 51 of the Constitution being concurrent powers, meaning that the subject matter that the Commonwealth Parliament can create legislation about is shared with the states.²] [For example, both the Commonwealth and state parliaments have legislated in the area of marriage and divorce, as they both possess the power to do so. Therefore, the state parliaments can make laws in the same areas as the Commonwealth if it is within the scope of concurrent powers.³]

[Yet, there are some areas of law-making over which the state parliaments do not have the power to legislate on, such as the areas of exclusive law-making.⁴] [Exclusive law-making powers are explicitly vested in the Commonwealth Parliament by the Constitution, and allow only the Commonwealth Parliament to make laws about national matters, such as currency and foreign affairs.⁵]

[However, this does not mean that the Commonwealth Parliament has unlimited law-making powers, as only the state parliaments can exercise residual powers.⁶] [Residual powers are law-making powers not given to the Commonwealth Parliament by the Constitution, therefore residing solely with the states. This means only the states can pass legislation on matters such as education and prisons.⁷]

[Therefore, whilst the states can be limited in their ability to pass legislation in exclusive areas of law-making, they are still able to exercise concurrent powers, enabling them to pass laws in areas over which the Commonwealth Parliament may also legislate.⁸]

☒ ☐ I have provided an introduction to state the extent to which I agree or disagree with the statement, and a brief reason for my answer.¹

☒ ☐ I have provided information about concurrent powers.²

☒ ☐ I have provided an example of concurrent powers to support my response.³

☒ ☐ I have provided information about exclusive powers.⁴

☒ ☐ I have provided an example of exclusive powers to support my response.⁵

☒ ☐ I have provided information about residual powers.⁶

☒ ☐ I have provided examples of residual powers to support my response.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'.

☒ ☐ I have used comparison words, such as 'Yet' and 'However'.

Linking to previous learning

15. a. [One role of the House of Representatives is to initiate laws.¹] [This is the main function of the House of Representatives, with bills generally being introduced by the lower house, although members of the Senate can also introduce bills to the Commonwealth Parliament. Dario wishes to introduce a bill into the House of Representatives to improve prisoner healthcare access.²] [However, given members of the House of Representatives are elected to represent the views and values of their electorate, Dario will need to consider whether this bill reflects the interests of his party, his voters, and the wider community.³]

☒ ☐ I have identified one role of the House of Representatives.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'.

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

- b. [Dario's bill is unlikely to be successful and may face complications as prisons are an area legislated by residual powers.¹] [As a Federal MP, Dario has the right to introduce bills into the House of Representatives using exclusive powers, such as legislation about overseas trade agreements.²] [However, if he wanted prison reform within state correctional facilities, this would require a state MP to introduce the bill into their state parliament, as prisons fall within the area of residual law-making. Therefore, Dario's bill is overstepping into an area of residual powers and is not likely to be successful.³]

☒ ☐ I have provided one reason why Dario's bill is unlikely to be successful.¹

☒ ☐ I have provided information about why Dario's bill is unlikely to be successful.²

☒ ☐ I have provided further information about why Dario's bill is unlikely to be successful.³

☒ ☐ I have used connecting words, such as 'However' and 'Therefore'.

7D Section 109 of the Australian Constitution

Check your understanding

- C. **Explanation:** Section 109 is applicable to conflicts between state and Commonwealth legislation.
- B. False. **Explanation:** If a state law is deemed invalid according to s 109, only the inconsistent part of the state law becomes void. The remaining parts of the Act remain valid.
- A state law that is inconsistent with a Commonwealth law is **not** automatically deemed **invalid** unless it is **challenged** in the courts.

4. B. False. **Explanation:** The application of section 109 does not change the areas in which states can legislate.

5. A; D; E. **Explanation:** Section 109 of the Constitution provides a method to resolve inconsistencies between state and Commonwealth laws, but only once the law is challenged in the courts. Moreover, s 109 is also significant as it renders inconsistent state laws, or sections of the state law, invalid if they contradict the Commonwealth law. However, the inconsistent state law could come back into effect if the contradicting Commonwealth law is changed or removed in the future.

Preparing for exams

Standard exam-style

6. [The main purpose of section 109 is to resolve inconsistencies between state and Commonwealth law.¹] [If a conflict arises in legislation that was passed as a result of concurrent law-making powers being exercised, s 109 is used to resolve any issues if the state's legislation is challenged in the courts. According to s 109, the state legislation would then be declared invalid and the Commonwealth law would prevail.²]

☒ ☐ I have stated the main purpose of s 109 of the Australian Constitution.¹

☒ ☐ I have provided information about s 109 of the Australian Constitution.²

7. [If the Victorian Parliament was to pass laws enabling easier access to an individual's banking data, it would likely be challenged by the Commonwealth Parliament in the courts under s 109 of the Constitution, as there are existing federal laws about consumer privacy.¹] [The courts would apply s 109 of the Constitution, which outlines that Commonwealth laws will prevail to the extent of the inconsistency if a conflict arises between state and Commonwealth legislation.²] [Therefore, the legislation produced by the Victorian Parliament could still operate, but any sections that conflict with Commonwealth legislation would no longer be valid as Commonwealth laws protecting data and privacy would prevail.³] [These sections would only be declared invalid once a case against the legislation is brought to the courts. Hence, the legislation allowing companies to access online banking data would remain valid and enforceable upon Victorian citizens until the courts declare otherwise.⁴]

☒ ☐ I have provided information about the relevance of section 109 of the Australian Constitution.¹

☒ ☐ I have provided further information about the relevance of s 109 of the Australian Constitution.²

☒ ☐ I have provided one example from the scenario and linked it to s 109 of the Australian Constitution.³

☒ ☐ I have provided a second example from the scenario and linked it to s 109 of the Australian Constitution.⁴

☒ ☐ I have used connecting words, such as 'Therefore' and 'Hence'.

8. [Firstly, section 109 is significant because it provides a method to resolve inconsistencies between state and Commonwealth legislation.¹] [In this case, the Victorian Parliament's law restricting caffeine consumption before 12 pm is inconsistent with the Commonwealth's law that mandates employers to provide employees with coffee in the morning. Therefore, s 109 is significant here as it allows the inconsistency between the two pieces of legislation to be resolved, whereby the Commonwealth law will prevail.²]

[Secondly, section 109 is significant because it does not act to immediately declare inconsistent state laws invalid.³] [A state law is only deemed invalid once it is challenged in the High Court. Therefore, Victorian employees could be banned from drinking caffeine before 12 pm in workplaces until the law is challenged and deemed invalid by the courts.⁴]

- ☒ ☐ I have provided one reason why section 109 of the Australian Constitution is significant.¹
- ☒ ☐ I have provided information about my chosen reason.²
- ☒ ☐ I have provided a second reason why section 109 of the Australian Constitution is significant.³
- ☒ ☐ I have provided information about my chosen reason.⁴
- ☒ ☐ 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 'Firstly' and 'Secondly'.
- ☒ ☐ I have used connecting words, such as 'Therefore'.

Extended response

9. A; D

10. [I agree with this statement to a moderate extent. Whilst s 109 can restrict a state's ability to exercise concurrent powers in some circumstances, it does not completely remove its law-making abilities.¹]

[Firstly, if there are conflicting state and Commonwealth laws, the state law could be deemed invalid if it is challenged in the High Court.²] [According to s 109, the Commonwealth law will prevail to the extent of the inconsistency if the state Act, or parts of it, contradict with the Commonwealth legislation, regardless of which law was passed first. Thus, in the area of concurrent law-making, the state may be restricted in its ability to enforce certain laws if they do not align with Commonwealth laws, even if such laws are relevant to citizens.³]

[However, s 109 does not act as a complete restriction on state law-making.⁴] [For example, a conflicting state law is not invalid until it is challenged in the courts and deemed invalid under s 109. Therefore, states still have the capacity to exercise concurrent powers and can continue establishing other legislation in the relevant area of law.⁵] [Moreover, if part of the state law was previously deemed invalid but the relevant Commonwealth law is later changed or removed, the invalid part of the state law can then come into effect.⁶]

[Thus, s 109 can limit a state's ability to exercise concurrent powers to a moderate degree, but it does not completely remove a state's ability to make laws in areas of concurrent law-making.⁷]

- ☒ ☐ 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 s 109 of the Australian Constitution can restrict state law-making.²
- ☒ ☐ I have provided information about how s 109 of the Australian Constitution can restrict state law-making.³
- ☒ ☐ I have provided one way s 109 of the Australian Constitution does not restrict state law-making.⁴
- ☒ ☐ I have provided information about how s 109 of the Australian Constitution does not restrict state law-making.⁵
- ☒ ☐ I have provided a second way s 109 of the Australian Constitution does not restrict state law-making.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'.
- ☒ ☐ I have used connecting words, such as 'Thus' and 'However'.

Linking to previous learning

11. a. [Yes, Fern is allowed to introduce laws regarding marriage.¹]
[This is because marriage is legislated using concurrent powers, which are shared between the Commonwealth and state parliaments, and Fern is a politician in the Victorian Parliament.²]
- ☒ ☐ I have identified that Fern can introduce laws regarding marriage.¹
 - ☒ ☐ I have provided information about marriage as a concurrent power.²
- b. [If this bill was passed by the Victorian Parliament, it would most likely be deemed invalid if challenged in the courts. This is because the Commonwealth Parliament's *Marriage Act 1961* (Cth) states that a marriage can occur on 'any day at any time', in turn contradicting the Victorian law.¹] [Therefore, as per s 109 of the Constitution, once challenged in the courts, the Commonwealth law would prevail and the sections of the Victorian law only permitting marriage on Wednesdays, between certain hours, would be deemed invalid.²]
- ☒ ☐ I have provided information about why Fern's marriage law is likely to be deemed invalid.¹
 - ☒ ☐ I have provided information about s 109 of the Australian Constitution and how it would impact Fern's marriage law.²
 - ☒ ☐ I have used connecting words, such as 'Therefore'.

7E High Court cases and their impact on law-making powers

Check your understanding

1. B. False. **Explanation:** High Court rulings on their interpretation of the Constitution cannot be overturned by the Commonwealth Parliament.
2. A. **Explanation:** The Commonwealth's establishment of the National Broadband Network (NBN) was made under the assumption that the internet is a 'like service' under s 51(v) of the Constitution following the *Brislan* case. Public housing, state police, and roads and infrastructure are considered areas of residual power.
3. C; D. **Explanation:** The decision of the High Court can be changed if another case contesting the same phrasing of the Constitution comes before it and the court overturns the precedent established by *Brislan*. Additionally, the decision of the High Court on constitutional issues is final, and can only be overruled by another High Court decision, or by a successful referendum.
4. A. **Explanation:** The Tasmanian government argued the Commonwealth did not have a law-making power under the Constitution to create laws regulating dam construction, as this was a residual power of the states.
5. The Tasmanian Dam case created the opportunity for any state legislation to be overruled by Commonwealth legislation as long as it is for the purposes of upholding genuine, international treaty obligations under the **external** affairs power.
6. D. **Explanation:** The Commonwealth Parliament created the ABC after it was determined by *Brislan* that broadcasting falls under 'other like services'.
7. B. False. **Explanation:** Although the division of powers is established by the Constitution, setting out which subject matter falls within exclusive, concurrent, and residual powers, the High Court is required to interpret the meaning of the Constitution and, by doing so, impacts the law-making powers of the state and Commonwealth parliaments.

Preparing for exams

Standard exam-style

8. [The decision in the Tasmanian Dam case had the effect of broadening the Commonwealth's law-making powers because s 51(xxix) of the Constitution, 'external affairs', was interpreted to allow the Commonwealth Parliament to legislate on all subject matter covered by an international treaty Australia has ratified.¹] [In practice, this means the Commonwealth law-making powers have been expanded as the Commonwealth Parliament can now make laws about the wide-ranging subject matter handled by international treaties, allowing it to possibly override state legislation in areas of residual law, such as in the Tasmanian Dam case.²]

✓ ✗ I have provided one effect that a High Court case had on state and Commonwealth law-making powers.¹

✓ ✗ I have provided information about my chosen effect the High Court case had on state and Commonwealth law-making powers.²

✓ ✗ 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.

9. [In the *Brislan* case, the High Court was required to interpret s 51(v) of the Constitution to decide whether radio broadcasting was an area of Commonwealth law-making power.¹] [The court found that it was, interpreting radio broadcasting as falling within the category of 'postal, telegraphic, telephonic, and other like services' under s 51(v).²] [The *Brislan* decision is significant because it suggests the Commonwealth Parliament is able to make laws in relation to new communication technologies if they can be considered 'other like services'.³] [Therefore, the division of powers is impacted as the Commonwealth Parliament has assumed greater legislative powers via the interpretation of s 51(v) and may continue to gain legislative powers over new, upcoming technologies, unless such interpretations of the Constitution are challenged in the High Court.⁴]

✓ ✗ I have provided information about one High Court case that has impacted the division of law-making powers.¹

✓ ✗ I have provided information about how the decision in my chosen High Court case has impacted the division of law-making powers.²

✓ ✗ I have provided information about the significance of my chosen High Court case and its impact on the division of law-making powers.³

✓ ✗ I have provided further information about the significance of my chosen High Court case and its impact on the division of law-making powers.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 connecting words, such as 'Therefore'.

Extended response

10. True: II; IV; V
False: I; III; VI
11. [The Tasmanian Dam case is a High Court case from 1983 in which the interpretation of the Australian Constitution had an impact on state and Commonwealth law-making powers.¹] [In the Tasmanian Dam case, the High Court was required to interpret s 51 (xxix) of the Constitution, which enabled the Commonwealth Parliament to make laws in relation to 'external affairs'. Specifically, the court considered whether the section extended to law-making to give effect to international treaties, even if by giving effect to such treaties, the Commonwealth was essentially legislating in an area where the states have residual law-making power.²] [The court determined that 'external affairs' should be interpreted as allowing the Commonwealth Parliament to make laws in relation to any subject matter covered by an international treaty that the executive branch of Australia had ratified. Therefore, this essentially broadened the Commonwealth's law-making powers as it allowed the Commonwealth Parliament to make laws on the wide array of subject matter covered by international treaties.³]

[The interpretation of the Constitution in the Tasmanian Dam case had a large impact on the state and Commonwealth law-making powers.⁴][The decision in the case means that residual areas of law-making that traditionally belonged solely to the states may be legislated upon by the Commonwealth Parliament if it exercises its external affairs powers to uphold international obligations.⁵][The presence of s 109 in the Constitution has the effect of rendering state legislation invalid if it is inconsistent with Commonwealth legislation. Therefore, the decision in the Tasmanian Dam case had the effect of broadening the law-making power of the Commonwealth, at the expense of the states' powers.⁶]

[In addition, the interpretation of the external affairs power in the Tasmanian Dam case has created the potential for further changes to the state and Commonwealth law-making powers in the future.⁷]

[The decision means that it is possible for any state legislation to essentially be overridden by Commonwealth legislation in the future, providing the Commonwealth legislation gives effect to international obligations under the external affairs power.⁸]

✓ ✗ I have provided one High Court case that has impacted the state and Commonwealth law-making powers.¹

✓ ✗ I have provided information about the legal issues in my chosen High Court case.²

✓ ✗ I have provided information about the interpretation of the Constitution in my chosen High Court case.³

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁴

✓ ✗ I have provided information about the impact of my chosen High Court case on state and Commonwealth law-making powers.⁵

✓ ✗ I have provided further information about the impact of my chosen High Court case on state and Commonwealth law-making powers.⁶

✓ ✗ I have provided information about the potential future impact of my chosen High Court case on state and Commonwealth law-making powers.⁷

✓ ✗ I have provided further information about the potential future impact of my chosen High Court case on state and Commonwealth law-making powers.⁸

✓ ✗ 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 paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'Therefore' and 'In addition'.

12. Significance: II; III; VI
Limitations: I; IV; V

13. [The Brislan case involved the High Court interpreting the words of s 51(v) of the Constitution to determine that radio broadcasting should be included in the Commonwealth's area of law-making power. This interpretation has a significant impact on the state and Commonwealth's law-making powers, however, there are some limitations.¹]

[One way in which the Brislan case has impacted the Commonwealth's law-making powers is that the decision broadened the power of the Commonwealth to legislate in relation to 'postal, telegraphic, telephonic, and other like services' under s 51(v).²][Since the High Court interpreted radio broadcasting to fall within this category of services, the Commonwealth Parliament has been able to legislate in relation to a range of different technologies that may also be considered 'other like services'.³][For example, the establishment of the Australian Broadcasting Corporation (ABC) in 1932 was created on the basis that Brislan's interpretation of s 51(v) allowed the Commonwealth to control broadcasting.⁴]

[Another way in which the Brislan case impacted the division of law-making powers is that it has set a precedent for future expansion of the Commonwealth's law-making powers.⁵]

[The interpretation of the term 'other like services' in s 51(v) suggests the ability of the Commonwealth to legislate in relation to new related communication technologies.⁶][The Commonwealth can likely rely on the Brislan decision, and subsequent decisions that have also considered s 51(v) to legislate in relation to the internet, even though a case has not yet been brought before the High Court to confirm this.⁷]

[When a High Court interpretation of the Constitution has the effect of broadening the Commonwealth's law-making powers, this can encroach on the state's law-making powers.⁸][For example, in Brislan, the decision suggests that the phrase 'other like services' should be given a broad interpretation, which means that areas of law-making that were considered as residual law-making powers of the states could be areas for which the Commonwealth has concurrent law-making powers. Brislan therefore reduced the state's law-making power.⁹]

[However, whilst it has been contended that the Brislan decision may have extended Commonwealth law-making power too broadly, there are limitations to the impact the decision can have.¹⁰][One limitation of the Brislan decision is it does not confirm that all other communication technologies will definitely be interpreted to fall in the s 51(v) category of Commonwealth law-making power.¹¹]

[Moreover, to confirm what constitutes as 'other like services', another case considering these words of the Constitution must be brought before the High Court as it can only rule on and create precedent in relation to cases before it.¹²]

[Another limitation of the impact of the Brislan decision is that where the Commonwealth has legislated in relation to 'other like services' in reliance of the Brislan decision, it is still possible for the validity of that legislation to be challenged in the High Court, and there is potential that such legislation may be declared invalid if the service under consideration is not as similar to those services listed in s 51(v).¹³]

[Therefore, although the decision in Brislan was significant in expanding the law-making powers of the Commonwealth, and demonstrating the potential for future expansion of these powers, it is not yet certain which current or future areas of law-making might be included in such an expansion.¹⁴]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the decision in my chosen High Court case has impacted Commonwealth law-making powers.²

✓ ✗ I have provided information about the first way the case has impacted Commonwealth law-making powers.³

✓ ✗ I have provided an example and linked it to the first way the case has impacted Commonwealth law-making powers.⁴

- ✓ ✗ I have provided a second way the decision in the case has impacted Commonwealth law-making powers.⁵
- ✓ ✗ I have provided information about the second way the case has impacted Commonwealth law-making powers.⁶
- ✓ ✗ I have provided an example and linked it to the second way the case has impacted Commonwealth law-making powers.⁷
- ✓ ✗ I have provided one way the decision in the case has impacted law-making powers.⁸
- ✓ ✗ I have provided information about the way the case has impacted state law-making powers.⁹
- ✓ ✗ I have provided a topic sentence to introduce the main idea of my second core argument.¹⁰
- ✓ ✗ I have provided one way my chosen case is limited in impacting state and Commonwealth law-making powers.¹¹
- ✓ ✗ I have provided a second way my chosen case is limited in impacting state and Commonwealth law-making powers.¹²
- ✓ ✗ I have provided a third way my chosen case is limited in impacting state and Commonwealth law-making powers.¹³
- ✓ ✗ I have provided a conclusion to my response.¹⁴
- ✓ ✗ 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 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 'Therefore'.

Linking to previous learning

14. [Section 109 of the Australian Constitution states that when there is inconsistency between state and Commonwealth legislation, assuming the legislation is an area of concurrent law-making power, the Commonwealth law will prevail and the state legislation will be ineffective to the extent of the inconsistency.¹] [When the High Court interprets the Australian Constitution in a way that expands the Commonwealth's law-making powers to include an area of law-making that was previously assumed to be a residual power of the states, this renders the area of law-making to be concurrent with the states. Therefore, state legislation would be invalid to the extent of the inconsistency with Commonwealth legislation, as per s 109 of the Constitution.²] [For example, in the Tasmanian Dam case, when Commonwealth legislation giving effect to international obligations regarding world heritage sites was enacted under the Commonwealth's 'external affairs' power, state legislation allowing for the construction of a dam was inconsistent with the Commonwealth legislation, and thus invalid to the extent that it was inconsistent.³]

- ✓ ✗ I have provided information about section 109 of the Australian Constitution.¹
- ✓ ✗ I have provided information about the relevance of section 109 when a High Court interpretation leads to an expansion of Commonwealth law-making powers.²
- ✓ ✗ I have provided an example and linked it to the relevance of section 109.³
- ✓ ✗ I have referred directly to the relevant section of the Constitution in my response.
- ✓ ✗ I have used connecting words, such as 'Therefore'.

7F Parliament's ability to make law – the bicameral structure

Check your understanding

- B. False. **Explanation:** All parliaments in Australia, except for three, operate with a bicameral structure that requires proposed legislation to be approved by both Houses of Parliament.
- A; C; D. **Explanation:** When a political party holds a majority in the upper house as well as the lower house, this may be known as a 'rubber stamp' upper house that may rush and approve bills with little debate as they vote with the party instead of basing their vote on personal opinions.
- When the government of the day has a **minority** in the upper house, this is known as a **hostile** upper house.
- B. **Explanation:** The lack of sitting weeks available for Victorian and Commonwealth parliaments can considerably slow the parliament's law-making process as, if MPs are not actually attending parliament, the law-making process cannot occur.
- A; B; C; D. **Explanation:** All compositions of the upper house have both strengths and limitations in the parliamentary law-making process.
- A. True. **Explanation:** Due to the bicameral structure of the Victorian and Commonwealth Parliaments, both houses rely upon one another to enact their law-making capacity and duty as most bills cannot pass without consent from both houses.

Preparing for exams

Standard exam-style

- [The makeup of a bicameral parliament is two houses: one upper and one lower.¹] [The function of such a parliament is to provide accountability and a checking process on each bill that is passed through parliament.²]
- ✓ ✗ I have provided information about the makeup of a bicameral parliament.¹
- ✓ ✗ I have provided information about the function of a bicameral parliament.²

8. [One way the bicameral structure of parliament improves the ability of parliament to make law is when there is a hostile upper house composition.¹] [When this occurs, it increases the level of scrutiny on bills and ensures that adequate levels of debate and consideration are undertaken before a law passes through the house.²]

[Another way the bicameral structure improves the ability of parliament to make law is that it provides two opportunities for proposed legislation to be reviewed.³] [If parliament consisted of only one house, the government of the day could pass legislation that benefits the majority of voters but fails to consider the views and values of other constituents in society.⁴]

✓ ✕ I have identified one way the bicameral structure improves the ability of parliament to make law.¹

✓ ✕ I have provided information about my chosen way.²

✓ ✕ I have identified a second way the bicameral structure improves the ability of parliament to make law.³

✓ ✕ I have provided information about my chosen way.⁴

✓ ✕ I have used signposting in my response, such as 'One way' and 'Another way'.

Extended response

9. Strengths: II; III; V
Limitations: I; IV

10. [The bicameral structure of parliament is a feature of both the Victorian and Commonwealth Parliaments. By requiring two chambers to review proposed legislation, parliament usually experiences higher quality law-making through increased scrutiny of bills. However, this, and the ease with which laws can be passed is impacted by whether or not the government has a majority in both houses.¹]

[Firstly, a bicameral structure can ensure thorough scrutiny and debate of bills. When the upper house does not have a government majority, often a higher level of review on proposed legislation will occur as the upper house will be composed of MPs with a range of different views. This can,, potentially improve the quality of parliamentary law-making.²]

[Moreover, the inclusion of a second house prevents the government from passing legislation that aligns solely with its political agenda rather than which best reflects the views and values of constituents, as other parties and independents will hold diverse values and opinions.³]

[Although, if particularly stubborn MPs hold the balance of power, they may force the government to alter bills for specific interests that do not represent the views of the broader population in order to pass the legislation.⁴]

[Additionally, when the government holds a majority in both houses, it may be able to pass bills with few barriers from opposing parties, therefore increasing the speed at which new laws can be passed.⁵]

[However, this may also mean that a 'rubber stamp' situation may occur in the upper house, whereby bills undergo little to no consideration, due to the government of the day holding a majority of seats in both houses, removing a vital part of the law-making process.⁶]

[Therefore, the bicameral structure of parliament can both enhance and hinder the ability of parliament to change the law, and this is dependent on whether the government has a majority in the upper house.⁷]

✓ ✕ I have provided an introduction to my response.¹

✓ ✕ I have provided one strength of the effect of the bicameral structure on the ability of parliament to make law.²

✓ ✕ I have provided a second strength of the effect of the bicameral structure on the ability of parliament to make law.³

✓ ✕ I have provided one limitation of the effect of the bicameral structure on the ability of parliament to make law.⁴

✓ ✕ I have provided a third strength of the effect of the bicameral structure on the ability of parliament to make law.⁵

✓ ✕ I have provided a second limitation of the effect of the bicameral structure on the ability of parliament to make law.⁶

✓ ✕ I have provided a conclusion to my response.⁷

✓ ✕ I have used paragraphs to organise my response.

✓ ✕ I have used signposting in my response, such as 'Firstly'.

✓ ✕ I have used connecting words, such as 'However', 'Moreover', and 'Additionally'.

11. A; B

12. [The composition of the 2031 Commonwealth Parliament's Senate would affect the parliament's law-making ability to a moderate extent. This Senate composition is hostile as the government does not hold a majority.¹]

[When the government does not hold a majority in the upper house, it must consider a broader range of perspectives, improving the quality of law-making.²] [In this case, the government of the day would not be able to rely on the support of its senators alone to pass legislation, and therefore, may be more willing to include amendments and a higher level of review.³] [For this particular government to pass legislation through the upper house, they will require the support of at least nine non-government MPs to reach a majority.⁴]

[However, this may slow the legislative process as minor parties and independents in the Senate can create delays by demanding changes and conducting unreasonable lengths of debate.⁵] [That being said, the bills that are passed through this hostile Senate may have undergone a higher level of review and scrutiny, improving outcomes for more individuals in the population, not just those who align with the government of the day's political agenda.⁶]

✓ ✕ I have provided an introduction to state the extent to which I believe the composition of this Commonwealth Parliament affects its law-making ability, and a brief reason for my answer.¹

✓ ✕ I have identified one way the bicameral structure enhances the ability of parliament to make law.²

✓ ✕ I have provided information about my chosen way in relation to the scenario.³

✓ ✕ I have provided an example from the scenario.⁴

✓ ✕ I have provided one way the bicameral structure limits the ability of parliament to make law in relation to the scenario.⁵

- ☒ ☐ I have provided a second way the bicameral structure enhances the ability of parliament to make law.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used connecting words, such as 'However'.

Linking to previous learning

13. a. [One role of the Governor in passing the Suburban Agriculture Bill 2056 (Vic) would be to provide royal assent.¹] [After the bill has passed both Houses of the Victorian Parliament, the Governor, as the King's Representative, would provide the final approval and sign it off as official law.²]

- ☒ ☐ I have identified one role of the Governor in passing the Suburban Agriculture Bill.¹
- ☒ ☐ I have provided information about my chosen role.²
- ☒ ☐ I have used signposting in my response, such as 'One role'.

- b. [One limitation of parliament's law-making in this scenario is the hostile upper house.¹] [A hostile upper house can delay the law-making process as the crossbench that holds the balance of power may push for further debate and amendments to the bill.²] [As the passing of the bill is urgent, due to the current community danger, the delay caused by the hostile upper house may act as a limitation on the ability of parliament to make law in this scenario.³]

- ☒ ☐ I have identified one way the bicameral structure limits the ability of parliament to make law.¹
- ☒ ☐ I have provided information about my chosen way.²
- ☒ ☐ I have provided an example from the scenario and linked it to my chosen way.³
- ☒ ☐ I have used signposting in my response, such as 'One limitation'.

7G Parliament's ability to make law - international pressures

Check your understanding

1. A. True. **Explanation:** The influence of international pressures on Australia means that many current and future laws are made in accordance with international law.
2. B. **Explanation:** A country can become a party to a treaty by signing it, which is the first step of the treaty-making process, indicating the signatory intends to be bound by the treaty's terms. The next step is ratification, which is a more formal undertaking to be bound by the terms of the treaty.

3. International **declarations** are not legally binding and are a statement of principles that a nation may sign. Alternatively, international **treaties** are agreements that become legally binding under international law upon ratification.
4. A; C. **Explanation:** International organisations cannot create laws on behalf of any parliament, but rather, may scrutinise and place pressure on parliament to make laws in a particular area.
5. B. **Explanation:** An international declaration is 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 United Nation cannot force countries to sign the declaration, nor are countries bound to follow a declaration.
6. A. True. **Explanation:** Australia's international obligations and commitments do not automatically become part of domestic law upon Australia signing a treaty, but can be a strong influence on law-making by parliament.

Preparing for exams

Standard exam-style

7. [One impact of international pressures is that they may cause parliaments to create or amend laws to uphold international standards.¹] [For example, other countries and international organisations may place pressure on the Australian Parliament to make laws to uphold basic human rights.²]

- ☒ ☐ I have identified one impact that international pressures may have on the ability of parliament to make laws.¹
- ☒ ☐ I have provided information about my chosen impact.²
- ☒ ☐ I have used signposting in my response, such as 'One impact'.

8. [International pressures refers to the influence that other countries and international organisations exert on parliaments to ensure its laws comply with international standards.¹] [If the Commonwealth Parliament passes a law that breaches the principles set out in the *International Convention on the Elimination of All Forms of Racial Discrimination* 1966 (ICERD), it may face criticism from other countries and international organisations, such as the United Nations.²] [This is because Australia is a signatory to, and has ratified, the ICERD, whilst also incorporating some provisions of the ICERD into domestic law by passing the *Racial Discrimination Act* 1975 (Cth). Therefore, international pressures can protect the Australian people by preventing parliament from passing laws permitting discrimination on the basis of race.³]

- ☒ ☐ I have defined international pressures.¹
- ☒ ☐ I have provided information about international pressures.²
- ☒ ☐ I have provided an example from the scenario and linked it to the protection of the Australian people.³
- ☒ ☐ I have used connecting words, such as 'Therefore'.

9. [I believe that international pressures affect the ability of parliament to make laws to a significant extent, due to the criticisms, scrutiny, and potential legal consequences that it may face.¹] [Firstly, if Australia is found to be in breach of international treaties to which it is a signatory to and has ratified, parliament will likely face criticism from other countries for failing to uphold fundamental human rights set out in international treaties. This may influence parliament to change the law to avoid further criticism.²] [Additionally, international organisations and other countries may be influential in sparking public interest about particular human rights issues that countries, such as Australia, are failing to uphold. This may place pressure on parliament to create or amend laws to reflect society's values, as members of parliament (MPs) are likely to support or initiate law reform that the majority of their constituents also support in order to increase their likelihood of re-election.³] [However, one way the impact of international pressures is limited is that international society may have conflicting views and values on certain matters. For example, environmental groups often campaign for Australia to reduce its coal consumption, however, transnational mining corporations want the government to continue supporting coal exports. Therefore, parliament is unlikely to be strongly influenced to either support or reduce coal consumption as members of parliament (MPs) are aware they will lose support from one group no matter what they do.⁴]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one reason why international pressures affect the ability of parliament to make laws.²

☒ ☐ I have provided a second reason why international pressures affect the ability of parliament to make laws.³

☒ ☐ I have provided one limitation of the ability of international pressures to affect the ability of parliament to make laws.⁴

☒ ☐ I have used signposting in my response, such as 'Firstly' and 'one way'.

☒ ☐ I have used connecting words, such as 'Additionally' and 'However'.

Extended response

10. Strengths: II; III; IV; VI
Limitations: I; V

11. [I agree with the statement that international pressures are effective at influencing parliament to change laws to a large extent.¹]
[Firstly, if Australia is found to be in breach of the obligations within international treaties to which it has ratified, Australia will likely face criticism from other countries, and potentially other consequences, for failing to uphold the obligations. This may influence parliament to change the law to avoid further criticism or other consequences.²]
[Such consequences can include sanctions. International organisations, such as the United Nations and the World Trade Organisation, have the power to impose sanctions on countries for breaching international treaties. Only the organisation has the power to remove these sanctions, placing pressure on a country, and more specifically its parliament, to comply with international law by not passing legislation that contravenes treaties.³]

[Additionally, international organisations may be influential in sparking public interest in relation to particular issues, such as those relating to human rights and climate change, that countries fail to uphold. This will likely place pressure on parliament to change laws in order to reflect society's values, as well as international standards.⁴]
[Another way international pressures may influence parliament to change laws is because of the fact that Australia is also signatory to a broad range of international declarations, which contain principles Australia has indicated it is committed to uphold. The principles within declarations can also influence parliament to enact a change in the law.⁵]

[However, one limitation of international pressures' influence on parliament's ability to change laws is that pressure from international organisations, or obligations in treaties Australia is a party to, may hinder the ability of parliament to tailor laws to the unique needs and circumstances of the Australian population.⁶]

[Another limitation is that international declarations are not legally binding, meaning that whilst there may be international criticism for failing to uphold principles in declarations, Australia will not face legal consequences for failing to enact legislation to uphold the principles set out in a declaration.⁷]

[Overall, international pressures are effective at influencing parliament to change the law to comply with international standards and avoid facing scrutiny from other countries or organisations. However, that same pressure can hinder parliament's ability to change law to meet domestic needs, and pressure in relation to declarations is limited since they are not legally binding.⁸]

☒ ☐ I have provided an introduction to state the extent to which I agree or disagree with the statement.¹

☒ ☐ I have provided one way international pressures influence parliament to change laws.²

☒ ☐ I have provided information about my chosen way.³

☒ ☐ I have provided a second way international pressures influence parliament to change laws.⁴

☒ ☐ I have provided a third way international pressures influence parliament to change laws.⁵

☒ ☐ I have provided one limitation of the influence of international pressures on the ability of parliament to change laws.⁶

☒ ☐ I have provided a second limitation of the influence of international pressures on the ability of parliament to change laws.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 'Another way'.

☒ ☐ I have used connecting words, such as 'Additionally' and 'However'.

Linking to previous learning

12. [One reason why parliament may not change the law in this case is due to international pressures, which refers to the influence that other countries and international organisations exert on the Australian Parliament to ensure its laws comply with international standards.¹] [As Australia is a party to the Convention Relating to the Status of Refugees (1967) (CRSR), this means Australia has formally ratified the treaty and is bound to uphold it under international law.²] [As passing legislation to return refugees that enter Australia to their country would breach the CRSR, parliament may face pressure from countries and international organisations, likely preventing such a law from being implemented.³]

✓ ✗ I have provided one reason why parliament may not change the law.¹

✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.²

✓ ✗ I have provided information about my chosen reason.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

13. [One role of the Commonwealth Parliament is to create laws that represent the views and values of society, as members of parliament (MPs) are elected by the people and should therefore, represent the peoples' views.¹] [An example of an international pressure is the influence exerted by international organisations, which may be highly influential in sparking public interest in particular human rights issues that Member States, such as Australia, are failing to uphold.²] [As a result, this may place pressure on the Commonwealth Parliament to create laws that reflect the views and values of society in relation to these human rights issues.³]

✓ ✗ I have provided one role of the Commonwealth Parliament.¹

✓ ✗ I have provided an example of an international pressure.²

✓ ✗ I have provided information about the relationship between my chosen role and international pressure.³

✓ ✗ I have used signposting in my response, such as 'One role'.

✓ ✗ I have used connecting words, such as 'As a result'.

7H Parliament's ability to make law – representative nature

Check your understanding

- B. False. **Explanation:** Despite the best efforts of some governments and MPs, parliament cannot fully consider the entire voter base in law-making. For example, as parliament is elected by the majority of voters, minority groups or diverse populations may not be represented.
- The representative nature of parliament is assisted through **regular elections**, meaning politicians must act to represent their constituents or else risk being **voted out**.

- A; B. **Explanation:** The diversity of parliament, and in turn, the ability of parliament to represent diverse communities in law-making is a product of both the choices of voters in compulsory elections, as well as the candidate pool that an electorate or electoral district has to choose from.
- Strengths: II
Limitations: I; III; IV
- A. **Explanation:** Each voting electorate and electoral district may have its own choice of representative; however, if no one who is a worthy representation of the demographic and values of the community is nominated to run in an election, this will limit the representative nature of parliament.
- B. False. **Explanation:** Even for an MP with the best intentions of representing a community, if they lack the lived experience of certain demographics, it is unlikely they would be able to fully represent their community in law-making.

Preparing for exams

Standard exam-style

- [One way in which parliament represents the community in law-making is through regular elections.¹] [Since MPs serve a fixed term, they have a certain pressure to represent their constituency in law-making or risk being voted out.²]
 - [The diversity of a given parliament is largely dependent on the MPs that sit within it who are chosen by the respective communities they represent. For some time, both the Victorian and Commonwealth Parliaments have not been diverse enough to reflect the diversity of the Victorian and Australian communities.¹] [If a parliament does not reflect the demographics of the society it is created to lead, its capacity to make law that is effective and inclusive of all, is reduced.²] [Moreover, if parliament is not truly representative of broader society, laws are less likely to address legislative challenges faced within communities, which can lead to civil unrest and mistrust in the parliament.³]
- ✓ ✗ I have provided one way in which parliament may represent the community in law-making.¹
- ✓ ✗ I have provided information about my chosen way.²
- ✓ ✗ I have used signposting in my response, such as 'One way'.
- ✓ ✗ I have provided one way the representative nature of parliament may affect its ability to make law.¹
- ✓ ✗ I have provided information about my chosen way the representative nature of parliament may affect its ability to make law.²
- ✓ ✗ I have provided further information about my chosen way the representative nature of parliament may affect its ability to make law.³
- ✓ ✗ I have used connecting words, such as 'Moreover'.

9. [I believe the composition of this Commonwealth Parliament affects its ability to be representative in law-making to a moderate extent.¹]

[From the table above, it is clear there are some differences in the level of diversity across the two houses, as well as in the overall cultural diversity of all the MPs and Senators. Whilst there are more women in the Senate (57%), there are fewer overall in the House of Representatives (38%) and therefore, the entire Parliament. Similarly, the diversity of Non-European (6.6%) and Asian MPs (4.4%) is disproportionate to the actual diversity observed in the community.²] [Consequently, in particular areas of law-making, parliament may be skewed towards the interests of less culturally-diverse men. Therefore, this Commonwealth Parliament may struggle to be representative in law-making.³]

[Although, just because there is a lack of diversity, it does not mean MPs will neglect their constituents. Even with differences in certain characteristics, like race and gender, MPs have a duty to represent all members of the community.⁴]

✓ ✗ I have stated the extent to which I believe the composition of this Commonwealth Parliament affects its ability to be representative in law-making.¹

✓ ✗ I have included information from the stimulus provided.²

✓ ✗ I have provided one way the composition of this Commonwealth Parliament is limited in its ability to be representative in law-making.³

✓ ✗ I have provided one way the composition of this Commonwealth Parliament is not limited its ability to be representative in law-making.⁴

Extended response

10. A; C; E

11. [The representative nature of parliament seeks to improve the quality of its law-making by ensuring the needs and wants of the diverse Australian population is catered for.¹]

[One way in which the representative nature of parliament improves its law-making ability is through regular elections, which place pressure on MPs to represent the views of their constituents or risk being voted out at the next election.²] [Furthermore, compulsory voting ensures a large proportion of individuals in Australia participate in elections and that parliaments are comprised of MPs elected by the majority of people. Therefore, if MPs truly represent their constituents' views, law-making can be reflective of the majority's views and values.³] [On the other hand, whilst these regular elections may compel a certain level of representative law-making, at the federal level, a political term of three or four years may not be long enough for productive legislative activity and reform to occur. This may mean parties may make shallow election promises to remain elected, whilst never actually implementing the proposed law reform.⁴]

[Another way in which the representative nature of parliament improves its law-making is that an MP is able to cross the floor when voting on legislation if they wish to deviate from the views of their political party. This is often done by an MP in order to vote in line with the views of their constituency, so they can ensure law-making is representative of the community's views.⁵] [However, despite this ability to cross the floor, MPs may often feel compelled to vote with their political party, rather than in line with the desires of their electorate or electoral district, reducing the representation of their constituents' views in parliament's law-making.⁶]

[The representative nature of parliament establishes a strong framework for parliament to effectively make law. However, in practice, parliament's ability to make laws that are representative can depend on a variety of factors.⁷]

✓ ✗ I have provided an introduction to my response to summarise my answer to the question.¹

✓ ✗ I have provided one strength of the effect of the representative nature of parliament on its ability to make law.²

✓ ✗ I have provided a second strength of the effect of the representative nature of parliament on its ability to make law.³

✓ ✗ I have provided one limitation of the effect of the representative nature of parliament on its ability to make law.⁴

✓ ✗ I have provided a third strength of the representative nature of parliament on its ability to make law.⁵

✓ ✗ I have provided a second limitation of the effect of the representative nature of parliament on its ability to make law.⁶

✓ ✗ I have provided a conclusion to my response.⁷

✓ ✗ 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 'On the other hand' and 'However'.

Linking to previous learning

12. [One reason why the 2050 Victorian Parliament may not be effective in its ability to make law is that the Legislative Council is a 'rubber stamp' upper house.¹] [This means the level of scrutiny and the role of the upper house as a house of review may not be adequately fulfilled. As the government holds a majority in both the upper house and Legislative Assembly, proposed legislation passed from the Legislative Assembly would likely be approved with little scrutiny and debate from the upper house.²] [In this case, amendments to and inquiry on the public transport bill from non-government members of the upper house may be limited. This means the upper house may be ineffective in forcing changes to the bill, as the government already has the required majority of votes to pass the bill. Therefore, the effectiveness of law-making is reduced, as bills may not be thoroughly examined or reflect the interests of the entire community.³]

[Another reason why this Victorian Parliament may not be effective in its ability to make law is the gender composition of the parliament.⁴] [In order for parliament to be representative and effective in law-making, its MPs should reflect the diversity and general composition of the society it is designated to create laws for. If this is not achieved, there may be skewed interests in law-making.⁵] [In this case, this Victorian Parliament is composed of 79% men, which is not reflective of the roughly 50/50 split of men and women observed in the Victorian population. Hence, the law-making interests of women in regards to public transport may be under or misrepresented, reducing the effectiveness of parliament's law-making.⁶]

- ✓ ✗ I have provided one reason why the 2050 Victorian Parliament may not be effective in its ability to make law.¹
- ✓ ✗ I have provided information about my chosen reason.²
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.³
- ✓ ✗ I have provided a second reason why the 2050 Victorian Parliament may not be effective in its ability to make law.⁴
- ✓ ✗ I have provided information about my chosen reason.⁵
- ✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.

71 The Constitution as a check on parliament – representative government

Check your understanding

1. A. True. **Explanation:** Representative government is a fundamental democratic principle that ensures the government of the day creates laws that reflect the views and values of the majority of society.
2. Section 7 of the Australian Constitution requires members of the **Senate** to be directly chosen by the people, whilst section 24 requires members of the **House of Representatives** to also be directly chosen by the people.
3. A. True. **Explanation:** The High Court is given power under ss 75 and 76 of the Constitution to hear matters arising under the Constitution or involving its interpretation.
4. Strengths: III
Limitations: I; II
5. B. False. **Explanation:** The High Court can only protect the principle of representative government relevant to the facts of the case before it. Therefore, the High Court cannot create laws to further protect representative government outside the case.

Preparing for exams

Standard exam-style

6. [The principle of representative government is outlined in ss 7 and 24 of the Australian Constitution and is a system where members of parliament are elected by the people to best represent the views of the majority.¹] [If an individual believes parliament has passed a law that breaches the principle of representative government, the High Court can interpret the Constitution and may declare the law, or part of the law, as ultra vires, meaning it becomes invalid.²] [The High Court's interpretation of the Constitution may also recognise implied rights, which are not explicitly outlined in the Australian Constitution but are considered to exist. These implied rights may be fundamental in protecting the principle of representative government.³]

- ✓ ✗ I have provided information about the principle of representative government.¹
- ✓ ✗ I have provided one aspect of the role of the High Court in protecting the principle of representative government.²
- ✓ ✗ I have provided a second aspect of the role of the High Court in protecting the principle of representative government.³
- ✓ ✗ I have referred directly to the relevant sections of the Constitution in my response.

7. [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] [Sections 7 and 24 of the Australian Constitution require members of the Senate and the House of Representatives to be 'directly chosen by the people', respectively.²] [This enforces the principle of representative government and ensures parliament makes laws that reflect the views and values of society. If parliament creates laws that infringe upon the principles of representative government protected by the Constitution, the High Court may declare the law ultra vires, meaning it becomes invalid.³]

- ✓ ✗ I have defined the term 'representative government'.¹
- ✓ ✗ I have provided information about ss 7 and 24 of the Australian Constitution.²
- ✓ ✗ I have provided an example of how ss 7 and 24 of the Australian Constitution protect the principle of representative government.³

8. [The principle of representative government is protected by sections 7 and 24 of the Australian Constitution and 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 can declare a law, or part of a law, invalid if it breaches the principle of representative government and has been made beyond the law-making powers of parliament.²] [Additionally, when interpreting the Australian Constitution, the High Court may recognise implied rights, such as the freedom of political communication, that are fundamental in upholding the principle of representative government.³] [However, the High Court can only interpret the Constitution and declare a law, or part of a law, invalid for breaching the principle of representative government if a case is brought before it.⁴]

- ✓ ✗ I have provided information about the principle of representative government.¹
- ✓ ✗ I have provided one aspect of the role of the High Court in protecting the principle of representative government.²
- ✓ ✗ I have provided a second aspect of the role of the High Court in protecting the principle of representative government.³
- ✓ ✗ I have provided one limitation of the role of the High Court in protecting the principle of representative government.⁴
- ✓ ✗ I have referred directly to the relevant section of the Constitution in my response.
- ✓ ✗ I have used connecting words, such as 'Additionally' and 'However'.

9. [In *Roach v Electoral Commissioner*, sections 7 and 24 of the Australian Constitution were interpreted by the High Court to protect the principle of representative government, which 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]
- [As these sections require members of the Senate and the House of Representatives to be 'directly chosen by the people', the decision in *Roach v Electoral Commissioner* declared the legislation banning all prisoners from voting as being in breach of ss 7 and 24 of the Constitution.²]
- [As a result, the voting rights of prisoners was preserved and the principle of representative government was protected.³]
- [However, ss 7 and 24 of the Constitution do not protect the right to vote for all prisoners, as the High Court found that those serving a prison term over three years should not be allowed to vote and that restrictions on voting are valid when there are substantial reasons. Therefore, whilst the decisions in *Roach v Electoral Commissioner* protected the principle of representative government, parliament can still impose restrictions on who can vote.⁴]

✓ ✗ I have provided one way sections 7 and 24 of the Australian Constitution have protected representative government.¹

✓ ✗ I have provided information about how sections 7 and 24 of the Australian Constitution have protected representative government.²

✓ ✗ I have provided an example from the case and linked it to protecting representative government.³

✓ ✗ I have provided one limitation from the case and linked it to the role of the High Court in protecting representative government.⁴

✓ ✗ I have referred directly to the relevant sections of the Constitution in my response.

✓ ✗ I have used connecting words, such as 'As a result' and 'However'.

Extended response

10. Strengths: II; III
Limitations: I; IV; V

11. [The role of the High Court in protecting the principle of representative government acts as a check on parliament in law-making, despite some limitations.¹]

[One strength of the High Court in protecting the principle of representative government is that it can declare a law, or part of a law, invalid if it breaches the principle of representative government and has been made beyond the law-making powers of parliament.²]

[Another strength is that the High Court is an independent judiciary, meaning it is not subject to the influence of other branches of government. This independence enables the Court to impartially interpret the Constitution and identify breaches of representative government, doing so without being influenced by political considerations.³]

[However, one limitation of the High Court in protecting the principle of representative government is that High Court judges are appointed by the government of the day. This may lead to the appointment of judges that are sympathetic towards the government's position, rather than being impartial.⁴]

[Another limitation is that, as the cost and time associated with bringing a case to the High Court are high, few cases are likely to be initiated in the High Court. Thus, the court's ability to act as a check on parliament in law-making is reduced.⁵]

[Overall, the High Court plays an important role in acting as a check on parliament in law-making through its ability to declare laws invalid. However, the High Court is limited in its abilities as it can only do so when a case is brought before it.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one strength of the role of the High Court in protecting representative government.²

✓ ✗ I have provided a second strength of the role of the High Court in protecting representative government.³

✓ ✗ I have provided one limitation of the role of the High Court in protecting representative government.⁴

✓ ✗ I have provided a second limitation of the role of the High Court in protecting representative government.⁵

✓ ✗ I have provided a conclusion to my response that links back to the question.⁶

✓ ✗ I have referred directly to the relevant section of the Constitution in my response.

✓ ✗ 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 'Thus'.

12. Strengths: I; III
Limitations: II; IV

13. [The High Court serves an important role in acting as a guardian of the Australian Constitution, despite the costs and time associated with bringing a claim to the High Court.¹]

[One strength of the High Court as a guardian of the Australian Constitution is that if Sally brings her claim to the High Court, it can declare the law, banning all people under the age of 30 from voting in elections, invalid.²]

[This will occur if the High Court finds that the law breaches sections 7 and 24 of the Australian Constitution, indicating it has been made beyond the law-making powers of parliament.³]

[Additionally, the High Court is an independent judiciary, meaning it is not subject to the influence of other branches of government.⁴]

[This independence enables the High Court to interpret ss 7 and 24 of the Constitution and declare the law, banning all people under the age of 30 from voting in elections, invalid without political influence or bias.⁵]

[However, one limitation of the High Court as a guardian of the Australian Constitution is that the costs and time associated with bringing a case to the High Court are high, meaning Sally may not have the resources to initiate her claim.⁶]

[This reduces the High Court's ability to act as a guardian of the Constitution, as it is unable to interpret ss 7 and 24 and determine if the law banning those under 30 from voting is unconstitutional.⁷]

[Another limitation is that the High Court can only declare the law invalid if a case is brought before it by Sally or another individual with standing.⁸]

[Overall, the High Court can act as a guardian of the Constitution as it is an independent judiciary that is capable of declaring the law invalid without facing parliamentary pressure. However, this can only occur if Sally or another individual with standing brings the case to the High Court, which can be expensive and time-consuming.⁹]

- ✓ ✕ I have provided an introduction to my response.¹

- ✓ ✕ I have provided one strength of the High Court in interpreting ss 7 and 24 of the Australian Constitution.²

- ✓ ✕ I have provided information about my chosen strength and linked it to the ability of the High Court to act as a guardian of the Australian Constitution.³

- ✓ ✕ I have provided a second strength of the High Court in interpreting ss 7 and 24 of the Australian Constitution.⁴

- ✓ ✕ I have provided information about my chosen strength and linked it to the ability of the High Court to act as a guardian of the Australian Constitution.⁵

- ✓ ✕ I have provided one limitation of the High Court in interpreting ss 7 and 24 of the Australian Constitution.⁶

- ✓ ✕ I have provided information about my chosen limitation and linked it to the ability of the High Court to act as a guardian of the Australian Constitution.⁷

- ✓ ✕ I have provided a second limitation of the High Court in interpreting ss 7 and 24 of the Australian Constitution.⁸

- ✓ ✕ I have provided a conclusion to my response that links back to the question.⁹

- ✓ ✕ I have referred directly to the relevant sections of the Constitution in my response.

- ✓ ✕ 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 'Additionally' and 'However'.

Linking to previous learning

14. [One role of the House of Representatives is to represent the people in law-making, which can be enacted by ensuring the views and values of the Australian people are reflected when new laws or amendments to existing laws are suggested.¹] [This upholds the principle of representative government as members of the House of Representatives are directly chosen by the people and are therefore, expected to make laws on behalf of the Australian people.²]
- ✓ ✕ I have provided one role of the House of Representatives.¹

 - ✓ ✕ I have provided information about how my chosen role upholds the principle of representative government.²

 - ✓ ✕ I have used signposting in my response, such as 'One role'.

7J The Constitution as a check on parliament - the separation of powers

Check your understanding

1. B. **Explanation:** The separation of powers ensures there is no abuse of powers in the parliamentary and judicial system by establishing executive, legislative, and judicial branches of power.
2. The **executive** is the branch with the power to administer laws and conduct the business of the government, whereas the **legislative** power is exercised to create laws in Australia. Finally, the **judicial** power ensures the independent application of laws to resolve legal matters.
3. B; C; D. **Explanation:** Judges are part of the judiciary and must remain completely independent from the executive under the separation of powers principle.
4. C. **Explanation:** Section 71 of the Constitution contains information about judicial power.
5. A. True. **Explanation:** In theory, executive powers reside with the Governor-General. However, in practice, the power to manage government business and administer laws resides with Cabinet, whose members also form part of the legislative branch of government.
6. A; C; D. **Explanation:** Whilst the prime minister needs an appropriate level of power and authority to effectively govern a country, this is not the main purpose of the separation of powers, which more broadly focuses on the power distribution within the parliamentary and judicial system as a whole.

Preparing for exams

Standard exam-style

7. [The executive power is the power, vested in the King and exercised by the Governor-General, to maintain and administer the law and the business of government.¹] [In practice, this power is usually carried out by Cabinet, which includes senior ministers of the government of the day.²]

 - ✓ ✕ I have defined the term 'executive power'.¹

 - ✓ ✕ I have provided information about the executive power.²

8. [The separation of powers acts as a check on parliament's law-making by ensuring no singular body has complete power to make and enforce laws, therefore preventing abuses of power.¹] [This is maintained through the establishment of three separate branches of power; the executive, legislative, and judicial powers. Whilst executive and legislative powers are exercised when managing the business of government and creating laws, respectively, the judicial power is the ability of courts and tribunals to enforce laws and resolve legal matters.²] [Therefore, by ensuring one body cannot make and administer laws while also prosecuting legal matters, proportionate power can be distributed between different bodies and misuses of power are prevented. As a result, if parliament does attempt to make laws beyond its law-making powers, such efforts can be restrained by the judicial branch which can declare such laws invalid, keeping parliament's law-making powers constrained.³]

✓ ✕ I have identified how the separation of powers acts as a check on parliamentary law-making.¹

✓ ✕ I have provided information about the separation of powers.²

✓ ✕ I have provided information about the separation of powers acting as a check on the law-making powers of parliament.³

✓ ✕ I have used connecting words, such as 'Therefore'.

9. [Legislative powers are those vested in the parliament that enable it to make laws. Generally, the House of Representatives and the Senate exercise these powers at the federal level.¹] [On the other hand, judicial powers are those vested in the courts and tribunals that enables them to enforce laws and resolve legal matters.²] [Legislative and judicial powers must remain completely independent from one another to avoid any abuses of powers. Therefore, one key difference between the two powers is that whilst the legislative can create laws, it cannot separately apply those laws in administering justice, which is the role of the judiciary.³]

✓ ✕ I have provided information about legislative powers.¹

✓ ✕ I have provided information about judicial powers.²

✓ ✕ I have provided one key difference between legislative and judicial powers.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. [No, this statement is not true as executive power is not always exercised by the Governor-General in practice.¹] [Theoretically, the Governor-General has the ability to exercise executive powers. However, in Australia, executive and legislative powers are combined and operate together.²] [This means the power to manage the business of the government and administer the law resides with Cabinet, composed of the prime minister and senior ministers. Cabinet and parliament can also exercise legislative powers, enabling them to make laws.³] [Therefore, the Governor-General does not exercise executive power in practice and the business of government and administration of the law is carried out by government figures and public servants, such as the police.⁴]

✓ ✕ I have stated that the statement is not true.¹

✓ ✕ I have provided one reason why executive power is not exercised by the Governor-General in practice.²

✓ ✕ I have provided information about members of the executive power.³

✓ ✕ I have provided further information about members of the executive power.⁴

✓ ✕ I have used connecting words, such as 'Therefore'.

Extended response

11. Strengths: I; III
Limitations: II; IV

12. [The separation of powers can act as a check on parliament's law-making ability to a moderate extent. Whilst the separation of the legislative branch and judiciary can prevent an abuse of power, in practice, other branches of power do not operate independently, meaning checks on an abuse of power may be restricted.¹]

[One reason why the separation of powers is an effective way to restrain parliament's law-making powers is that the judiciary can declare laws created by parliament ultra vires.²] [If the Commonwealth Parliament has breached its law-making powers according to the Constitution, the High Court, which is independent and not politically affiliated, has the judicial power to deem the law invalid. Therefore, the separation of powers ensures there is no abuse of the Commonwealth Parliament's legislative powers by maintaining it can only legislate within the scope of exclusive and concurrent powers.³]

[Moreover, the separation of powers is a valid check on parliamentary law-making as judicial powers are only vested in the courts and tribunals, which must remain completely independent and separate from legislative and executive powers. Judges cannot hold seats in parliament where laws are being made, in the same way parliament cannot prosecute and adjudicate legal matters.⁴] [Hence, the independence of the judiciary also ensures cases can be determined without the influence of external factors, such as political pressures, given judges cannot be associated with political parties.⁵]

[However, a limitation of the separation of powers' ability to act as a check on law-making is through the appointment of judges by the executive.⁶] [The judiciary must remain completely independent from the executive and legislative branches. However, given judges are appointed by members of the executive, this may mean the composition of the judiciary is influenced by the political motivations and values of the executive. Therefore, the extent to which the judiciary remains completely independent and able to act as an unbiased check on law-making may be limited.⁷]

[Furthermore, the overlap in the members of both the legislative and executive powers may limit the ability of each branch of government to act as a check on each other. If the government holds a majority in both Houses of Parliament, this can influence the effectiveness of the legislature in acting as a check on the laws introduced by ministers of the executive.⁸]

[In conclusion, although the separation of powers can act as an effective check on parliament's law-making, there are certain limitations in some aspects due to the overlap of the branches.⁹]

✓ ✕ I have provided an introduction to summarise my answer to the question.¹

✓ ✕ I have provided one reason why the separation of powers is an effective check on parliament in law-making.²

✓ ✕ I have provided information about my chosen reason.³

✓ ✕ I have provided a second reason why the separation of powers is an effective check on parliament in law-making.⁴

✓ ✕ I have provided information about my chosen reason.⁵

✓ ✕ I have provided one reason why the separation of powers is limited in its ability to act as a check on parliament in law-making.⁶

✓ ✕ I have provided information about my chosen reason.⁷

✓ ✕ I have provided a second reason why the separation of powers is limited in its ability to act as a check on parliament in law-making.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 reason' and 'In conclusion'.
- ✓ ✗ I have used connecting words, such as 'Therefore' and 'Moreover'.

Linking to previous learning

13. a. [No, MP Anderson does not have the ability to introduce an education bill as the Commonwealth Parliament has neither the exclusive nor the concurrent power to legislate in the area of education. Rather, education is a residual power that can only be legislated on by the states.¹] [Residual powers are law-making powers that are not granted to the Commonwealth Parliament in the Australian Constitution and therefore, belong to the state parliaments. If MP Anderson were to somehow pass this bill, it would likely be deemed invalid.²] [Hence, given education is within the scope of residual powers and not the concurrent or exclusive powers of the Commonwealth, it would not be possible for MP Anderson to introduce the Mandatory Education Material Act 2084 (Cth) into the Commonwealth Parliament.³]

- ✓ ✗ I have identified that MP Anderson does not have the ability to introduce education bills.¹
- ✓ ✗ I have provided information about residual powers.²
- ✓ ✗ I have provided an example from the scenario and linked it to the division of powers.³
- ✓ ✗ I have used connecting words, such as 'Hence'.

- b. [MP Anderson would not be able to act as a judge in determining a court case involving his Mandatory Education Material Act 2084 (Cth) due to the separation of powers.¹] [The Australian Constitution ensures there is not an abuse of power in the parliamentary and court systems by establishing the separation of powers. The Constitution outlines three branches of power: the legislative, the executive, and the judicial.²] [Whilst the legislative and executive branches of power overlap, judicial powers, which are vested in courts and tribunals to enforce the law and resolve legal matters, must remain completely independent and cannot be politically motivated.³] [Therefore, MP Anderson cannot determine any court case concerning his proposed legislation, as he holds a seat in parliament and is not allowed to prosecute and adjudicate legal matters according to the separation of powers.⁴]

- ✓ ✗ I have identified that MP Anderson cannot determine the court case due to the separation of powers.¹
- ✓ ✗ I have provided information about the separation of powers.²
- ✓ ✗ I have provided further information about the separation of powers.³
- ✓ ✗ I have provided an example from the scenario and linked it to the separation of powers.⁴
- ✓ ✗ I have used connecting words, such as 'Therefore'.

7K The Constitution as a check on parliament - express protection of rights

Check your understanding

- A. True. **Explanation:** The Australian Constitution explicitly states five express rights that are afforded to all Australian citizens.
- C. **Explanation:** The wording of the express rights can only be modified after a successful referendum. Therefore, parliament does not have the power to change the words of the Constitution by passing new legislation, regardless of which house the senator belongs to.
- According to section 92 of the Constitution, 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. On the other hand, according to section 117 of the Constitution, Australian Citizens of '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'.
- B; C; D. **Explanation:** Section 116 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'. Therefore, it does not encourage parliament to pass laws that mandate religious practices in all work industries but rather limits it from doing so.
- C. **Explanation:** As per s 51 (xxxi) of the Constitution, if the Commonwealth Parliament wishes to acquire property, it must provide 'just terms'. This means Nora is entitled to fair financial compensation from the government as her property is being taken for the airport construction project.
- A. **Explanation:** Justices cannot deem laws invalid if there is not a case before them regarding the relevant law. Moreover, a referendum is only required if the Commonwealth Parliament chooses to amend or change the wording of the Constitution.

Preparing for exams

Standard exam-style

- [One express right is the right to freedom of interstate trade and commerce.¹] [According to section 92 of the Constitution, 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free'. This means the Commonwealth or state parliaments cannot restrict the flow of trade and movement of goods, or people, between states.²]
- ✓ ✗ I have identified one express right entrenched in the Australian Constitution.¹
- ✓ ✗ I have provided information about my chosen express right.²
- ✓ ✗ I have referred directly to the relevant section of the Constitution in my response.
- ✓ ✗ I have used signposting in my response, such as 'One express right'.

8. [The express protection of rights acts as a check on parliament in law-making by ensuring parliament does not breach its law-making powers through legislation that infringes on the five express rights afforded to all Australian citizens.¹] [Express rights are fully enforceable by the High Court, meaning if legislation is passed that infringes upon the rights explicitly stated in the Constitution, the High Court may deem it ultra vires once a case is brought by an individual with standing.²] [Additionally, express rights act as check on parliament in law-making by ensuring such rights can only be amended via a successful referendum, meaning parliament is prohibited from passing laws that change the wording of the express rights without a national vote.³]

✓ ✗ I have provided one way express rights act as a check on parliament in law-making.¹

✓ ✗ I have provided information about my chosen way.²

✓ ✗ I have provided a second way express rights act as a check on parliament in law-making.³

✓ ✗ I have used connecting words, such as 'Additionally'.

9. [No, this law would not be valid as it infringes upon the constitutional express right to not discriminate against someone based on their state of residence.¹] [According to s 117 of the Constitution, an individual of any state shall not be subject to any disability or discrimination from another state which they would not receive if they were a resident of this other state.²] [Therefore, the Interstate Employee Fee Act 2056 (Vic) breaches this express right as it discriminates against interstate employees, like Jorja, by mandating them to pay a fee to work in Victoria, a fee that is not applicable to Victorian citizens.³] [Although, Jorja may still need to pay the fee if she wishes to begin her employment before the High Court deems the legislation invalid, as the Act will remain in force until then.⁴]

✓ ✗ I have stated that the Interstate Employee Fee Act 2056 is invalid.¹

✓ ✗ I have provided information about the express right to no discrimination based on one's state of residence.²

✓ ✗ I have provided an example from the scenario and linked it to the express right to no discrimination based on one's state of residence.³

✓ ✗ I have provided information about declaring legislation invalid in the High Court and linked it to the scenario.⁴

✓ ✗ I have referred directly to the relevant section of the Constitution in my response.

✓ ✗ I have used connecting words, such as 'Therefore' and 'Although'.

Extended response

10. Strengths: II; V
Limitations: I; III; IV

11. [The express protection of rights can act as a check on parliament in law-making to a moderate extent, however, there are limitations on its ability to prevent and proactively limit legislation that infringes upon the express rights.¹]

[Firstly, express rights are enshrined in the Constitution and can only be modified or removed through a referendum, meaning they cannot be changed by parliament alone.²] [This acts as a check on parliamentary law-making as it ensures parliament cannot pass legislation that changes the wording of the Constitution without a national consensus, protecting the core rights of Australian citizens.³] [Moreover, express rights are fully enforceable by the High Court, meaning if legislation is passed that breaches an express right, an individual with standing can take the case to the High Court where the legislation may be deemed invalid, otherwise known as 'ultra vires'.⁴] [This is a check on parliament in law-making as it can limit the scope of law-making and ensure express rights are maintained without being infringed.⁵]

[However, relatively few rights are protected by and entrenched in the Constitution. This means there are no significant limits on parliamentary law-making with regard to legislating on the core rights of each citizen, and there are not many rights that are constitutionally protected.⁶] [Additionally, there is no mechanism preventing parliament from passing laws that are constitutionally invalid or breach the express rights in the first place. Therefore, laws can be established that infringe on express rights, and will be enforced until a case is brought before the High Court where the Act may be deemed invalid.⁷] [Finally, an individual with standing must bring a case to the High Court in order to challenge a law. Considering this requirement, in addition to the cost and time-consuming nature of initiating legal action, legislation breaching one of the express rights may continue to remain in force, preventing parliament's law-making powers from being checked.⁸]

[In conclusion, whilst the express protection of rights act as a check on parliament in law-making in some regards, there are notable limitations to this check due to the limited number of constitutionally protected rights and parliament's legislative powers.⁹]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way express rights act as a check on parliament in law-making.²

✓ ✗ I have provided information about my chosen way.³

✓ ✗ I have provided a second way express rights act as a check on parliament in law-making.⁴

✓ ✗ I have provided information about my chosen way.⁵

✓ ✗ I have provided one way express rights are limited in acting as a check on parliament in law-making.⁶

✓ ✗ I have provided a second way express rights are limited in acting as a check on parliament in law-making.⁷

✓ ✗ I have provided a third way express rights are limited in acting as a check on parliament in law-making.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 'Finally'.

✓ ✗ I have used connecting words, such as 'Moreover' and 'However'.

12. Strengths: I; II
Limitations: III; IV

13. [The Constitution can prevent the Commonwealth Parliament from making any laws infringing upon religious freedom to a certain degree. However, as demonstrated by the Mandatory Religion Classes Act 2075 (Cth), it does not completely prohibit parliament from passing laws about religion even if they infringe upon the express rights.¹]

[Firstly, the express right to the freedom of religion is fully enforceable by the High Court. This means if legislation is passed, such as the Mandatory Religion Classes Act 2075 (Cth), that breaches an express right, an individual with standing, like Jacey, can take a case to the High Court to try and get the legislation to be deemed invalid.²]

[However, there is no mechanism preventing parliament from passing laws that are constitutionally invalid or breach the express rights in the first place.³][Therefore, the Act has been passed, despite infringing on an express right, and will continue to operate until it is deemed invalid by the High Court.⁴]

[On the other hand, the High Court is independent of the executive and legislature. This means it can deem the Act ultra vires, even if the majority of parliament wishes to enforce it.⁵][Although, in order to challenge a law in the High Court and have it be declared invalid, a case needs to be brought forward by an individual with standing.⁶]

[Though Jacey can prove she has 'special interest' in the case, as she is directly impacted by the legislation as a high school student, there are significant cost and time factors associated with bringing a case to court. Therefore, as a high school student, she may not have the financial means and time to take a case to court and therefore, the legislation will remain in force preventing parliament's law-making powers from being checked.⁷]

[Hence, the Constitution can only limit the parliament from making laws about religion to a certain degree. Though parliament has the ability to pass legislation that may infringe upon an express right, if it is challenged in the High Court, the law can be deemed invalid.⁸]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one way the Constitution can restrict the Commonwealth Parliament's ability to make laws on religion.²

☒ ☐ I have provided one way the Constitution is limited in its ability to restrict the Commonwealth Parliament from making laws on religion.³

☒ ☐ I have provided an example from the scenario and linked it to my chosen way.⁴

☒ ☐ I have provided a second way the Constitution can restrict the Commonwealth Parliament's ability to make laws on religion.⁵

☒ ☐ I have provided a second way the Constitution is limited in its ability to restrict the Commonwealth Parliament from making laws on religion.⁶

☒ ☐ I have provided an example from the scenario and linked it to my chosen way.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'.

☒ ☐ I have used connecting words, such as 'On the other hand', 'Although', and 'Hence'.

Linking to previous learning

14. a. [No, Ceci is not correct and they are not entitled to trial by jury merely because it is an entrenched express rights.¹][The right to a trial by jury, as per s 80 of the Constitution, only applies to accused individuals charged with Commonwealth indictable offences. Therefore, as they were charged with murder under Victorian legislation, they are not guaranteed a right to a jury trial by the Australian Constitution.²][However, Ceci still has the right to a trial by jury as this is a right afforded to accused persons in Victoria according to the *Criminal Procedure Act 2009* (Vic). Hence, whilst Ceci's right to a jury trial is not protected by the Constitution in this case, they are still able to have a trial by jury under Victorian law.³]

☒ ☐ I have stated that Ceci is not correct and provided a brief explanation.¹

☒ ☐ I have provided information about the constitutional right to a trial by jury.²

☒ ☐ I have provided information about the right to a trial by jury for Victorian accused persons.³

☒ ☐ I have referred directly to the relevant section of the Constitution in my response.

☒ ☐ I have used connecting words, such as 'Therefore' and 'Hence'.

- b. [One role of the jury in Ceci's case is to remain objective.¹][This means that the jury must remain independent and unbiased toward both Ceci and the prosecution throughout the entire criminal proceedings and when determining the verdict. If a juror believes they are unable to remain objective, they will be excused during the jury empanelment process.²]

[A second role of the jury is to determine the verdict.³][Once all the evidence and facts of the case have been presented, the jury must determine whether Ceci is guilty or not guilty. As this is a criminal case, a guilty verdict must be determined beyond reasonable doubt and a unanimous verdict is required to convict Ceci of murder.⁴]

☒ ☐ I have provided one role of the jury.¹

☒ ☐ I have provided information about my chosen role.²

☒ ☐ I have provided a second role of the jury.³

☒ ☐ I have provided information about my chosen role.⁴

☒ ☐ 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 role' and 'A second role'.

8A Statutory interpretation

Check your understanding

1. B. False. **Explanation:** Judges can only interpret statutes that are relevant to the case before them. They cannot interpret statutes voluntarily whenever they wish.
2. C. **Explanation:** The values of society may be reflected in how judges interpret the law.
3. B; C. **Explanation:** Judges cannot change the wording of legislation. Their interpretation of statutes can be used by parliament to create new laws. Clarifying the meaning of words is a reason for statutory interpretation, not an effect.
4. Parliament makes laws **in futuro**, meaning laws are created that will apply to future events.
5. A. **Explanation:** *Deing v Tarola*, or the 'Studded belt case', served to clarify the specific meaning of the word 'weapon' in the relevant legislative provision.
6. B. False. **Explanation:** Parliament has no obligation to create legislation based on the decisions made by judges. However, it can codify judges' decisions if it believes it is appropriate to do so.

Preparing for exams

Standard exam-style

7. [One reason for statutory interpretation is to address the changing nature of words and their meaning.¹] [As society progresses, the meaning of words and how they are used reflects these changes. Judges may interpret the meaning of words in line with society's values.²] [For example, in the past, transgender people were not recognised to be included in Victorian marriage legislation as there was an assumption that the word 'man' meant someone born with male body features. If judges interpreted laws in this manner now, this would not reflect society's values.³]

✓ ✗ I have identified one reason for statutory interpretation.¹

✓ ✗ I have provided information about my chosen reason for statutory interpretation.²

✓ ✗ I have provided an example and linked it to my chosen reason for statutory interpretation.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

8. [One reason why the word 'human interference' may require interpretation here is that the use of ChatGPT, or technology in general, may have been an unforeseen circumstance for legislative drafters when conceiving the fraud legislation.¹] [Judges may be required to interpret the specific meaning of words to identify the scope of the statute and whether it extends to certain areas.²] [For example, Lily's use of ChatGPT may be considered a non-human interference on JT's life, however, their inputs and command of the program could also be considered to be a human interference.³]

✓ ✗ I have identified one reason why the phrase 'human interference' may require statutory interpretation.¹

✓ ✗ I have provided information about my chosen reason for statutory interpretation.²

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen reason for statutory interpretation.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

9. [One effect of statutory interpretation is that it can broaden the meaning of legislation.¹] [This allows judges to expand the scope of the law, and may result in a precedent being applied to more cases.²] [Another effect of statutory interpretation is that it can be used to inform parliament's law-making.³] [Parliament may amend legislation in response to statutory interpretation, whether that be confirming or rejecting the judge's interpretation of legislation.⁴]

✓ ✗ I have provided one effect of statutory interpretation.¹

✓ ✗ I have provided information about my chosen effect.²

✓ ✗ I have provided a second effect of statutory interpretation.³

✓ ✗ I have provided information about my chosen effect.⁴

✓ ✗ I have used signposting in my response, such as 'One effect' and 'Another effect'.

10. [One reason for statutory interpretation is to clarify the meaning of words that could be ambiguous.¹] [Judges may be required to interpret the specific meaning of words and identify the scope of the statute and whether it extends to certain areas.²] [The court in Finn's case would have to decide whether nail clippers constitute a weapon by interpreting the meaning of the term 'weapon'.³]

[One effect of statutory interpretation is that it creates a precedent and binds lower courts in the same hierarchy to that interpretation.⁴] [This allows for consistency as cases with similar facts are treated the same before the law.⁵] [In Finn's case, the court's decision as to whether nail clippers constitute a 'weapon' may establish a precedent that will bind lower courts in the same hierarchy where material facts are similar.⁶]

✓ ✗ I have identified one reason for statutory interpretation.¹

✓ ✗ I have provided information about my chosen reason for statutory interpretation.²

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen reason for statutory interpretation.³

✓ ✗ I have identified one effect of statutory interpretation.⁴

✓ ✗ I have provided information about my chosen effect of statutory interpretation.⁵

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen effect of statutory interpretation.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One reason' and 'One effect'.

Extended response

11. Strengths: II; IV
Limitations: I; III
12. [Statutory interpretation is an effective way to make law, as it creates a precedent and can prompt parliament to enact legislative change. However, there are limitations to the ability of statutory interpretation to make laws.¹]

[One way statutory interpretation is an effective way to make law is through the ability of judges to fill in the gaps of legislation and tailor it to the current societal standards.²] [For example, in the *Mabo Case*, the judges changed the law in order to reflect views of society; that Aboriginal and Torres Strait Islander peoples' history in Australia prior to colonisation should be recognised through land ownership rights.³] [Another way statutory interpretation is an effective way to make law is that judges can apply laws to unforeseen circumstances and broaden or narrow the meaning of legislation accordingly.⁴]

[A third way that statutory interpretation is an effective way to make law is that parliament may consider court decisions when amending legislation. This can lead to judge-made law becoming part of legislation.⁵]

[However, one limitation of statutory interpretation in law-making is that parliament has no obligation to use court decisions to inform law-making.⁶] [Whilst the Commonwealth Parliament passed the *Native Title Act 1993* (Cth) in response to the High Court decision in the *Mabo case*, it had no obligation to do so.⁷] [Furthermore, judges are not elected by the people and thus, do not represent the people when interpreting statutes.⁸]

[Statutory interpretation plays an important role in creating precedent and common law, however, its role in contributing to the creation of legislation is largely limited as parliament has no obligation to include judge-made law in statutes.⁹]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way statutory interpretation is an effective way to make law.²

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen way.³

✓ ✗ I have provided a second way statutory interpretation is an effective way to make law.⁴

✓ ✗ I have provided a third way statutory interpretation is an effective way to make law.⁵

✓ ✗ I have provided one limitation of statutory interpretation in law-making.⁶

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen limitation.⁷

✓ ✗ I have provided a second limitation of statutory interpretation in law-making.⁸

✓ ✗ I have provided a conclusion to my response that links back to the question.⁹

✓ ✗ I have referred directly to relevant legislation in my response.

✓ ✗ 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 'Furthermore'.

Linking to previous learning

13. [The judge is the umpire of a courtroom who oversees all personnel and evidence, whilst upholding rules and procedure.¹] [Judges can interpret the relevant statutes in order to decide the case before them.²] [However, judges cannot interpret statutes of their own volition, a person with standing must bring a case before them in order for statutes to be interpreted.³]

✓ ✗ I have provided information about the role of a judge.¹

✓ ✗ I have provided one aspect of the role of the judge with regard to statutory interpretation.²

✓ ✗ I have provided information about my chosen.³

✓ ✗ I have used connecting words, such as 'However'.

8B The doctrine of precedent

Check your understanding

- 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 before them with similar material facts.
- A. True. **Explanation:** The ratio decidendi forms the binding part of the judgment, whereas obiter dictum refers to the comments that form the persuasive part of the judgment.
- Binding precedent: I; III
Persuasive precedent: II; IV
- A. **Explanation:** Superior courts may avoid following precedent by reversing it in the same case on appeal, or overruling it in a later case with the same or similar facts.
- B. **Explanation:** Precedent is only binding where the material facts of the case are similar to the case in which the precedent was set. When judges can show there are differences in the facts of the case, they can avoid using precedent.
- C. **Explanation:** Even if judges in the lower courts disapprove of a precedent, they are still bound to follow previous decisions from courts higher in the hierarchy.
- B. False. **Explanation:** Courts can avoid following precedents if they are higher in the court hierarchy than the court that originally established the precedent. Additionally, courts can avoid following precedent by distinguishing a precedent, or setting new precedents by reversing or overruling the existing precedent.

Preparing for exams

Standard exam-style

8. [The Magistrates' Court of Victoria may not be bound by a decision of the County Court of Victoria by distinguishing a precedent. This is when a lower court avoids applying a precedent by showing the case which established precedent in the higher court has sufficiently different material facts to the case now being considered by the lower court.¹] [Therefore, if the Magistrates' Court shows the material facts of a case it is deciding upon are sufficiently different from the case in which the precedent was set in the County Court, it will not be bound to follow the decision.²]

☒ ☐ I have provided one reason why the Magistrates' Court of Victoria may not be bound by a County Court decision.¹

☒ ☐ I have provided information about my chosen reason.²

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

9. [Binding precedent is the legal reasoning of a higher court that must be followed by all lower courts in the same court hierarchy where the material facts are similar.¹] [Alternatively, persuasive precedent is legal reasoning that can act as a guide for judges even though they are not bound to follow it.²] [One key difference between binding precedent and persuasive precedent is that persuasive precedent includes decisions made in different countries or court hierarchies, such as UK or NSW decisions, whereas binding precedent only includes court decisions made in the same court hierarchy.³]

☒ ☐ I have provided information about binding precedent.¹

☒ ☐ I have provided information about persuasive precedent.²

☒ ☐ I have provided a key difference between binding precedent and persuasive precedent.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. [One reason why the court may not be able to stray from precedent in this case is due to its binding nature.¹] [Since Priya's case is being heard in the County Court and the previous case was heard in the Court of Appeal, the judge will be bound by the previous decision as the Court of Appeal is more superior than the County Court.²] [Unless the court can distinguish the facts from the case which created the binding precedent to the material facts of the case, it is likely that the unfavourable precedent will apply to Priya's case.³]

☒ ☐ I have identified one reason why the court may not be able to change the law.¹

☒ ☐ I have provided information about my chosen reason.²

☒ ☐ I have provided an example from the scenario and linked it to precedent.³

☒ ☐ I have used signposting in my response, such as 'One reason'.

11. [The first error in the scenario is that the decision was overruled on appeal in the Supreme Court of Appeal.¹] [Overruling a precedent is when a superior court changes a previous decision made by a lower court in a later and different case. If it is the same case being heard on appeal, then changing the decision is referred to as reversing a precedent.²]

[The second error is that the Victorian Supreme Court – Court of Appeal is bound by a decision made by the House of Lords, a court in England.³] [Precedents from different jurisdictions, such as overseas or interstate, are not binding on the Victorian Supreme Court of Appeal, but may be persuasive.⁴]

[The third error in the scenario is that the Supreme Court – Trial Division follows every part of the Supreme Court of Appeal's decision.⁵] [Throughout a court judgment there is ratio decidendi, which is the reason for the final decision, and obiter dictum, which are comments made by the way which are merely persuasive for judges deciding upon future cases. The ratio decidendi is the only binding part of the decision and must be followed, unlike obiter dictum, which are statements that can be disregarded by future judges.⁶]

☒ ☐ I have identified the first error in the scenario.¹

☒ ☐ I have provided information about the correct procedure for the first error in the scenario.²

☒ ☐ I have identified the second error in the scenario.³

☒ ☐ I have provided information about the correct procedure for the second error in the scenario.⁴

☒ ☐ I have identified the third error in the scenario.⁵

☒ ☐ I have provided information about the correct procedure for the third error in the scenario.⁶

☒ ☐ I have used paragraphs to organise my response.

☒ ☐ I have used signposting, such as 'The first error' and 'The second error'.

Extended response

12. A; C; D

13. [I agree with this statement to a limited extent as although judges may be bound by existing precedent, there are avenues they can take to avoid following these established legal principles.¹]

[Judges are bound by previous decisions, where there were similar material facts to the facts of the current case the lower court is presiding over, that are made in superior courts in the same hierarchy.²] [Thus, magistrates are always bound to follow existing precedent set by other, higher courts in the Victorian court hierarchy when these decisions relate to similar facts to the case the Magistrates' Court is hearing.³]

[However, one way courts may not be bound by precedent is by distinguishing a precedent. This occurs when the judge can establish that the material facts of the case before them are different to the facts of the case in which the precedent was set.⁴] [A second way courts can avoid using precedent is if a superior court overrules a precedent made by a lower court.⁵] [When overruling a precedent, a court hearing a case with similar material facts, at a later date and in a different case, will invalidate the original precedent and establish a new precedent that will be binding on all future cases.⁶]

[Therefore, judges are not always bound by precedent and may be able to utilise various pathways to avoid following previous decisions they disagree with.⁷]

- ✓ ✗ 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 judges are bound by precedent.²
- ✓ ✗ I have provided information about my chosen way.³
- ✓ ✗ I have provided one way judges can avoid using precedent.⁴
- ✓ ✗ I have provided a second way judges can avoid using precedent.⁵
- ✓ ✗ I have provided information about my chosen way.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' and 'A second way'.
- ✓ ✗ I have used connecting words, such as 'Thus' and 'However'.

Linking to previous learning

14. [One reason why the Supreme Court – Trial Division is bound by decisions made in the Court of Appeal is because of the hierarchical arrangement of the courts.¹][The Court of Appeal is above the Trial Division in the court hierarchy, meaning the Trial Division is bound by decisions made in the Court of Appeal.²]
- ✓ ✗ I have provided one reason why the Victorian Supreme Court – Court of Appeal is not bound by the decisions of the Victorian Supreme Court – Trial Division.¹
 - ✓ ✗ I have provided information about my chosen reason.²
 - ✓ ✗ I have used signposting in my response, such as 'One reason'.

8C Courts' ability to make law – judicial conservatism and activism

Check your understanding

- A. True. **Explanation:** Whilst the courts play an important role in law-making, they must wait for a case to come before them where there is no existing law, or the law is unclear in its application to the case.
- Strengths: III; IV
Limitations: I; II
- A. True. **Explanation:** Conservative judges may be reluctant to change the law as they feel it is the role of parliament to develop the law, as it is composed of elected representatives.

- Judicial **activism** involves judges taking into account social and political factors to interpret the law broadly and in turn, create new legal principles. Alternatively, judicial **conservatism** involves judges interpreting the law narrowly to avoid making controversial changes to the law.
- A. **Explanation:** Whilst judicial activism allows for courts, particularly the High Court which is not bound by precedent, to make controversial changes in the law, an individual must bring the relevant case to court first. The courts cannot make law whenever they wish.
- A; B. **Explanation:** Conservative judges are often hesitant to make substantial changes to the law and may narrowly interpret the legal principles, or avoid making changes altogether, therefore restricting the ability of the courts to make law.
- B. False. **Explanation:** Though parliament is composed of elected and representative individuals, the courts still play an important role in law-making by interpreting legislation or case law and applying principles to matters before them.

Preparing for exams

Standard exam-style

8. [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][Therefore, if a particular law is unclear, or there is no law applicable to the legal matter that needs to be resolved, a court may be required to develop precedent.²][Consequently, this may result in new common law being established that must be followed by lower courts within the same hierarchy in future cases of a similar nature, demonstrating how the doctrine of precedent influences the courts to make law.³]
- ✓ ✗ I have defined the term 'doctrine of precedent'.¹
 - ✓ ✗ I have provided information about the doctrine of precedent.²
 - ✓ ✗ I have provided information about how the doctrine of precedent influences the courts' ability to make law.³
 - ✓ ✗ I have used connecting words, such as 'Therefore' and 'Consequently'.
9. [Judicial conservatism is a judicial approach where a judge is reluctant to develop new law as they feel it is the role of parliament, as the elected representative body, to do so.¹][On the other hand, judicial activism is a judicial approach where a judge takes into account numerous social and political factors when interpreting the law and deciding cases.²][One key difference between the two approaches taken by the courts is that judicial activism may result in substantial and controversial changes in the law, whereas judicial conservatism will not result in controversial changes to the law as judges adopting this approach will leave law-making to parliament.³]
- ✓ ✗ I have provided information about judicial conservatism.¹
 - ✓ ✗ I have provided information about judicial activism.²
 - ✓ ✗ I have provided one key difference between judicial conservatism and judicial activism.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.

10. [One reason why the court may not change the law in Nick's case is the judge may decide to take a judicially conservative approach.¹] [If the judge is reluctant to develop new law, as they feel it is the role of parliament as the elected representative body to do so, it may result in the application of outdated precedents rather than the establishment of new ones, irrespective of progressing community values.²] [Therefore, if the judge takes a conservative approach in Nick's case, they may apply the old-standing principle that Nick's lawyer advised him of, rather than changing this existing law.³]

✓ ✗ I have provided one reason why the court may not change the law in Nick's case.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.³

✓ ✗ I have used signposting in my response, such as 'One reason'.

✓ ✗ I have used connecting words, such as 'Therefore'.

Extended response

11. Strengths: II; IV
Limitations: I; III

12. [I agree with this statement to a moderate extent as, whilst judges are free from political influence, there are limitations to their ability to make law.¹]

[Firstly, as judges are not elected by the people, they are free from political influence. This means they can make controversial changes to the law without worrying about being re-elected.²] [Another reason why judges are effective law-makers is that the doctrine of precedent enables courts to fill in the gaps of legislation when interpreting statutes to apply it to the case before them. When doing so, judges can consider a range of issues that have not been contemplated by parliament.³]

[However, one limitation of the ability of judges to make effective law is that judges are not elected by the people. This means that they may create laws that do not reflect the views and values of the majority of society, resulting in laws being ineffective.⁴] [Another limitation is that judges must wait for an individual with standing to bring a case to court, or for a person to be accused of a crime, before they can make new law. Unlike parliament, courts cannot develop laws whenever they wish.⁵]

[Overall, the courts are effective law-makers as they are free from political influence and can fill in the gaps of legislation. However, this is subject to limitations as judges must wait for a case to be brought before them and may make changes in the law that do not reflect society's values.⁶]

✓ ✗ I have provided an introduction to state the extent to which I agree or disagree with the statement, and a brief reason why.¹

✓ ✗ I have provided one reason why judges are effective law-makers.²

✓ ✗ I have provided a second reason why judges are effective law-makers.³

✓ ✗ I have provided one reason why judges are limited in their law-making ability.⁴

✓ ✗ I have provided a second reason why judges are limited in their law-making ability.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 'Another reason'.

✓ ✗ I have used connecting words, such as 'However' and 'Overall'.

13. A; D

14. [Judicial activism can be a strength of the law-making process as it enables judges to consider a wide range of sociopolitical factors in their interpretation of the law and the creation of new legal principles.¹]

[One reason why judicial activism is a strength of the law-making process is that judges who take an activist approach feel their role extends beyond merely applying legal principles to the case before them.²] [These judges are willing to undertake a secondary role in developing the common law, which can be beneficial when these progressive changes align with progressive changes in society.³]

[In the *Mabo Case*, the High Court acknowledged the land rights of First Nations peoples, overturning the long-standing common law notion that Australia was 'terra nullius'. The judges in this case undertook a secondary role in developing the law in relation to the land rights of Aboriginal and Torres Strait Islander people.⁴]

[Another reason why judicial activism is a strength of the law-making process is that, unlike parliament, judges are not elected by the people and can, therefore, make controversial changes in the law without needing to consider the impact such decisions have on their prospects of re-election.⁵] [The High Court ruling abolishing the notion that Australia was 'terra nullius' prior to British colonisation was highly controversial.⁶] [However, as judges are free from political influence, the court could recognise native title without concern for whether it aligned with the views and values of the majority of society at the time.⁷]

[Therefore, the *Mabo* judgment revealed the strength of judicial activism in allowing judges to make controversial, yet significant, changes in the law.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one reason why judicial activism is a strength of the law-making process.²

✓ ✗ I have provided information about my chosen reason.³

✓ ✗ I have provided examples from the case study and linked them to my chosen reason.⁴

✓ ✗ I have provided a second reason why judicial activism is a strength of the law-making process.⁵

✓ ✗ I have provided examples from the case study and linked them to my chosen reason.⁶

- ☒ ☐ I have provided information about 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 'One reason' and 'Another reason'.
- ☒ ☐ I have used connecting words, such as 'However'.

Linking to previous learning

15. [Judicial conservatism is a judicial approach where a judge is reluctant to develop new law as they feel it is the role of parliament, as the elected representative body, to do so.¹] [This upholds the principle of representative government because it ensures that judges do not make significant changes in the law, as this is parliament's primary responsibility considering it the elected representative body of society and can legislate according to the views and values of the majority.²]
- ☒ ☐ I have defined judicial conservatism.¹
- ☒ ☐ I have provided information about how judicial conservatism upholds the principle of representative government.²

8D Courts' ability to make law – costs, time, and the requirement for standing

Check your understanding

1. B. **Explanation:** Judges need to wait for a case to come before them before they can develop the law. Therefore, if parties are reluctant to pursue a legal matter through the courts due to the associated costs and delays, the courts will be unable to develop the law.
2. B. False. **Explanation:** Victoria Legal Aid is available to a limited degree for financially disadvantaged parties, especially for civil matters. Therefore, many people who are experiencing financial difficulties but are still not eligible for assistance may not be able to bring their cases to court, preventing new laws from being created by the courts.
3. B; C. **Explanation:** Whilst Victoria Legal Aid is available in some circumstances, not all parties are eligible and may, consequently, be restricted from initiating a civil claim. As judges must wait for cases to come before them to develop the law, this restricts the courts' ability to make law.
4. A potential party to a legal dispute may be **deterred** by court delays, such as delays caused by lengthy trial procedures. As a result, they may choose to not initiate proceedings in the court.
5. A; C; E. **Explanation:** In order to establish standing, a party must be affected by, or have a special interest in, the issues involved in the case. It is not enough for a party to show that they merely have a general interest in the case, or want to prove a legal point.
6. Strengths: I
Limitations: II; III

7. B. False. **Explanation:** The doctrine of precedent, judicial conservatism, and judicial activism are also factors that affect the ability of the courts to make law.

Preparing for exams

Standard exam-style

8. [One way the costs and time associated with bringing a case to court may restrict the ability of the courts to make law is that the high cost of legal representation, alongside extensive court delays, may deter a potential plaintiff from initiating a civil claim.¹]
[As complex cases are time-consuming and require legal expertise and representation, a party's lack of financial resources and time results in fewer opportunities for judges to develop common law or declare invalid statute law 'ultra vires', restricting law-making by the courts.²]
- ☒ ☐ I have provided one way the costs and time in bringing a case to court may restrict the ability of the courts to make law.¹
- ☒ ☐ I have provided information about my chosen way.²
- ☒ ☐ I have used signposting in my response, such as 'One way'.
9. [Standing is 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.¹] [The requirement for standing is important in the development of the law by the courts as it reduces the number of frivolous claims being made in court by individuals who merely have a general interest in the matters involved in a case.²]
[In turn, this reduces delays in the court system and allows more opportunities for genuine cases to be pursued through the courts, where there is potential for new legal principles to be established or for laws to be declared invalid.³]
- ☒ ☐ I have defined the term 'standing'.¹
- ☒ ☐ I have provided information about the importance of the requirement for standing in the courts' ability to make law.²
- ☒ ☐ I have provided further information about the importance of the requirement for standing in the courts' ability to make law.³
- ☒ ☐ I have used connecting words, such as 'In turn'.
10. [Standing is 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.¹] [The requirement for standing prevents individuals who have a general interest in a case, and those who want to prove a point, from bringing their case to court.²] [Kirby is likely to meet the standing requirement as her private rights have been directly affected by the matters involved in this case.³] [This is because the boundary fence built by Kirby's neighbour is blocking sunlight into Kirby's garden, demonstrating her private rights are being infringed.⁴]
- ☒ ☐ I have defined the term 'standing'.¹
- ☒ ☐ I have provided information about the requirement for standing.²

✓ ✗ I have provided one reason why Kirby will likely meet the standing requirement.³

✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.⁴

11. [One reason why the court may not be able to change the law in this case is due to the costs involved in bringing a case to court.¹] [The costs involved in bringing a case to court are significant and Ahmet may not be able to afford to pursue his case as he is currently unemployed.²] [For example, Ahmet may not be able to afford legal representation or court filing fees, therefore he may be unable to bring his case to court.³] [As a result, the court would not be able to declare the Religion Prohibition Act 2056 (Cth) invalid as judges require a case to come before them before they can develop the law and potentially declare a piece of legislation invalid.⁴]

✓ ✗ I have provided one reason why the court may not be able to change the law in Ahmet's case.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen reason.³

✓ ✗ I have provided information about how the court may be unable to change the law in Ahmet's case.⁴

✓ ✗ I have used signposting in my response, such as 'One reason'.

✓ ✗ I have used connecting words, such as 'As a result'.

Extended response

12. Strengths: III; IV
Limitations: I; II

13. [The courts are able to overcome the limitations of costs and time in making laws to a moderate extent. Whilst high costs and extensive court delays may deter individuals from bringing their cases to court, there are processes and procedures in place to assist parties in overcoming these barriers.¹]

[Firstly, the reluctance of parties, such as Alex, to pursue a matter through the courts due to the costs and time involved results in less opportunity for judges to develop common law.²] [If Alex were to pursue a case against Betty's Beans, there would be significant legal costs, such as the cost of legal representation, and it would be a time-consuming process. Therefore, if the case is not brought forward to the High Court, the precedent will remain and be left unchallenged even if it is outdated and ineffective.³] [Another limitation created by the costs and time associated with bringing a case to court is that the eligibility criteria for Victoria Legal Aid (VLA) is strict for civil cases, as it is generally limited to criminal matters and is not an exhaustive resource for civil disputes.⁴] [Alex, who is a university student, may not have the financial means to pursue a legal case, but may also be ineligible for VLA assistance due to its strict criteria. Thus, if he is unable to bring his case to the courts due to a lack of legal support and representation, the ability of the courts to develop the law in this area is also hindered.⁵]

[However, one way the courts can overcome these limitations related to costs and time is through the judge's directions. Judges often give directions to parties, such as limiting the number of witnesses or topics that witnesses may be questioned on, to reduce the costs and

time associated with a trial.⁶] [As a result, the total time of Alex's court proceedings may be lessened and the costs of the proceedings may be reduced. Therefore, Alex may be encouraged to pursue his case if he is aware it will not be a significant financial or time burden, allowing the High Court to develop law in this case.⁷] [Another way the courts are able to overcome the limitations of time is the existence of the Victorian court hierarchy, which enables administrative convenience. This separates disputes across the hierarchy and minimises delays.⁸] [Therefore, Alex's case would be heard by a suitable court and delays across the courts could be minimised as different courts are allocated cases according to their capacity and jurisdiction.⁹]

[Overall, whilst there are some systems in place to reduce the costs and time associated with bringing a case to court, such as judges giving directions and the existence of the Victorian court hierarchy, the high financial expenses and court delays limit the number of cases brought forward by individuals, restricting the ability of the courts to make law.¹⁰]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the costs and time in bringing a case to court restrict law-making by the courts.²

✓ ✗ I have provided an example from the scenario and linked it to my chosen way.³

✓ ✗ I have provided a second way the costs and time in bringing a case to court restrict law-making by the courts.⁴

✓ ✗ I have provided an example from the scenario and linked it to my chosen way.⁵

✓ ✗ I have provided one way the courts are able to overcome the limitations of costs and time in law-making.⁶

✓ ✗ I have provided an example from the scenario and linked it to my chosen way.⁷

✓ ✗ I have provided a second way the courts are able to overcome the limitations of costs and time in law-making.⁸

✓ ✗ I have provided an example from the scenario and linked it to my chosen way.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 'Another limitation'.

✓ ✗ I have used connecting words, such as 'Therefore' and 'However'.

Linking to previous learning

14. Strengths: I; II
Limitations: III; IV; V

15. [The Victorian courts play an important role in law-making by creating precedent and judges having an approach of judicial activism. However, there are factors that restrict the ability of the courts to make law, such as the requirement for standing and the costs and time in bringing a case to court.¹]

[One strength of the role of the Victorian courts in law-making is their ability to set precedents. This involves a court establishing legal principles in circumstances where no statute or common law exists, or it is not clear how the law should be applied to the case before them, thereby developing law.²] [However, judges can only make law ex post facto, meaning they make laws retrospectively only after a case is brought before them and cannot be proactive in reforming the law.³] [Another limitation of the role of the Victorian courts in law-making is the requirement for standing. This means judges must wait for an individual who is affected by, or has a special interest in, the issues involved in the case to bring it to the courts before they can establish a new law.⁴]

[Additionally, judicial activism can promote law-making in the courts and ensure laws remain reflective of current social views and values. Judges who take a judicial activist approach consider a range of social and political factors to interpret the law broadly and, in turn, create new legal principles that more accurately reflect the current sociopolitical climate.⁵] [On the other hand, judicial conservatism restricts the Victorian courts from engaging in their role in law-making as judges who adopt this approach are reluctant to develop new laws as they feel it is the role of parliament, as the elected representative body, to do so, limiting the development of the law through the courts⁶]

[Overall, the Victorian courts play an important role in law-making through establishing precedent and engaging in judicial activism. However, there are some limitations as judges may take a conservative approach to law-making and individuals without standing are restricted from bringing their case to court, providing fewer opportunities for the courts to develop the law.⁷]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one strength of the role of the Victorian courts in law-making.²

☒ ☐ I have provided one limitation of the role of the Victorian courts in law-making.³

☒ ☐ I have provided a second limitation of the role of the Victorian courts in law-making.⁴

☒ ☐ I have provided a second strength of the role of the Victorian courts in law-making.⁵

☒ ☐ I have provided a third limitation of the role of the Victorian courts in law-making.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 strength' and 'Another limitation'.

☒ ☐ I have used connecting words, such as 'However' and 'Additionally'.

8E The relationship between courts and parliament in law-making

Check your understanding

- B. False. **Explanation:** As parliament is responsible for establishing most of the courts, and the courts are responsible for applying the legislation created by parliament, they have a close relationship in law-making.
- C. **Explanation:** Obiter dictum refers to the judge's comments made in passing to provide context to a legal decision. These comments may be influential on other judges or parliament's future law-making.
- A. True. **Explanation:** Whilst parliament holds a high level of law-making supremacy in most other regards, where the Australian Constitution specifically prevents parliament from law-making in a certain area, the parliament does not have supremacy. Additionally, parliament cannot abrogate decisions made by the High Court on constitutional matters.
- True: III; IV
False: I; II
- B. False. **Explanation:** Whilst parliament may be influenced by statements on law made in obiter dictum by judges in court, it is under no obligation to take on these comments and incorporate them into law-making.

Preparing for exams

Standard exam-style

- [One feature of the relationship between the courts and parliament in law-making is the supremacy of parliament.¹] [This is 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. Therefore, parliament establishes most of the courts, manages their respective jurisdictions, and therefore controls their ability to create common law.²]

☒ ☐ I have provided one feature of the relationship between the courts and parliament in law-making.¹

☒ ☐ I have provided information about my chosen feature.²

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

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

- [One way in which the courts may be able to influence parliament in law-making is through comments made in obiter dictum.¹] [When handing down their judgment, obiter dictum comments, consisting of an opinion of the law or principle applied to the case, may be made by the judge or magistrate presiding over the case to inform the parliament of certain issues that may exist with the current law. These comments have proven to be influential on parliament's law-making and may spur it to codify or abrogate a common law principle.²]

☒ ☐ I have provided one way in which the courts may be able to influence parliament in law-making.¹

☒ ☐ I have provided information about my chosen way.²

☒ ☐ I have used signposting in my response, such as 'One way'.

8. [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] [One key difference between codification and abrogation of common law is that whilst codification demonstrates a positive affirmation of the principles established in court, abrogation is a negative response to a common law principle that ultimately abolishes the court-made principle.³]

☒ ☐ I have defined the term 'codification of common law'.¹

☒ ☐ I have defined the term 'abrogation of common law'.²

☒ ☐ I have provided one key difference between codification and abrogation of common law.³

☒ ☐ I have used signposting in my response, such as 'One key difference'.

☒ ☐ I have used comparison words, such as 'Alternatively', when distinguishing.

9. [This statement is incorrect, as parliament is the supreme law-making body.¹] [Parliament has the authority to create laws within its constitutional power as it has been provided this power by the Australian Constitution. One of these areas over which the parliament has power is the judiciary, meaning parliament is responsible for establishing most of the Australian courts and their jurisdictions, including the Supreme Court of Victoria.²] [Additionally, the Supreme Court is lesser than parliament in law-making, as parliament is able to abrogate, and effectively overrule, any legal principle established by the Supreme Court.³]

☒ ☐ I have stated that the statement is incorrect and provided a reason for my answer.¹

☒ ☐ I have provided one reason why the statement is incorrect.²

☒ ☐ I have provided a second reason why the statement is incorrect.³

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

10. [The parliament has two main options in relation to the court-established 'holo-limits' principle. It may choose to either codify or abrogate the common law principle.¹] [If parliament decides to codify the 'holo-limits' principle, it will formalise and affirm the court-made law into statute, thus demonstrating its approval and satisfaction of the judgment against PG Inc.²] [However, it may also decide to abrogate the 'holo-limits' principle, which demonstrates disagreement with the handling of Ms Ashton's case in the court. By abrogating the principle, parliament would establish a statute that would directly overrule the common law and invalidate the 'holo-limits' precedent.³]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have provided one way the principle of 'holo-limits' could be decided by parliament.²

☒ ☐ I have provided a second way the principle of 'holo-limits' could be decided by parliament.³

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

Extended response

11. True: I; II; IV
False: III

12. [Parliament and the courts, such as the Supreme Court, have a strong relationship in law-making as they rely on each other to ensure laws are effective for society and remain relevant.¹]

[One feature of the relationship between parliament and the courts in relation to assault using electric scooters 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 in relation to the matter of assault using electric scooters and chose to abrogate the principle. This means it passed legislation that directly overruled the common law, potentially because it viewed the application of the law relating to electric scooters to be inappropriate and incongruent with parliament's intention for the Act.³]

[Another feature of the relationship between parliament and the courts is parliamentary supremacy, which is 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 government branches, such as the executive and the judiciary.⁴] [In this case, parliament was able to overrule the decision of the Supreme Court as it is the superior law-making body. As the body that establishes the Supreme Court in the first place, parliament is permitted to manage the court's decisions in law-making to an extent, through codification and abrogation.⁵]

[Courts can also exercise a certain level of influence on parliament in law-making through comments made in obiter dictum. These comments are made in passing to provide context to a legal decision and often include an opinion on the current state of the law that applied to the case.⁶] [In relation to the established principle in relation to assault using electric scooters, parliament has taken note of the judge's obiter dictum and acted accordingly in law-making. These comments can be particularly influential as they are a direct review to parliament of how the law is being applied and considered within society. Consequently, as parliament strives to create and maintain effective laws, it can often be influenced to take action in law-making by the courts.⁷]

☒ ☐ I have provided an introduction to my response.¹

☒ ☐ I have identified one feature of the relationship between parliament and the courts.²

☒ ☐ I have provided an example from the scenario and linked it to the relationship between parliament and the courts.³

☒ ☐ I have identified a second feature of the relationship between parliament and the courts.⁴

- ✓ ✗ I have provided an example from the scenario and linked it to the relationship between parliament and the courts.⁵
- ✓ ✗ I have identified a third feature of the relationship between parliament and the courts.⁶
- ✓ ✗ I have provided an example from the scenario and linked it to the relationship between parliament and the courts.⁷
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'One feature' and 'Another feature'.
- ✓ ✗ I have used connecting words, such as 'Consequently'.

Linking to previous learning

13. [No, this statement is not correct. Whilst statutory interpretation and the doctrine of precedent are valid means by which courts can influence law-making, they are not the only ways they can do so.¹ Under the doctrine of precedent, courts are permitted to create common law. Common law applies to the court hierarchy internally and is usually created when courts apply the statutes relevant to the case before it in the process of statutory interpretation. Therefore, by physically making law, the courts are able to influence law-making.² However, beyond precedent and statutory interpretation, the courts contribute to law-making by influencing parliament to amend or create legislation via obiter dictum.³ Obiter dictum refers to statements accompanying a judgment that can include opinions and reservations on the law applied to a specific case. Within these comments, judges may flag potential changes to the law they wish to see. Parliament can then choose whether to adopt these recommendations into their law-making by reforming the law.⁴ Additionally, the courts can unintentionally influence parliament and law-making through the outcome of a case. If a court hands down a particular decision that highlights an issue with the current law, public unrest and community feedback may then spur law-making and reform by the parliament.⁵

- ✓ ✗ I have stated that the statement is incorrect and provided a brief reason for my answer.¹
- ✓ ✗ I have provided one reason why the statement is correct.²
- ✓ ✗ I have provided a topic sentence to introduce the main idea of my second paragraph.³
- ✓ ✗ I have provided one reason why the statement is incorrect.⁴
- ✓ ✗ I have provided a second reason why the statement is incorrect.⁵
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used connecting words, such as 'However' and 'Additionally'.

14. Enhances: I; II; IV; V; VIII
Limits: III; VI; VII

15. [I agree with this statement to a moderate extent. Whilst parliament is the supreme law-making body, the courts are able to influence law-making through both their relationship with parliament and by establishing precedent when resolving cases before them. Therefore, the courts' ability to make laws should not be overlooked.¹

[One reason parliament is effective in law-making is due to its supremacy and structure, as established by the Constitution. Parliament has the freedom to make, amend, or abolish laws, subject to limitations outlined in the Australian Constitution. It is supreme over the other branches of government, the executive and judiciary, which renders it very effective in law-making.²] The bicameral structure of both the Commonwealth Parliament and the Victorian Parliament guarantees that all legislation is scrutinised by two Houses of Parliament at both the federal level and in Victoria. This scrutiny acts as a check on all proposed legislation.³] This assists in parliament's law-making because if parliament consisted of only one house in which the government of the day had a majority, the government in power could influence changes in legislation that align solely with its political agenda rather than enacting statute that reflects the views and values of all constituents. The requirement for legislation to pass through a second house of parliament can prevent this from happening.⁴] However, in a situation where the government of the day holds a majority in both houses, the upper house may 'rubber stamp' bills, whereby it passes legislation with little scrutiny. In these circumstances, a bill may undergo little to no consideration, therefore limiting the effectiveness of law-making by parliament.⁵

[Another reason parliament is effective in law-making is due to the fact that international pressures can act as a check on parliament in law-making.⁶] International pressures are the influence that other countries and international organisations exert on parliaments to ensure the laws created comply with international standards. Australia is a member of the United Nations and is a signatory to many international treaties, which influences law-making by parliament.⁷ For example, the Commonwealth Parliament may be more inclined to introduce or modify legislation to ensure it upholds human rights since if Australia is found to be in breach of human rights treaties it is a signatory to, parliament will likely face criticism from other countries.⁸

[Courts can also be effective in law-making, but their effectiveness is limited by some factors.⁹] One reason courts are effective law-makers is because they create law through making decisions that then become precedents for other, lower courts in the same hierarchy to follow. Judges can create new legal principles or interpret existing legislation. This allows judges to create and apply legal principles that specifically address the matters in the case by considering issues that have not been accounted for by legislation.¹⁰] However, there are limitations to the courts' ability to make law. The costs and time associated with bringing a case to court and the requirement for standing all act as barriers for the courts in law-making.¹¹] For example, the reluctance of parties to pursue a matter through the courts due to the costs and time required for a case to be resolved may result in some cases not being heard in court, limiting the opportunity for judges to develop common law. Consequently, this may result in outdated and ineffective precedents remaining binding as they are not challenged for long durations.¹²] Additionally, the requirement for standing limits the ability of individuals with a general interest in an issue to change the law as they are unable to pursue the matter through the courts if they have not been directly affected by the matter or do not have a special interest in the case. This slows the development of the law through the courts as individuals who do not have standing, but wish to initiate a case, cannot do so.¹³

[Another reason courts can be effective law-makers is if judicial activism is practised.¹⁴] The degree to which a judge acts progressively may also impact the courts' law-making ability and effectiveness. Judges are said to operate judicially on a spectrum, ranging from acting conservatively or as an activist.¹⁵] Unlike members of parliament, judges are not elected by the people and may, therefore, be more inclined to make controversial or progressive changes to the law without the fear of not being re-elected. This can result in the courts more easily altering common

law principles in Australia to better align with progressive shifts in society's values.¹⁶ However, judicial activism is limited in that parliament can abrogate any precedents set by the courts, by passing contrary legislation to override it. Therefore, even when courts make progressive changes to the law, these changes can be overridden, demonstrating how the courts' ability to change the law can be stifled.¹⁷

[To conclude, there is no perfectly effective law-making institution. Whilst parliament may be specifically designed for law-making, there are certain structural drawbacks that can reduce the effectiveness of its legislation. The courts can also be effective in law-making, but are faced with significant limitations to their ability to make law.¹⁸]

✓ ✕ I have provided an introduction to state the extent to which I agree or disagree with the statement, and a brief reason for my answer.¹

✓ ✕ I have provided one feature of the relationship between parliament and the courts in law-making.²

✓ ✕ I have provided information about one factor affecting parliament's ability to make law.³

✓ ✕ I have provided one way my chosen factor enhances the ability of parliament to make law.⁴

✓ ✕ I have provided one way my chosen factor limits the ability of parliament to make law.⁵

✓ ✕ I have provided information about a second factor affecting parliament's ability to make law.⁶

✓ ✕ I have provided one way my chosen factor enhances the ability of parliament to make law.⁷

✓ ✕ I have provided a second way my chosen factor enhances the ability of parliament to make law.⁸

✓ ✕ I have provided a topic sentence for my paragraph.⁹

✓ ✕ I have provided information about one factor enhancing the courts' ability to make law.¹⁰

✓ ✕ I have provided information about one factor limiting the courts' ability to make law.¹¹

✓ ✕ I have provided one way my chosen factor limits the ability of the courts to make law.¹²

✓ ✕ I have provided a second way my chosen factor limits the ability of the courts to make law.¹³

✓ ✕ I have provided a topic sentence for my paragraph.¹⁴

✓ ✕ I have provided information about one factor enhancing the courts' ability to make law.¹⁵

✓ ✕ I have provided one way my chosen factor enhances the ability of the courts to make law.¹⁶

✓ ✕ I have provided one way my chosen factor is limited in enhancing the ability of the courts to make law.¹⁷

✓ ✕ I have provided a conclusion to my response that links back to the question.¹⁸

✓ ✕ I have used paragraphs to organise my response.

✓ ✕ I have used signposting in my response, such as 'One reason' and 'Another reason'.

✓ ✕ I have used connecting words, such as 'Therefore' and 'However'.

9A Reasons for law reform

Check your understanding

- A. **Explanation:** It is important for parliamentarians to consult the community so that shifts in community values can be reflected in law.
- A; B. **Explanation:** Technology is becoming more widespread, creating a greater need for changes to the law, and rendering some laws and the phrasing contained in them outdated.
- A; C. **Explanation:** For a law to be effective, people must be willing to follow and abide by it. Therefore, ensuring a law reflects community values can increase the likelihood of people obeying and respecting it.
- C. **Explanation:** The \$550 Coronavirus Supplement payment is an example of economic law reform as it was introduced due to high levels of unemployment during the COVID-19 pandemic.
- The shared beliefs of the local, state, and national communities are always changing. Therefore, laws must adapt to **suit** these changing beliefs, so that citizens are more likely to respect and **obey** the law.
- A; B; C. **Explanation:** Parliament will not seek to increase delays, as doing so will not improve the legal system.

Preparing for exams

Standard exam-style

- [One reason for law reform is shifts in community values, as the shared beliefs of the community are always changing.¹] [Therefore, the law must adapt to these evolving values, so that citizens are more likely to respect and obey the law.²]

- ☒ ☐ I have provided one reason for law reform.¹
- ☒ ☐ I have provided information about my chosen reason for law reform.²
- ☒ ☐ I have used signposting in my response, such as 'One reason'.
- ☒ ☐ I have used connecting words, such as 'Therefore'.

- [Law reform in relation to sexual offences may be necessary to improve the legal system.¹] [As of 2021, the justice system's response to sexual offences is evidently inadequate, given 87% of victims do not report instances of sexual assault to the police.²] [Therefore, law reform is required in order to protect victims of sexual assault and improve their access to the justice system, therefore improving the justice system overall.³]

- ☒ ☐ I have provided one reason for law reform and linked it to the stimulus.¹
- ☒ ☐ I have provided an example from the stimulus and linked it to law reform.²
- ☒ ☐ I have provided information about my chosen reason for law reform and linked it to the stimulus.³
- ☒ ☐ I have used connecting words, such as 'Therefore'.

Note: Protection of society is also an acceptable answer.

- [One reason for law reform in relation to the introduction of robot bees is to ensure the law remains reflective of technological advancements.¹] [The advancement of robotic technology and robotic bees could lead to the breach of privacy for many individuals as the footage from the robotic bees is publicly accessible.²] [Therefore, given that there are no current laws that regulate the cameras attached to the bees, law reform is required so that the law remains relevant to the current day technologies.³]

- ☒ ☐ I have provided one reason for law reform and linked it to the scenario.¹
- ☒ ☐ I have provided an example from the scenario.²
- ☒ ☐ I have provided information about my chosen reason for law reform and linked it to the scenario.³
- ☒ ☐ I have used signposting in my response, such as 'One reason'.
- ☒ ☐ I have used connecting words, such as 'Therefore'.

- [The Shoe Bill's main purpose is to protect the community from harm.¹] [The small town of Indio is riddled with construction nails on the ground. Therefore, people without shoes may experience foot injuries if they are not wearing footwear.²] [Consequently, this bill aims to protect the community by preventing harm from occurring to individuals who walk barefoot on the ground.³]

[Moreover, the Shoe Bill reflects community values.⁴] [Laws must adapt to suit changing beliefs, so that citizens are more likely to respect and obey the law.⁵] [In the town of Indio, wearing no shoes in public was previously acceptable. However, as times have changed, alongside the increased risk of stepping on nails, community values have shifted, and therefore so too should the law. This shift in community values has been indicated by the 93% support by the community for the bill.⁶]

- ☒ ☐ I have provided one reason for law reform.¹
- ☒ ☐ I have provided an example from the scenario.²
- ☒ ☐ I have provided information about my chosen reason for law reform and linked it to the scenario.³
- ☒ ☐ I have provided a second reason for law reform.⁴
- ☒ ☐ I have provided information about my chosen reason for law reform.⁵
- ☒ ☐ I have provided an example from the scenario and linked it to law reform.⁶
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used connecting words, such as 'Consequently' and 'Moreover'.

Extended response

- Protection of the community: I; IV
A shift in community values: II; III

12. [Smoking in outdoor dining areas is linked with shifts in community values and the protection of society as reasons for law reform.¹]

[One reason for the passing of the *Tobacco Amendment Act 2016* (Vic), and the subsequent prohibition of smoking in outdoor areas, was to protect the community from the impacts of second-hand smoking.²]

[Law reform may be required to protect communities from many sources of harm, particularly when these groups cannot prevent or control the harm that is occurring.³][For instance, non-smokers cannot control the degree of second-hand smoke they inhale when dining outdoors. Consequently, law reform is necessary to protect the community from smoke inhalation in outdoor dining areas.⁴]

[A second reason for the prohibition of smoking in outdoor dining areas is to ensure the law reflects community values.⁵][The shared beliefs of the state-wide community are ever-changing. Laws, therefore, must adapt to suit these evolving beliefs, so that citizens are more likely to respect and obey the law.⁶][For instance, community values towards smoking have shifted in the past few decades. 73% of Victorians support a ban on smoking in outdoor dining areas. Hence, Australian, and specifically Victorian, values are shifting such that attitudes towards smoking are becoming increasingly unfavourable.⁷]

✓ ✗ I have identified the links between smoking in outdoor dining areas and the need for law reform.¹

✓ ✗ I have provided one reason for law reform in relation to smoking in outdoor dining areas.²

✓ ✗ I have provided information about my chosen reason for law reform.³

✓ ✗ I have provided an example relevant to smoking in outdoor dining areas and linked it to my chosen reason for law reform.⁴

✓ ✗ I have provided a second reason for law reform in relation to smoking in outdoor dining areas.⁵

✓ ✗ I have provided information about my chosen reason for law reform.⁶

✓ ✗ I have provided an example relevant to smoking in outdoor dining areas and linked it to my chosen reason for law reform.⁷

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One reason' and 'A second reason'.

✓ ✗ I have used connecting words, such as 'For instance' and 'Consequently'.

Linking to previous learning

13. [One way in which international pressures can act as a reason for law reform is through their ability to influence legislative changes to ensure domestic laws reflect international standards.¹][For example, the UN is an international organisation that monitors the compliance of its Member States with international law, sometimes exerting pressure on a country to compel it to implement domestic law reform in order to comply with international treaties.²][For instance, the pressure placed on Australia by the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* influenced the Australian Government to initiate law reform in relation to ending Australia's offshore processing agreement with Papua New Guinea in 2021.³][The Australian Government was compelled to initiate this

law reform to comply with the Convention it is party to and prevent further inhumane treatment of refugees.⁴]

✓ ✗ I have provided one way international pressures are a reason for law reform.¹

✓ ✗ I have provided an example relevant to my chosen reason.²

✓ ✗ I have provided information about my chosen example and linked it to the need for law reform.³

✓ ✗ I have provided information about international pressures influencing law reform.⁴

✓ ✗ I have used signposting in my response, such as 'One way'.

✓ ✗ I have used connecting words, such as 'For example, and 'For instance'.

9B Influences on law reform

Check your understanding

1. B. False. **Explanation:** Petitions, demonstrations, and the use of the courts are all viable, and arguably, more effective means of influencing law reform than voting in a representative democracy.
2. B. **Explanation:** Petitions do not require participants to physically mobilise and can be organised digitally.
3. A **demonstration** occurs when a large number of people congregate in person and seek to bring attention to a common issue.
4. B. False. **Explanation:** E-petitions signed online through the official parliamentary website are formally recognised by parliament.
5. A; B. **Explanation:** Individuals must have standing to bring an issue to court, in that they must prove that they have been sufficiently impacted by the law.
6. D. **Explanation:** The ability to raise awareness about a common issue is a shared strength of the three means of influencing law reform.

Preparing for exams

Standard exam-style

7. [One way individuals can influence law reform is through a petition, which is a formal document addressed to the government that is signed by individuals who are demanding action or legislative reform.¹][Petitions are a free and convenient way to collate people's support for action and raise awareness for an issue.²]

✓ ✗ I have identified and defined one way individuals can influence law reform.¹

✓ ✗ I have provided information about my chosen way individuals can influence law reform.²

✓ ✗ I have used signposting in my response, such as 'One way'.

8. [I agree with the statement to a moderate extent in that, whilst the courts can be effective in influencing law reform, ultimately it is extremely costly and time-consuming for an ordinary person to bring a case before the courts.¹]

[The courts may be required to establish a new precedent when a case is brought before them by an individual with standing. As a result, parliament may then codify the precedent set, thereby making common law into statutory law, demonstrating the ability of individuals to influence reform through the courts.²][However, pursuing litigation is extremely expensive and time-consuming. The average person will often become less willing and able to pursue a case through the courts as a result.³][Overall, the courts can be an effective way to influence law reform, however, to have the resources to present a case before the courts in the first instance is challenging.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 the use of the courts in influencing law reform.²

✓ ✗ I have provided one limitation of the use of the courts in influencing law reform.³

✓ ✗ I have provided a conclusion to my response that links back to the question.⁴

✓ ✗ I have used connecting words, such as 'As a result' and 'However'.

Extended response

9. Strengths: I; III
Limitations: II; IV

10. [Demonstrations can be an effective means by which individuals and groups successfully influence law reform.¹]

[One strength of demonstrations is that they have the ability to cause major disruptions, such as striking a workplace or blocking roads, which can pressure the government to meet the demands of the demonstrators so the disruptions cease.²][A second strength of demonstrations is that, given the representative nature of parliament, parliamentarians should legislate according to the views of the majority. Therefore, parliament should theoretically pay close attention to demonstrations as constituents often use them to communicate their desires for change.³]

[However, demonstrations may be limited if they are negatively depicted in the media or interest dissipates.⁴][The disruptions caused by demonstrators often result in unfavourable media attention, in turn creating negative associations with the issue and potentially reducing community support.⁵][Additionally, demonstrations may be unsuccessful in initiating legislative change and the momentum of the movement may fade.⁶]

[Ultimately, individuals and groups can utilise demonstrations as a successful means of influencing law reform, however, it is imperative that demonstrations are consistent and followed up by additional action to maintain momentum.⁷]

✓ ✗ I have provided an introduction to my response to summarise my answer to the question.¹

✓ ✗ I have provided one strength of demonstrations as a means of influencing law reform.²

✓ ✗ I have provided a second strength of demonstrations as a means of influencing law reform.³

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁴

✓ ✗ I have provided one limitation of demonstrations as a means of influencing law reform.⁵

✓ ✗ I have provided a second limitation of demonstrations as a means of influencing law reform.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 strength' and 'A second strength'.

✓ ✗ I have used connecting words, such as 'However' and 'Additionally'.

11. A; D

12. [I agree with this statement to a limited extent. Whilst petitions are a viable means by which individuals and groups can influence law reform, demonstrations can also be successful in initiating such reform.¹]

[Petitions can be a cost-effective and accessible means of influencing law reform.²][They are a convenient way to collate people's support for an action without consuming their time, and must be responded to in the Petition Report by the relevant minister.³][Conversely, demonstrations are difficult to organise and can be highly time-consuming for individuals to participate in.⁴]

[However, petitions contain many limitations.⁵][Petitions generally need to address high stakes media topics, and even when one is, it is difficult to attain enough signatures for parliament to consider the law reform a petition is demanding. Indeed, Kevin Rudd's media diversity petition in 2020 acquired over 500,000 signatures to attain the attention of parliament, and still, no law reform has been actioned by parliament for greater media diversity.⁶][Alternatively, demonstrations have the ability to cause disruption and can therefore be used as an effective tool by which people's demands are swiftly met, even if an issue is not necessarily considered a high-stakes topic.⁷]

[Overall, petitions are a viable means by which individuals and groups can pursue law reform. However, so too are demonstrations.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 a strength of petitions as a means of influencing law reform.³

✓ ✗ I have provided a contrasting limitation of demonstrations as a means of influencing law reform.⁴

✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁵

✓ ✗ I have provided a limitation of petitions as a means of influencing law reform.⁶

- ☒ ☐ I have provided a contrasting strength of demonstrations as a means of influencing law reform.⁷
- ☒ ☐ I have provided a conclusion to my response that links back to the question.⁸
- ☒ ☐ I have referred to a relevant case example to support my response.
- ☒ ☐ I have used paragraphs to organise my response.
- ☒ ☐ I have used connecting words, such as 'Conversely' and 'However'.

Linking to previous learning

13. [One reason for law reform is shifts in community values.¹]
[Laws must be altered to suit the changing values and beliefs of the community so citizens are more likely to respect and obey the law.²][For instance, following the ban of driverless cars in 2040, the Australian Government realised that such a law was not aligned with the values of the community, and repealed it accordingly.³]
[The means by which the Australian people were able to communicate this shift in community values was through petitions. Without petitions as a way to influence reform, Giuseppe and the community may not have had another convenient way to directly reach parliament and voice their concerns.⁴]
- ☒ ☐ I have identified shifts in community values as a reason for law reform.¹
 - ☒ ☐ I have provided information about shifts in community values as a reason for law reform.²
 - ☒ ☐ I have provided an example relevant to the scenario and linked it to my chosen reason for law reform.³
 - ☒ ☐ I have provided information about the relationship between my chosen reason for law reform and petitions.⁴
 - ☒ ☐ I have used signposting in my response, such as 'One reason'.

9C The role of media in law reform

Check your understanding

- C. **Explanation:** The intended role of the media when it comes to law reform is to inform the Australian public about the objective facts of political issues so that informed decisions can be made by citizens.
- Sometimes the law reform agenda is set in direct accordance with the interests of the **media**, given the for-profit nature of media ownership in Australia.
- A; D. **Explanation:** Oversimplifying issues may result in a biased and incomplete presentation of the facts. This may encourage people to not seek to change the law as they see no issue with society's current state in certain aspects.
- B. False. **Explanation:** Social and traditional media often present a skewed version of facts.

- A. **Explanation:** By engaging with constituents, MPs can initiate bills or support law reform policies that those whom they have engaged with online support, therefore better reflecting the views of the Australians they were elected to represent.
- B. False. **Explanation:** Social media is able to influence parliament as much as, or more than, traditional media through its broad reach.

Preparing for exams

Standard exam-style

- [One role of the media in relation to law reform is to inform and educate people of current contentious political and legal issues, as well as debates in the public realm.¹][For example, this may involve distributing information through traditional media, such as newspapers, or social media, such as Instagram.²]
- ☒ ☐ I have provided one role of the media in law reform.¹
- ☒ ☐ I have provided information about my chosen role of the media in law reform.²
- ☒ ☐ I have used signposting in my response, such as 'One role'.
- [One way the media can influence law reform is by educating the community about current legal and political issues, thus, prompting individuals and groups to influence law reform.¹][For instance, the Four Corners' report on sports gambling prompted a shift in community values, resulting in individuals and groups attempting to influence law reform through demonstrations and therefore, motivating parliament to initiate law reform.²]
- ☒ ☐ I have provided one way in which the media can influence law reform.¹
- ☒ ☐ I have provided an example relevant to the scenario and linked it to my chosen way in which the media can influence law reform.²
- ☒ ☐ I have used signposting in my response, such as 'One way'.

Extended response

- A
- Strengths: I, II
Limitations: III, IV
- [Traditional media can have a large influence on law reform through its accessibility to people of all ages and its ability to conduct widespread investigations. However, the media can sensationalise events which in turn may lead to misinformation¹]
[One strength of traditional media in influencing law reform is that traditional media, such as newspapers, remain accessible to people of all generations in Australia, particularly to older generations who may not use social media. This ensures all generations can stay informed, empowering individuals to make informed voting decisions, and ultimately influencing the success of policies in parliament.²]
[Another strength of traditional media in influencing law reform is that politicians may be fearful of negative representations in the media and are therefore more likely to reform the law following in-depth investigations exposing poor practice in certain areas.³][For instance, the ABC's Four Corners' investigation into the banking system titled 'Banking Bad' prompted the 2019 royal commission into the banking

system and in turn, resulted in many amendments to the law, such as the establishment of the 'best interest duty' for mortgage brokers.^{4]}

[One limitation of the traditional media and its role in law reform, however, is that traditional media may sensationalise certain events in order to gain attention, leading to the oversimplification of news and events. This may result in the spread of misinformation as people may not bother to read beyond the eye-catching title, believing they gain the full story from this single title. This can reduce the level of meaningful influence that traditional media has on law reform.^{5]}

[Moreover, traditional media is limited in its ability to fulfil its role in law reform due to biases inherent in many media corporations. This may result in some media platforms using their influence to push against law reform, resulting in the media acting to prevent law reform instead of presenting a platform to encourage it.^{6]} [The law reform agenda may be set in direct accordance with the media's interests, given the for-profit nature of media ownership in Australia. For example, News Corp controls over 100 physical and digital newspaper mastheads and overall 65% of the Australian newspaper market.^{7]}

- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have provided one strength of the role of traditional media in influencing a change in the law.²
- ☒ ☐ I have provided a second strength of the role of traditional media in influencing a change in the law.³
- ☒ ☐ I have provided an example of traditional media influencing legislative change and linked it to my chosen strengths.⁴
- ☒ ☐ I have provided one limitation of the role of traditional media in influencing a change in the law.⁵
- ☒ ☐ I have provided a second limitation of the role of traditional media in influencing a change in the law.⁶
- ☒ ☐ I have provided an example of traditional media influencing legislative change and linked it to my chosen limitations.⁷
- ☒ ☐ 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 'For instance' and 'Moreover'.

12. Strengths: I; II
Limitations: III; IV

13. [I agree to a moderate extent that the media is an effective tool to influence law reform. Whilst the media can amplify the voices of many and grant access to information regarding law reform, there are several limitations in its ability to be utilised as a tool for igniting law reform.^{1]}

[There are numerous strengths in the ability of the media to act as an effective tool for influencing law reform. Social media campaigns can help assure politicians that there is popular support for a particular law reform come election time, therefore increasing the likelihood of parliament adopting the reform being called for, proving an effective tool for amplifying voices.^{2]} [Another strength of social media is that it enables communities and groups to gather support for an issue themselves, rather than having to wait for the mainstream media to capture the story. In this way, the media can act as an effective tool for communities to have their opinions heard regarding law reform.^{3]} [Furthermore, traditional media, such as newspapers,

remain accessible to people of all generations in Australia, particularly to older generations who may not use social media. This ensures all generations can stay informed, empowering individuals to make informed voting decisions, and ultimately influencing the success of policies in parliament.^{4]}

[However, there are several limitations on the ability of the media to act as an effective tool for influencing law reform. A limitation of traditional media is that certain news outlets can have strong biases based on their ownership, causing them to disseminate misleading information to the public, hence limiting the ability of traditional media to inform people of relevant causes. This means that law reform may not occur because people are not aware of it being required.^{5]}

[Another limitation of traditional media is that people cannot directly determine what news companies will publish, rather, it is determined by journalists under the influence of the company owner, and hence popular issues will only sometimes be voiced, limiting the ability of people to utilise traditional media as an effective tool.^{6]} [A limitation of social media is that many complex events may be oversimplified into an infographic or short-form video, with people not receiving full information. This limits the ability of social media to act as an effective tool for influencing law reform if people cannot fully understand the nature of reforms on the agenda.^{7]}

[Overall, the media can be an effective tool for law reform, due to the accessibility of social media and traditional media for most demographics. However, strong biases within traditional media and the inability of most regular, Australian citizens to influence what is shown in traditional media limits its ability to be an effective tool for influencing law reform.^{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 one way the media can be an effective tool for influencing law reform.²
- ☒ ☐ I have provided a second way the media can be an effective tool for influencing law reform.³
- ☒ ☐ I have provided a third way the media can be an effective tool for influencing law reform.⁴
- ☒ ☐ I have provided one way the media can be an ineffective tool for influencing law reform.⁵
- ☒ ☐ I have provided a second way the media can be an ineffective tool for influencing law reform.⁶
- ☒ ☐ I have provided a third way the media can be an ineffective tool for influencing law reform.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 'Another strength' and 'Another limitation'.
- ☒ ☐ I have used connecting words, such as 'Furthermore' and 'However'.

Linking to previous learning

14. The media: I; II
Demonstrations: III; IV

15. [I agree with this statement to a limited extent. Whilst the media can greatly influence law reform in fulfilling its role and swaying the influence of politicians and the public, demonstrations are also an effective means of influencing law reform.¹]

[The media can be extremely effective at influencing law reform. Corporations, such as News Corp, generally have the financial resources and political connections to investigate and report on contentious issues. This allows people to become informed about political and legal issues that the news companies choose to report on so they can make decisions when it comes to influencing law reform, such as when voting in elections and referendums.²][Social media campaigns can help assure politicians that there is popular support for a particular reform come election time, therefore increasing the likelihood of parliament adopting the reform being called for.³]

[However, the media is not the only way law reform is influenced by groups or individuals, as demonstrations can also influence law reform.⁴][Demonstrations have the ability to cause disruption and can be an effective tool for people to have their demands met swiftly, as exemplified by workers' strikes.⁵][Moreover, given the representative nature of parliament, parliamentarians should theoretically pay close attention to demonstrations, as a number of their constituents are clearly communicating their desire for change.⁶]

[On balance, whilst the media can be effective in influencing law reform, it is not the only way law reform is influenced by individuals and groups.⁷]

- ☒ ☐ 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 the media influences law reform.²
-
- ☒ ☐ I have provided a second way the media influences law reform.³
-
- ☒ ☐ I have provided a topic sentence to introduce the main idea of my paragraph.⁴
-
- ☒ ☐ I have provided one way demonstrations influence law reform.⁵
-
- ☒ ☐ I have provided a second way demonstrations influence law reform.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 connecting words, such as 'However' and 'Moreover'.
-

9D The Victorian Law Reform Commission

Check your understanding

- A. True. **Explanation:** The VLRC is Victoria's central law reform body that provides the Victorian Parliament with objective recommendations for law reform in various areas of law.
- A; C; D; F. **Explanation:** The VLRC is solely a Victorian law reform body. Therefore, it does not engage with the prime minister's requests for new federal laws or in law reform activity related to New South Wales.
- Part of the process: I; III; IV
Not part of the process: II; V
- A; C; E. **Explanation:** The VLRC inquiry was primarily concerned with stalking in the context of non-family violence, as opposed to family violence, as there is less development in this area of law. Additionally, consultations were conducted with 36 different parties. As of October 2023, none of the recommendations for legislative amendments have been implemented by the Victorian Parliament.
- B. **Explanation:** The terms of reference explicitly stated that the inquiry was not tasked with investigating whether those who cannot understand or communicate in English, irrespective of personal disability, should be able to serve on juries.
- True: I; III
False: II; IV
- A. True. **Explanation:** The VLRC can investigate matters within the scope of the terms of reference provided by the Victorian Attorney-General, or minor community legal matters, which concern both criminal and civil areas of law.

Preparing for exams

Standard exam-style

- [The Victorian Law Reform Commission is Victoria's main, independent law reform body. It seeks to provide the Victorian government with insight into areas of potential law reform.¹][It investigates a wide range of matters, concerning both the criminal and civil justice system, and is imperative to the development of a fair, just, and inclusive legal system for all Victorians.²]
- ☒ ☐ I have provided information about the VLRC.¹
-
- ☒ ☐ I have provided further information about the VLRC.²
-
- [One role the Victorian Law Reform Commission (VLRC) undertook in its inquiry into Stalking was receiving and analysing the Victorian Attorney-General's term of reference.¹][This means the VLRC examined and reported back to the Victorian Attorney-General with law reform recommendations on the specific matters outlined in the terms of reference which, in this case, tasked the VLRC with considering a range of aspects concerning stalking, harassment, and similar conduct in the Victorian community, specifically non-family violence stalking.²][Existing legislation, barriers to reporting for victims, and current sentencing practices and options for stalking were outlined as avenues for inquiry in the terms of reference.³]

✓ ✗ I have provided one role the VLRC undertook in its inquiry into Stalking.¹

✓ ✗ I have provided information about my chosen role the VLRC undertook in its inquiry into Stalking.²

✓ ✗ I have provided examples from the inquiry into Stalking and linked them to my chosen role.³

✓ ✗ I have used signposting in my response, such as 'One role'.

10. [One part of a Victorian Law Reform Commission (VLRC) inquiry is the consultation and submissions process, which would be utilised by Matilda's team to gather information about work from home practices and community attitudes towards three-day weekends.¹] [During this part of the process, the VLRC would publish a consultation paper, engage with relevant bodies and experts, and invite community members to make submissions in digital, written, or oral formats about work from home practices and opinions about a three-day weekend.²]

[Another part of a VLRC inquiry is the final report, which includes the commission's findings and recommendations.³] [Matilda's team at the VLRC would need to deliver relevant findings and recommendations for potential law reform regarding changes to workdays and work-from-home practices to the Victorian Attorney-General via the report, who will then table it in the Victorian Parliament.⁴]

✓ ✗ I have provided one aspect of the process used by the VLRC in its inquiries.¹

✓ ✗ I have provided information about my chosen aspect.²

✓ ✗ I have provided a second aspect of the process used by the VLRC in its inquiries.³

✓ ✗ I have provided information about my chosen aspect.⁴

✓ ✗ 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 part' and 'Another part'.

11. [I agree with this statement to a moderate extent, as the Victorian Law Reform Commission (VLRC) can investigate matters without a terms of reference from the Victorian Attorney-General, however, its ability to do so is limited by resource availability.¹] [The VLRC's main function is to respond to and investigate matters outlined in a terms of reference provided by the Victorian Attorney-General. Although, they also have the power, as outlined in s 5 of the *Victorian Law Reform Commission Act 2000* (Vic), to investigate minor community legal issues.²] [It may conduct research and investigations into matters concerning broader society, such as in its Inclusive Juries inquiry, and these inquiries are known as community law reform projects.³] [However, the VLRC's ability to investigate minor legal issues without a terms of reference from the Victorian Attorney-General is limited by resourcing and financial constraints. The VLRC is only able to conduct investigations that do not require a significant amount of resources. Therefore, it may not be able to investigate all important issues in the community without a terms of reference from the Victorian Attorney-General.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 the VLRC's ability to respond to the law reform needs of the community.²

✓ ✗ I have provided further information about the VLRC's ability to respond to the law reform needs of the community.³

✓ ✗ I have provided information about limitations to the VLRC's ability to respond to the law reform needs of the community.⁴

✓ ✗ I have used connecting words, such as 'However' and 'Therefore'.

Extended response

12. Strengths: I; II
Limitations: III; IV

13. [The Victorian Law Reform Commission (VLRC) is able to influence law reform to a great extent, although it may be limited in its ability to do so due to time and resource constraints, as well as parliament's willingness to enact law reform.¹]

[Firstly, the VLRC is able to initiate and investigate minor community legal matters without a terms of reference from the Victorian Attorney-General. The Inclusive Juries inquiry was a community law reform project that sought to investigate and provide recommendations about the participation barriers to jury duty faced by deaf, hard of hearing, blind, or low-vision people.²] [Therefore, VLRC's power to investigate matters without a terms of reference from the Victorian Attorney-General enables it to provide recommendations for law reform in areas that are specific to the needs of certain groups and communities.³]

[Additionally, the VLRC can provide objective and unbiased recommendations for law reform. It is independent of political parties and is able to review laws on controversial matters objectively and deliver a set of recommendations for law reform to parliament based on its in-depth research, expert opinions, and the views of those who make submissions.⁴] [For example, the inquiry into Inclusive Juries was informed by 29 consultations with expert and informed parties, as well as 14 community submissions that allowed the VLRC to gain insight into local experiences and opinions. Hence, the recommendations provided to the VLRC are informed and based on a diverse range of perspectives and experiences that can assist in making the justice system more accessible and equitable.⁵]

[However, projects can be very time consuming. Therefore, it may take a while for the VLRC to influence substantial changes in the law on certain subject matter. The Inclusive Juries inquiry was established in 2020, yet was not tabled in the Victorian Parliament until 2023. Therefore, although the time spent consulting with relevant parties, engaging with the community, and reviewing submissions is necessary to provide informed recommendations, the VLRC may not be able to provide timely recommendations for law reform and the exclusionary nature of jury duty may be prolonged until parliament enacts law reform.⁶] [Moreover, though the final report has been tabled, as of October 2023, no legislative amendments have been implemented by the Victorian Parliament. The process of changing the law within parliament is also time consuming, further delaying law reform.⁷]

[Finally, the Victorian Parliament has no obligation to implement the recommendations for law reform made by the VLRC. Although a VLRC report must be tabled by the Victorian Attorney-General in the Victorian Parliament, there is no obligation on parliament to implement any of the recommendations. Hence, it may decide to maintain the existing laws regarding jury service and not seek to implement any of the 53 recommendations from the Inclusive Juries inquiry that would make participation in civic life more accessible for those who are deaf, hard of hearing, blind, or have low vision.⁸]

[In conclusion, whilst the VLRC has a great capacity to influence law reform, and 75% of its overall recommendations since 2001 have been implemented in part or full, there remain limitations in its ability to influence law reform in a timely and effective manner.⁹]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one way the VLRC is able to influence law reform with reference to my chosen inquiry.²
- ✓ ✗ I have provided information about my chosen way.³
- ✓ ✗ I have provided a second way the VLRC is able to influence law reform.⁴
- ✓ ✗ I have provided information about my chosen way and linked it to my chosen inquiry.⁵
- ✓ ✗ I have provided one way the VLRC is limited in its ability to influence law reform with reference to my chosen inquiry.⁶
- ✓ ✗ I have provided information about my chosen way.⁷
- ✓ ✗ I have provided a second way the VLRC is limited in its ability to influence law reform with reference to my chosen inquiry.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 'Finally'.
- ✓ ✗ I have used connecting words, such as 'Additionally' and 'However'.

Linking to previous learning

14. [One reason for law reform is the need for the protection of society, which is emphasised by the Victorian Law Reform Commission's (VLRC) inquiry into Stalking.¹] [Sources of harm can develop and change over time, which means laws must be established to protect citizens, especially if existing laws do not adequately protect particular groups.²] [In its inquiry into Stalking, the VLRC sought to research, investigate, and provide recommendations into stalking, specifically in non-family violence circumstances as it highlighted that less development had occurred in this area of law, compared to stalking in family violence situations.³] [Therefore, the VLRC Stalking inquiry sought to provide recommendations for law reform that promote the protection of stalking victims and ensure laws remain relevant to stalking in the 21st century.⁴]

- ✓ ✗ I have identified one reason for law reform and linked it to one VLRC inquiry.¹

- ✓ ✗ I have provided information about my chosen reason for law reform.²
- ✓ ✗ I have provided information about my chosen VLRC inquiry.³
- ✓ ✗ I have provided information about my chosen reason for law reform and linked it to my chosen VLRC inquiry.⁴
- ✓ ✗ I have used signposting in my response, such as 'One reason'.
- ✓ ✗ I have used connecting words, such as 'Therefore'.

9E Royal Commissions

Check your understanding

- A. True. **Explanation:** Royal commissions can explore an area of policy, encompassing social, legal, or political issues in their research. Alternatively, they can investigate particular incidents or allegations, seeking to determine the truth behind them.
- B. **Explanation:** Royal commissions make recommendations for law reform but do not have the power to create or alter legislation based on these recommendations.
- B; C. **Explanation:** The government is not required to adopt recommendations made by the Robodebt Royal Commission, or any other royal commission. Additionally, all royal commissions, including the Robodebt Commission, are independent of the government, meaning the investigations are not influenced by political perspectives or party biases.
- A. **Explanation:** The Yoorrook Justice System focused on truth-telling and, therefore, did not exercise coercive powers when preparing its June 2022 interim report.
- Strengths: II; IV
Limitations: I; III
- A. True. **Explanation:** The power to establish a royal commission at the Commonwealth level is provided under the *Royal Commissions Act 1902* (Cth). Alternatively, in Victoria, the power to establish a royal commission is provided under the *Inquiries Act 2014* (Vic).

Preparing for exams

Standard exam-style

7. [One strength of royal commissions is that they are able to comprehensively investigate a particular incident, area of policy, or social, legal, or political issue in their research. Therefore, they can provide insightful recommendations for law reform that accurately and adequately addresses the issue at hand.¹] [This is because royal commissions can seek submissions from the community, hold public hearings, and exercise coercive powers, such as through compelling witnesses to give evidence under oath.²] [For example, the Yoorrook Justice Commission, through its truth-telling process, was able to gain insight into the frustration felt by Victoria's First Peoples, and their cynicism towards the historical attempts of previous governments to rectify injustices faced by Aboriginal and Torres Strait Islander peoples.³]

- ✓ ✕ I have provided one strength of royal commissions in influencing law reform.¹
- ✓ ✕ I have provided information about my chosen strength.²
- ✓ ✕ I have provided an example of one recent royal commission and linked it to my chosen strength.³
- ✓ ✕ I have used signposting in my response, such as 'One strength'.

8. [A royal commission is 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.¹] [One role of royal commissions is to seek submissions from the community. For example, during its investigation, the commission could seek submissions from members of the community who have been impacted by the high costs and long delays involved in the Victorian court system.²] [Moreover, another role of royal commissions is to engage in coercive powers of investigation. For example, the commission could compel Victorian judicial officers to provide evidence under oath in regard to the high costs and long delays in hearing cases in Victorian courts.³] [Therefore, a royal commission would likely influence law reform to address high costs and long court delays involved in the Victorian judicial system, as the recommendations for law reform are more likely to reflect community views and attitudes, possibly indicating to members of parliament the desires of the public. Consequently, the reform would have an increased likelihood of being initiated as members of parliament usually pass laws they believe will be popular in order to maintain public support and increase their chances of re-election.⁴]

- ✓ ✕ I have defined the term 'royal commission'.¹
- ✓ ✕ I have provided examples from the scenario and linked them to one role of a royal commission.²
- ✓ ✕ I have provided examples from the scenario and linked them to a second role of a royal commission.³
- ✓ ✕ I have provided examples from the scenario and linked them to how a royal commission could influence law reform.⁴
- ✓ ✕ I have used signposting in my response, such as 'One role' and 'another role'.
- ✓ ✕ I have used connecting words, such as 'Moreover' and 'Therefore'.

Extended response

9. Strengths: I; III; IV
Limitations: II; V
10. [One strength of royal commissions is that they have coercive powers of investigation, such as being able to compel witnesses to give evidence under oath, that ensures the whole truth emerges. Consequently, this enables the issue to be better understood by parliament and facilitates effective law reform as more adequate measures can be recommended by the commission.¹] [This was evident in the Robodebt Royal Commission, where coercive powers were used to compel witnesses, such as senior government officials, to appear at public hearings and give evidence about the Robodebt Scheme under oath.²] [As a result, the Commission gained valuable

insight into the implementation and operation of the Robodebt Scheme, enabling it to provide 57 recommendations aiming to prevent future failures in government administration.³]

[However, one limitation of royal commissions is that the government is not obliged to follow the suggested recommendations, meaning the inquiry could be considered a waste of time and money.⁴] [Consequently, the Commonwealth Parliament is under no obligation to adopt the 57 recommendations for law reform made by the Robodebt Royal Commission.⁵] [As the Commission was provided with a budget of \$30 million, and took approximately a year to conduct and produce its final report, this could be viewed as a waste of time and money if the government does not enact law reform on a significant proportion of recommendations.⁶]

- ✓ ✕ I have provided one strength of a royal commission in influencing a change in the law.¹
- ✓ ✕ I have provided an example of one recent royal commission.²
- ✓ ✕ I have provided information about how my chosen royal commission may influence a change in the law.³
- ✓ ✕ I have provided one limitation of a royal commission in influencing a change in the law.⁴
- ✓ ✕ I have provided an example of one recent royal commission.⁵
- ✓ ✕ I have provided information about how my chosen royal commission may not influence a change in the law.⁶
- ✓ ✕ 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 'As a result' and 'However'.

11. Strengths: I; III
Limitations: II

12. [Royal commissions can be effective in influencing a change in the law through their ability to gain valuable insights into matters of public importance, once established by the government. However, there are limitations in their investigative powers.¹]

[One strength of royal commissions is that, because they are established by the government, members of parliament may be more likely to act on and implement law reform based on the findings of the commission.²] [For example, the Yoorrook Justice Commission was established by the Victorian Government and, therefore, members of the Victorian Parliament may be more likely to adopt the recommendations of the Commission and implement law reform.³] [Furthermore, another strength of royal commissions is that they are able to comprehensively investigate a particular incident, area of policy, or social, legal, or political issue in their research. Therefore, they can provide insightful recommendations for law reform that accurately and adequately address the issues at hand.⁴] [For example, the Yoorrook Justice Commission, through its truth-telling process, was able to gain insight into the frustration felt by Victoria's First Nations peoples, and cynicism towards historical government attempts to rectify the issues Aboriginal and Torres Strait Islander peoples have experienced since colonisation.⁵]

[However, one limitation of royal commissions is that the government is not obliged to follow the suggested recommendations, meaning the inquiry could be considered a waste of time and money if members of parliament fail to pass the commission's recommendations into legislation.⁶] [Therefore, whilst the Yoorrook Justice Commission gained valuable insights through its truth-telling process, parliament is under no obligation to act on these findings.⁷]

[Overall, royal commissions may be influential in changing the law through their ability to comprehensively investigate public matters, which took place in the preparation of the Yoorrook Justice Commission's interim report. However, it is ultimately limited as parliament is under no obligation to make law reform based on these recommendations.⁸]

- ☒ ☐ I have provided an introduction to my response.¹

- ☒ ☐ I have provided one strength of royal commissions in influencing a change in the law.²

- ☒ ☐ I have provided an example of one recent royal commission inquiry and linked it to my chosen strength.³

- ☒ ☐ I have provided a second strength of royal commissions in influencing a change in the law.⁴

- ☒ ☐ I have provided an example of one recent royal commission inquiry and linked it to my chosen strength.⁵

- ☒ ☐ I have provided one limitation of royal commissions in influencing a change in the law.⁶

- ☒ ☐ I have provided an example of one recent royal commission inquiry and linked it to my chosen limitation.⁷

- ☒ ☐ I have provided a conclusion to my response that summarises the discussion and 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 'Furthermore' and 'However'.

Linking to previous learning

13. A; C

14. [I agree to a moderate extent with the statement that there are other bodies, such as royal commissions, that are more effective than the Victorian Law Reform Commission (VLRC) in influencing law reform. However, the independence and extensive investigative powers of the VLRC make it quite influential in law reform.¹]

[One strength of the VLRC in influencing law reform is that it is independent of political parties and is able to review laws on controversial matters objectively, delivering a set of recommendations for law reform to parliament based on expert opinions and the views of those in the public who make submissions.²] [In this way, the VLRC may be more effective than royal commissions as, whilst royal commissions are independent, they are still dependent on the government's willingness to initiate an investigation about a particular issue and ensure its scope is sufficiently wide.³] [Additionally, another strength of the VLRC is that it can investigate smaller issues, such as community law reform projects, without a terms of reference.⁴] [In this way, the VLRC may be more effective, as royal commissions

cannot investigate issues without a terms of reference.⁵] [Although, any reform projects initiated by the VLRC itself can only be on minor issues and are a small portion of the work the VLRC does, meaning fewer recommendations for law reform are made in these areas where minor issues of society exist.⁶]

[However, royal commissions may be more effective in certain circumstances. One strength of royal commissions is they have coercive powers of investigation, such as being able to compel witnesses to give evidence under oath, which ensures the whole truth emerges. Consequently, an issue can be better understood by parliament, facilitating effective law reform as more accurate and adequate recommendations can be made.⁷] [In this way, royal commissions may be more effective than the VLRC, as the VLRC does not have coercive powers of investigation.⁸]

[Overall, whilst there are other bodies that may influence law reform, such as royal commissions, the VLRC is effective through its independence and wide investigative powers.⁹]

- ☒ ☐ 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 strength of the VLRC in influencing law reform.²

- ☒ ☐ I have provided one limitation of royal commissions in influencing law reform.³

- ☒ ☐ I have provided a second strength of the VLRC in influencing law reform.⁴

- ☒ ☐ I have provided a second limitation of royal commissions in influencing law reform.⁵

- ☒ ☐ I have provided one limitation of the VLRC in influencing law reform.⁶

- ☒ ☐ I have provided one strength of royal commissions in influencing law reform.⁷

- ☒ ☐ I have provided a second limitation of the VLRC in influencing law reform.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 strength' and 'another strength'.

- ☒ ☐ I have used connecting words, such as 'However' and 'Additionally'.

9F Parliamentary committees

Check your understanding

- A. True. **Explanation:** Parliamentary committees consult with the community during their investigations to better understand the views of society on particular issues and laws.
- A **standing** committee is appointed for the life of parliament, whereas, a **select** committee is created for a specific purpose to investigate a policy issue.

3. B. **Explanation:** Parliamentary committees make recommendations for law reform but do not have the power to create legislation based on these recommendations.
4. Strengths: I; IV
Limitations: II; III
5. A; C. **Explanation:** During its Inquiry into Anti-Vilification Protections, the parliamentary committee received submissions from members of the community, which assisted in the recommendations for law reform. As a result, parliament supported the majority of the committee's recommendations.
6. B; C. **Explanation:** The Inquiry into Tackling Climate Change in Victorian Communities was limited to investigating the need for law reform in Victoria and involved 15 days of public hearings.
7. B. False. **Explanation:** Joint committees are composed of members from both the upper and lower Houses of Parliament.

Preparing for exams

Standard exam-style

8. [One strength of parliamentary committees in influencing law reform is that the recommendations of law reform proposed by parliamentary committees are likely to reflect community attitudes and, consequently, are more likely to be accepted.¹] [This is because parliamentary committees conduct research and consultation with the community, which can occur via written submissions from individuals, experts, and interest groups, to ensure their recommendations reflect society's views.²] [For example, in the Inquiry into Anti-Vilification Protections by the Legislative Assembly Legal and Social Issues Committee (LALSIC), there were 62 public submissions and seven days of public hearings from the community. This assisted the committee in creating 36 recommendations for law reform, 34 of which parliament supported.³]
- ☒ ☐ I have provided one strength of parliamentary committees in influencing law reform.¹
- ☒ ☐ I have provided information about my chosen strength.²
- ☒ ☐ I have provided an example of one recent parliamentary committee inquiry and linked it to my chosen strength.³
- ☒ ☐ I have used signposting in my response, such as 'One strength'.
9. [A parliamentary committee is a group of members of parliament who undertake work on behalf of the parliament to investigate policy and government administration.¹] [One role of parliamentary committees is to invite submissions from the community. For example, during the investigation into the need for greater protections for youth in relation to social media, parliamentary committees would hear submissions from social media experts or concerned parents.²] [Moreover, another role of parliamentary committees is to conduct public hearings, during which individuals and experts could provide evidence, and the committee would be able to cross-examine these witnesses.³] [Therefore, parliamentary committees are likely to influence law reform and support the introduction of greater protections for young people in relation to social media, as the recommendations reflect community views and attitudes. Consequently, the reform would have an increased likelihood of being accepted.⁴]

- ☒ ☐ I have defined parliamentary committee.¹
- ☒ ☐ I have provided one aspect of the role of a parliamentary committee.²
- ☒ ☐ I have provided a second aspect of the role of a parliamentary committee.³
- ☒ ☐ I have provided information about how a parliamentary committee could influence law reform.⁴
- ☒ ☐ I have linked my answer to the scenario where appropriate.
- ☒ ☐ I have used signposting in my response, such as 'One role' and 'another role'.
- ☒ ☐ I have used connecting words, such as 'Moreover' and 'Therefore'.

Extended response

10. Strengths: I; IV; V
Limitations: II; III; VI
 11. [One strength of parliamentary committees is that they can invite submissions from members of the community and listen to their evidence at public hearings. This can ensure recommendations for law reform are reflective of community views and attitudes, therefore increasing the likelihood of the recommendations being accepted by parliament.¹] [This was evident in the Inquiry into Anti-Vilification Protections by the Legislative Assembly Legal and Social Issues Committee (LALSIC), which received 62 submissions from the community, including from the Jewish Community Council of Victoria. The committee also conducted seven days of public hearings to listen to and cross-examine witnesses.²] [As a result, the committee made 36 recommendations for law reform to minimise Victorian citizens' exposure to vilification based on the views of the community, 34 of which parliament supported.³]
- [However, one limitation of parliamentary committees is that parliament does not have to implement law reform based on their recommendations.⁴] [Whilst parliament supported 34 of the 36 recommendations made by the LALSIC, it was under no obligation to implement law reform to address vilification and hate conduct in Victoria.⁵] [Therefore, an inquiry conducted by a parliamentary committee may not necessarily result in changes being made to the law as they only have the power to recommend the law.⁶]
- ☒ ☐ I have provided one strength of a parliamentary committee in influencing a change in the law.¹
- ☒ ☐ I have provided an example of one recent parliamentary committee inquiry.²
- ☒ ☐ I have provided information about my chosen parliamentary committee inquiry and how it may have influenced a change in the law.³
- ☒ ☐ I have provided one limitation of a parliamentary committee in influencing a change in the law.⁴
- ☒ ☐ I have provided an example of one recent parliamentary committee inquiry.⁵

✓ ✗ I have provided information about my chosen parliamentary committee inquiry and how it may not have influenced a change in the law.⁵

✓ ✗ 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 'As a result' and 'However'.

12. Strengths: II; III
Limitations: I; IV

13. [Parliamentary committees can be effective in influencing a change in the law through their ability to undertake work on behalf of parliament to investigate policy and government administration. However, there are limitations in their investigative powers.¹]

[One strength of parliamentary committees in influencing a change in the law is that they can invite submissions from members of the community and hear their evidence at hearings. This can ensure recommendations for law reform are reflective of community views and are consequently, more likely to be accepted by parliament.²]

[In the Legislative Assembly Environment Committee's (LAEC) Inquiry into Tackling Climate Change in Victorian Communities, the committee received 162 submissions from the community, such as Eastern Climate Action Melbourne. Therefore, this ensured its recommendations for law reform, in relation to how the Victorian Government can support urban, rural, and regional communities in combating climate change, were reflective of community views.³]

[Furthermore, another strength of parliamentary committees is that they can investigate specific matters of policy or government performance, and these investigations can be in-depth.⁴][During its inquiry, the LAEC conducted an in-depth investigation as it received 162 submissions and conducted 15 days of public hearings. This contributed to the Victorian Government's decision to support 67 of the 72 recommendations for law reform in its response in June 2021, which it has started implementing.⁵]

[However, one limitation of parliamentary committees in influencing law reform is that parliament does not have to implement law reform based on the recommendations made by the committee.⁶][Whilst parliament supported 67 of the 72 recommendations for law reform, the Victorian Government is under no obligation to implement law reform based on these recommendations.⁷]

[Overall, parliamentary committees may be influential in changing the law through their ability to consult with the community and receive expert opinions, which occurred in the LAEC's Inquiry into Tackling Climate Change. However, it is ultimately limited as parliament is under no obligation to make law reform based on these recommendations.⁸]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one strength of a parliamentary committee in influencing a change in the law.²

✓ ✗ I have provided an example of one recent parliamentary committee inquiry and linked it to my first chosen strength.³

✓ ✗ I have provided a second strength of a parliamentary committee in influencing a change in the law.⁴

✓ ✗ I have provided an example of one recent parliamentary committee inquiry and linked it to my second chosen strength.⁵

✓ ✗ I have provided one limitation of a parliamentary committee in influencing a change in the law.⁶

✓ ✗ I have provided an example of one recent parliamentary committee inquiry and linked it to my chosen limitation.⁷

✓ ✗ I have provided a conclusion to my response that summarises the discussion and 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 'Furthermore' and 'However'.

Linking to previous learning

14. A; C

15. [I agree to a limited extent with the statement that there are other bodies, such as parliamentary committees, that are more effective than the Victorian Law Reform Commission (VLRC) in influencing law reform, as the independence and extensive investigative powers of the VLRC make it quite influential on law reform.¹]

[One strength of the VLRC in influencing law reform is it is independent of political parties and is able to review laws on controversial matters objectively, delivering a set of recommendations for law reform to parliament based on expert opinion and the views of those in the public who make submissions.²][In this way, the VLRC may be more effective than parliamentary committees, as parliamentary committees may not be independent and there could be bias if the committee is composed predominantly of members of the same political party.³][Additionally, another strength of the VLRC is it can investigate smaller issues, such as community law reform projects, without a terms of reference.⁴][In this way, the VLRC may be more effective, as parliamentary committees cannot investigate issues without a terms of reference.⁵][Although, any reform projects initiated by the VLRC itself can only be on minor issues and are a small portion of the work the VLRC does, reducing the number of recommendations for law reform in these areas.⁶]

[However, parliamentary committees may be more effective in certain circumstances. One strength of parliamentary committees is that they are created by, and operate under, the authority of parliament, meaning their recommendations may be more influential on law reform.⁷][In this way, parliamentary committees may be more effective than the VLRC, as the VLRC is independent of the government and therefore, its recommendations may not be as influential compared to parliamentary committees' recommendations.⁸]

[Overall, whilst there are other bodies that may influence law reform, such as parliamentary committees, the VLRC is effective through its independence and wide investigative powers.⁹]

- ✓ ✕ 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 strength of the VLRC in influencing law reform.²

- ✓ ✕ I have provided one limitation of parliamentary committees in influencing law reform.³

- ✓ ✕ I have provided a second strength of the VLRC in influencing law reform.⁴

- ✓ ✕ I have provided a second limitation of parliamentary committees in influencing law reform.⁵

- ✓ ✕ I have provided one limitation of the VLRC in influencing law reform.⁶

- ✓ ✕ I have provided one strength of parliamentary committees in influencing law reform.⁷

- ✓ ✕ I have provided a second limitation of the VLRC in influencing law reform.⁸

- ✓ ✕ I have provided a conclusion to my response that links back to the question.⁹

- ✓ ✕ I have used paragraphs and topic sentences 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 'Additionally' and 'Although'.

10A Reasons for constitutional reform

Check your understanding

- B. False. **Explanation:** There are multiple reasons why the Constitution may need to be altered, to push a political agenda is just one of these reasons.
- B; C. **Explanation:** Changes in technology and improving the legal system may both be reasons for law reform. However, changes to IVF technology do not influence the Constitution and the establishment of the Koori Court was initiated through state legislation, not by changes to the Constitution.
- A. **Explanation:** The 1973 referendums sought to give more power to the Commonwealth Parliament to make laws on the subject matter of prices and income.
- A. **Explanation:** The global event of the Cold War influenced constitutional reform in 1951 as the Australian public broadly feared the spread of communism.
- B. **Explanation:** The *Pharmaceutical Benefits Case* 1945 led to a referendum enshrining in the Constitution the power for the Commonwealth Parliament to legislate on social services.
- One possible reason, claimed by the 'no' campaign, for the **1999 Preamble referendum** was for John Howard to push his own political agenda and appear politically woke. On the other hand, one reason for the **1999 Republic referendum** was to better reflect societal values as there had been shifts in Australian society, with many citizens no longer wanting to be tied to Australia's colonialist past.
- A. True. **Explanation:** A referendum is usually initiated due to a number of reasons for constitutional reform in conjunction with each other influencing the referendum.

Preparing for exams

Standard exam-style

- [One reason why the Constitution may need to change is to promote reconciliation as certain First Nations' rights may require greater protection from the Constitution. Alternatively, the Constitution may need to be altered so it does not exclude First Nations peoples from specific human rights.¹] [For example, in 1967, the referendum on Aboriginal and Torres Strait Islander peoples altered the Constitution to allow the Commonwealth Parliament to legislate on matters concerning First Nations people, better allowing the protection of First Nations' cultural rights.²] [As Australian society has increasingly valued reconciliation, other constitutional reform has been proposed, such as the 2023 Voice to Parliament referendum.³]

✓ ✗ I have provided information about one reason for constitutional reform.¹

✓ ✗ I have provided an example of my chosen reason.²

✓ ✗ I have provided information about my chosen reason.³

Note: This question could have been answered with a number of different reasons.

- [One reason why the Constitution may need to be amended is because of global events, such as wars, which may require the Federal Government to seek additional powers or enact changes to ensure the protection of citizens.¹] [During the Second World War, constitutional reform regarding 'Post-war Reconstruction and Democratic Rights' was proposed with the intent of providing greater economic security and social justice to Australian citizens during this time of global unrest.²] [The proposed constitutional alteration would provide the government with the power to legislate on 14 different matters, including the rehabilitation of ex-servicemen, national health, and unemployment, all issues which had emerged or been exacerbated by this global event of World War II.³]

✓ ✗ I have identified one reason for constitutional reform.¹

✓ ✗ I have provided an example of my chosen reason for constitutional reform.²

✓ ✗ I have provided information about my chosen reason.³

- [One reason why constitutional reform may occur is because of a High Court case that declares an Act to be constitutionally invalid, emphasising a possible deficiency in the Australian Constitution.¹] [In 1945, the *Pharmaceutical Benefits Case* resulted in the High Court declaring the *Pharmaceutical Benefits Act* 1944 (Cth) was invalid on the basis that the Commonwealth Parliament went beyond its law-making powers to create the Act. Therefore, the Constitution was altered to add a paragraph which provided the Commonwealth Parliament with the power to legislate on social service matters.²] [Another reason for constitutional reform is for a politician to push their own political agenda and gain wider public support, changing the Constitution through a referendum as a means to gain this support.³] [For example, in 1999, John Howard initiated the Preamble referendum which many people regarded as a 'politician's preamble'.⁴]

✓ ✗ I have identified one reason why the Constitution may need to change.¹

✓ ✗ I have provided an example of my chosen reason.²

✓ ✗ I have identified a second reason why the Constitution may need to change.³

✓ ✗ I have provided an example of my chosen reason.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.

- [It could be argued one of the reasons that the 1967 referendum regarding First Nations people was initiated was due to shifting societal attitudes and an increasing value by society placed on combating discrimination.¹] [In 1967, a referendum was proposed which would alter the Constitution in two ways. The first being that it would provide the Commonwealth Parliament with the power to create legislation regarding First Nations peoples, and the second being that it would ensure Aboriginal and Torres Strait Islanders were counted in Australia's population when a census occurred.²] [The referendum was the most successful in Australian history with 90.77% of the Australian population voting 'yes' to the question.³] [This indicates that shifting societal attitudes regarding First Nations peoples and the rights they should be allocated in Australian society influenced the constitutional reform.⁴]

- ✓ ✗ I have provided an introduction to answer the question.¹
- ✓ ✗ I have provided information to justify my answer.²
- ✓ ✗ I have provided an example from the referendum and linked it to the theory.³
- ✓ ✗ I have provided information about my chosen referendum to justify my answer.⁴
- ✓ ✗ I have referred to a past referendum to support my response.

Extended response

12. B. False.

13. A; C; D; E

14. [I agree with this statement to a minimal extent as although progressions in societal values are a common reason for constitutional reform, it is not 'the only reason' as there are several other influences that may cause a constitutional amendment to be initiated.¹]

[The Constitution was established over a century ago, therefore, shifts in the core values held by society, such as the broad desire of current society to better support First Nations peoples and condemn the colonialist past of Australia, are a strong influence upon Constitutional reform. This can be perceived in the 1967 referendum.²]

[However, there are several other reasons for constitutional reform, such as to remove the extent of power held by the states, to respond to High Court decisions, and to pursue political growth.³] [In 1973, the Prices and Income referendum aimed to provide the Commonwealth with the power to legislate over income and prices to combat rampant inflation, therefore removing certain power of the states to control these aspects of the economy. Therefore, the removal of power from states acted as an influence for reform.⁴]

[High Court decisions may also lead to constitutional reform, exemplified by the 1946 Social services referendum which was initiated after the High Court's decision in the *Pharmaceutical Benefits Case*.⁵]

[Another reason for constitutional reform is a government's desire to pursue a political agenda, as initiating constitutional change successfully can increase the political party's approval as they may be perceived as progressing Australia forward.⁶]

[Ultimately, there are many reasons for constitutional reform that may all act in conjunction with one another.⁷]

- ✓ ✗ 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 reason why I agree that progression in societal values is the only reason for constitutional reform.²
- ✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.³
- ✓ ✗ I have provided one reason why I disagree that progression in societal values is the only reason for constitutional reform.⁴
- ✓ ✗ I have provided a second reason why I disagree that progression in societal values is the only reason for constitutional reform.⁵

- ✓ ✗ I have provided a third reason why I disagree that progression in societal values is the only reason for constitutional reform.⁶

- ✓ ✗ I have provided a conclusion to my response that links back to the question.⁷

- ✓ ✗ I have used paragraphs and topic sentences to organise my response.

- ✓ ✗ I have used signposting in my response, such as 'Another reason'.

- ✓ ✗ I have used connecting words, such as 'However' and 'Therefore'.

15. A; B; D

16. [Three reasons for attempted constitutional reform associated with the 1951 Communist Party referendum were global events, societal attitudes, and a High Court decision.¹]

[The first reason was due to the global political climate and events at the time of this proposed constitutional reform.²] [The global political climate and the events of the Cold War led to concern that increasing support for communism in Australia would be a threat to Australia's security and defence.³]

[A second reason was the shifting attitudes of society in relation to communism.⁴] [There were fears about the growing presence of communism in Australia, with many people disagreeing with the communist political ideology. Therefore, the referendum held in 1951 sought to diminish this ideology in Australia by banning the communist party entirely.⁵]

[Furthermore, a third reason for the 1951 referendum was a High Court decision.⁶] [The High Court declared Commonwealth legislation to ban the Communist Party to be unconstitutional, so that the only way the Commonwealth could legislate on these matters would be to amend the Constitution.⁷]

- ✓ ✗ I have provided an introduction to my response to summarise my answer to the question.¹

- ✓ ✗ I have identified one reason for the 1951 referendum.²

- ✓ ✗ I have provided an example from the scenario and linked it to my first chosen reason.³

- ✓ ✗ I have identified a second reason for the 1951 referendum.⁴

- ✓ ✗ I have provided an example from the scenario and linked it to my second identified reason.⁵

- ✓ ✗ I have identified a third reason for the 1951 referendum.⁶

- ✓ ✗ I have provided an example from the scenario and linked it to my third chosen reason.⁷

- ✓ ✗ I have used signposting in my response, such as 'The first reason', 'A second reason', and 'a third reason'

- ✓ ✗ I have referred to past referendums to support my response.

Linking to previous learning

17. a. [Express rights are the five human rights that are explicitly stated and entrenched in the Australian Constitution.¹] [Freedom of religion is one of the express rights set out under s 116 of the Constitution which aims to ensure the Commonwealth cannot pass laws that are designed to restrict the free practice of religion or impose a religion on any individuals.²] [The 1988 referendum aimed to extend the freedom of religion express right by altering s 116 of the Australian Constitution.³]

☒ ☐ I have defined the term 'express rights'.¹

☒ ☐ I have provided information about express rights.²

☒ ☐ I have referred to the 1988 referendum to support my response.³

- b. [One reason why constitutional reform was proposed in the case of the 1988 referendum was to ensure the better protection of rights.¹] [Bob Hawke, prime minister at the time, proposed to alter the Constitution with the intent to extend the express right to freedom of religion so to better protect the religious rights of Australians.²]

☒ ☐ I have provided one reason for the 1988 proposed constitutional reform.¹

☒ ☐ I have provided information about my chosen reason.²

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

10B Referendums

Check your understanding

- B. False. **Explanation:** In this scenario, only 3/6 of the states had a majority of their population vote 'yes'. The requirement is for 4/6 or more of the states to have a majority of their citizens voting yes. Therefore, since this requirement was not met, the referendum would fail.
- A; B; C; E. **Explanation:** In order for the Constitution to be altered, it must obtain approval from both Houses of Parliament, meet the double majority requirement from the public, and gain royal assent from the Governor-General.
- A. **Explanation:** Section 128 of the Constitution establishes the steps a constitution alteration bill must take in order for the constitutional amendment to be approved.
- A; C. **Explanation:** Referendums are compulsory to vote in for anyone registered on the electoral roll and they do not necessarily have to be held at the same time as a federal election, therefore they can often come at a significant cost.
- A. **Explanation:** The process of gaining the double majority requirement for a referendum can be costly, discouraging federal leaders from initiating them due to the expense.

- B. False. **Explanation:** Unlike regular legislation that can be changed by parliament passing a bill and this bill gaining royal assent, the Constitution can only be changed when the double majority requirement is met in a referendum, which first requires an absolute majority in parliament to approve the constitution alteration bill to amend the Constitution.

Preparing for exams

Standard exam-style

- [The first role of the Houses of Parliament regarding altering the Constitution is for one of the members to initiate the change by introducing a constitution alteration bill into either one of the Houses of Parliament.¹] [The second role of the Houses of Parliament is to debate the proposed change, as they would for any other legislation, and vote on whether to approve the alteration or not. An absolute majority of members approving the bill in both Houses of Parliament is typically required unless an exception is made by the Governor-General requiring the change to only be approved by an absolute majority in one of the houses.²]

☒ ☐ I have provided one aspect of the role of the Houses of Parliament in constitutional reform.¹

☒ ☐ I have provided a second aspect of the role of the Houses of Parliament in constitutional reform.²

☒ ☐ I have used signposting in my response, such as 'The first role' and 'The second role'.

- [The double majority requirement, established under s 128 of the Australian Constitution, must be met for the Commonwealth Constitution to be altered. The requirement for a double majority means that the majority of voters Australia-wide must vote 'yes' (more than 50% of the Australian population), including voters in the territories, and the majority of voters in the majority of states must vote 'yes' (at least 4/6 states).¹] [In the scenario, a majority of all voters in Australia voted in favour of the proposed change, meeting the national majority requirement.²] [However, only 3/6 of the states, Tasmania, Queensland, and South Australia, had majority of voters in favour of the change, therefore, the approval from four or more of the states did not occur and the referendum would be unsuccessful.³]

☒ ☐ I have defined the double majority requirement.¹

☒ ☐ I have provided examples from the scenario and linked them to the national majority being achieved.²

☒ ☐ I have provided examples from the scenario and linked them to the state majority not being achieved.³

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

Extended response

- A; C
- [The double majority requirement was not met in the 1977 Simultaneous elections referendum, causing it to fail.¹] [The requirement for a double majority means that for a referendum to succeed, the majority of voters Australia-wide must vote 'yes' (more than 50% of the Australian population), including voters in the territories, and the majority of voters in the majority of states must vote 'yes' (at least 4/6 states).²]

[The national majority requirement was achieved in the 1977 Simultaneous elections referendum as 62.22% of the Australian population voted 'yes' to the proposed change.³] [However, the majority of people in only 3/6 of the states voted in favour of the proposed change, meaning that the double majority requirement was not met.⁴] [Western Australia, Tasmania, and Queensland all had a majority of their population vote 'no' to the proposed change to the Constitution.⁵]

[As a result of the proposed constitutional change not passing the state majority hurdle, the constitutional reform proposal to introduce Senate elections at the same time as the elections for the House of Representatives failed.⁶]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have defined the double majority requirement.²

✓ ✗ I have provided examples from the referendum and linked them to the double majority requirement.³

✓ ✗ I have provided examples from the referendum and linked them to the double majority requirement.⁴

✓ ✗ I have provided information about the double majority requirement.⁵

✓ ✗ I have provided a conclusion summarising the analysis and linking back to the referendum.⁶

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used connecting words, such as 'However' and 'As a result'.

11. Strengths: I; III; IV
Limitations: II; V

12. [One strength of the process of altering the Commonwealth Constitution is that the requirement of having a referendum to change the Constitution ensures voters in Australia have the power to reject changes made to the Constitution.¹] [In the 1999 Republic referendum, only 45.13% of the Australian public voted 'yes' to proposed changes to the Constitution.²] [This indicates that majority of the Australian public wanted to maintain Australia's status as a monarchy as opposed to change to a republic, and were able to have their say against the Constitution being changed. This safeguards against the Houses of Parliament being able to make drastic changes to Australian society without the public's approval.³]

[However, one limitation of the requirements for the Australian Constitution to be changed is the expense that accompanies referendums.⁴] [In the 1999 Republic referendum, the Australian government spent \$66,820,894 to send out the referendum to all Australians on the electoral roll, prepare the yes/no voting pamphlets, and advertise the referendum.⁵] [Considering the low success rate of referendums, with only 8/45 of the referendum proposals that have been conducted in Australia's history being successful, this is a high price to pay for a referendum that is likely to fail when looking at historical patterns.⁶]

✓ ✗ I have identified one strength of the process of altering the Commonwealth Constitution.¹

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen strength.²

✓ ✗ I have provided information about my chosen strength.³

✓ ✗ I have identified one limitation of the process of altering the Commonwealth Constitution.⁴

✓ ✗ I have provided an example relevant to the scenario and linked it to my chosen limitation.⁵

✓ ✗ I have provided information about my chosen limitation.⁶

✓ ✗ 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'.

Linking to previous learning

13. a. [This referendum would not be successful as the requirement for a double majority has not been achieved.¹] [In the scenario, a national majority of 'yes' votes has been achieved as 59% of Australian voters have approved the proposed change to make Legal Studies education a matter dealt with by the Commonwealth Parliament.²] [However, the referendum would fail as only 3/6 of the states are in support of the change, being Victoria, New South Wales, and Western Australia. The remainder of the states had a majority of their population vote 'no' to the proposed change, therefore the Commonwealth Parliament will not gain the power to legislate on Legal Studies education.³]

✓ ✗ I have stated that the referendum would be unsuccessful.¹

✓ ✗ I have provided examples from the scenario and linked them to the national majority being achieved.²

✓ ✗ I have provided examples from the scenario and linked them to the double majority not being achieved.³

b. [The division of powers refers to the constitutional division of law-making powers between the state parliaments and Commonwealth.¹] [Currently, Legal Studies education is a residual power as states can legislate on any matters which the Commonwealth do not have the exclusive power to legislate on and since Legal Studies education is not an exclusive or concurrent power of the Commonwealth, it is therefore a residual power. This means law-making powers regarding Legal Studies education are not granted to the Commonwealth Parliament in the Australian Constitution and therefore belong to the state Parliaments.²] [The Constitution Alteration (Legal Studies) Bill 2056 is attempting to change Legal Studies education from being a residual power to a concurrent power, meaning the Commonwealth Parliament would have the right to legislate on education as well as the states. However, since the proposed referendum failed, education is still a residual power and is thus exercised by the state parliaments.³]

✓ ✗ I have defined the division of powers.¹

✓ ✗ I have provided an example from the scenario and linked it to the division of powers.²

✓ ✗ I have provided information about the division of powers.³

10C Factors that affect the success of referendums

Check your understanding

1. B. False. **Explanation:** Out of the 45 referendums that have taken place in Australian history, only eight of these have been successful.
2. B. False. **Explanation:** Bipartisan support does not guarantee a referendum will be successful. For example, the 1967 Nexus referendum was defeated despite both major parties supporting a 'yes' vote.
3. A. **Explanation:** Bipartisan support refers to agreement by the two major parties on a particular issue.
4. If the wording of the referendum question is too **complex**, or there are multiple questions within the one question, the referendum is less likely to be successful. This was shown in the 1999 referendum relating to Australia becoming a republic.
5. A. **Explanation:** People with a conservative ideology are likely to vote 'no' to referendums, not wanting significant changes in society to occur.
6. A. **Explanation:** A factor influencing the failure of the 1973 Prices and income referendum was that the prime minister who initiated this change, Gough Whitlam, was disliked by certain members of the Australian public for his economic policies.
7. A; C. **Explanation:** Some state premiers were supportive of a 'yes' vote in the Voice to Parliament referendum. Additionally, voting in a referendum is compulsory therefore voters could not choose to simply not vote in the Voice to Parliament referendum without facing punishment, even if the voter did not want to vote in the referendum.
8. B. False. **Explanation:** Multiple factors are likely to contribute to the success of a referendum in conjunction with each other.

Preparing for exams

Standard exam-style

9. [One factor that may influence the success of a referendum is the complexity of the proposed amendment. During a referendum campaign, if a referendum proposal is particularly complex or not well-explained when it is proposed, misinformation may spread to the Australian public about the proposed constitutional change, influencing voters to not support the change due to confusion or misunderstandings.¹] [The 1999 Australian Constitutional Referendum Survey found that 47.7% of respondents believed they needed more information about the issues of the 1999 referendum proposals, both of which failed. This indicates the effect that voter confusion or misunderstandings can have on the success of a referendum, particularly in the 1999 Republic referendum.²]

✓ ✗ I have provided one factor that may influence the success of a referendum.¹

✓ ✗ I have provided an example from one Australian referendum and linked it to how my chosen factor may influence the success of a referendum.²

✓ ✗ I have used signposting in my response, such as 'One factor'.

10. [The success of the 1977 referendum regarding the retirement of judges was influenced by the factor of bipartisan support, which refers to the agreement of the government of the day and the opposition party on a particular issue.¹] [In 1977, a referendum proposal asked the public whether the Constitution should be amended to introduce a retirement age for judges in the Federal courts. This referendum received a national majority with 80.10% of Australians voting 'yes' to the proposed change.²] [In the lead up to the question being asked to the public, 'a spirit of agreement' was developed in that both of the major parties broadly supported the 'yes' vote, leading voters from both the left and right sides of the political spectrum to broadly support the proposed change.³]

✓ ✗ I have provided one factor that may have affected the success of a successful referendum.¹

✓ ✗ I have provided an example of a successful Australian referendum.²

✓ ✗ I have provided examples of my chosen successful Australian referendum and linked them to the effect of my chosen factor on the success of this referendum.³

11. [One factor that may negatively impact the success of a referendum is a lack of support from state governments as this may cause the requirement for a double majority to not be achieved if approval for the change from four out of the six states or more is not met.¹] [In the 1977 Simultaneous elections referendum, the state governments of Tasmania, Queensland, and Western Australia all launched 'no' campaigns against the proposed constitutional reform, believing it would minimise the power of smaller states. Therefore, this influenced the referendum's failure as the double majority requirement was unable to be met with only three Australian states having a majority of their citizens vote in favour of the change.²]

[Another factor that may influence the success of a referendum is negative views towards the prime minister, or the political party of the prime minister, proposing the constitutional reform as this may cause voters to vote 'no' due to a lack of trust in the politician.³]

[In 1973, Gough Whitlam proposed a referendum to give powers to the Commonwealth to control prices and income. The referendum failed, partly due to many people perceiving Whitlam's economic policies unfavourably, believing him to lack economic sophistication.⁴]

✓ ✗ I have provided one factor that may cause a referendum to not succeed.¹

✓ ✗ I have provided an example of a referendum proposal and linked it to my chosen factor.²

✓ ✗ I have provided a second factor that may cause referendum to not succeed.³

✓ ✗ I have provided an example of a referendum proposal and linked it to my chosen factor.⁴

✓ ✗ I have used paragraphs to organise my response.

✓ ✗ I have used signposting in my response, such as 'One factor' and 'Another factor'.

12. [One factor that may have influenced the 1999 Republic referendum's failure is the complexity of the proposed referendum, as many voters may have wanted to support one aspect of the constitutional reform but not the whole question.¹] [The 1999 Republic referendum was criticised for incorporating two questions in the one question; whether Australia would become a republic, and the manner by which the president would be chosen if Australia did become a republic.²] [Therefore, the referendum was unsuccessful as members of the Australian public did not support the second aspect of the question, wanting the future president to be chosen by the Australian public, not by members of parliament.³]
- [Another factor that may have influenced the failure of the 1999 Republic referendum is conservatism, which is a political philosophy committed to traditional ideas and values, therefore opposing change and innovation to the current status quo.⁴] [John Howard, the prime minister at the time of the referendum, was a champion of the conservative perspective as he considered the current system of Australia secure and working effectively, therefore there was no need to change it.⁵] [The 'no' vote against the referendum indicated this viewpoint aligned with the public, as many Australians evidently wanted to stick with the status quo of Australia being a monarchy.⁶]

- ✓ ✗ I have provided one factor that may have affected the success of the 1999 Republic referendum.¹
- ✓ ✗ I have provided an example relevant to the 1999 Republic referendum and linked it to my chosen factor.²
- ✓ ✗ I have provided information about the effect of my chosen factor on the success of the 1999 Republic referendum.³
- ✓ ✗ I have provided a second factor that may have affected the success of the 1999 Republic referendum.⁴
- ✓ ✗ I have provided an example relevant to the 1999 Republic referendum and linked it to my chosen factor.⁵
- ✓ ✗ I have provided information about the effect of my chosen factor on the success of the 1999 Republic referendum.⁶
- ✓ ✗ 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'.

Extended response

13. A; C; D
14. [Bipartisan support influences the success of a referendum to some extent, however, due to a lack of trust for politicians and society transitioning away from aligning themselves exclusively with one political party, this factor may have a limited influence on the outcome of a referendum.¹]
- [Bipartisan support refers to the agreement of the government of the day and the opposition party on a particular issue. When both major parties advocate for Australians to vote 'yes' to a particular referendum, it can show Australians that all sides of the political spectrum are in favour of the change, increasing the likelihood of voter support irrespective of their political affiliations.²]
- [For example, in the 1967 referendum about First Nations people, there was broad bipartisan support for the change, leading to over 90% of the Australian population voting 'yes'.³]

[Despite bipartisan support for referendums often increasing the proportion of votes in favour of a change, a lack of trust for politicians has caused referendum proposals with bipartisan support to sometimes fail, even though both, major political parties broadly support the proposed constitutional amendments.⁴]

[In the 1967 Nexus referendum regarding whether the number of members in the House of Representatives should be increased, there was unanimous bipartisan support for a 'yes' vote. Despite this, the referendum still failed, indicating that bipartisan support is not a definitive factor that is able to guarantee a referendum is successful.⁵]

[In addition, there has been a broad movement away from supporting the two, major political parties in Australia, with more Australians aligning with values of independent parties, causing the factor of bipartisan support to likely have less of an impact in modern society. In the 2022 federal elections, an increasing number of independent MP's were voted into the Commonwealth Parliament, indicating a transition away from party alignment and, therefore, the diminishing influence of bipartisan support.⁶]

[Although bipartisan support can lead to a greater proportion of Australians voting 'yes' to a proposed constitutional reform, past referendums that have had bipartisan support have failed. However, every successful referendum proposal in Australia's history has received bipartisan support in the lead up to the national vote, indicating this is an important factor for a referendum to succeed.⁷]

- ✓ ✗ I have provided an introduction to summarise my answer to the question.¹
- ✓ ✗ I have provided one way my chosen factor positively influences the success of a referendum.²
- ✓ ✗ I have provided an example of a referendum and linked it to my chosen factor.³
- ✓ ✗ I have provided a topic sentence to introduce the main idea of the paragraph.⁴
- ✓ ✗ I have provided one way my chosen factor negatively influences the success of a referendum.⁵
- ✓ ✗ I have provided an example of a referendum and linked it to my chosen factor.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 connecting words, such as 'Despite' and 'Although'.

Linking to previous learning

15. a. [One factor that influenced the success of the 1967 referendum was bipartisan support, which refers to the agreement of the government of the day and the opposition party on a particular issue.¹]
- [In the 1967 Aboriginal referendum, for example, there was broad bipartisan support for the change to occur, leading to over 90% of the Australian population voting 'yes'.²]
- [Both the Australian Labor Party and the coalition at the time urged the Australian public to vote 'yes' to the changes, therefore members of the Australian public from both sides of the political spectrum were encouraged to support the constitutional reform.³]

- ✓ ✗ I have provided one factor that may have affected the success of the 1967 referendum.¹
- ✓ ✗ I have provided an example of the referendum and linked it to the theory.²
- ✓ ✗ I have provided information about my chosen reason.³
- ✓ ✗ I have used signposting in my response, such as 'One factor'.

- b. [The first reason why the constitutional reform about First Nations peoples occurred in 1967 was for greater rights' protection.¹] [One of the changes that was proposed in 1967 was changing s 51 of the Constitution to allow the Commonwealth Parliament to legislate on matters impacting Aboriginal and Torres Strait Islander peoples. This change was proposed in order to allow the Commonwealth to introduce legislation that could better protect the rights of First Nations people.²] [One of these introduced Acts was the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) which enabled the Commonwealth to assist in protecting the cultural rights of First Nations people.³]

[Another reason for the constitutional reform in 1967 was changing societal values with regard to the protection of First Nations peoples and their treatment by Australian society post-colonisation.⁴] [By the 1960s, society had started to condemn the discrimination First Nations people were facing, indicated by the protests that were occurring at the time, such as the Freedom Rides.⁵] [As a result, the constitutional reform in 1967 responded by ensuring Aboriginal peoples could now be counted as part of the Australian population in a census. This was influenced by the Australian public's shift towards valuing the rights of First Nations people more during this time, and wanting to create a more equal and less discriminatory Australian society.⁶]

- ✓ ✗ I have provided one reason for the 1967 constitutional reform.¹
- ✓ ✗ I have provided an example relevant to the 1967 referendum and linked it to my chosen reason.²
- ✓ ✗ I have provided information about my chosen example.³
- ✓ ✗ I have provided a second reason for the 1967 constitutional reform.⁴
- ✓ ✗ I have provided information about my chosen reason.⁵
- ✓ ✗ I have provided an example relevant to the 1967 referendum and linked it to my chosen reason.⁶
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'The first reason' and 'Another reason'.

10D The 1967 referendum

Check your understanding

- On 27 May 1967, **90.77%** of Australian voters voted 'yes' to the First Nations referendum proposal.
- B. False. **Explanation:** The 1967 referendum resulted in two changes to the Australian Constitution. The first was the removal of s 127 which excluded Aboriginal peoples from being counted in the national Census. The second change was the amendment to s 51(xxvi) of the Constitution which prevented the Commonwealth Parliament from making laws concerning Aboriginal peoples.
- C; D. **Explanation:** The 1967 referendum did not award Aboriginal and Torres Strait Islander peoples the right to vote. It was in 1962 when the Commonwealth Parliament passed a law giving Aboriginal and Torres Strait Islander peoples the option to vote in federal elections. Furthermore, the referendum did not give the Commonwealth Parliament exclusive power to make laws concerning Aboriginal and Torres Strait Islander peoples. Rather, the referendum established creating laws about First Nations peoples as being an area of concurrent law-making power.
- B. False. **Explanation:** Harold Holt was the Prime Minister of Australia who introduced the 1967 referendum after speaking with FCAATSI delegates.
- A. **Explanation:** No official 'no' campaign was published for the 1967 referendum. This was a unique feature of this referendum.
- A; C; D. **Explanation:** The 1967 referendum, which changed s 51(xxvi) of the Constitution, did not result in the Commonwealth Parliament gaining the sole power to create legislation for Aboriginal and Torres Strait Islander peoples. Rather, the power to make laws on such subject matter is shared with the states.
- Under **s 109** of the Constitution, the Commonwealth Parliament's legislation overrules state laws where the laws of the Commonwealth conflict with one of the states. Therefore, the 1967 referendum allowed the Commonwealth Parliament to override state legislation which was discriminatory and conflicted with Commonwealth legislation.
- B. False. **Explanation:** The 1967 referendum did result in legislative changes, for example, the *Racial Discrimination Act 1975* (Cth) was passed after the referendum as the Commonwealth Parliament now had the power to make laws relating to Aboriginal and Torres Strait Islander peoples.

Preparing for exams

Standard exam-style

- [One reason why the 1967 referendum was significant is that it allowed the Commonwealth Parliament to legislate Acts that uplifted and protected First Nations rights.¹] [For example, the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) enabled the Australian Government to protect cultural heritage sites if they were under threat.²] [Furthermore, another reason why the 1967 referendum was significant is that it allowed for greater developments in Indigenous affairs, such as politicians admitting to Australia's oppressive, colonialist past against Aboriginal and Torres Strait Islander peoples.³] [For example, in 1992, Paul Keating made his 'Redfern speech' in which he acknowledged the genocide of Aboriginal and Torres Strait Islander peoples, the Stolen Generations, and the ongoing oppression of First Nations peoples.⁴]

- ✓ ✕ I have provided one reason why the 1967 referendum was significant.¹
- ✓ ✕ I have provided information about my chosen reason.²
- ✓ ✕ I have provided a second reason why the 1967 referendum was significant.³
- ✓ ✕ I have provided information about my chosen reason.⁴
- ✓ ✕ I have used signposting in my response, such as 'One reason' and 'another reason'.
- ✓ ✕ I have used connecting words, such as 'Furthermore'.

10. [One reason why the 1967 referendum was significant is it allowed the Commonwealth Parliament to overrule discriminatory state legislation. This is because the referendum changed the constitution to amend s 51(xxvi), therefore allowing the Commonwealth Parliament to make laws, concurrently with state parliaments, concerning Aboriginal and Torres Strait Islander peoples.¹] [The Commonwealth Parliament was able to overrule state laws relating to Aboriginal and Torres Strait Islander peoples as a result of s 109 of the Constitution. Section 109 states that, when a conflict arises between state and Commonwealth legislation, the state legislation is deemed inoperable to the extent it is inconsistent with the Commonwealth legislation, allowing the Commonwealth legislation to prevail.²] [For example, in *Mabo v Queensland*, the High Court held the Queensland Act was contradictory to the clauses contained in the *Racial Discrimination Act 1975* (Cth). Therefore, since the *Racial Discrimination Act 1975* (Cth) is Commonwealth legislation, it prevailed over Queensland's state laws.³]

- ✓ ✕ I have provided one reason why the 1967 referendum was significant in relation to the High Court decision in *Mabo v Queensland* (No 1) (1988).¹
- ✓ ✕ I have provided information about my chosen reason.²
- ✓ ✕ I have provided an example from the case and linked it to my chosen reason.³
- ✓ ✕ I have used signposting in my response, such as 'One reason'.

Extended response

11. Positives: I; II; IV
Negatives: III; V
12. [The 1967 referendum was a significant moment in Australia's history for a number of reasons. It created tangible changes to the rights of First Nations peoples whilst also being of symbolic significance to Aboriginal and Torres Strait Islander peoples.¹] [Firstly, the 1967 referendum was significant as it allowed the Commonwealth Parliament to legislate Acts that uplifted and protected First Nations rights, such as the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) which enabled the Australian government to protect cultural heritage sites.²] [Another reason why the referendum was significant is that it allowed more beneficial and effective policies for First Nations peoples to be created.³] [Section 127 of the Constitution was removed by the referendum, therefore allowing First Nations peoples to be counted in the Census. This enabled more beneficial public policies to be created, as information from the Census could be drawn upon

to better understand the key areas where reform was required for Aboriginal and Torres Strait Islander peoples.⁴] [Thirdly, another reason as to why the referendum was significant is that its unprecedented success, as well as the fact that a 'no' campaign did not exist, indicated the widespread support among Australians for greater equality in society.⁵]

[However, the referendum's significance was limited in some regards. Firstly, in the short term, the 1967 referendum had little impact on First Nations peoples according to Russell Taylor in a 2017 report reflecting on the referendum.⁶] [Additionally, the referendum was not an absolute fix to the issues facing First Nations peoples in Australia. For example, the reformed Constitution now makes no formal reference to Aboriginal and Torres Strait Islander peoples which many regard as invalidating the existence of Aboriginal and Torres Strait Islander peoples and a refusal of Australians to recognise Australia's colonialist past.⁷]

[Ultimately, the 1967 referendum was broadly significant, however, it cannot be said that this singular referendum addressed all the injustices of Australian society with respect to First Nations peoples.⁸]

- ✓ ✕ I have provided an introduction to my response to summarise my answer.¹
- ✓ ✕ I have provided one reason why the 1967 referendum was significant.²
- ✓ ✕ I have provided a second reason why the 1967 referendum was significant.³
- ✓ ✕ I have provided information about my chosen reason.⁴
- ✓ ✕ I have provided a third reason why the 1967 referendum was significant.⁵
- ✓ ✕ I have provided one reason why the 1967 referendum was limited in its significance.⁶
- ✓ ✕ I have provided a second reason why the 1967 referendum was limited in its significance.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 'Another reason'.
- ✓ ✕ I have used connecting words, such as 'However' and 'Ultimately'.

Linking to previous learning

13. [One reason why the 1967 constitutional reform relating to First Nations peoples was proposed is due to the shifting attitudes of Australian society.¹] [The views and values held by the majority of Australian society are constantly shifting. As colonised, white Australian society increasingly began to perceive First Nations peoples as equals, the 1967 referendum was initiated to reflect this societal change in the Constitution.²]

[Another reason why this constitutional reform occurred was for rights' protection, as the referendum allowed the Commonwealth Parliament to override discriminatory state laws that impeded Aboriginal and Torres Strait Islander rights, such as their property or human rights.³] [For example, a Queensland Act which abolished the Meriam people's property rights to the Murray Islands under native title, the *Queensland Coast Islands Declaratory Act 1985* (Qld), was in conflict to a Commonwealth Act, and therefore was determined invalid to the extent it was inconsistent with the Commonwealth legislation, upholding rights' protection for First Nations people.⁴]

✓ ✗ I have provided one reason for the 1967 constitutional reform relating to First Nations peoples.¹

✓ ✗ I have provided information about my chosen reason.²

✓ ✗ I have provided a second reason for the 1967 constitutional reform relating to First Nations peoples.³

✓ ✗ I have provided information about my chosen reason.⁴

✓ ✗ I have used signposting in my response, such as 'One reason' and 'Another reason'.

14. [One factor that affected the success of the 1967 referendum was the bipartisan support it had. There was an absence of an official 'no' campaign published for the referendum and both the Prime Minister at the time, Harold Holt, as well as the opposition leader, Gough Whitlam, supported the constitutional reform relating to First Nations peoples.¹] [By receiving bipartisan support, this demonstrated to the Australian public that there was a broad political consensus that the 1967 proposal would have positive impacts on people of all demographics in the Australian population.²] [Additionally, another factor that helped in ensuring the 1967 referendum was successful was the knowledge held by voters.³] [If there is more positive publicity about a referendum, there is likely to be more information disseminated regarding the issue voters are deciding on. For example, the 1967 First Nations referendum had high degrees of publicity, making Australian citizens aware of the proposed changes and the benefits it could bring to society. The referendum ended up being the most successful in Australia's history, indicating that this publicity and the knowledge it allowed voters to gain improved the referendum's success.⁴]

✓ ✗ I have provided one factor that affected the success of the 1967 First Nations referendum.¹

✓ ✗ I have provided information about my chosen factor.²

✓ ✗ I have provided a second factor that affected the success of the 1967 First Nations referendum.³

✓ ✗ I have provided information about my chosen factor.⁴

✓ ✗ I have used signposting in my response, such as 'One factor' and 'another factor'.

✓ ✗ I have used connecting words, such as 'Additionally'.

15. Strengths: I; II
Limitations: III; IV

16. [The Australian people were successful in changing the Constitution during the 1967 referendum about First Nations peoples as the referendum succeeded with a 90.77% 'yes' vote. However, the rigid nature of the Constitution made it a difficult process for the Australian population to do so.¹]

[Firstly, one way the Australian people were able to change the Constitution is through petitions.²] [In 1957, a petition created by the Aboriginal-Australian Fellowship (AAF) was signed by over 100,000 people and presented to the Commonwealth Parliament. This showed parliamentarians of the general public's desire for the Constitution to change, influencing discussions in parliament which ultimately led to the referendum.³] [However, as the petition was introduced to parliament in 1957, yet the referendum did not take place until 1967, this indicates a limit to the public's ability to change the Constitution in that this process is time-consuming.⁴] [To hold a referendum, the proposed change must be introduced, then passed through both Houses of Parliament, and then put to the people in a national vote. Therefore, regardless of how persuasive petitions are, the Commonwealth Parliament does not always have the time to change the Constitution. Therefore, citizens are limited in their capacity to influence constitutional reform.⁵]

[Secondly, another way the Australian public can influence constitutional reform is through demonstrations, such as the Freedom Rides in 1965 in the lead-up to the 1967 referendum.⁶]

[Demonstrations attract the attention of the Australian public, making citizens aware of injustices that constitutional reform can address. For example, the Freedom Rides exposed to the Australian people the segregated and poor living conditions Aboriginal peoples were being subjected to in NSW towns. Therefore, this public pressure compels parliament to initiate a referendum to address the public outrage and remain popular among voters.⁷] [However, for a referendum to be successful, a double majority must be achieved whereby a majority of Australian voters approve the change and 4/6 of the states have a majority of their voters vote 'yes'. Therefore, if minority groups are partaking in demonstrations that the rest of Australia does not care about, demonstrations will be unsuccessful in influencing constitutional reform.⁸] [Here, the demonstrations, amongst other campaigns, were successful since a majority of Australians supported the views of the Freedom Ride students as reflected in the high 'yes' vote to the referendum proposal.⁹]

[Ultimately, the Australian public can influence constitutional reform, and did so in the 1967 referendum, by gathering public support for an issue that changing the constitution can address, such as the segregation being experienced by First Nations peoples. Although their ability to change the Constitution can be limited by the rigid requirements set by the Constitution, the ability to alter the Constitution was not limited here.¹⁰]

✓ ✗ I have provided an introduction to my response.¹

✓ ✗ I have provided one way the Australian people can change the Constitution.²

✓ ✗ I have provided an example from the 1967 referendum and linked it to my chosen way the Australian people can change the Constitution.³

✓ ✗ I have provided one way the Australian people are limited in changing the Constitution.⁴

✓ ✗ I have provided an example from the 1967 referendum and linked it to my chosen way the Australian people are limited in changing the Constitution.⁵

✓ ✗ I have provided a second way the Australian people can change the Constitution.⁶

✓ ✗ I have provided an example from the 1967 referendum and linked it to my chosen way the Australian people can change the Constitution.⁷

- ✓ ✗ I have provided a second way the Australian people are limited in changing the Constitution.⁸
- ✓ ✗ I have provided an example from the 1967 referendum and linked it to my chosen way the Australian people are limited in changing the Constitution.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 'Secondly'.
- ✓ ✗ I have used connecting words, such as 'However' and 'Ultimately'.

10E Possible future constitutional reform

Check your understanding

- B. False. **Explanation:** Australians have continued to request the Commonwealth Parliament to hold a referendum to enable constitutional reform about various constitutional issues, such as reform to establish a First Nations Voice which took place in 2023.
- B. **Explanation:** In 2017, the Uluru Statement from the Heart was produced at the National First Nations Constitutional Convention in Uluru after the Referendum Council had collated Aboriginal and Torres Strait Islander communities' priorities regarding constitutional recognition.
- B; D. **Explanation:** The Voice to Parliament, comprised only of Aboriginal and Torres Strait Islander representatives, would not have been a third chamber of parliament as it would have had no ability to vote on legislation, rather, it would have advised in regard to proposed legislation.
- In 1999, a referendum was held asking Australian voters whether they agreed to **becoming a republic**. However, after this proposal failed, calls for this referendum to happen again have occurred. On the other hand, for the first time in 2023, a referendum was put to voters asking whether they supported Australia **introducing a Voice to Parliament**.
- A; C. **Explanation:** Becoming a republic may make Australia have a similar system to the United States' two-party system of government and would alter the status quo by changing Australia from a constitutional monarchy to a republic.
- B. False. **Explanation:** Polling has shown there is still a strong unwillingness of the Australian public to agree to become a republic. A 2021 poll from IPSOS revealed that 40% of Australians rejected the idea of becoming a republic, whilst just 34% outrightly supported this change.
- B; D. **Explanation:** There have been calls to change the Constitution to remove the eligibility requirement that a member of the Commonwealth Parliament cannot have dual citizenship, whilst there have also been calls to extend the terms of members of the House of Representatives from three to four years.
- B. False. **Explanation:** After a constitution alteration bill is passed through the Houses of Parliament, it is ultimately then up to the people to approve the change at a referendum.

Preparing for exams

Standard exam-style

- [One possible future constitutional reform is changing s 44 of the Australian Constitution to remove the eligibility requirement that states a member of the Commonwealth Parliament must not have dual citizenship.¹] [Considering Australia is a multicultural nation with a number of migrants possessing dual citizenship, people have called for this change so that the Commonwealth Parliament can be more reflective of the Australian people and their values.²]
- ✓ ✗ I have provided one possible future constitutional reform.¹
- ✓ ✗ I have provided information about my chosen possible future constitutional reform.²
- ✓ ✗ I have used signposting in my response, such as 'One possible future constitutional reform'.
- [I do not agree with this statement as, although demonstrations can help the Australian people influence constitutional change, this is not the only means by which Australians can do so.¹]
- [Firstly, in relation to the 2023 Voice to Parliament referendum, demonstrations were held across cities in Australia, both before the referendum proposal was passed through parliament and during the lead-up to the referendum. Therefore, demonstrations were potentially one means through which constitutional reform was initiated.²] [However, there are various other means through which the Australian people may influence law reform aside from demonstrations. For example, petitions were also utilised to influence the proposed constitutional reform of implementing the Voice.³] [The Uluru Statement from the Heart was a petition established by First Nations representatives across Australia that urged the government to implement a Voice to Parliament and a Makaratta Commission. Therefore, without this petition, the Voice to Parliament may not have been established as an avenue for potential law reform. Hence, whilst demonstrations can be successful in influencing potential constitutional reform, as demonstrated by the Voice referendum, there are multiple other ways that constitutional reform may be initiated by the Australian people.⁴]
- ✓ ✗ I have provided an introduction to state whether I agree or disagree with the statement.¹
- ✓ ✗ I have provided information about how demonstrations can influence constitutional reform and linked it to the Voice to Parliament referendum.²
- ✓ ✗ I have provided information about one other way the Australian people can influence and linked it to the Voice to Parliament referendum.³
- ✓ ✗ I have provided further information about my chosen way the Australian people influencing the Voice to Parliament referendum.⁴
- ✓ ✗ I have used paragraphs to organise my response.
- ✓ ✗ I have used signposting in my response, such as 'Firstly' and 'For example'.
- ✓ ✗ I have used connecting words, such as 'Therefore', 'However', and 'Hence'.

11. [One strength of the Australian public in influencing constitutional reform is that they have the power of their vote, and can therefore pressure governments or politicians to pass constitution alteration bills through parliament in order to initiate a referendum.¹] [For example, members of the Australian public want to change the Constitution to remove the part of s 44 of the Constitution that deems a person ineligible to be a member of the Commonwealth Parliament if that person is a dual citizen. As a response to members of the Australian public seeking this reform in recent decades, in 1998, a member of the Senate introduced the Constitution Alteration (Right to Stand for Parliament-Qualification of Members and Candidates) Bill to try and initiate constitutional change.²] [Although this bill did not pass through parliament, the introduction of this bill to parliament shows how politicians are willing to listen to voters and may initiate bills to maintain support and increase their chances of re-election.³]

[However, one limitation of the Australian public in influencing constitutional reform is that they are unable to actually have their say on the matter by voting in a referendum unless a referendum is put to them, which requires the majority of parliament to pass a constitution alteration bill.⁴] [For example, although the proposed reform of altering the eligibility requirements for parliamentarians had the support from a number of Australians, the bill seeking to change s 44 of the Constitution was not passed through parliament.⁵] [Therefore, a referendum was never put to the Australian people asking whether they agreed with this constitutional change, meaning the Australian public could not influence constitutional reform by approving it, and the constitutional reform could not occur.⁶]

- ☒ ☐ I have provided one strength of the Australian people in influencing constitutional reform.¹
- ☒ ☐ I have provided an example of one proposed constitutional reform relevant to my chosen strength.²
- ☒ ☐ I have linked my chosen proposed constitutional reform to my chosen strength.³
- ☒ ☐ I have provided one limitation of the Australian people in influencing constitutional reform.⁴
- ☒ ☐ I have provided an example of one proposed constitutional reform relevant to my chosen weakness.⁵
- ☒ ☐ I have linked my chosen proposed constitutional reform to my chosen weakness.⁶
- ☒ ☐ 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 'For example' and 'However'.

Extended response

12. Strengths: I; II
Limitations: III; IV; V
13. [The unsuccessful 2023 Voice to Parliament referendum demonstrates how the Australian people can be limited in their ability to change the Australian Constitution, particularly because of the strict double majority requirements.¹]

[Firstly, the Australian people are able to change the Constitution by pressuring governments to introduce and pass a constitution alteration bill through parliament so that the public can decide on whether the Constitution should be changed during a referendum.²]

[For example, Anthony Albanese ran his 2022 federal election campaign on the promise he would try to implement a Voice to Parliament, therefore, since the public indicated they wanted this by electing him as Prime Minister, he was compelled to initiate constitutional reform in parliament.³]

[Another way the Australian people are able to influence constitutional change is through petitions.⁴] [For example, the Uluru Statement from the Heart was signed by a number of First Nations peoples, indicating the desires of Aboriginal and Torres Strait Islander communities to gain constitutional recognition. This petition then inspired the bill being introduced to parliament which was seeking to change the Constitution to add the Voice, therefore beginning the process of constitutional reform.⁵]

[However, the ability of the Australian people to change the Constitution is limited in a number of ways.⁶] [Firstly, for a referendum to take place and be successful, a lengthy and difficult process must occur. Considering only eight out of 45 referendums in Australia's history have been successful, it is clear the double majority requirement is difficult to achieve.⁷] [Despite the advocacy by some Australians for a Voice to Parliament to be established, the double majority requirement was not achieved during the referendum as no state had a majority 'yes' vote and the national majority was not achieved as a majority of Australians voted 'no' to the proposed change.⁸]

[Secondly, a referendum allows all Australian voters to have their say on whether they approve constitutional change.⁹] [In the 2023 Voice to Parliament referendum, this resulted in Australians not changing the Constitution since a majority rejected the change. Therefore, even when there is a large group of people advocating for constitutional change, their ability to change the Constitution is contingent on the rest of the Australian public.¹⁰]

[Finally, there are certain factors that are likely to result in a failed referendum that are outside the control of the Australian voters and are instead dependant on politician's choices.¹¹] [For example, in the lead-up to the Voice to Parliament referendum, there was a lack of bipartisan support, a lack of voter knowledge, and a strong 'no' campaign. Hence, the failure of the Voice referendum can be attributed to multiple intersecting factors.¹²]

- ☒ ☐ I have provided an introduction to my response.¹
- ☒ ☐ I have provided one way the Australian people can influence a change to the Constitution.²
- ☒ ☐ I have provided an example relevant to the 2023 Voice to Parliament referendum and linked it to my chosen way.³
- ☒ ☐ I have provided a second way the Australian people can influence a change to the Constitution.⁴
- ☒ ☐ I have provided an example relevant to the 2023 Voice to Parliament referendum and linked it to my chosen way.⁵
- ☒ ☐ I have provided a topic sentence to introduce the main idea of my paragraph.⁶
- ☒ ☐ I have provided one way the Australian people are limited in their ability to influence constitutional reform.⁷

- ✓ ✗ I have provided an example relevant to the 2023 Voice to Parliament referendum and linked it to my chosen way.⁸
- ✓ ✗ I have provided a second way the Australian people are limited in their ability to influence constitutional reform.⁹
- ✓ ✗ I have provided an example relevant to the 2023 Voice to Parliament referendum and linked it to my chosen way.¹⁰
- ✓ ✗ I have provided a third way the Australian people are limited in their ability to influence constitutional reform.¹¹
- ✓ ✗ I have provided an example relevant to the 2023 Voice to Parliament referendum and linked it to my chosen way.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 'For example' and 'However'.

Linking to previous learning

14. Strengths: I; II; IV
Limitations: III; V

15. [By comparing the successful 1967 referendum about First Nations peoples with the unsuccessful proposed constitutional change for Australia to become a republic, limitations in the Australian public's ability to influence constitutional change can be demonstrated.¹]

[Firstly, the Australian people are able to change the Constitution by pressuring governments to introduce and pass a constitution alteration bill through parliament so that the public can decide on whether the Constitution should be changed via referendum.²][For example, prior to the 1967 referendum, there were a number of activist efforts, such as the Freedom Rides, which sought to compel parliament to take the first steps in removing the discriminatory provisions of the Constitution.³]

[Secondly, when factors all point towards the referendum being successful, the Australian people have a greater likelihood of voting 'yes' to changes to the Constitution.⁴][For example, in the 1967 referendum about First Nations peoples, many factors pointed in favour of the yes vote succeeding from the outset as there was no, published 'no' campaign and bipartisan support for a 'yes' vote to the proposal.⁵]

[Thirdly, all eligible voters have to vote in a referendum, therefore, all of these individuals are able to have their say on whether the Constitution should be changed.⁶][For example, in 1967, 90.77% of Australian voters approved the constitutional change in relation to Aboriginal and Torres Strait Islander peoples' rights, demonstrating how the Australian people can change the Constitution by exercising their right to vote.⁷]

[However, considering the fact that many proposed reforms have not yet been initiated despite the Australian people wanting to change the Constitution, it is clear the Australian people's ability to change the Constitution is limited.⁸][The Constitution can only be changed by a referendum, which requires parliament to initiate and pass a bill for the referendum to occur.⁹][Despite a number of Australians wanting Australia to become a republic, no parliamentarian in recent years has tried to introduce a constitution alteration bill on this issue to parliament. Therefore, the ability of the people to change the Constitution is limited as they cannot vote in a referendum if parliament fails to initiate a referendum.¹⁰]

[Furthermore, for a referendum to take place and be successful, a lengthy and difficult process must occur.¹¹][In 1999 when the question of whether Australia should become a republic was first put to the people, the double majority requirement was not achieved as the national 'yes' vote was below 50%. Therefore, constitutional change could not occur despite some of the Australian public strongly advocating for this change.¹²]

- ✓ ✗ I have provided an introduction to my response.¹
- ✓ ✗ I have provided one way the Australian people can influence a change to the Constitution.²
- ✓ ✗ I have provided an example relevant to the 1967 referendum about First Nations peoples and linked it to my chosen way.³
- ✓ ✗ I have provided a second way the Australian people can influence a change to the Constitution.⁴
- ✓ ✗ I have provided an example relevant to the 1967 referendum about First Nations peoples and linked it to my chosen way.⁵
- ✓ ✗ I have provided a third way the Australian people can influence a change to the Constitution.⁶
- ✓ ✗ I have provided an example relevant to the 1967 referendum about First Nations peoples and linked it to my chosen way.⁷
- ✓ ✗ I have provided a topic sentence to introduce the main idea of my paragraph.⁸
- ✓ ✗ I have provided one way the Australian people have limited influence over changing the Constitution.⁹
- ✓ ✗ I have provided an example relevant to the republic proposed constitutional reform and linked it to my chosen way.¹⁰
- ✓ ✗ I have provided a second way the Australian people have limited influence over changing the Constitution.¹¹
- ✓ ✗ I have provided an example relevant to the republic proposed constitutional reform and linked it to my chosen way.¹²
- ✓ ✗ 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 'For example' and 'However'.

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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.389

Access the principle that all people should be able to engage with the justice system and its processes on an informed basis. p.III, 34, 157

Accused the party who is charged with a criminal offence. p.77

Administrative convenience the systematic benefit derived from legal matters being distributed amongst the courts according to their complexity and severity. p.174

Aggravating factors aspects of an offence or the offender that render the offending more serious and can lead to a more severe sentence. p.130

Appeal a legal process that a dissatisfied party may pursue to have a court's decision reviewed by a higher court. p.60, 175

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.166

Australian Constitution the founding document of Australia that sets out the composition of the Australian Parliament, its function and layout, and its powers. p.IV, 452

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.142

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. p.82, 197

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.7

Bicameral parliament a law-making body with two houses or chambers that must approve of new bills or amendments to laws. p.302

Binding precedent legal reasoning of a higher court that must be followed by all lower courts in the same court hierarchy where the material facts are similar. p.363

Bipartisan support the agreement of the government of the day and the opposition party on a particular issue. p.470

Burden of proof the responsibility of a party to prove the facts of a case. p.6, 142

C

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. p.183

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.VII, 140

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.205

Codification the process of parliament confirming common law precedent by enacting legislation to give effect to the legal principles. p.388

Community correction order (CCO) a non-custodial sanction that is served by the offender in the community with certain conditions attached. p.122

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

Community legal centres (CLCs) not-for-profit community organisations that provide free legal information, advice, education, and casework services. p.44

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.164

Concurrent powers law-making powers granted to both the Commonwealth and state parliaments. p.281

Conservatism a political philosophy committed to traditional ideas and values, therefore opposing change and innovation. p.475

Constitutional monarchy a system of government in which the Crown is the Head of State, but elected representatives have the power to create laws. p.IV

Constitutional reform alterations made to the Australian Constitution through the process of a successful referendum. p.452

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.211

Costs the amount of money, including court fees and fees for legal representation, that has to be paid to resolve a legal dispute. p.146, 377

County Court of Victoria Victoria's principal trial court that hears and determines criminal and civil matters. p.59

Court hierarchy the arrangement of courts in order of superiority. p.58, 173

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.4

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.VII, 4

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.246

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. p.312

Defendant the party that is defending themselves against a claim by another person, the plaintiff, for an alleged breach of civil law. p.191

Democratic society an organised system of people living in a community, in which the laws and processes that govern people's lives are created by elected representatives. p.319

Demonstration public protest to a law or action undertaken by a large group of people. p.404

Denunciation the act of publicly condemning an offender's criminal behaviour. p.115

Deterrence the act of discouraging an offender, or other individuals, from reoffending or committing similar crimes, through the imposition of a criminal sanction. p.114

Disapproving a precedent an act whereby a lower court expresses its disapproval of a precedent established by a higher court through its written judgment, but is still bound to follow it. p.365

Distinguishing a precedent an act whereby a lower court avoids applying a precedent by demonstrating that the case before it has different material facts to the case in which the precedent was established. p.365

Division of powers the constitutional division of law-making powers between the Commonwealth and state parliaments. p.280

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.362, 369

Double majority a voting system that requires a majority of voters Australia-wide to vote 'yes', and a majority of voters in the majority of states to vote 'yes'. p.463

E

Enforcement issues a problem a plaintiff may need to consider regarding the capacity of a defendant to fulfil their legal obligation to compensate the plaintiff. p.148

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.III, 32, 156

Exclusive powers law-making powers granted only to the Commonwealth Parliament by s 51 and s 52 of the Australian Constitution. p.280

Executive power the power, vested in the King and exercised by the Governor-General, to maintain and administer the law and the business of government. p.335

Express rights the five human rights that are explicitly stated and entrenched in the Australian Constitution. p.342

F

Fairness the principle that all people can participate in the justice system and its processes should be impartial and open. p.II, 30, 154

Fine a sanction that requires an offender to make a monetary payment as a penalty for a criminal offence. p.120

G

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. p.114

Governor the representative of the monarch in each of the six Australian states. p.275

Governor-General the representative of the monarch in the Commonwealth Parliament. p.268

Guilty plea a full admission of guilt by an accused person of an offence for which they have been charged. p.132

H

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.IV

House of Representatives the lower house of the Commonwealth Parliament, which is comprised of 151 members of parliament representing the electorates across Australia. p.265

Human rights entitlements and liberties that exist for all human beings, irrespective of any personal qualities and characteristics. p.VIII

I

Imprisonment a sanction that removes an offender from the community and places them in prison for a given period of time. p.124

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.5

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.6

Injunction a type of remedy requiring a party to either perform a specific action or prohibiting a party from taking a particular action. p.253

International pressures the influence that other countries and international organisations exert on parliaments to ensure the laws created comply with international standards. p.310

International treaty an agreement between two or more countries or international organisations, that creates international rights and obligations. p.311

J

Judge an independent authority who presides over a trial, ensuring procedural fairness by overseeing all personnel and evidence. p.65, 180

Judicial activism a judicial approach where a judge takes into account numerous social and political factors when interpreting the law and deciding cases. p.372

Judicial conservatism a judicial approach where a judge is reluctant to develop new law as they feel it is the role of parliament, as the elected representative body, to do so. p.371

Judicial determination a method of dispute resolution whereby a judge or magistrate will make a legally binding decision after the parties present their cases at a trial or hearing. p.229

Judicial power the power vested in courts and tribunals that enables them to enforce laws and resolve legal matters. p.335

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.69, 185

L

Law reform the amendment, progression, and/or modernisation of law by aligning it with societal attitudes, removing defective elements, and improving its effectiveness. p.396

Legal practitioner a lawyer with an Australian legal practising certificate. p.82, 197

Legislative Assembly the lower house of the Victorian Parliament, which is comprised of 88 members of parliament representing the electoral districts across Victoria. p.272

Legislative Council the upper house of the Victorian Parliament which is comprised of 40 members of parliament who represent eight regions across Victoria. p.274

Legislative power the power vested in parliament that enables it to make laws. p.335

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.147

M

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. p.65, 180

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.59

Mediation a non-judicial dispute resolution method involving an independent third party, known as a mediator, who facilitates conversations between disputing groups. p.161

Mitigating factors aspects of an offence or the offender that render the offending less serious and can lead to a less severe sentence. p.131

O

Overruling a precedent an act whereby a superior court changes a previous decision made by a lower court, when ruling on a different case. p.365

P

Parliamentary committee a group of members of parliament who undertake work on behalf of parliament and investigate the need for law reform. p.441

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.386

Persuasive precedent legal reasoning that can act as a guide for judges even though they are not bound to follow it. p.363

Petition a formal document addressed to the government that is signed by individuals who are demanding action or legislative reform. p.403

Plaintiff the party that initiates a civil claim against another person, the defendant, in court. p.191

Plea negotiations discussions between the prosecution and the accused, aimed at encouraging the accused to plead guilty to a lesser charge, or fewer charges altogether in exchange for the prosecution requesting a lesser sentence. p.52

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. p.VI

Presumption of innocence the right for all accused persons to be presumed innocent until it is proven otherwise beyond reasonable doubt. p.7

Principles of justice underlying principles of the legal system, and in VCE Legal Studies, these principles can be applied to the Victorian justice system in order to assess whether justice is achieved. p.II

Prosecution the party that acts on behalf of the Commonwealth or the state and brings a criminal case to court. p.75

Protection the act of ensuring offenders do not pose a significant risk to the welfare and safety of their victims and broader society. p.115

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.113

R

Referendum a compulsory national vote in which members of the electoral roll vote 'yes' or 'no' to alter the Australian Constitution. p.452, 462

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.112

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.246

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.327

Residual powers law-making powers that are not granted to the Commonwealth Parliament in the Australian Constitution and therefore belong to the state parliaments. p.282

Reversing a precedent an act whereby a superior court changes a precedent set by a lower court in the hierarchy in the same case on appeal. p.364

Right to be informed about the likely release date of the offender a right provided to victims of violent crimes whereby they can apply to be registered on the Victims Register and will be informed about the likely release date of an offender who has been imprisoned. p.23

Right to be informed about the proceedings an entitlement whereby victims can be provided with information about the case they are involved in, subject to certain limitations. p.22

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'. p.11

Right to give evidence using alternative arrangements an entitlement for victims or witnesses of certain crimes in Victoria to give evidence in court in a non-standard way that aims to be less traumatic for the victim. p.20

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. p.12

Right to trial by jury a right to be tried by unbiased members of the community who have been randomly selected from the electoral roll. p.15

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. p.429

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.112

Senate the upper house of the Commonwealth Parliament, which is comprised of 76 senators who represent the six states and two territories across Australia. p.266

Separation of powers a principle established by the Australian Constitution that ensures the legislative, executive, and judicial powers remain separate. p.335

Social media mechanisms of sharing information used in the 21st century, involving digital applications and websites such as Facebook, YouTube, Instagram, and X (formerly Twitter). p.413

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. p.82, 197

Specialisation the process of a court developing expertise in a particular area of law as a result of hearing similar matters regularly. p.59

Specific deterrence a type of deterrence in which the offender themselves is discouraged from reoffending and committing offences of a similar nature. p.114

Standard of proof the degree to which the facts of a case must be proven in court. p.7, 142

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. p.380

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

Statutory interpretation a process whereby the courts give meaning to the words in legislation when applying the legislation to a case. p.VI, 354

Summary offences a minor criminal offence usually heard in the Magistrates' Court. p.5

Supreme Court of Victoria the most superior court in Victoria that deals with the state's most serious criminal and civil cases. p.59

T

Traditional media mechanisms for spreading information that began use prior to the 21st century, such as newspapers, magazines, television, and radio. p.411

U

United Nations an intergovernmental organisation that aims to promote better living standards and human rights, maintain international peace and security, and develop friendly relations among nations. p.313

V

Victim impact statement (VIS) a written or verbal statement made to a court about the effect of an offence upon the victim. p.133

Victoria Legal Aid (VLA) a government-funded agency that provides free legal information, advice, and free or low-cost legal representation. p.38

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.219

Victorian Law Reform Commission (VLRC) the central, independent law reform body in Victoria which investigates a wide range of matters, concerning both the criminal and civil justice system, and provides recommendations to the Victorian Parliament about areas of potential law reform. p.418

Voice to Parliament a proposed advisory body comprised of Aboriginal and Torres Strait Islander representatives chosen by local, First Nations communities that would give independent advice to the Commonwealth Parliament during the law-making process. p.492

Acknowledgements

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