

COMMERCE PRESENTATIONS AND PUBLICATIONS



**CPAP LEGAL STUDIES
STUDY GUIDE**

BONUS PRACTICE EXAMINATION

**SUGGESTED ANSWERS
AND MARKING SCHEME**

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PART A

Question 1 (2 marks)

Sample answer: A bicameral parliament has two houses, upper and lower. The Victorian Parliament has the Legislative Council and the Legislative Assembly.

Question 2 (4 marks)

Example answer:

- ✓ *An injunction is a court order either prohibiting the defendant from doing something (a restrictive injunction), or compelling the defendant to take a prescribed action (a mandatory injunction). Injunctions are poor at compensating a plaintiff for harm, because there is little of equal value that a court can command a defendant to do. In situations like defamation it is close to compensatory, as the defendant could be ordered to give something of value like an apology. If the plaintiff has lost a limb or suffered psychological trauma, though, the money of damages would be more generally compensatory.*

Problematic answer:

- ✗ *An injunction is a court order either prohibiting the defendant from doing something, or compelling the defendant to take a prescribed action. An order prohibiting the defendant from taking action is called a 'restrictive' or 'prohibitive' injunction, and an order forcing the defendant to take particular action is called a 'mandatory' injunction. They may be awarded on a temporary basis before trial has commenced, or as a permanent order at the conclusion of trial. Courts will only order injunctions if they are convinced that an award of damages is not an adequate remedy. This will happen when money is not suitable to restore the plaintiff to the position they were in before the harm occurred.*

This answer is problematic because it spends too long on the 'outline' and fails to leave time for the discussion. It fails to go into arguments about how and why injunctions achieve or do not achieve restoration.

Question 3 (7 marks)

a.

Sample arguments:

- ✓ *In theory, members of parliament will usually reflect the needs and values of the majority, and if the majority is unhappy with their performance the representatives will generally be voted out at the next election – the representative function of parliament can influence it to pass laws that the majority support, such as greater restrictions on vaping for recreational use.*
- ✓ *There will sometimes be a tension between the representative following her or his own opinion or party line, and the representative following majority opinion in her or his electorate or the state or country as a whole. For example, the majority may support changing the law to regulate vaping, and this may be supported by medical stakeholders, but the party may receive lobbying and donations from the industry and be reluctant to adopt that policy. It can be difficult for a representative to choose between expert advice, their party line, and what voters want them to do.*
- ✓ *Even though parliament will be influenced in its law-making by the needs and values of the people it represents, it is virtually impossible to make laws that match the views and beliefs of all members of our community, given the diversity of beliefs, backgrounds and experiences. This dilutes the influence that any individual person or group can have on the law-making of parliament, such as the views of people who think vaping is low-risk versus those who want it regulated for health and addiction reasons.*

Problematic example:

- ✗ *A representative parliament is one where the people elect representatives to govern on their behalf. Members of parliament will usually reflect the needs and values of the majority, and if the majority is*

unhappy with their performance the representatives may be voted out at the next election. The stimulus shows one elected representative talking about the risks of vaping, and the way that the law currently contains a loophole allowing it to be marketed to young people.

This is problematic because it contains a definition of representative government, but it is not connected clearly to an argument about the effect on parliament's ability to make law.

b. Explain one reason for law reform. 3 marks

Sample answers:

- ✓ *Laws must match community values, or they won't be accepted and followed. So, as society's attitudes change, laws need to be interpreted in light of those values. Butler makes the point that public support for vaping was higher in the past because a community concern was supporting people to quit smoking, but values have shifted to protecting young people now that vaping is a bigger concern than cigarettes in that age group.*
- ✓ *Newly-emerging threats and harmful trends can influence a change in the law because parliament seeks to address the specific harm that might be caused. The original vaping laws were made by people who saw cigarettes as the most harmful trend, but the new technology of vaping has made them flavoured, cheap, disposable, and easy to access for teenagers.*

Question 4 (5 marks)

Sample answer: *The VLRC is an independent body established by the Victorian Parliament to assist it with law reform and research in the state. The VLRC conducts research into existing legislation, assessing whether it is effective, and recommending changes to the law to the Victorian Parliament. For instance, in 2020 the Commission self-referred the community concern issue of jury eligibility, and reported to Parliament in 2022 with the recommendation that eligibility rules and jury procedures be modified to allow people who are deaf or blind to serve on juries. If an issue is likely to take more resources, instead of being self-referred a reference will be given by the Attorney-General. Once the Commission starts an inquiry, it will research by publishing public consultation papers, receiving written submissions, holding meetings and consulting with experts. The rules regarding juries were compared with other jurisdictions, for instance. The Attorney-General will table the report in parliament, as it did with the juries report in 2023, but the parliament is not obliged to implement the reforms.*

Question 5 (4 marks)

Sample arguments:

- ✓ *Since the inception of the modern scheme for class actions, judges on the whole have reported that class actions demonstrate positive outcomes. This indicates that the courts have seen benefits to claimants who might otherwise never have seen justice, because the judicial feedback is positive.*
- ✓ *Class actions are limited to situations where enough people have been harmed in similar fact situations, and will not increase access to justice in situations where there is only one injured party or where the facts are unusual. A representative proceeding would only be appropriate if seven or more people could be found who had suffered harm, because they require a minimum number of claimants to join together to meet the efficiency goals of the grouped proceeding.*
- ✓ *The regime of class actions is designed to permit a range of claims to be brought that would otherwise not have been pursued, such as claims like the Robodebt class action, which focus on injured parties who are not in strong financial positions. A class action allows complainants to join as group members and be responsible for none of the upfront costs – group members will only 'contribute' to costs if the claim is successful and there is a costs agreement to take costs out of the damages or settlement before the money is distributed.*
- ✓ *Group proceedings can give access to court for complainants who each have suffered relatively small harm, as each individual complaint may not be worth a lawsuit by itself. Class actions can gather together thousands of people, though – such as the Optus data breach, which affected almost 10 million*

customers but did not harm most of them in any significant way. Every person affected can hypothetically band together and use one set of plaintiff and court resources to have their claim settled, even if for some people the harm was only needing to replace their ID.

- ✓ A class action does not increase the ability of the named plaintiff to use the legal system if there is no litigation funder, group costs order or 'no win no fee' agreement in place. The named plaintiff will have to put time in to pre-trial procedures, mediations, and trial, and will have to fund upfront lawyer's fees, disbursements and court costs. There is a significant burden on the named plaintiff that would be less if they were only bringing a case on their own behalf.
- ✓ Because class actions are likely to have large damages awarded or compensation settlements, they are more attractive to litigation funders and law firms willing to charge on a 'no win no fee' basis. This enables injured parties who have no funding for upfront costs to bring an action defending their rights, because costs will be borne by profitable organisations who would not have represented an individual on a pro bono basis.
- ✓ Class actions can limit access for complainants who are vulnerable to unfair litigation funding agreements and 'no win no fee' arrangements. Class actions often involve individuals who have been harmed but have little experience with the legal system, and they often defend rights in a human rights setting rather than a commercial one. Litigation funders can therefore make agreements with inexperienced plaintiffs to take up to 75% of the settlement (the highest figure found by the VLRC in its inquiry).

Question 6 (8 marks)

Sample arguments:

- ✓ VCAT members who have specialised legal or professional knowledge appropriate to their list provide reliable, impartial determinations of legal disputes. Their decisions are binding, providing certain and fair outcomes for the parties, and saving further delay for matters that might be worth a great deal of money.
- ✓ Because VCAT operates without strict and consistent rules of evidence and procedure, and because members do not have the same legal training or oversight as judges and magistrates, VCAT is often called the 'Wild West' and is criticised for being unpredictable and inconsistent. With a major case, there could be a great deal on the line, and parties may prefer the court environment where there are rules of evidence and procedure and judges must follow precedent.
- ✓ It is more difficult for a wealthier party to use its resources to gain an advantage in VCAT, because procedures are designed to be fast and streamlined, and legal representation can be denied to parties. A major case may not involve two equally-matched parties – it may involve an individual complainant against the government or a corporation, and VCAT may therefore prevent the defence from taking advantage of their stronger position to bleed the complainant of funds.
- ✓ VCAT frequently rules against parties being permitted legal representation in its hearings, but lack of legal representation can be viewed as a weakness if one party is not confident or knowledgeable enough to express themselves without it. Lack of representation can reduce equality of opportunity. If a major case is defined as major because it involves significant sums of money this is less likely, though, as lawyers are usually only prohibited entirely from matters worth less than \$15,000.
- ✓ Open hearings ensure that VCAT determinations are transparent, contributing to the fairness and equality of its procedures. It is important for all cases that justice is not only done, but that it can also be seen to be done. Parties may then request written reasons at the end of the dispute, which increases transparency and accountability.
- ✓ VCAT is traditionally a lower-fee venue than courts, but fees are higher than they used to be and major cases have special fees attached to them in some lists such as property and development disputes. Fees for VCAT increased significantly under the last state government, and the current Andrews Labor Government introduced a 3-tier fee structure and put a cap on the increases but did not reduce them to previous levels. Daily hearing fees have also been introduced for most claims.
- ✓ VCAT usually does not award costs to the winning party, whereas courts award costs by default. It is therefore more intimidating for a party to initiate a matter in the courts, because they might be liable for the reasonable costs of the other side; however, VCAT will not reward the party in the right with costs

in their favour. Exceptions may be made in some major cases, but the likelihood in VCAT is that a party will bear its own costs – this may be unfair to the winning party if their case was major and had high costs attached, but they were not in the wrong.

- ✓ VCAT timeliness has been affected by increased demand and the Covid-19 pandemic. The Civil Claims List, for instance, had 80% of its claims resolved within 16 weeks in 2018-19, but within 56 weeks in 2021-22. The image demonstrates that building disputes are even higher than that, reaching perhaps 70 weeks. This has decreased time-based access. VCAT is likely to be faster than courts such as the County Court, but it is now more on par with the Magistrates' Court – it depends whether a major case would be under the jurisdiction limit for the Magistrates' Court, if parties would prefer to file there instead.
- ✓ Court-based resolution can be delayed because of multiple appeals. Appeal waiting times can stretch to 12-18 months, and can be longer than the initial wait for a hearing or trial date. VCAT provides limited avenues for appeal, because it limits appeals to questions of law; whereas, courts provide appeals on points of both fact and law from most matters. Delays for appeals are less common with VCAT, even though appeals might be more desirable in major cases where the parties have more at risk.

Question 7 (10 marks)

Sample arguments relating to the judge:

- ✓ The judge is responsible for being an impartial third party, who shows preference to neither side over the other, and who assists neither party in the presentation of its case. The judge would have answered the jury's note, for instance, with impartial legal information. This ensures that Hayne was treated equally and fairly, and that natural justice was preserved.
- ✓ The case management powers of the judge can be used to promote a more efficient and effective resolution to the case, giving both the Crown and Hayne better access and ensuring that neither party used bad faith strategy designed to unfairly disadvantage its opposition. The judge would have controlled the questions asked of the victim, for instance, to not drag out proceedings or introduce inadmissible evidence.
- ✓ The judge generally does not participate in the trial by calling witnesses, deciding which legal arguments and precedent to raise or presenting and arguing the interpretation of evidence – thus, their legal expertise could not be used to benefit either party in the case or to actively search for the truth. The judge was not able to guide the jury when the jury seemed unsure.
- ✓ Judges can only make decisions based on evidence and arguments put to them, and the outcome should be based on the best legal arguments rather than whom the court thinks is right. Regardless of what the judge privately thought of Hayne's behaviour or guilt, the jury was left to reach its own verdict – even if this was coloured by Hayne's fame.

Sample arguments relating to the jury:

- ✓ Jurors have the responsibility to be unbiased, and the jury randomness assists this. Biases or prejudices shouldn't be able to carry the verdict, because a cross-section of society should mean that jurors with biases are balanced out by other jurors without those same biases. Even though some jurors may have been rugby fans, or some may have been prejudiced against Hayne because of negative opinions of sports stars, the fact that there were 12 jurors should have insulated the jury against individual biases.
- ✓ Jurors have the responsibility to look at the case from the perspective of a layperson, and this benefits all parties. Jurors being 'regular' people requires that legal jargon be kept to a minimum. This makes their decision-making easier, stops lawyers and judges from even unintentionally overcomplicating the system, and allows parties and the viewing public to better understand the case as well, giving a wider range of people access. This was particularly important in Hayne's case, as many members of the public followed it because of his fame.
- ✓ Jurors have the responsibility to try as hard as possible to reach consensus in the jury room. The introduction of majority verdicts for most crimes minimises the possibility of retrials, while still achieving a great deal of confidence and consensus in the verdict. Hayne was convicted with a unanimous verdict, but this was only reached after more than a week of deliberation where they were unable to agree at first.

- ✓ *Many potential jurors are excused, ineligible, disqualified or challenged. The pool of jurors is considerably smaller than the number sent the original questionnaire, and the same types of people are excluded every time. It is therefore difficult to argue that it is truly representative of a cross-sectioned mix of society, and defence lawyers in sexual assault cases consistently ask female jurors to stand aside.*
- ✓ *Many prejudices are common across different groups in society, so accused from well-known groups in particular can fail to be treated as equals before the law. Many people hero-worship Australian sports stars, the same as many people have negative opinions of sports stars. It would not be difficult to have a concentration of one group on the jury.*

Sample arguments relating to parties:

- ✓ *Parties are responsible for thoroughly reviewing their own cases and deciding which legal arguments and evidence will give them the best chance of success. This level of agency and decision-making ability gave Hayne access to justice, and may encourage confidence in the fairness of the outcome even though he was found guilty – at least he can be confident that he was in charge of how he defended himself, which may encourage him to respect the jury’s judgment.*
- ✓ *Parties are responsible for being experts in their own cases, and giving them control is therefore arguably the most effective and efficient way of deciding how their side should be argued. This was a sexual assault case where there were no direct witnesses other than the accused and the victim; it therefore makes sense for the accused to have control over instructing his lawyers, because he has first-hand knowledge.*
- ✓ *Party control puts of a lot of responsibility and stress on individual parties, and most accused are not experienced in arguing at trial. This then increases party reliance on legal representation, which increases the costs of trial and reduces equality between parties if the prosecution has greater financial resources than the accused. Hayne is likely to have funds for a lawyer, and was able to hire a QC, because of his rugby career, but he now plans to appeal and this will add costs.*

Sample arguments relating to legal representatives:

- ✓ *Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give access to the accused with the need to serve justice and overall fairness in terms of the system. Cunneen was not permitted to use her experience as a QC to fight to win Hayne’s case if Hayne asked her to present any evidence that contradicted when he had told her in confidence.*
- ✓ *Experienced legal representatives are responsible for helping the accused to present their case in the best possible light. This gives the accused confidence in the system, and a better chance at a fair and just trial. Cunneen has raised concerns regarding the wording of the jury’s note, for instance, and plans to appeal, because she can see in her experience that there may be an issue with jurors conducting outside research.*
- ✓ *‘Justice’ may belong to accused people who can afford the better legal representatives, rather than accused people on the basis of their innocence, and this decreases proper access to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. The 2019 trial of George Pell resulted in multiple appeals to a successful High Court appeal, and involved some of the most successful lawyers in Australia – Robert Richter is an acclaimed senior barrister, whose fees were estimated at \$30k per day of trial. Hayne in this case is wealthy enough to afford a QC and now an appeal. It is unlikely that many other accused persons would have the resources to do this, and would simply have had to accept the first finding of guilt.*
- ✓ *Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in plea negotiations because it is not always in the lawyer’s best interests to register a guilty plea, or they may believe they can win a ‘not guilty’ verdict outright for their client. Cases involving sexual assault are particularly vulnerable to this, because the conviction rate is so low.*

END OF SECTION A

SECTION B

Instructions for Section B

Use stimulus material to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.

Answer **all** questions in the spaces provided.

Question 1 (16 marks)

a.

Sample answer: *The bill would have been passed using exclusive powers, because only the Commonwealth Parliament can introduce referendum bills.*

Problematic answer:

- ✗ *The bill would have been passed using exclusive powers, because it was passed by the Commonwealth Parliament.*

This is problematic because it is insufficiently specific in the justification – the Commonwealth Parliament can pass laws in areas other than exclusive powers.

b.

Sample arguments:

- ✓ *As the 'people's house', the lower house is democratically elected and answerable to the public: members of parliament passing laws that society finds unacceptable are likely to be voted out of office. The Voice referendum bill is supported by large sections of the public, especially in populous states such as Victoria, and this may have pressured the Government to initiate the referendum.*
- ✓ *The lower house had the role of reflecting public opinion. The public can become involved in parliament's law-making processes through signing and submitting petitions, or lobbying their local member of parliament. This gives the people significant influence over the law-making of parliament, since over 90% of bills are introduced in the lower house, and allows individual constituents to make appointments with their local federal member.*
- ✓ *Reflecting majority opinion in bills can be difficult, because the public does not always have one clear view. For example, in 1999 the public voted 'no' resounding in the referendum to establish a republic, and the people of no state voted majority in favour. The Voice referendum enjoys support in some demographics, but not in others – for instance, in smaller states, and with some Aboriginal groups who are campaigning for different measures.*
- ✓ *The lower house's primary role is to introduce new bills like the Voice bills, but only 45% (approx) of its sitting time is devoted to legislation, and it sits for only 625 hours per year on average. The lower house cannot introduce and debate unlimited new bills, and most of its legislative time is spent introducing and passing uncontroversial bills that relate to the everyday running of the country. This puts a practical limit on the ability of the Parliament to respond to social issues ahead of other concerns such as the budget and the environment.*
- ✓ *The lower house acts as the seat of government, meaning that it selects which party or coalition will form the executive. The executive then has a great deal of control over the policy direction of the country and new bills that are introduced. The Voice referendum bill, for instance, was introduced by the federal government, and they were able to easily pass it through the lower house. The upper house required more cooperation with crossbenchers, but this can mean that improvements are made that the lower house would have missed.*

c.

Sample arguments:

- ✓ *Referendum is the only process that gives the people the power to alter the wording of the Constitution and where the parliament is not entirely sovereign in its own jurisdiction. The only way in which a referendum can be passed is by the public voting in favour of it and providing a double majority – this prevents the Commonwealth Parliament from adding new sections that create additional bodies for itself, such as the proposed s129.*
- ✓ *The people can use the double majority provision to stop the Commonwealth from creating a Voice to Parliament if it is not what the majority of voters want. In early 2023 support for the Voice fell and fewer than four states were in favour – nationwide support also fell below 50%. This suggests that the majority might not be in favour of the Voice, or might prefer a different measure of Indigenous inclusion in the Constitution. The Parliament has decided in favour of the Voice, but they cannot pursue their chosen measure if the two majorities are not achieved.*
- ✓ *The people can vote in a s128 referendum to change the wording of the Constitution, but they cannot entirely control the law that is made because subsequent interpretation by the High Court will determine the meaning, scope and application of the words they include. The people can vote to approve or reject a change by parliament, but they cannot control the way that parliament will be able to use the final wording of the Constitution. For example, the High Court determined in the Hindmarsh Island Bridge Case that the inclusion of Indigenous people in the ‘race power’ in 1967 also permitted the Commonwealth to make laws that disadvantaged Indigenous people. The Voice proposal would be subject to the same interpretation, as Source 2 explains.*
- ✓ *The people can use the power of representative government to influence the federal parliament to introduce a referendum bill. For instance, the public could use their votes at election to support candidates who pledged to introduce a referendum bill to decide the issue of the Voice, either for or against. The Government may then have a mandate to introduce that bill.*

d.

Sample arguments:

- ✓ *The High Court can determine the meaning and scope of any wording in the Constitution, and in doing so can increase or reduce the law-making powers of the federal parliament, increase or reduce rights and protections for the people, or change the way that government institutions operate. For instance, in the Tasmanian Dams Case the High Court interpreted the ‘external affairs’ power to include any matter covered by a legitimate treaty obligation, even if that matter was otherwise residual and a power of the states. If the Voice referendum passes, Source 2 identifies how the High Court could interpret the section to require compulsory consultation and invalidate laws that did not receive it.*
- ✓ *High Court interpretation can increase the scope of the constitutional rights, or even add additional rights to those contained in the express wording. For instance, in the ACTV Political Broadcasting Case the Court found that ss7 and 24 created an implied freedom of political communication. This increases the ability of the Court to check the legislature, and protect the people from the power of the government. As explained in Source 2, this could include protecting the right of the Voice to advise on proposed laws, if the referendum passes.*
- ✓ *The High Court cannot change the wording of the Constitution, but it can change the meaning of the wording, and then enforce that meaning on the legislature and executive. Neither the parliaments nor the government can ignore or override the Court’s interpretation, and it is fully enforceable unless overridden by referendum – this includes words changed by referendum, such as the Voice, and even where the people have decided what they want the words to mean.*
- ✓ *It has historically been difficult to change the Constitution through referendum, with only 8/44 proposals being successful, and some proposals like the Voice have been considered for years. This can be compared with the ease with which the High Court can interpret the wording – if a case is brought by someone with standing, the Court can even fast track the hearing of the case, like it did with the challenges to the 2009 stimulus package and the Covid-19 lockdown challenges.*
- ✓ *As stated in Source 2, the High Court usually does not second-guess the parliament’s policy decisions. It is strictly concerned with the legality of laws, and not whether it agrees with the policy direction of them. For instance, in the Tasmanian Dams Case, the High Court began by stating that the judgment of the*

Court was not on whether the justices supported the policy of damming the Gordon River or not. The same would apply with the powers of the Voice.

Question 2 (24 marks)

a.

Sample answer: Yes, it was. Three justices dismissed the appeal, but a majority of four allowed it and the outcome is determined by the majority.

b.

Sample answer:

- ✓ In the case of BA, the High Court was asked to use its powers of statutory interpretation to determine the scope and meaning of the phrase “break and enter” in the Crimes Act. The precedent set on the meaning of the words would then be used to determine whether BA had broken the law in this way, and would be binding on lower courts in Australia using the same section 112 in the Crimes Act in later cases. The Court did not agree on the meaning of the phrase, but the decision of the majority will form the ratio decidendi. The majority decided that ‘breaking and entering’ did not include any cases where a person had a “right of exclusive possession” such as a lease agreement, even if they did not live there anymore. This narrows the scope of the phrase, which is what the minority judgment of three judges did not agree with. Their alternative definition will form persuasive precedent.

c.

Example answers:

- ✓ Arranging courts in a hierarchy allows for decisions to be appealed to higher courts, such as was done in BA v The King. Appeals can be on questions of fact or on questions of law, and involve the higher court being asked to scrutinise the original decision-maker. Here, BA was found guilty in the Court of Criminal Appeal, and therefore in the court of original jurisdiction, too. Because of the hierarchy he was able to appeal at least twice up the chain to ask increasingly more senior and experienced judges each time to scrutinise the law regarding breaking and entering, and decide whether it had been applied correctly in his case. This would have been more expensive for him each time, and may have taken years, but it has resulted in a precedent being set and BA being acquitted.
- ✓ Arranging courts in a hierarchy allows for precedent to be set by higher courts that are binding on lower courts in the same hierarchy when they are dealing with cases based on similar material facts. In the case of BA v The King, the High Court was asked to consider the meaning of ‘breaking and entering’ in the Crimes Act, and to possibly set a new precedent on its meaning. The ratio decidendi of the majority was that it did not include any situation in which someone had a “right of exclusive possession” such as a lease agreement, even if they did not live there anymore. BA was therefore acquitted, but the decision extended beyond that because of the hierarchy: due to the High Court being at the top of the state and federal hierarchies, their definition must be used by all Australian courts in the future, leading to efficiency.

d.

Sample arguments:

- ✓ Access to justice can be undermined by how expensive legal representation and trial presentation are, including witness fees. Part of an accused’s trial preparation will be looking at the hand-up brief of evidence prior to committal to see whether the prosecution has enough evidence to justify the charges and satisfy the burden of proof that rests with them. If they do not, the accused can argue this to the magistrate at the committal hearing and the case may be dismissed, saving significant costs and delivering justice.

- ✓ *The presumption of innocence can be legally upheld, but can fail to protect the accused from the informal punishment of undergoing years of criminal processes. The current case has been on foot since 2019, from the event to the current appeal. The right of the accused to be tried without unreasonable delay may have been achieved in his initial trial, but multiple appeals following this has dragged the case out significantly. Delays in appeal processes therefore delay closure for the accused and prevent natural justice in possible later retrials.*
- ✓ *An accused is able to prepare for trial by receiving copies of evidence and witness statements held by the prosecution, but not having to disclose any of theirs in return. This is because the accused is presumed innocent of all charges unless and until the prosecution can satisfy their burden and prove guilt. Because the prosecution has more resources than the accused, this protection levels the playing field between them and improves equality of opportunity.*
- ✓ *The defendant will never be asked to defend themselves against something they have not been fully informed of and already proved guilty of. The prosecution must justify the bringing of the serious injury case at a committal hearing, and then must discharge the burden of proof at trial before the accused will be asked to lead their own evidence or witnesses – the accused can ask for the case to be dismissed instead of presenting a defence, if the evidence is insufficient. This knowledge of the case against them, and the protection against self-incrimination or persecution, gives the accused greater access to justice.*
- ✓ *In terms of evidence and legal arguments, equality is not achieved between the parties because the benefit is given to the accused, because they are presumed innocent and should be protected by the law. One of the purposes of pre-trial procedures was allowing BA to discover all evidence against him before he decided what his defence was going to be or whether to engage in plea negotiations, but the prosecution did not receive similar information about the evidence or arguments of the accused. The prosecution had to decide which charges to pursue without necessarily knowing the BA's version of the facts or legal arguments.*
- ✓ *Because the prosecution carries the burden of proof, it is their responsibility to ensure that they only bring charges that they can support with evidence. Fairness requires that every accused receives natural justice, and punishing an individual without sufficient evidence of their guilt would be contrary to this and in breach of their rights under the Victorian Charter.*
- ✓ *In most cases except those involving serious offences, an accused has a presumption of release on bail, because they are protected by the presumption of innocence and do not have the burden of proving their own innocence to justify their freedom. This protects human rights and fairness 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. If an accused was charged under the Crimes Act they would be scheduled for an indictable trial, which could take over a year to be timetabled in the courts. One year or more on remand would significantly disrupt their lives, especially if they were factually innocent.*
- ✓ *Procedures such as holding an accused on remand jeopardises their access to justice because they are much less able to prepare for their defence and cannot earn money in the meantime. BA has appealed his case at least twice, so this opportunity to generate income would have been important to his defence and ability to pay legal fees. Since the Victorian reforms to bail laws in 2017 and 2018, the presumption of bail has been removed from a number of serious and violent offences, which may include what BA was charged with, and the accused must show cause why they should receive bail – this is reversing the presumption of innocence at a pre-trial stage, and reduces the ability of the accused to properly defend themselves.*
- ✓ *In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences, which may include what BA was charged with depending on the level of harm caused to his former partner victim. This decreases fairness because an accused can be brought back to trial even though they were presumed innocent the first time and found not guilty; it also decreases access 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. BA has already had at least three court appearances for this charge – if the police could charge him again with new evidence, it could feel like state harassment of an individual.*

e.

Sample answer:

- ✓ *Yes, she would still be able to sue him. She has suffered harm from her right to physical safety being infringed, and civil cases are separate from criminal actions and do not depend on their outcome.*

f.

Sample answers:

- ✓ *The question of scope of liability means that defendants who did not personally commit the wrongdoing may still be held liable – for instance, the victim’s landlord may be responsible for some aspect of home security. However, other defendants may breach a duty of care and avoid liability, because the court may decide that the chances of harm were too remote. The complainant should think about the scope of who might be held legally responsible for her harm, although her former partner would likely be within scope because he directly assaulted her.*
- ✓ *Enforcement of orders may make the victim scared of pursuing action, because seeking enforcement of an unpaid court award of damages may engage her in an additional round of legal proceedings. An order of compensation would be legally enforceable, but after a High Court appeal her former partner may not have the funds to satisfy it.*
- ✓ *The negotiation options open to the victim may allow her to access a fair settlement, because neither party may be equipped to fight the claim in a contested hearing. A single woman living alone after a possibly abusive relationship may not have the funds to pay for a lawyer, and he may have exhausted funds on his appeals. Unfortunately, the violence involved makes this case largely unsuitable for cooperative resolution.*

Problematic example:

- ✗ *A key consideration for any potential plaintiff is whether they can afford to pursue the issue through to conclusion, because they may be forced to either abandon the claim or settle for an unfair amount if they run out of funds to service the dispute. Solicitors charge \$400-800ph, and barrister can charge up to \$10,000 for a single day in court for a standard case. Even if a plaintiff enters into a ‘no win no fee’ arrangement with a law firm, the fees deducted from a final remedy or settlement may leave the plaintiff with less than they need for compensation.*

This answer is problematic because it is a memorised description, and has not been adjusted to suit the facts of the source material.