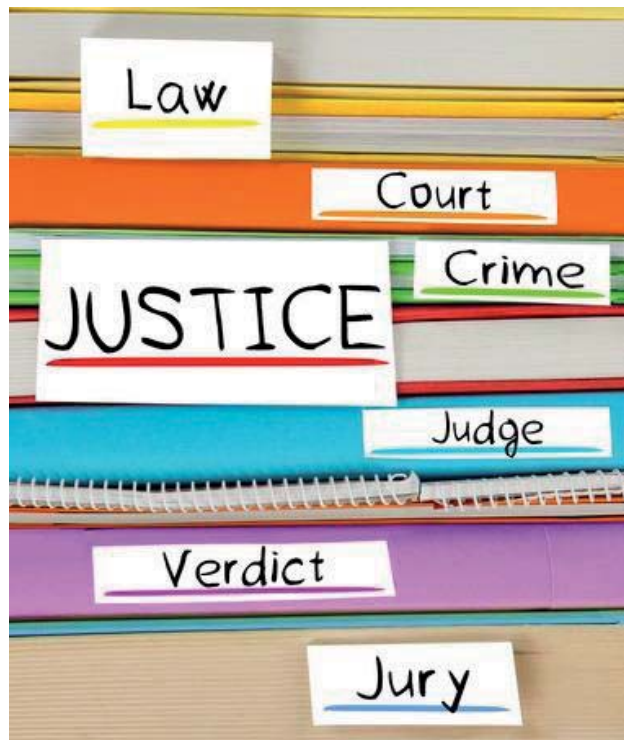


# THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES



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# VCAA STUDY DESIGN 2018-2022

Exam Tip: You should consider how the different parts of the course relate to each other. VCAA can, and does, combine content from different Areas of Study in its exam questions, so the Study Design should be read as one document – not as four completely independent topics.

## UNIT 3 – RIGHTS AND JUSTICE

Unit 3 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 3 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 3.

Unit 3 examines the Victorian justice system, and the way in which both criminal and civil disputes progress through a range of dispute resolution and support services in the system. The effectiveness of the criminal and civil justice systems is analysed, and both recent and suggested changes to the system are examined.

### Area of Study 1: The Victorian criminal justice system

AOS 1 (or 'Outcome 1') makes up 50% of Unit 3. The Outcome summary from the Study Design reads:

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

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

#### *Key Concepts*

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian criminal justice system, including:
  - The distinction between summary and indictable offences
  - the burden of proof
  - the standard of proof
  - the presumption of innocence
- The rights of the accused, including
  - the right to be tried without unreasonable delay
  - the right to a fair hearing
  - the right to trial by jury
- The rights of victims, including:
  - the right to give evidence as a vulnerable witness
  - the right to be informed about the proceedings
  - and the right to be informed of the likely release date of the accused

#### *Determining a criminal case*

- The role of institutions available to assist an accused, including Victoria Legal Aid ('VLA') and Victorian community legal centres.
- The purposes of committal proceedings.
- The role, purposes and appropriateness of plea negotiations and sentence indications, in determining criminal cases.
- The reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals.
- The responsibilities of key personnel in a criminal trial, including the judge, jury, parties, and legal practitioners.
- The purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection.

- Examples of sanctions: fines, community corrections orders and imprisonment, and their specific purposes.
- Factors considered in sentencing, including aggravating factors, mitigating factors, guilty pleas and victim impact statements.

### Reforms

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

Exam tip: The Study Design defines 'recent' as within the previous four years. Therefore, if the Study Design specifies 'recent' in relation to reforms that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2018 examination no reform before 2014 should be used as a 'recent reform'.

## Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points.

Exam tip: It is safer to apply higher-order skills broadly in your examination preparation than to apply them narrowly. In other words, assume *more* analysis and discussion rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic of content on the Study Design.

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

- Legal principles and information.
- The range of means used to determine a criminal case.
- The responsibilities of key personnel in a criminal trial.
- The ability of criminal sanctions to achieve their purposes.
- Recent reforms and recommended reforms to the criminal justice system.
- The ability of the criminal justice system to achieve the principles of justice.

The 'higher-order' application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

Exam tip: The task word 'synthesise' is new on the current Study Design. Essentially, it means 'to combine'. Very often, a question will provide information in the form of a real or hypothetical fact scenario; 'synthesising' this with theory content would, for instance, involve combining the theory with the practice, and commenting on the way in which the theory of the legal system might apply to the facts given. Alternatively, a question may ask you to combine information you know about one legal body with information you know about another legal body, and give an opinion on the ways in which they are the same or different, why one is less effective than the other or more effective. This would be another way you might 'synthesise'.

## Area of Study 2: The Victorian civil justice system

AOS 2 (or 'Outcome 2') makes up the other 50% of Unit 3. The Outcome summary from the Study Design reads:

The Victorian civil justice system aims to restore a wronged party to the position they were originally in before the breach of civil law occurred. The system involves a range of institutions to resolve a civil dispute, including courts (the Magistrates' Court, County Court and Supreme Court), complaints bodies and tribunals. In this area of study students consider the factors relevant to commencing a civil claim, examine the institutions and methods used to resolve a civil dispute and explore the purposes and types of remedies. Students consider factors that affect the ability of the civil justice system to achieve the principles of justice. They examine recent reforms from the past four years and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the civil justice system to actual and/or hypothetical scenarios.

## Key Knowledge

The Key Knowledge points identified in the Study Design are:

### Key concepts

- The principles of justice: fairness, equality and access.
- Key concepts in the Victorian civil justice system, including:
  - The burden of proof
  - The standard of proof
  - Representative proceedings

### Resolving a civil dispute

- Factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.
- The purposes and appropriateness of Consumer Affairs Victoria ('CAV') and the Victorian Civil and Administrative Tribunal ('VCAT') in resolving civil disputes.
- The purposes of civil pre-trial procedures.
- The reasons for a Victorian court hierarchy in determining civil cases, including administrative convenience and appeals.
- The responsibilities of key personnel in a civil trial, including the judge, jury, the parties and legal practitioners.
- Judicial powers of case management, including the power to order mediation and give directions.
- The methods used to resolve civil disputes, including mediation, conciliation and arbitration, and their appropriateness.
- The purposes of remedies.
- Damages and injunctions, and their specific purposes.

### Reforms

- Factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility.
- Recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.

## Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The purposes of civil pre-trial procedures.

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

- Legal principles and information.
- Factors to consider when initiating a civil claim.
- The appropriateness of institutions and methods used to resolve a civil dispute.
- The responsibilities of key personnel in a civil trial.
- The ability of remedies to achieve their purposes.
- Recent reforms and recommended reforms to the civil justice system.
- The ability of the civil justice system to achieve the principles of justice.

The 'higher-order' application skills of applying content to actual *and/or* hypothetical scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles and information.

Exam tip: It is safer to apply higher-order skills broadly in your examination preparation than to apply them narrowly. In other words, assume *more* analysis and discussion rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic of content on the Study Design.

## UNIT 4 – THE PEOPLE AND THE LAW

Unit 4 is worth 50% of the total school-assessed work for the year. School-assessed coursework is worth half of the final Study Score for Legal Studies; therefore, the Assessment Tasks (SACs) for Unit 4 will be worth 25% of your final Study Score for the subject (after VCAA has moderated them and decided on the final grade you will receive for them).

Roughly half the marks on the final VCAA examination will be based on content from Unit 4.

Unit 4 examines the role played by both parliament and the courts in law-making, the interaction between them as law-makers, and the role played by the Australian Constitution in relation to the law-making of both institutions. The effectiveness of parliament and the courts as law-makers is analysed, as well as the influence of the Constitution, and students study the ability of the people to have an impact on all three.

### Area of Study 1: The people and the Australian Constitution

AOS 1 (or 'Outcome 1') makes up 40% of Unit 4. The Outcome summary from the Study Design reads:

The Australian Constitution establishes Australia's parliamentary system and provides mechanisms to ensure that parliament does not make laws beyond its powers. In this area of study students examine the relationship between the Australian people and the Australian Constitution and the ways in which the Australian Constitution acts as a check on parliament in law-making. Students investigate the involvement of the Australian people in the referendum process and the role of the High Court in acting as the guardian of the Australian Constitution.

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

- The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making.
- The division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers.
- The significance of section 109 of the Australian Constitution.
- The means by which the Australian Constitution acts as a check on parliament in law-making, including:
  - The bicameral structure of the Commonwealth parliament
  - The separation of the legislative, executive and judicial powers
  - The express protection of rights
  - The role of the High Court in interpreting the Australian Constitution
  - The requirement for a double majority in a referendum
- The significance of one High Court case interpreting sections 7 and 24 of the Australian Constitution.
- The significance of one referendum in which the Australian people have protected or changed the Australian Constitution.
- The significance of one High Court case which has had an impact on the division of constitutional law-making powers.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

### Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

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

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

- Legal principles and information.
- The significance of section 109 of the Australian Constitution.
- The ways in which the Australian Constitution acts as a check on parliament in law-making.
- The ability of the Australian people to protect or change the Australian Constitution.
- The significance of High Court cases involving the interpretation of the Australian Constitution.
- The impact of international declarations and treaties on the interpretation of the external affairs power.

The 'higher-order' application skill of comparing two or more topics of content to find similarities and differences is listed explicitly for the following Key Knowledge point:

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

The 'higher-order' application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

Exam tip: It is safer to apply higher-order skills broadly in your examination preparation than to apply them narrowly. In other words, assume *more* analysis and discussion rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic of content on the Study Design.

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

AOS 2 (or 'Outcome 2') makes up the other 60% of Unit 4. The Outcome summary from the Study Design reads:

Parliament is the supreme law-making body, and courts have a complementary role to parliament in making laws. Courts can make laws through the doctrine of precedent and through statutory interpretation when determining cases. In this area of study students investigate factors that affect the ability of parliament and courts to make law. They examine the relationship between parliament and courts in law-making and consider the capacity of both institutions to respond to the need for law reform. In exploring the influences on law reform, students draw on examples of individuals and the media, as well as examples from the past four years of law reform bodies recommending legislative change.

### Key Knowledge

The Key Knowledge points identified in the Study Design are:

#### *Parliament and courts*

- Factors that affect the ability of parliament to make law, including:
  - The roles of the houses of parliament
  - The representative nature of parliament
  - Political pressures
  - Restrictions on the law-making powers of parliament
- The roles of the Victorian courts and the High Court in law-making.
- The reasons for, and effects of, statutory interpretation.
- Factors that affect the ability of courts to make law, including:
  - The doctrine of precedent
  - Judicial conservatism
  - Judicial activism
  - Costs and time in bringing a case to court
  - The requirement for standing
- Features of the relationship between courts and parliament in law-making, including:
  - The supremacy of parliament
  - The ability of courts to influence parliament
  - The interpretation of statutes by courts
  - The codification of common law
  - The abrogation of common law

#### *Law reform*

- Reasons for law reform.
- The ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts.
- The role of the media, including social media, in law reform.
- The role of the Victorian Law Reform Commission and its ability to influence law reform.
- One recent example of the Victorian Law Reform Commission recommending law reform.
- The role of one parliamentary committee or one Royal Commission, and its ability to influence law reform.
- One recent example of a recommendation for law reform by one parliamentary committee or one Royal Commission.
- The ability of parliament and the courts to respond to the need for law reform.



## Key Skills

'Lower-order' skills such as explaining and defining apply to all Key Knowledge points. The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge points:

- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law-reform.
- The ability of law reform bodies to influence a change in the law – for this content point, VCAA specifies that only "recent" examples from the previous four years may be used.

**Exam tip:** If the Study Design specifies 'recent' in relation to examples that may be used, you should expect the examination to be marked strictly: do not expect any examples older than four years to be granted *any* marks. For instance, on the 2018 examination no example before 2014 should be used as a 'recent example'.

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

- Legal principles and information.
- Factors that affect the ability of parliament and the courts to make laws.
- Features of the relationship between parliament and courts.
- The influence of the media, including social media, on law reform.
- The means by which individuals can influence law reform.
- The ability of law reform bodies to influence a change in the law.
- The ability of parliament and the courts to respond to the need for law reform.

The 'higher-order' application skills of applying content to actual scenarios and synthesising information from multiple sources are listed explicitly for the following Key Knowledge points:

- Legal principles.

**Exam tip:** It is safer to apply higher-order skills broadly in your examination preparation than to apply them narrowly. In other words, assume *more* analysis and discussion rather than less. You ought to be able to engage with opinions and arguments in relation to almost every topic of content on the Study Design.

## STRUCTURE OF THIS STUDY GUIDE

The material in this Study Guide has *not* been structured according to the current VCAA Study Design summarised above, and does not following each dot point through in order from first to last. Instead, the material has been synthesised to group topics that have a lot of overlap, and to gather together the information needed for similar key skills such as analysing and discussing.

The companion textbook published by CPAP, *Legal Fundamentals in Australia*, has been structured dot-point by dot-point according to the VCAA Study Design. This is because the function of the textbook is to support the reader to learn the content from the ground up.

This Study Guide has a different function, however: the function of this Study Guide is to help students process, summarise, apply and revise the course material, and to begin using it in ways that will enhance examination preparation and technique. Changing the structure of topics used for the layout of the Study Guide has therefore been done for two main reasons:

1. To reduce duplication of content in revision and examination preparation. For instance, the 'Principles of justice' are the same in both Unit 3 AOS 1 and Unit 3 AOS 2. In the *Legal Fundamentals in Australia* textbook they are taught separately: once at the start of AOS 1 and a second time at the start of AOS 2. In this Study Guide they have been combined, with both criminal and civil material included.
2. To support students in processing and engaging with the course material rather than simply memorising it. Seeing content in an alternative context and with different connections being made forces the reader to make new mental connections and to see content in a different light from that in which it was originally learnt.

We hope that the decisions made in the organisation of this Study Guide achieve these goals.

**Exam tip:** You should consider the way in which your own course revision notes would be best structured. Do you prefer using the order of the Study Design? Or would it be better for you to cut and paste topics to follow a structure more like this Study Guide?

### REVIEW/APPLICATION QUESTIONS – Advice

The Review/Application questions are different from the sample examination questions scattered throughout this Study Guide, because they are focused on basic content comprehension and memorisation more than on examination strategy or the active processing of material. Before you can apply knowledge, elaborate on it and actively process it, you first need to comprehend it and have quick access to an accurate version of it in your memory.

- a. If you want to work on **COMPREHENSION**, use your notes and the relevant topics in this Study Guide to help you answer Review/Application questions. Try to answer questions using different wording from the notes, because this will work on comprehension: do you understand the material well enough to explain it differently?
- b. If you want to work on **MEMORISATION**, *do not* use your notes or this Study Guide. Answer everything from memory, and then check your accuracy against your notes and this Guide after you have finished. Testing your closed-book memory has been shown to have some of the best benefits when it is done as soon as possible after learning the material – don't worry about whether it is 'too soon' to test yourself.

## UNIT 3 – RIGHTS AND JUSTICE

### INTRODUCTION TO DISPUTE RESOLUTION IN AUSTRALIA

Criminal law regulates human behaviour insofar as it affects society as a whole, whereas civil law regulates human behaviour insofar as it relates to the private relationships between individuals. The difference between criminal and civil law is required knowledge for understanding the Unit 3 split between Area of Study 1, 'The Victorian criminal justice system', and Area of Study 2, 'The Victorian civil justice system'.

#### Criminal law

Criminal law regulates the relationship between individuals and the state. The state sets out standards of behaviour that everyone is expected to follow for the protection and benefit of the whole community, and anyone who breaks these rules can be prosecuted by the police or the Office of Public Prosecutions, on behalf of the whole community.

The person accused of the crime is called the 'defendant', but they can also be referred to as the 'accused'. The person bringing the action is called the 'prosecution' or the 'prosecutor'.

**Exam tip:** It is important to always use the correct terminology when talking about criminal cases. Words such as 'crime', 'charged', 'guilty', 'accused' and 'prosecution' all denote criminal law and criminal disputes.

Criminal cases begin with the commission of a crime. Once a crime has been reported to the police the police will begin an investigation, and once a suspect has been found and charged she or he will appear in court.

#### Civil law

Civil law regulates the relationship between individuals and other individuals – remember that, legally, companies count as individuals, as does the government when it is being sued or launching a private action itself.

The state sets out expectations of conduct for the way in which individuals treat each other, with the aim of protecting each individual from another individual unlawfully infringing her, his or its rights. Anyone who feels their rights have been unlawfully infringed can take a civil action against the individual who did it: they can *sue* them. The legal matter will be one individual against the other individual.

The individual bringing the action is called the 'plaintiff', and the individual who is being taken to court is called the 'defendant', the same as in criminal cases. The word 'accused' should not be used for civil cases, though.

**Study tip:** It is equally important to use the correct terminology when talking about civil cases. Words such as 'tort', 'civil wrong', 'sued', 'liable', 'remedy' and 'plaintiff' all denote civil law and civil disputes. Some language, such as 'rights' or 'defendant', apply to both civil and criminal law.





## Equality

### Definition

'Equality' is the idea that every person or organisation that has a dispute to be resolved is equal in the eyes of the law and in the legal system as a whole. No-one should be privileged and benefited, nor discriminated against or at a disadvantage, for being who they are.

For example, former High Court justice Lionel Murphy said in the *McInnis* case in 1992: "Where the kind of trial a person receives depends on the amount of money he or she has, there is no equal justice."

### Detail

The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to substantive equality in the legal system in a range of ways. For example, s8 of the Charter provides that "[e]very person has the right to recognition as a person before the law," and that "[e]very person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination."

Importantly, in terms of meaningful equality, it also makes it clear that "[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination."

Equality and inequality in the legal system may be affected by a range of factors including:

- Gender. Whether someone is a woman, a man or a non-binary gender can affect their treatment, their outcome, and their ability to achieve justice.
- Cultural and community background. The cultural community to which someone belongs, or that they have spent a lot of time in, can affect their ability to achieve justice.
- Physical and mental abilities and disabilities. The particular mix of physical and mental abilities and disabilities someone has can affect their ability to achieve justice.

Some examples of ways in which we attempt to ensure equality include:

- Various forms of disadvantage are recognised, and targeted assistance or support mechanisms are legislated for to try to achieve substantive equality. For instance, a range of mental disabilities and psychological disorders are supported in criminal proceedings through the Assessment and Referral List in the Magistrates' Court, and free interpreters are provided during police questioning and Magistrates' Court criminal proceedings. Victoria Legal Aid provides a duty lawyer service within the Victorian Civil and Administrative Tribunal to assist with a range of civil claims – for instance, tenants with residential tenancy disputes, or claimants with anti-discrimination matters.
- Judicial proceedings are governed by strict rules of procedure that are consistently applied to both parties equally. For instance, evidence can be tested through cross-examination of witnesses, ensuring that all evidence is reliable. Each party is given an equal opportunity to test the evidence tendered through the witnesses called by the other side.



## Access

### Definition

'Access' is the idea that all people must be able to effectively utilise the legal system, and the places and systems for the resolution of disputes and the administration of justice. Access is therefore about more than just not being banned or prohibited from something: it is about the ability, in real life, of different people to use something meaningfully, and to use it in a way that is similar to how other people are able to.

### Detail

The Victorian *Charter of Human Rights and Responsibilities Act 2006* protects the rights of people in the state to meaningful access to the legal system in a range of ways.

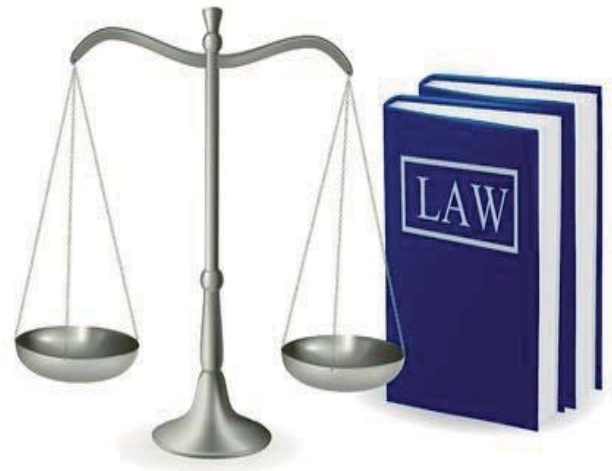
For example, s25 of the Charter protects the rights of the accused in a criminal case to "be informed promptly and in detail of the nature and reason for the charge in a language or, if necessary, a type of communication that he or she

speaks or understands;" to have "adequate time and facilities to prepare his or her defence and to communicate with a lawyer or advisor chosen by him or her;" to "have the free assistance of an interpreter if he or she cannot understand or speak English;" to be "tried without unreasonable delay;" and "to have legal aid provided if the interests of justice require it," amongst other things.

Section 8 of the Charter provides that "[m]easures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination," which applies to civil and criminal matters equally.

Proper and meaningful access to the legal system may be affected by a range of factors including:

- Knowledge, experience and training. Some parties will have knowledge of the legal system and the laws and procedures used in it. They may be aware of their rights and how to use the various mechanisms for dispute resolution. This knowledge can come from prior experience, education, or a combination of the two; but, the extent to which someone has it, will affect their ability to meaningfully access justice.
- Money. Whether someone has access to a great deal of money or not can affect their ability to access justice. Parties being able to afford the cost of a range of dispute resolution options, so they can realistically pursue their case and have some choice regarding the best way to do it, will give them greater access than someone will have who can't afford it. Whether or not someone has enough money to access legal support, advice and representation will also affect their meaningful access.



Some ways in which we attempt to ensure access to justice include:

- The court hierarchy allows courts to develop specialisation as courts deal each day with certain cases that fit into their jurisdiction. Parties therefore have access to experts in the area under dispute, and can more quickly and cheaply go to lower courts for less serious matters. A court hierarchy also allows for administrative convenience, as parties know which court deals with which type of dispute and do not have to complete forms and pay fees that are not relevant to them.
- The first Neighbourhood Justice Centre ('NJC') was opened in the City of Yarra in 2007. The NJC aims to improve the justice system by addressing social disadvantage and improving access to justice services. It combines support services such as drug counselling and childcare with community initiatives, and mixes the legal system with the local community. The NJC focuses on early intervention, and involves the locals in finding solutions to their social problems.
- The Family Court provides civil interpreter services for deaf, hearing-impaired and speech-impaired clients. The Court can make arrangements for AUSLAN interpreters, and for Communication Access Real-time Translation providers to attend hearings.

#### **REVIEW/APPLICATION QUESTIONS 2 - The principles of justice**

- 1. Define the idea of 'fairness'.**
- 2. Identify three things that have the ability to compromise fairness.**
- 3. Outline two ways in which the legal system attempts to provide people with fairness in dispute resolution.**
- 4. Define the idea of 'equality'.**
- 5. Identify three things that have the ability to compromise equality.**
- 6. Outline two ways in which the legal system attempts to provide people with equality in dispute resolution.**
- 7. Define the idea of 'access'.**
- 8. Identify three things that have the ability to compromise access.**
- 9. Outline two ways in which the legal system attempts to provide people with access in dispute resolution.**

## Key concepts in the justice system

When resolving both criminal and civil cases in Australian courts the system of trial used is the adversary system. The adversary system is a system where two opposing parties put conflicting arguments before an independent judicial member, at the end of which the party with the best case wins and the other loses. Under this system the parties to the case are adversaries, or opponents, who each try to win the case; they have a lot of control over the way in which they conduct their case, although they need to follow rules of evidence and procedure that are strict, and applied equally to both of them; overseeing the case and ensuring the parties are adhering to the rules of the court is the judge or magistrate, who is an impartial adjudicator; and the ultimate aim of the adversary system is to find a winner and a loser in the court 'contest'.

The judicial officer in a civil case has greater power in pre-trial proceedings to scrutinise the parties' preparation of their cases and to make directions about the manner in which they present their cases. In criminal cases the individual is prosecuted by a representative of the government. Because this naturally involves a power imbalance in legal expertise and resources, there are a range of criminal rules and procedures that try to guard against any unfairness resulting for the accused person. In civil disputes, the government is treated as a legal individual, and is therefore on the same footing as any other party.

### The burden of proof

#### Definition

The burden of proof is the responsibility borne by the party bringing the case to prove the claims made. In a criminal hearing or trial, the burden will be on the prosecution to bring evidence to prove the allegations it has made against the accused; in a civil hearing or trial, the burden will be on the plaintiff or complainant to bring evidence to prove the allegations it has made against the defendant.

This proof must be brought before the defendant/respondent has a responsibility to defend herself or himself.

#### Detail

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

If the evidence is evenly balanced, and doesn't persuasively point to either one party or the other, the effect of the legal burden being on the prosecution or plaintiff means that the defendant should win by default.

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

- In 2005 offences relating to the trafficking of drugs were added to the Commonwealth *Criminal Code*. For instance, when the defendant is in possession of a 'trafficable' quantity of a controlled drug, they will be presumed without evidence to have the intention to traffic, or the intention to cultivate or manufacture for a commercial purpose. The onus will then be placed on the defendant to prove they did not.
- The *Fair Work Act 2009* reverses the burden of proof in relation to evidence for a civil unfair dismissal claim. Adverse action (such as firing) taken against an employee who exercises a workplace right (such as joining a union) will be presumed to be for a prohibited reason unless the defendant employer proves otherwise. Once the former employee has established that an adverse action has occurred, the burden of proof shifts to the defendant employer to prove that they did not act for a prohibited reason. The reason for creating this presumption is to address the imbalance in knowledge that an employee faces in proving a claim for unfair dismissal against their employer.

### The standard of proof

#### Definition

The standard of proof is the quality or weight of evidence that must be led by the party with the burden of proof, in order for them to discharge that burden. In a criminal hearing or trial, the standard of proof is the quality of evidence required for the prosecution to demonstrate that the accused is guilty of the charges; in a civil hearing or trial, the standard of proof is the quality of evidence required for the plaintiff or complainant to demonstrate that the defendant should be held liable.

The precise criminal standard is 'beyond reasonable doubt', meaning that it must be beyond reasonable doubt that the accused is legally and criminally responsible for the offence; in a civil hearing or trial, the standard of proof is 'on the balance of probabilities', meaning the court must be satisfied that it is more probable than not that the plaintiff's version of the case is the correct one.





- Once they have been charged with an indictable offence, an accused person will be brought before the Magistrates' Court for a bail hearing. Bail is the ability of the charged person to return home, and return to their normal lives until the conclusion of their dispute or their bail is revoked, because it is recognised that they are still innocent under the law.
- A committal hearing is a hearing before the Magistrates' Court in which the prosecution will have to demonstrate that they have enough evidence against the accused to support a conviction in a higher court.

### The distinction between summary and indictable offences

#### Definition

Criminal offences are classified as either summary or indictable, depending on their seriousness, and whether or not they will be tried before a jury. A summary offence is less serious and does not require a jury; an indictable offence is more serious, and usually does require a jury.

#### Detail

Summary offences are the least serious offences. They are heard in the Magistrates' Court, which is the lowest court in the Victorian state hierarchy; and, under the current jurisdiction of the Magistrates' Court, can be punished by no more than two years for a single offence, or five years total for multiple offences heard at the same hearing. Summary offences are prosecuted by the arresting police officer, and are heard by a single magistrate sitting without a jury. The court proceedings used in summary offences are called 'hearings'.

<b>THE MOST SERIOUS INDICTABLE OFFENCES</b>	Dealt with in the Supreme Court (Trial Division) before a Supreme Court justice and a jury.
<b>SERIOUS INDICTABLE OFFENCES</b>	Dealt with in the County Court before a County Court judge and a jury.
<b>MINOR INDICTABLE OFFENCES</b>	
<b>INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY</b>	Dealt with in the County Court before a County Court judge and a jury... UNLESS the defendant chooses to have it heard in the Magistrates' Court <i>as though it were</i> a summary offence.
<b>SUMMARY OFFENCES</b>	Dealt with in the Magistrates' Court before a magistrate alone – there is NO jury at any time.  There is a limit to the fines and jail time a magistrate can give.  Some summary offences can be resolved without a court hearing. Instead, a fine or infringement notice is issued by the police; if the accused person pays the fine, the matter is taken to be resolved.

Indictable offences are heard in the County Court and the Supreme Court (Trial Division), which are the higher two of the three state courts. Under the current jurisdiction of the County and Supreme Courts, indictable offences can be punished by unlimited sanctions – the act of parliament that provides for the offence will therefore state the range of consequences the courts can give for that particular offence. Indictable offences are prosecuted by the Office of Public Prosecutions, and are heard by a single judge or justice sitting with a jury: the judge or justice administers the law, and the jury decides the facts and reaches a verdict. The court proceedings used in indictable offences are called 'trials'.

Some indictable offences can be heard summarily – that is, dealt with in the Magistrates' Court without a jury. Generally, they are offences where the maximum term of imprisonment a guilty party could receive in the County Court is 10 years or where a fine of no more than \$120,000 could be given.

If a person is charged with one of these offences, they may seek to have their indictable offence heard summarily in the Magistrates' Court. This means they will not have a jury, but they will also face a lower maximum penalty: the maximum term of imprisonment that can be given by the Magistrates' Court is two years for a single offence, so there is less risk involved with a guilty verdict. Alternatively, the accused may be planning to plead guilty, and may wish to save themselves time and money in addition to guaranteeing themselves a lower possible maximum penalty.

## Additional civil concepts

### Representative proceedings

#### Definition

A representative proceeding is a civil claim in which the party bringing the action belongs to a larger group of seven or more people, and litigates on behalf of the group. Group members are not listed by name in the pleadings, and they play a largely passive role.

#### Detail

Because the named plaintiff represents a 'class' of people who all share a common characteristic or interest, representative proceedings are also known as class actions or group proceedings. The person or people representing the rest of the group must have the same interests as the group, but the exact harm and damages allocated to each group member do not need to be the same. Group members are not required to instruct lawyers or pay legal fees.

Any remedy that is won, such as damages, will be divided between all members of the group. The Australian regime uses an 'opt out' model for group members: this means that all potential claimants who fall within the definition of the class become members of the group when the claim is filed, regardless of whether they are aware of the case and consent to be a class member.

Representative proceedings can be heard by the Federal Court and the state Supreme Courts.

#### Examples

Class actions have included:

- From 2013-14 the Victorian Supreme Court heard a class action on behalf of around 10,500 people seeking damages for loss in the Kilmore East-Kinglake bushfire.
- Personal injury claims arising from defective products. Types of products include pacemaker batteries, artificial knees, arthritis medications and tobacco.
- Improper actions under the federal *Migration Act 1958* (Cth) including determinations of refugee status, the refusal of visas and illegal detention. In October 2001, however, the Commonwealth amended the Act to prohibit any class actions being taken in relation to visas, deportations and other removals of non-citizens.

**Exam tip:** It is important to use case studies and examples selectively. You should not spend an entire paragraph explaining every detail of a case when the point you want to illustrate could be done in one sentence. Students make this mistake repeatedly in examinations, and waste time doing it. The only part of the case or example that needs to be used is the part that illustrates the strength, weakness or point being made.

### **REVIEW/APPLICATION QUESTIONS 3 – Key concepts in the justice system**

1. Give a definition of the term 'burden of proof'.
2. Who has the burden of proof in criminal and civil trials?
3. Give a definition of the term 'standard of proof'.
4. What is the standard of proof in each of criminal and civil trials?
5. Define 'rules of procedure'.
- a. Give two examples of the strict rules of procedure present in the adversary trial.
6. Define 'rules of evidence'.
- a. Give two examples of the strict rules of evidence present in the adversary trial.
7. Which party is protected by the presumption of innocence?
8. When is the presumption of innocence overturned?
9. Provide two examples of ways in which the legal system tries to protect the presumption of innocence.
10. Outline the difference between a summary offence and an indictable offence.
11. Explain what it means to say that an indictable offence can be heard summarily.
- a. What would be two advantages of having an indictable offence heard summarily?
12. Which court will a relevant indictable offence be heard in if the accused chooses *not* to have it heard summarily, and which court will a relevant indictable offence be heard in if the accused *does* choose to have it heard summarily?
13. Outline the differences between a representative proceeding and a civil dispute brought by multiple plaintiffs against the one defendant.
14. What are the conditions that must be fulfilled in order for a group of people to qualify as a 'class'?
15. Which courts have the power to hear representative proceedings?
16. Identify two terms commonly used instead of the term 'representative proceeding'.
17. To what extent are members of the class involved in the proceedings?

## Evaluation of key concepts

**Exam tip:** There are a number of very good reasons to always match strengths and weaknesses together in groups – rather than keeping them in two separate lists, or matching every single strength against one weakness in pairs. Groups of ‘features’ makes the points easier to remember, easier to structure in an answer, and it also prepares for the range of ‘evaluate’ or ‘critically examine’ questions that can be asked. For example, if the examination asks you to “evaluate” one strength, it is asking you to explain the strength and then to examine the flip-side of it, one or more corresponding weaknesses, before coming to a conclusion. The opposite also holds true for evaluating a weakness. This is another reason why grouping strengths and weaknesses into matching pairs or paragraphs is a sensible way of note-taking, as each strength and weakness already has an ‘evaluation’ prepared for it! For example, in the 2011 examination students were asked to “evaluate two weaknesses of parliament as a law-maker.”

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access. A selection of sample points has been included here, but space has been provided for you to include additional arguments you believe you can explain clearly and that you would like to focus on learning for the examination.

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

STRENGTHS	KEY CONCEPTS	WEAKNESSES
<p>The prosecution or plaintiff will be discouraged from bringing unsubstantiated charges because they have to prove the claims with evidence before the defendant will be asked to bring any defence. Having proper grounds to put an individual through the ordeal of a trial is part of <b><i>fairness</i></b>.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The burden of proof</b></p>	<p>The party that has already been injured (represented by the state in a criminal case), bears the burden of starting the trial and leading all of the evidence first. If they cannot do this adequately, the case is dismissed. The party that might be in the wrong, the defendant, is protected, which is <b><i>unfair</i></b>.</p> <p>In terms of evidence and legal arguments, <b><i>equality</i></b> is not achieved between the parties because the benefit is given to the defendant. The defending party can discover all evidence against them before they even start to decide what their defence is going to be.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

<p>The defendant cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the <b>fairness</b> of the trial, because it would be <b>unfair</b> to prosecute or sue someone if they were liable to no evidence justifying it and they were sure to be found not guilty or not liable at the end.</p> <p>Criminal cases have serious consequences attached to them, and they are also subject to a very high standard of proof: beyond reasonable doubt. This is only <b>fair</b>, because a person's freedom may be on the line. Civil cases have a standard of proof that is appropriate to their consequences.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The standard of proof</b></p>	<p>Juries may interpret the standard of proof differently in each case. This means there is not truly one consistent standard applied to all trials and it is difficult to argue that the standard is strict and objective, and that every defendant is <b>equal</b> in the trial process.</p> <p>For example, studies from the United Kingdom, New Zealand, Queensland and New South Wales all show consistently that jurors have difficulty with the concept of 'beyond reasonable doubt' and fail to apply it consistently or interpret it in the same way. This makes defendants in different cases <b>unequal</b> to each other in terms of how they are treated, and does not give them the same <b>access</b> to justice.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>The rules apply <b>equally</b> to both parties so one party is not advantaged at the expense of the other.</p> <p>The strict rules for the admissibility and inadmissibility of evidence ensure a <b>fair</b> hearing because all evidence must be relevant, reliable and legally-obtained. Greater <b>equality</b> is achieved in the courtroom because evidence must have more probative than prejudicial value, so it is less likely to trigger prejudices against the defendant.</p> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>Rules of evidence and procedure</b></p>	<p>Witnesses are only allowed to respond to the questions asked and cannot elaborate – this may result in some important evidence not being brought before the court, and reduce the <b>fairness</b> of the hearing.</p> <p>Complex rules can be manipulated by experienced parties, and are confusing for inexperienced parties and the jury. Parties do not have <b>equal access</b> to justice when one understands the rules and the other does not.</p> <hr/> <hr/> <hr/> <hr/> <hr/>

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<p>The presumption of innocence is upheld by procedures such as bail. This protects human rights and <b>fairness</b> by not punishing someone before they have been found guilty. It also allows the defendant to prepare adequately for their case and earn money in the months or years before trial, which gives them greater <b>access</b> to justice and increases the <b>equality</b> between them and the prosecution.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The presumption of innocence</b></p>	<p>In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. This decreases <b>fairness</b> because they can be brought back to trial even though they were presumed innocent the first time <i>and</i> found not guilty; it also decreases <b>access</b> to justice with the second trial because their finances will be depleted, and they are more likely to be assumed guilty if they are charged multiple times.</p> <p>Procedures such as holding suspects on remand <b>unfairly</b> deny the defendant the right to the presumption of innocence, and jeopardises their <b>access</b> to justice because they are much less able to prepare for their defence and cannot earn money in the meantime.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Minor offences are not sent to a court with complex, lengthy and expensive procedures. The Magistrates’ Court has simplified procedures and forms, and the filing fees for different actions are lower. This all helps reduce legal expenses for representation, and increase <b>access</b> to justice.</p> <hr/> <hr/> <hr/> <hr/>	<p><b>Summary and indictable offences</b></p>	<p>The accused will sometimes have the ability to elect a summary hearing for a minor indictable offence, but this decision may be made on the basis of costs and resources and not what would deliver the greatest degree of <b>fairness</b>.</p> <p>Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases <b>access</b>.</p> <hr/> <hr/> <hr/> <hr/>

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<p>Since the inception of the modern scheme for representative proceedings, judges on the whole have reported that class actions demonstrate positive outcomes.</p> <p>The introduction of the modern class action regime seems to have permitted a range of claims to be brought that would otherwise not have been pursued. For instance, cases where each individual claim was not financially valuable enough to warrant a lawsuit. This has given better <b>access</b> to parties who would otherwise have avoided formal legal proceedings.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>Representative proceedings</b></p>	<p><b>Equality</b> between the parties may not be achieved by a representative proceeding. Most often a defendant is sued by a group representative, and may feel overwhelmed by the potential damages that could attach to a single unfavourable decision – simply because of the number of members in the group.</p> <p>Representative proceedings are not permitted to settle at a pre-trial conference or mediation without the consent of the court and without group members being notified.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**Application exercise**

The burden of proof discourages the prosecution or a potential plaintiff from bringing a flimsy case to trial, because they will bear the onus of bringing sufficient proof to demonstrate the validity of their claims before the defendant will be required to say anything or bring forward any evidence of their own. This protects the rights of the defendant and the fairness of trial because the defendant is protected from the ordeal without proper grounds for it being shown. The downside is that the injured party bears the responsibility of proving the case, and the party that is potentially in the wrong receives significantly more protection. This may be less of a problem when the party bringing the action is the state, but when a civil case is brought by an individual who has already had their rights infringed they may be discouraged from pursuing justice because of the heavy burden on them and the balance of rights being in the defendant's favour. This also decreases equality in the proceedings, because we consciously protect the responding party over the complaining party. Ultimately, the burden of proof is unfairly weighted against the achievement of justice, particularly in civil cases, and both sides should be examined simultaneously.

- a. The above answer is a sample of an evaluation of a strength. Using this as a guide, evaluate one strength of each of the key concepts in the section.

## Rights of parties to a criminal case

### Rights of the accused

Victoria is the only state in Australia to have enacted a *Charter of Rights and Responsibilities* ('the Victorian Charter'). It was passed by the Parliament of Victoria, received royal assent on 25 July 2006, and came into force on 1 January 2007. The Victorian Charter protects a range of rights of the accused in the criminal justice system.

For instance:

*Section 21 – Right to liberty and security of the person*

- (5) *A person who is arrested or detained on a criminal charge –*
- (a) *must be promptly brought before a court; and*
  - (b) *has the right to be brought to trial without unreasonable delay; and*
  - (c) *must be released if paragraph (a) or (b) is not complied with.*

*Section 24 – Fair hearing*

- (1) *A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.*

### The right to be tried without unreasonable delay

#### Definition

The right to be tried without unreasonable delay means criminal trials should be held as quickly as possible after the events that give rise to the charges. The concept of 'as quickly as possible' rests on the idea that we must balance the need to be properly prepared for legal proceedings – which will take time – with the need to see justice be done and to gain closure. This is why the right is to be tried without *unreasonable* delay, and not without any delay at all.

#### Detail

There are a number of reasons why this is important in protecting the rights of the accused:

- Awaiting trial is a period of great uncertainty for the accused, particularly if there is a prospect of a custodial sentence should the trial result in a conviction. Avoiding lengthy delays in bringing a matter to trial reduces the uncertainty that the accused person faces, and may also minimise legal costs and other expenses.
- People accused of the most serious indictable offences are generally held on remand to await their trial. A delayed trial may result in the accused being held in custody for longer.

Examples of ways in which the criminal justice system tries to avoid unreasonable delay include:

- All criminal matters in Victoria commence with a committal hearing in the Magistrates' Court, usually between three and six months after charging. At this hearing, the magistrate hears the prosecution's evidence and decides whether the evidence is sufficient to support a conviction by a jury at trial.
- All criminal cases are listed for a directions hearing within 24 hours of the completion of the committal hearing in the Magistrates' Court. At this post-committal directions hearing, counsel for the prosecution and the defence are

expected to advise the court of the anticipated issues at the trial, an estimate for the hearing time of the trial, and identify any problems that might prevent a trial proceeding quickly. The court will set a trial date, or arrange for case management if necessary.

The length of a “reasonable period” of delay is considered on a case-by-case basis. This was decided in *Barbaro v DPP (Cth) & Anor* [2009] VSCA 26.

Factors that the court may consider include the complexity of the case against the accused, the amount of evidence to be collected by the prosecutors, the number of witnesses to be called to give evidence, and the risk that the accused will not return to trial if they are released on bail. In *Barbaro’s* case, the accused faced a two-year delay between first being charged and the commencement of his trial. The court found that *Barbaro* was an unacceptable flight risk, and that the risk could not be alleviated by the court imposing bail conditions.

### **The right to a fair hearing**

#### **Definition**

The elements making up the right to a fair hearing include:

- i. That a competent and independent arbiter be in charge of the hearing
- ii. That the hearing be conducted impartially
- iii. That the accused have adequate legal representation
- iv. That the accused have an accurate understanding of the proceedings

#### **Detail**

The arbiter is the judicial officer – a judge or magistrate – who oversees the hearing. Although judicial officers are appointed by the attorney-general, acting on behalf of the government, they are independent of government. Judicial officers must also be confident in their administration of justice, so that parties to court proceedings have confidence that their criminal matter has been determined by an arbiter who understands the law and criminal procedure. Judicial officers are therefore generally drawn from members of the Victorian Bar.

The public must have confidence in the actual impartiality of the judicial officer presiding over the trial. This means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. Equally as important as avoiding actual bias, is the principle that judicial officer must avoid any perception of potential bias.

The right to a fair hearing includes the right to adequate legal representation. This means that an accused person has a qualified legal representative to argue their case in court. In the *Charter of Rights and Responsibilities 2006*, the right to legal representation is outlined as a separate provision in s25: a person charged with a criminal offence is entitled “to have legal aid provided if the interests of justice require it.”

Other rights that ensure a fair hearing include the free assistance of an interpreter if the accused is not fluent in English, and free assistance and access to specialised communication tools and technology if the accused has difficulties in communication. This ensures that the accused understands the proceedings and is enabled to participate in her or his own defence.



### **The right to trial by jury**

#### **Definition**

The right to trial by jury means that every defendant in a criminal trial for an indictable offence has the right to trial by her or his peers to ensure that the judgment of the community is given, and the power of the government is kept in check.

#### **Detail**

A jury is used for trials of indictable offences, where the accused has pleaded not guilty. A criminal jury is made up of 12 members of the community, randomly selected from the electoral roll. The jury’s function is to listen to the evidence presented against the accused at trial, follow the directions of the trial judge on the relevant law, determine the relevant facts, and reach a verdict of guilty beyond reasonable doubt, or not guilty.



The alternative to trial by jury is trial by judge alone. There are a number of reasons why trial by jury is preferable to protect the rights of the accused:

- Juries spread the burden of decision-making. Instead of one person – the judge – being responsible for findings of fact, in a jury trial the evidence must be assessed as being beyond reasonable doubt by a group of people cooperating to reach a verdict. Furthermore, the verdict must be unanimous for the most serious indictable offences, or by majority for less serious indictable offences. The jury's determination of the facts and verdict is therefore more likely to be correct, providing greater protection of the rights of the accused.
- The jury limits the role of the state in the accused's trial. The charges and prosecution are brought by the police and the Office of Public Prosecutions, which are both part of the Executive branch of government. The jury, being drawn randomly from the community, provides an objective assessment of the evidence collected and presented against the accused independent of the state.



In Victoria, s210 of the *Criminal Procedure Act 2009* provides that the trial for an indictable offence commences when the accused formally pleads not guilty in the presence of the jury panel. There is no alternative procedure for the trial of an indictable offence. Unlike the other mainland Australian states, Victoria has made no legislative provision for a trial to be held before judge alone.

#### *Commonwealth trials*

One of the five express rights contained in the Commonwealth Constitution is the right to trial by jury for indictable Commonwealth offences.

#### *Section 80 – Trial by jury*

*The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.*

The s80 right to trial by jury extends to indictable offences only, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences.

### **Rights of victims**

The *Victims Charter Act 2006* (Vic) outlines many of the rights of victims of crime in the Victorian criminal justice system. The objects of the Act are to recognise the impact of crime on victims and their families, to recognise that all persons affected by crime should be treated with respect, and to reduce the likelihood that victims of crime suffer secondary victimisation by the criminal justice system.

#### **The right to give evidence as a vulnerable witness**

Any person who has circumstances that qualify them has the right to give evidence as a vulnerable witness. For sexual offence and family violence charges, Division 4 of the *Criminal Procedure Act 2009* provides that the court *may* make a number of alternative arrangements for witnesses to give evidence, including:

- Allowing the witness to give evidence to the court via closed circuit television from another venue.
- Using screens to obstruct the direct line of vision between the accused and the witness.
- Allowing the witness to have a support person beside her or him while giving evidence.

If the witness is the complainant in a sexual offence charge, the court *must* make these arrangements for their testimony, unless the complainant is aware of these rights and waives them. This applies also if the complainant is under the age of 18 at the time the proceeding commenced, or if they have a cognitive impairment.

Other arrangements that the court may make to enable witnesses to give evidence in sexual offence and family violence trials include:

- Restricting the number of people in court while the witness gives evidence.
- Requiring lawyers not to wear robes, and to sit down while questioning the witness.

The court may declare any witness in a sexual assault or family violence case to be a protected witness. A protected witness must not be cross-examined by the accused in person. If the accused does not have legal representation to conduct the questioning for them, they are offered the chance to obtain it, or it must be provided by Victoria Legal Aid for the purposes of cross-examination of a protected witness.

Section 41 of the *Evidence Act 2008* gives courts the power to disallow improper questioning of a vulnerable witness. The *Evidence Act* defines people under the age of 18, and people who have a cognitive impairment as vulnerable. However, the court may consider other factors that may contribute to a witness' vulnerability, including age, education, ethnic and cultural background, gender, language skills, disabilities, and the context of the question.

The *Evidence Act* places an obligation on the court: it must disallow an improper question, or inform the witness not to answer it, unless the court is satisfied that the question is necessary. The Act defines as 'improper' questions that are:

- Misleading or confusing.
- Annoying, intimidating, offensive, humiliating or repetitive.
- Put to the witness in a manner that is insulting.
- Based on stereotype.

### **The right to be informed about the proceedings**

In the criminal justice system, the victim of a crime is not a party to the criminal proceedings. There is a risk that, by being relegated to the position of a witness in the criminal justice process, the victim of a crime may feel marginalised. For this reason, the *Victims Charter Act 2006* places obligations on prosecutors to provide relevant information to victims, to fulfil a general right to be informed about the proceedings. Prosecutors must give the victim timely information regarding:

- Applications for bail made by the accused, the outcome of those applications and any conditions imposed.
- The offences with which the accused is ultimately charged.
- Reasons why the accused was not charged with a particular offence.
- The hearing of the charges.
- The outcome of criminal proceedings, including the sentence.
- Any appeals, and their outcomes.

During court proceedings, the prosecutor is required to minimise unnecessary contact between the victim and the accused, and protect the accused from intimidation by the accused and people connected with the accused.

#### **Richmond football photo case**

A photograph of a topless woman wearing a Richmond Tigers premiership medal was distributed online and via text messages, allegedly instigated by one of the players, without the woman's consent or knowledge. This is in breach of laws against publishing intimate images of another person without their permission, and is a form of sexual harassment and abuse.

In October 2017 the victim asked police to drop the investigation and stop pursuing a prosecution. Her lawyers at Maurice Blackburn said: "Our client maintains that her trust and privacy has been breached by the unauthorised distribution of the photo [but] her welfare is our main priority, as is restoring her privacy, so we do not wish to cause her any more distress by commenting further." Victoria Police said that case had been closed: "At the request of the complainant the investigation into the circulation of intimate images has ceased."

### **The right to be informed of the likely release date of the accused**

If the accused is convicted of a criminal offence, she or he may be sentenced to a term of imprisonment. Section 17 of the *Victims Charter Act* enables the victim to be included on a register kept for victims of a criminal act of violence in Victoria; if they choose to do this, the victim may then be provided with information concerning the offender such as the length of their sentence and the likely date of their release from imprisonment. Any victim has the right to be informed of the likely release date of the accused.

A person included on the victims register may also make a submission to the Adult Parole Board about the effect of the offender's potential release on them as the victim of the offender's crime. The Board must consider this submission when determining whether to place the offender on parole and release them from prison before their top (maximum) sentence has been served.

### Victorian Law Reform Commission review

In August 2016, the Victorian Law Reform Commission ('VLRC') tabled in Parliament its 'Report on the Role of Victims of Crime in the Criminal Trial Process'. The VLRC supported the current legal position – that victims are participants in the criminal trial process, but are not parties to proceedings – and recommended that this continue. The VLRC made a number of additional recommendations for legislative amendments to protect and enhance the role of victims in criminal trials, including to provide a definition of protected victims in the *Criminal Procedure Act 2006* to enable fair witness testimony.

#### REVIEW/APPLICATION QUESTIONS 4 – Rights of parties to a criminal case

1. What rights are protected by ss21 and 24 of the Victorian Charter?
2. How might you define "unreasonable delay"?
3. Provide two examples of ways in which the criminal justice system tries to avoid delay.
4. Identify a handful of factors that might contribute to the 'fairness' of a hearing.
5. Provide two examples of ways in which the criminal justice system tries to provide a fair hearing.
6. What is meant by a 'jury'?
7. For what kinds of criminal matters is a jury used?
8. Identify two reasons why a trial by jury might be preferred to a bench trial.
9. What legislation provides for trial by jury for Victorians?
10. What piece of legislation outlines many of the rights of victims in criminal trials?
11. Define what is meant by 'vulnerable witness'.
12. Identify three ways in which the judge might amend normal court procedure to protect a vulnerable witness.
13. What kinds of questions should be disallowed if they are asked of a vulnerable witness?
14. Provide two examples of matters that a prosecutor must inform the victim in the proceedings of.
15. What formal role in the proceedings does the victim play?
16. If the offender is sentenced to a term of imprisonment, what additional right does the victim in the case gain?
17. What role is the victim permitted to play with regard to the offender receiving parole?
18. What general position in relation to the role of victims did the Victorian Law Reform Commission take in its 2016 report?

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## Evaluation of the rights of parties to a criminal case

The following strengths and weaknesses have been linked back to the three principles of justice: fairness, equality, and access. A selection of sample points has been included here, but space has been provided for you to include additional arguments you believe you can explain clearly and that you would like to focus on learning for the examination.

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

STRENGTHS	RIGHTS	WEAKNESSES
<p>The courts oversee case management to ensure that unreasonable delays in proceedings do not occur</p> <p>Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude. This improves <b>access</b> for people accused of a criminal offence.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The right to be tried without unreasonable delay</b></p>	<p>If cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. This can be a weakness, which impacts the <b>fairness</b> of a trial for the accused.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Courts are constituted to ensure that judges are expert and impartial. This ensures <b>fairness</b> in criminal proceedings for all people.</p> <p>The rules of evidence and procedure ensure that only evidence that is relevant is introduced in a criminal trial. For example, evidence of prior convictions are not admissible as evidence of the offence. This contributes to <b>fairness</b> by ensuring that the accused is tried impartially.</p> <hr/> <hr/>	<p><b>The right to a fair hearing</b></p>	<p>A person with greater <b>access</b> to resources to pay for expert legal defence may have a better outcome than a person whose resources are constrained. This may lead to a disparity in the outcomes achieved by an accused with unlimited resources, compared with an accused who suffers socio-economic disadvantage, which undermines <b>fairness</b> and <b>equality</b> in the justice system.</p> <hr/> <hr/>

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<p>Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures <i>fairness</i> in the adjudication of a criminal trial.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The right to trial by jury</b></p>	<p>For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective <i>access</i> for an accused person to sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions.</p> <p>Juries do not have to give reasons for their verdicts, so there is no way to ensure that their decision-making is free from bias. If juries do not act impartially in reaching a verdict, this reduces the <i>fairness</i> of the criminal justice system.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>
<p>Accommodating the special needs of witnesses such as children or those involved in an alleged sexual offence ensures that such people have appropriate <i>access</i> to give evidence in court. It ensures they are treated <i>fairly</i> by legal procedures such as cross-examination.</p> <hr/> <hr/> <hr/> <hr/>	<p><b>The right to give evidence as a vulnerable witness</b></p>	<p>Providing some witnesses with different conditions in which to give evidence may prejudice a jury in their assessment of the credibility of all witness testimony at trial. A jury may be biased by sympathy in favour of accepting the evidence of a vulnerable witness, or they may develop prejudices against their reliability. These circumstances may impact the <i>fairness</i> of a trial unless carefully managed by the presiding judge.</p> <hr/> <hr/> <hr/> <hr/>

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<p>The obligation to inform victims about proceedings ensures that the prosecution considers the role of victims in a criminal trial. This enhances <b>access</b> for victims to criminal legal procedures.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>	<p><b>The right to be informed about the proceedings and the likely release date of the accused</b></p>	<p>This right may unfairly intrude on the convicted person’s right to privacy after they have served the sanction imposed by the court. This may compromise their right to <b>equal</b> treatment under the law.</p> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/> <hr/>

**REVIEW/APPLICATION QUESTIONS 4A – Rights of parties to a criminal case**

**Application exercise**

Juries are not required to give reasons for their verdicts, so there is no way of knowing whether the outcome was based on bias, or on a misunderstanding of the law, evidence or procedure. The legal system is, after all, very complex, and it is extremely difficult for inexperienced laypeople to understand matters well enough to come to sound decisions; the fact that we have laws ensuring that all deliberations are kept secret provides not check on this. The benefit of this is that increased finality is brought to each case, because appeal courts are reluctant to overturn a jury’s findings without having any clear grounds on which to do it; juries are also given the freedom to consider matters of common sense and empathy in their deliberations, without fear of being criticised for trespassing into ‘non-legal’ matters. Providing written reasons for their verdicts would not necessarily stop this, though, if the law permitted them to do it, so the lack of reasons is overall a negative.

- a. The above answer is a sample of an evaluation of a weakness. Using this as a guide, evaluate one weakness of each of the rights of parties covered in the section.