THE CPAP STUDY GUIDE TO VCE LEGAL STUDIES

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Megan Blake

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(LLB, BA (Melb) Dip Ed, Postgrad Dip Arts (Research), PhD (Monash)) completed a law degree at the University of Melbourne and worked for a number of years with private law firms and large corporations. Since joining the teaching profession, Megan has been a teacher of VCE Legal Studies and has been actively involved in Legal Studies education. She had positions of responsibility with the VCAA, including as a member of the panel designing the 2011-2017 Legal Studies Study Design, and she has had over a decade experience as a VCE Legal Studies examination assessor. In 2018 and 2019 she acted as Assistant Chief Assessor on the examination assessment panel. Megan is a prolific writer of Legal Studies resources, co-authoring the *Legal Fundamentals in Australia* textbook, authoring the quarterly CPAP Legal Studies Updates and writing CPAP practice examinations and assessment tasks. Megan has also authored works for Jacaranda and has extensive experience presenting student lectures and workshops.

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COMMERCE PRESENTATIONS AND PUBLICATIONS
206/1 Queens Rd
Melbourne Vic 3001
TEL: (03) 9866 2289
Fax: (03) 9005 2717
Email: cpap@commpap.com
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VCAA STUDY DESIGN 2024-2028

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.
For example, in 2019 the exam asked: "Discuss the extent to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion." (10 marks) This corresponded to the Key Knowledge dot-point 'express rights' in Unit 4 AOS 1, but extended also to the role of the High Court, referendum, pressures on parliament, the principle of representative government, and beyond, as the student chose.

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.

The Victorian justice system, which includes the criminal and civil justice systems, aims to protect the rights of individuals and uphold the principles of justice: fairness, equality and access. In Unit 3, students examine the methods and institutions in the criminal and civil justice system, and consider their appropriateness in determining criminal cases and resolving civil disputes. Students consider the Magistrates' Court, County Court and Supreme Court within the Victorian court hierarchy, as well as other means and institutions used to determine and resolve cases.

Students explore topics such as the rights available to an accused and to victims in the criminal justice system, the roles of the judge, jury, legal practitioners and the parties, and the ability of sanctions and remedies to achieve their purposes. Students investigate the extent to which the principles of justice are upheld in the justice system.

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

In this area of study, students explore the criminal justice system, key personnel, and the use of plea negotiations to determine a criminal case. Students investigate the rights of the accused and of victims, and explore the purposes and types of sanctions and sentencing considerations. They consider the impact of time, costs and cultural differences on the ability of the criminal justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the criminal justice system to actual and/or hypothetical scenarios.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Key ideas

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

The principles of justice during a criminal case

- The principles of justice:

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

Sentencing

- The purposes of sanctions:
    - rehabilitation
    - punishment
    - deterrence (general and specific)
    - denunciation
    - protection
- Types of sanctions and their specific purposes:
    - fines
    - community corrections orders
    - imprisonment
- Factors considered in sentencing, including:
    - aggravating factors
    - mitigating factors
    - guilty pleas
    - victim impact statements

Pay special attention to the fact that some of the Key Knowledge points imply Key Skills. For instance, the word 'appropriateness' is *evaluative* in nature, and requires arguments to be made that are similar to strengths and weaknesses.

Key Skills

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

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

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

- Legal principles and information
- The roles of key personnel in a criminal case
- The reasons for the Victorian court hierarchy
- The appropriateness of plea negotiations
- The impact of costs, time, and cultural differences on the achievement of the principles of justice
- The ability of sanctions to achieve their purposes
- 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 point:

- Legal principles and information

Exam tip: The skill word 'synthesise' means 'to combine'. It is an underlying skill rather than a task word. 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.

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:

One of the aims of the Victorian civil justice system is to restore a wronged party to the position they were originally in before a breach of civil law occurred. There are a range of institutions in Victoria that aim to help parties resolve a civil dispute, including courts (the Magistrates' Court, County Court and Supreme Court), Consumer Affairs Victoria, and the Victorian Civil and Administrative Tribunal.

In this area of study, students consider the factors relevant to commencing a civil claim, examine the institutions and methods used to resolve a civil dispute and explore the purposes and types of remedies. Students consider the impact of time and costs on the ability of the civil justice system to achieve the principles of justice. Students synthesise and apply legal principles and information relevant to the civil justice system to actual and/or hypothetical scenarios.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Key ideas

- Key principles in the Victorian civil justice system, including:
  - the burden of proof
  - the standard of proof
- Factors to consider when initiating a civil claim, including:
  - costs
  - limitation of actions
  - enforcement issues

The principles of justice during a civil dispute

- The principles of justice:
  - fairness
  - equality
  - access
- The purposes and appropriateness of methods used to resolve civil disputes, including:
  - mediation
  - conciliation
  - arbitration
- The reasons for the Victorian court hierarchy in determining civil disputes, including:
  - administrative convenience
  - appeals
- The roles of key personnel in a civil dispute, including:
  - the judge or magistrate (including the role of case management)
  - the jury
  - the parties
- The need for legal practitioners in a civil dispute
- The use of class actions to resolve civil disputes
- The purposes and appropriateness of institutions used to resolve disputes, including:
  - Consumer Affairs Victoria
  - the Victorian Civil and Administrative Tribunal
  - the courts
- The impact of costs and time on the ability of the civil justice system to achieve the principles of justice during a civil dispute

Remedies

- Type of remedies and their specific purposes:
  - damages
  - injunctions

Key Skills

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

The skill of 'compare' is used in relation to the following Key Knowledge point:

- The roles of key personnel in criminal and civil cases

> **Exam tip**: Note that this foreshadows questions on the exam that will explicitly require similarities and differences between criminal roles and civil roles.

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

- Legal principles and information
- Factors to consider when initiating a civil claim
- The reasons for the Victorian court hierarchy
- The appropriateness of class actions, methods and institutions used to resolve a civil dispute
- The impact of costs and time on the achievement of the principles of justice
- The ability of remedies to achieve their purposes
- 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 point:

- Legal principles and information

> **Exam tip**: The underlying skill of 'synthesis' can be applied to all Unit 3 AOS 2 content, combined with any Key Knowledge and task word.

UNIT 4 – THE PEOPLE, THE LAW, AND REFORM

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.

The study of Australia's laws and legal system includes an understanding of institutions that make and reform our laws. In Unit 4, students explore how the Australian Constitution establishes the law-making powers of the Commonwealth and state parliaments, and how it protects the Australian people through structures that act as a check on parliament in law-making. Students develop an understanding of the significance of the High Court in protecting and interpreting the Australian Constitution. They investigate parliament and the courts, and the relationship between the two in law-making, and consider the roles of the individual, the media and law reform bodies in influencing changes to the law, and past and future constitutional reform.

Area of Study 1: The people and the Australian Constitution

AOS 1 (or 'Outcome 1') makes up 60% 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. Parliament is the supreme law-making body, and courts have a complementary role to parliament in making laws. Courts can make laws through the doctrine of precedent and through statutory interpretation when determining cases.

In this area of study, students examine the ways in which the Australian Constitution acts as a check on parliament in law-making, and factors that affect the ability of parliament and courts to make law. They explore the relationship between parliament and courts in law-making and consider the capacity of both institutions to make law.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Parliament and the Australian Constitution

- The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making
- The law-making powers of the state and Commonwealth parliaments, including:
  - exclusive powers
  - concurrent powers
  - residual powers
- The significance of section 109 of the Australian Constitution
- One High Court case which has had an impact on state and Commonwealth law-making powers
- Factors that affect the ability of parliament to make law, including:
  - the bicameral structure of parliament
  - international pressures
  - the representative nature of parliament
- The means by which the Australian Constitution acts as a check on parliament in law-making, including:
  - the role of the High Court in protecting the principle of representative government
  - the separation of the legislative, executive and judicial powers
  - the express protection of rights

The Victorian courts and the High Court in law-making

- The reasons for statutory interpretation
- The effects of statutory interpretation
- Features of the doctrine of precedent including:
  - binding precedent
  - persuasive precedent
  - the reversing, overruling, distinguishing, and disapproving of precedent
- Factors that affect the ability of courts to make law, including:
  - the doctrine of precedent
  - judicial conservatism and judicial activism
  - costs and time in bringing a case to court
  - the requirement for standing

Key Skills

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

The 'lower-order' skill of using examples is listed expressly for the following Key Knowledge point:

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

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

- Legal principles and information
- The relationship between parliament and courts
- The significance of one High Court case which has had an impact on state and Commonwealth law-making powers
- The ability of parliament and the courts to make law
- The means by which the Australian Constitution acts as a check on parliament in law-making

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 point:

- Legal principles

Exam tip: The underlying skill of 'synthesis' can be applied to all Unit 4 AOS 1 content, combined with any Key Knowledge and task word.

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

AOS 2 (or 'Outcome 2') makes up the other 40% of Unit 4. The Outcome summary from the Study Design reads:

Laws should reflect the needs of society, but they can become outdated. Individuals and groups can actively participate to influence change to laws, and law reform bodies (including the Victorian Law Reform Commission, parliamentary committees, and Royal Commissions) can investigate and make recommendations for change. Laws can be changed by parliament and the courts, while constitutional reform requires a referendum.

In this area of study, students investigate the need for law reform and the means by which individuals and groups can influence change in the law. Students draw on examples of individuals, groups and the media influencing law reform, as well as examples from the past four years of inquiries of law reform bodies. Students examine the relationship between the Australian people and the Australian Constitution, the reasons for and processes of constitutional reform, the successful 1967 referendum and calls for future constitutional reform, such as that articulated by the 2017 Uluru Statement from the Heart.

Key Knowledge

The Key Knowledge points identified in the Study Design are:

Law reform

- Reasons for law reform
- The means by which individuals or groups can influence law reform including:
  - through petitions
  - through demonstrations
  - the use of the courts
- The role of the media, including social media, in law reform
- The role of the Victorian Law Reform Commission and its ability to influence law reform
- One recent Victorian Law Reform Commission inquiry relating to law reform in the civil or criminal justice system
- The role of Royal Commissions or parliamentary committees in law reform and their ability to influence law reform
- One recent Royal Commission inquiry or one recent parliamentary committee inquiry

Constitutional reform

- Reasons for constitutional reform
- The requirement for the approval of the Commonwealth Houses of Parliament and a double majority in a referendum
- Factors affecting the success of a referendum
- The significance of the 1967 referendum about First Nations people
- Possible future constitutional reform, including:
  - a First Nations Voice in the Australian Constitution

Key Skills

'Lower-order' skills such as explaining, using, 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 reasons for law reform
- The reasons for constitutional reform
- The role of the media in law reform
- The means by which individuals or groups can influence law reform
- The ability of law reform bodies to influence a change in the law

Note that the examples used in relation to the ability of law reform bodies to influence a change in the law must be *recent* – in others words, from the four calendar years prior to the exam.

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 2024 examination, no example before 2020 should be used as a 'recent example'.

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

- Legal principles and information
- Factors affecting the success of a referendum
- The role of the media in law reform
- The means by which individuals or groups can influence law reform

- The ability of the Australian people to change the Australian Constitution, including in relation to the 1967 referendum about First Nations people and possible future constitutional reform
- The ability of law reform bodies to influence a change in the law

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 point:

- Legal principles and information

Exam tip: The underlying skill of 'synthesis' can be applied to all Unit 4 AOS 2 content, combined with any Key Knowledge and task word.

REVIEW QUESTIONS – Advice

The Review 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 (comprehension) and have quick access to an accurate version of it in your memory (memorisation).

a. **If you want to work on COMPREHENSION, use your notes and the relevant topics in this Study Guide to help you answer Review 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 or whether you'll get some parts wrong.**

APPLICATION EXERCISES – Advice

The Application exercises are different from the Review questions because they are focused on practising higher-order skills and task words. The Application exercises will rely on your understanding of factual content, but will ask you to *do* something with that content.

a. **If you want to work on COMPREHENSION, use the Application exercises as model sentences and answers. Look at the structure of the information given to you, and try to model your own answers on this breakdown of content + argument + application.**

b. **If you want to work on MEMORISATION, take arguments from the Application exercises and put them into your notes. You may need to modify them based on the wording of the question you are given or the source material attached to it, but this will build up a bank of options for you to start from.**

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 affects 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 ('OPP'), on behalf of the whole community.

The person accused of the crime is called the 'accused', but they can also be referred to as the 'criminal defendant'. The party 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. They cannot be used for civil cases.

Criminal cases begin with a wrongdoing that is against a criminal law. 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.

The power of courts to hear criminal matters is divided by how serious the crime is, and how serious the consequences are – such as the maximum jail sentence. Tribunals cannot resolve criminal disputes.

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 that 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' – this word is seen in both civil and criminal cases. The word 'accused' is *never* used for civil cases.

Exam 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 'allegations' or 'defendant', apply to *both* civil and criminal law. In every exam, students mix up criminal cases and civil cases, and write answers using the wrong terminology. You do not receive full marks if your answer confuses criminal and civil language.

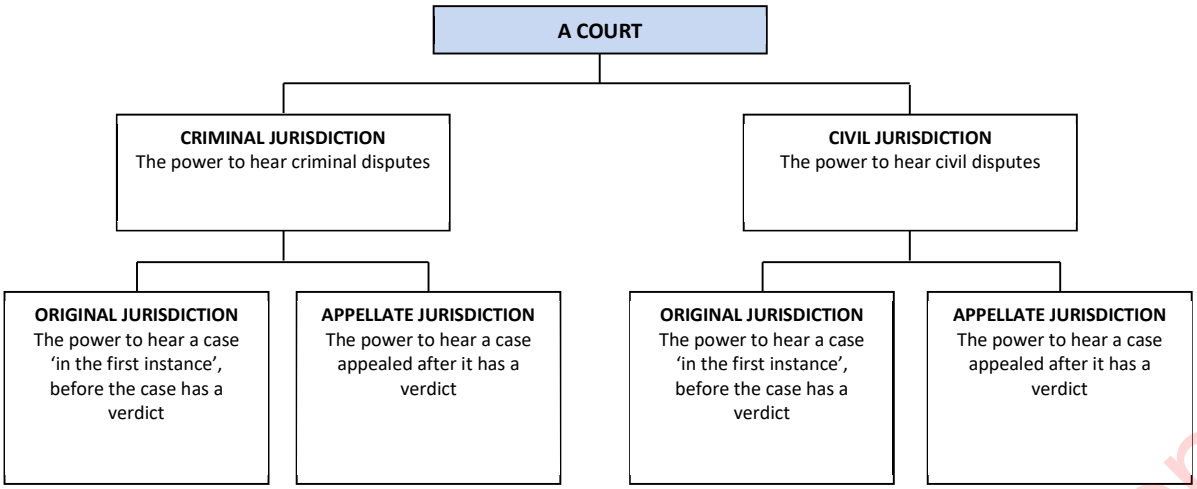
The power of courts and tribunals to hear civil matters is divided by how complex the case is: how much money is being asked for, or how complicated the law and/or evidence are. More complex matters are heard in higher courts.

Resolution of disputes

The most common means of resolving disputes has traditionally been through the court system. Courts operate on a federal level as well as in each state. Federal courts generally hear cases relating to federal law, while state courts generally hear cases relating to state law.

Courts resolve disputes according to the jurisdiction of each court. The 'jurisdiction' of an official body is the authority it has to use the power of government: for a body like parliament, this will be the authority to make laws; for a body like a court or tribunal, this will be the authority to hear cases and give out criminal sanctions (such as prison terms) or civil remedies or orders (such as monetary damages). Which court or tribunal a party goes to will depend on the type of law covering the area, and how serious their case is.

A court may have original criminal jurisdiction; original civil jurisdiction; appellate criminal jurisdiction; and/or appellate civil jurisdiction.



Tribunals are not courts: they are government bodies, given the power to resolve civil disputes in less complex areas. Any appeals or legal challenges allow the courts to check the work of tribunal, however, to ensure they are held accountable.

Where relevant, the ability of the individual to take her, his or its own action outside the official dispute resolution bodies will also be studied. For instance, individuals may try to resolve civil disputes privately without going to any court or official government tribunal. Criminal disputes cannot be resolved privately.

REVIEW QUESTIONS – Introduction to dispute resolution

1. **Identify the names of the parties in a criminal case, versus the names of the parties in a civil case.**
2. **What is the difference between who the prosecution represents versus who the plaintiff represents?**
3. **Does the victim prosecute a crime?**
4. **Does the victim bring a civil lawsuit?**
5. **Can tribunals resolve criminal disputes?**
6. **What is a synonym for 'jurisdiction'?**
7. **Would a court use its original or its appellate jurisdiction to decide a verdict in a case?**
8. **Would a challenge to an error made in the original trial be heard using the original jurisdiction or appellate jurisdiction of a court?**
9. **Would a retrial be conducted in the original jurisdiction or the appellate jurisdiction of a court?**

Fill out the following table as it relates to a comparison of criminal and civil terminology:

CRIMINAL TERMINOLOGY	CIVIL TERMINOLOGY
	Civil wrong
Prosecuted	
Guilty	
	Defendant
Prosecution or OPP	

APPLICATION EXERCISE – Introduction to dispute resolution

Niamh's friend is driving her home one night when the car crashes into a streetlight while her friend is checking her phone. Niamh sues her friend for $210,000 to compensate for injury caused as a result of the accident.

a. **Advise Niamh on whether she is considering bringing a criminal case or a civil case against her friend.**
b. **Which bodies might have the jurisdiction to hear disputes regarding these facts, considering both criminal and civil elements? Explain to Niamh where the disputes might be resolved.**
c. **Draw up a list of dispute resolution terminology you might use when discussing the case being brought by Niamh.**
d. **Draw up a list of terminology you would need to avoid when discussing the case being brought by Niamh.**

AOS1: THE VICTORIAN CRIMINAL JUSTICE SYSTEM

Part 1: Key ideas in criminal law

Key ideas in the criminal justice system are the distinction between summary and indictable offences, the burden of proof, the standard of proof, and the presumption of innocence. Rights of participants are also studied, including rights of the accused and rights of the victim.

THE DISTINCTION BETWEEN SUMMARY AND INDICTABLE OFFENCES

Keyword: **Seriousness**

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 as it is heard in the Magistrates' Court; an indictable offence is more serious, and does require a jury (if tried as an indictable offence in Victoria) as it is tried in the County or Supreme Courts.

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'.

THE MOST SERIOUS INDICTABLE OFFENCES	Dealt with in the Supreme Court (Trial Division) before a Supreme Court justice and a jury. There is no limit to the fines or jail time a justice can give, except for the maximum penalty for the crime, prescribed in the legislation.
SERIOUS INDICTABLE OFFENCES **MINOR INDICTABLE OFFENCES**	Dealt with in the County Court before a County Court judge and a jury. There is no limit to the fines or jail time a judge can give, except for the maximum penalty for the crime, prescribed in the legislation.
INDICTABLE OFFENCES THAT CAN BE HEARD SUMMARILY	Dealt with in the County Court before a County Court judge and a jury… …UNLESS the accused chooses to have it heard in the Magistrates' Court *as though it were* a summary offence.
SUMMARY OFFENCES	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, they can both give out unlimited sanctions – the act of parliament that provides for the offence will therefore state the upper limit 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 1200 penalty units could be given.

Exam tip: The value of a penalty unit changes every year on 1 July. It goes up to take account of inflation. Legislation refers to penalty units rather than exact dollars so that the amounts don't rapidly go out-of-date. In the exam you can refer to penalty units, or you can calculate the dollar amount for that year.

If a person is charged with one of these mid-range 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.

Every year since 2013 between 28-31% of indictable matters have been finalised summarily after committal.

REVIEW QUESTIONS – The distinction between summary and indictable offences

1. **Outline the difference in seriousness between a summary offence and an indictable offence.**
2. **Which type of offence is heard with a jury?**
3. **Which type of offence is eligible for potentially unlimited fines or imprisonment?**
4. **Can imprisonment be ordered for both types of offences?**
5. **Are guilty pleas allowed for both types of offences?**
6. **Explain what it means to say that an indictable offence can be heard summarily.**
7. **What would be two advantages of having an indictable offence heard summarily?**
8. **Which court will a minor indictable offence be heard in if the accused chooses *not* to have it heard summarily, and which court will a minor indictable offence be heard in if the accused *does* choose to have it heard summarily?**

Evaluation: The distinction between summary and indictable offences

Exam tip: There are good reasons to match strengths and weaknesses together in groups – rather than keeping them in two separate lists, or matching every strength against one weakness in pairs.
Groups of 'features' make the points easier to remember, easier to structure in an answer, and they also prepare for the range of 'evaluate'-style 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.

STRENGTHS	WEAKNESSES
Minor offences are not sent to a court with complex, lengthy and expensive procedures. The Magistrates' Court has simplified procedures and forms, and the fees for different actions are lower. This all helps reduce legal expenses for representation, and increase access for accused. Court time and resources are allocated more effectively, which makes the system operate with increased efficiency and specialisation. Courts that employ more personnel dedicated to time-intensive tasks and with specialised knowledge can dedicate those to more serious cases, ensuring they receive due process.	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 reflects the gravity of the wrongdoing. Indictable offences heard in higher courts are subject to greater delays than minor ones are, which decreases access. For example, the average timeframe for resolution through the Magistrate's Court is 6-12 months (58.7% within 6 months in 2021-21); through the Supreme Court (Trial Division) it is 12-24 months (63.4% within 12 months and 12.1% over 24 months in 2020-21).

Exam tip: Note that strengths and weaknesses must always include *what* the point is, plus an explanation of *why* you think it is

KEY PRINCIPLES IN THE VICTORIAN CRIMINAL JUSTICE SYSTEM

When resolving 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 arbiter or 'umpire' (often called a judge) – if the prosecution can score enough points according to the rules of the game, they win. The job of the defence is to stop the prosecution scoring points.

Under this system the parties to the case are adversaries, or opponents, who each battle the other; 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 applied equally to both of them. A judge or magistrate, the impartial adjudicator, oversees the case and ensures the parties are adhering to the rules of the court, and the hearing has the ultimate aim to find a winner and a loser.

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 key concepts that follow are specific to trials and hearings conducted in courts; they are not applied in the same way, or at all, outside courts and outside courtroom trials and hearings.

The burden of proof

Keyword: Bring evidence

Definition
The burden of proof is the responsibility borne by the party bringing the case to show sufficient evidence to prove the accused guilty of the charges. 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.

This burden must be satisfied before the accused has any responsibility to defend herself or himself.

Detail
The criminal 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.

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 means that the accused should win by default.

In practice, the burden of proof is very occasionally 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.

But a reversal of the burden of proof is considered a denial of fairness and natural justice.

- It is *not* a reversal of the burden of proof when the accused argues a defence. They do *not* have the legal burden to prove themselves innocent – they are merely introducing reasonable doubt to make the prosecution evidence less convincing.

REVIEW QUESTIONS – The burden of proof

1. **Give a synonym of the word 'burden'.**
2. **Give a synonym of the word 'proof'.**
3. **Which party has the burden of proof in criminal trials?**
4. **Why does this party have the burden?**
5. **Is it a reversal of the burden of proof when the accused argues the elements of a defence?**

The standard of proof

Keyword: Amount of evidence

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.

The precise criminal standard is 'beyond reasonable doubt', meaning that it must be beyond any rational or reasonable doubt that the accused is legally and criminally responsible for the offence.

Detail
It is generally accepted that the high standard of proof in criminal trials lessens the risk of wrongful convictions, and this is an important principle in the justice system.

Current Australian interpretation by courts defines 'beyond reasonable doubt' as a phrase that each juror should understand for themselves. Jurors should disregard only those doubts that are "far-fetched or fanciful", but they do not need to be convinced beyond *any* doubt.

The prosecution must prove *all* the elements of the offence beyond reasonable doubt, and must also *disprove* all *defences* beyond reasonable doubt, as long as those defences have been raised as issues in the trial or hearing.

REVIEW QUESTIONS – The standard of proof

1. **Give a synonym of the word 'standard'.**
2. **Can you use the same synonym of the word 'proof'?**
3. **Which party has to satisfy the standard of proof?**
4. **What is the standard of proof in criminal trials?**
5. **Is there an official definition of the meaning of the standard of proof in legislation or precedent?**
6. **What kinds of doubts can be ignored in a guilty verdict?**

The presumption of innocence

Keyword: Default

Definition
The presumption of innocence is the assumption that the party against whom allegations are being made is innocent of all allegations unless, and until, the party bringing the case shows a sufficient weight of evidence to the contrary. The default rests with the accused unless and until the prosecution disproves it.

Detail
The presumption of innocence is protected by s25 of the Victorian Charter. Because of the presumption of innocence, the accused does not have the responsibility to prove that she or he is innocent, or even likely or probably innocent. The defendant does not need to prove anything – except that the prosecution has not discharged its burden of proof.

Procedures and rules in the criminal justice system that protect the presumption of innocence include:

- Once she or he has 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 relatively normal life until the conclusion of the dispute or bail is revoked, because it is recognised that the accused is 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.

REVIEW QUESTIONS – The presumption of innocence

1. **Which party is protected by the presumption of innocence?**
2. **Is the accused presumed innocent when they are arguing a defence?**
3. **Is the presumption of innocence the same as the presumption of 'not guilty'?**
4. **At what point in a trial is the presumption of innocence overturned?**
5. **Provide two examples of ways in which the legal system tries to protect the presumption of innocence.**

Evaluation: Key principles in the criminal justice system

Exam tip: There are good reasons to match strengths and weaknesses together in groups – rather than keeping them in two separate lists, or matching every strength against one weakness in pairs.
Groups of 'features' make the points easier to remember, easier to structure in an answer, and they also prepare for the range of 'evaluate'-style 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.

STRENGTHS	PRINCIPLE	WEAKNESSES
The accused will have access to the evidence against them before they will be expected to defend themselves. It would not be fair to ask the accused to defend against claims they did not know the details of. The prosecution 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. Not having proper grounds to put an individual through the ordeal of a prosecution would be abuse of state power.	**The burden of proof**	The party that has already been injured (whose interests are 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 accused, is the one who receives the benefit of the doubt. In terms of evidence and legal arguments, equality is not achieved between the parties because the benefit is given to the accused. The defending party can discover all evidence against them before they even start to decide what their defence is going to be.
The accused cannot be held responsible for a wrongdoing if there is only flimsy evidence against them. This contributes to the fairness of the trial, because it would be unfair to prosecute someone if there was little to no evidence justifying it and they were sure to be found not guilty at the end. 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 fair, because a person's freedom may be on the line.	**The standard of proof**	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 equal in the trial process. 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 accused in different cases unequal to each other in terms of how they are treated, and does not give them the same access to justice.

The presumption of innocence is upheld by procedures such as bail. This protects human rights and fairness by not punishing someone before they have been found guilty. It also allows the accused to prepare adequately for their case and earn money in the months or years before trial, which gives them a meaningful ability to defend themselves and increases the equality between them and the prosecution. The accused will never be asked to defend themselves against something they have not been fully informed of and already proved guilty of.	**The presumption of innocence**	In 2012 the Victorian Parliament reduced the protection of double jeopardy for serious indictable offences. The 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. Procedures such as holding suspects on remand unfairly deny the defendant the right to the presumption of innocence, and jeopardise their access to justice because they are much less able to prepare for their defence and cannot earn money in the meantime.

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

APPLICATION EXERCISE – Key principles in the criminal justice system: evaluation

The burden of proof discourages the prosecution 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 accused will be required to bring forward any evidence of their own. This protects the rights of the accused and the fairness of trial because the accused is protected from the ordeal without proper grounds. The downside is that the state, protecting the rights of victims, bears the responsibility of proving the case, and the party that is potentially in the wrong receives significantly more protection. This also decreases equality in the proceedings, because we consciously protect the accused over the complaining party, the prosecution. Ultimately, the burden of proof gives an unfair benefit to the accused and may prevent justice from being done.

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 STAKEHOLDERS IN A CRIMINAL CASE

Parties to a criminal case are the accused and the prosecution, but 'stakeholders' is broader: stakeholders include any person with an interest in the case, including witnesses and victims.

The Victorian *Charter of Rights and Responsibilities* ('the Charter') was passed by the Parliament of Victoria 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 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 Victorian *Victim's Charter Act 2006* (Vic) performs a similar role for victims in the criminal justice system.

These Charters are not legally-enforceable with fines or orders. Instead, they affect policy and factual or procedural decisions. Courts and tribunals must interpret all Victorian laws in a way that upholds Charter rights, where possible.

Rights of the accused

The right to be tried without unreasonable delay

Keyword: Timely

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, taking into account all the circumstances. Resolution should be finalised in a timely manner: not rushed, but not unnecessarily delayed.

Detail
The concept of 'as quickly as possible' rests on the idea that the need to be properly prepared for legal proceedings – which will take time – must be balanced against 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.

Victorian Charter
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.

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 indictable 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 indictable 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 accused 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 flexible definition of 'reasonable' was decided in the Victorian Court of Appeal 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.

There is no fixed number of days or months that is considered 'reasonable'.

The right to silence

Keyword: **Refusal**

Definition
Any person who believes on reasonable grounds that she or he is suspected of having been a party to an offence, or who is on trial for an offence, is entitled to remain silent and refuse to answer questions or give evidence. No adverse inferences can be drawn from that refusal.

Exam tip: The right is one to *refuse* to respond – questions may still be asked. The accused may also *choose* to give information if she or he wishes.

Detail
The phrase 'right to silence' is a group of rights, with three main parts:

1. No person under suspicion of criminal responsibility can be compelled to answer questions from a police officer or any person in a similar position of authority. (per *Petty v The Queen* (1991) 173 CLR 95)
2. No person on trial for a criminal offence can be compelled to give evidence.
3. No 'adverse inferences' can be drawn at trial from a failure to answer questions before trial, or to give evidence during trial.

The rights continue to exist at common law, but have been supplemented by statute such as the *Crimes Act 1958* (Vic) and the *Evidence Act 2008* (Vic).

Crimes Act 1958 (Vic)
Section 464J – Right to remain silent etc not affected
Nothing in this subdivision affects—
(a) the right of a person suspected of having committed an offence to refuse to answer questions or to participate in investigations except where required to do so by or under an Act or a Commonwealth Act

Evidence Act 2008 (Vic)
Section 89 – Evidence of silence

(1) In a criminal proceeding, an inference unfavourable to a party must not be drawn from evidence that the party or another person failed or refused —
(a) to answer one or more questions; or
(b) to respond to a representation —
put or made to the party or other person by an investigating official who at that time was performing functions in connection with the investigation of the commission, or possible commission, of an offence.

(4) In this section, "inference" includes —
(a) an inference of consciousness of guilt; or
(b) an inference relevant to a party's credibility.

The Victorian Director of Public Prosecutions found that 7–9% of suspects refuse to answer police questions.

The privilege against self-incrimination

The origin of the right to refuse to answer questions is Sir Edward Coke's 17th century challenge to the ecclesiastical church courts and their practice of putting people under oath for questioning before they even knew what they were being accused of. It was a protection against potential self-incrimination, and was based on the Latin principle *nemo tenetur se ipsum accusare*, 'no man is bound to accuse himself.' This principle is also protected in Article 14(3)(g) of the International Covenant on Civil and Political Rights, which states that no person may be "compelled to testify against himself or to confess guilt."

The privilege against self-incrimination is waived when an accused chooses to give evidence in their defence. The *Crimes Act* provides that, in the event that an accused chooses to testify in court, they lose their right to selectively choose which questions they want to answer.

The rule against adverse inferences

'Adverse assumptions' include assuming things like guilty knowledge from silence. The right against adverse inferences was established in Australia in *Petty v The Queen* (1991) 173 CLR 95. The High Court held that allowing the judge or jury to draw adverse inferences would erode the value of the right to remain silent, and render it worthless, because it would effectively turn a refusal to answer into an answer that worked against the accused.

Verdicts have been overturned on appeal because judges gave directions to juries that implied an adverse inference, or the prosecution suggested guilt by silence to the jury.

- The prosecutor told the jury to 'ask themselves why an accused had remained silent' in *R v Stavrinos* (2003) 140 A Crim R 594.
- In *King v R* (1986) 15 FCR 427 the judge said that the police "gave the accused the opportunity to explain" his whereabouts.
- In *Yisrael v District Court of New South Wales* (1996) 87 A Crim R 63 the judge told the jury that the accused's failure to respond to certain questions was not the "sort of response one would expect" from a person telling the truth.

Exceptions

In Victoria, there is a requirement that a person provide their name and address when asked for a valid reason by the police, or their driver's licence when they are pulled over by police while driving. Valid reasons include being on public transport property, in licensed premises, or if the police believe you can assist with an indictable offence.

Other statutes abrogate the right in specific cases: in the area of bankruptcy; for witnesses testifying before a Royal Commission; in federal anti-terrorism laws; and in Victorian organised crime laws such as the *Major Crime (Investigative Powers) Act 2004* (Vic).

In Victoria, some limitations have been placed on the right of silence by the pre-trial disclosure requirements of Part 5.5 of the *Criminal Procedure Act 2009* (Vic). For example:

- If the prosecution has served on the accused a summary of its opening statement, the accused must give the prosecution and the court a response to the summary, which identifies the acts, facts, matters and circumstances with which they disagree and the reasons why, per s183.
- If the accused intends to call an expert witness at the trial, they must file a copy of the witness's statement with the court and the prosecution, per s189.
- If the accused intends to give evidence of an alibi, they must notify the Director of Public Prosecutions of that fact, per s190.

If the accused fails to comply with the pre-trial disclosure requirements, they may be prevented from giving or calling certain evidence, and their response to the prosecution's opening address may be restricted. This could work against the accused. For instance, the prosecution would ask the police to investigate the claimed alibi. In addition to gaining an insight into the defence being mounted, the police would be given additional information in the investigation phase.

The right to trial by jury

Keyword: Peers

Definition
The right to trial by jury means that every accused who pleads not guilty 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 that the power of the government is kept in check.

Detail
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 either guilty beyond reasonable doubt, or not guilty if there *are* reasonable doubts.

The alternative to trial by jury would be trial by judge alone, but this is not permitted in Victoria for indictable offences. 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.

The accused cannot, therefore, elect to be tried without a jury. This right is not one they can choose to waive.

Unlike the other mainland Australian states, Victoria has made no provision for a trial before judge alone. In 2020 the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic) inserted an emergency provision into the *Criminal Procedure Act* to temporarily allow for trial by judge alone in trials for indictable offences, but it lasted only until 26 April 2021.

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 only to indictable offences that are contained in federal law, and it is the Commonwealth Parliament that has the power to decide which Commonwealth offences are indictable offences and therefore which offences are tried by jury. Section 80 does not apply to any trials for state crimes held in state courts, and is not necessary to discuss in Unit 3 because the name of the Area of Study is the *Victorian* criminal justice system.

REVIEW QUESTIONS – Rights of the accused	
1.	**Can the courts ignore the Victorian Charter and the Victim's Charter when hearing cases?**
2.	**How might the Charters have an effect on Victorian cases?**
3.	**What section of the Victorian Charter protects the right to be tried without unreasonable delay?**
4.	**What is the difference between 'reasonable' delay and 'unreasonable' delay?**
5.	**When in each dispute does the right to be tried without unreasonable delay start?**
6.	**Provide two examples of ways in which the criminal justice system tries to avoid delay.**
7.	**Name the two main pieces of legislation in Victoria that protect the right to silence.**
8.	**Do witnesses to a crime have the right to silence?**
9.	**Does an accused have the right to silence when being questioned by people outside the legal system?**
10.	**Can an accused waive the right to silence and choose to give information to the police?**
11.	**If an accused gives evidence at trial, can they choose only some questions to answer and still be protected by the right to silence?**
12.	**What is the meaning of 'adverse inferences'?**
13.	**How is telling the jury to 'ask themselves why an accused remained silent' a breach of the right to silence?**
14.	**Outline one exception to the right to silence in Victoria.**
15.	**How many people sit on a criminal jury?**
16.	**What category of charges give rise to the right to trial by jury?**
17.	**Will an accused be tried by jury if she or he pleads guilty?**
18.	**What legislation provides for trial by jury for Victorians being prosecuted for state offences?**
19.	**Can an accused waive the right to trial by jury and elect a trial by judge alone?**
20.	**What legislation provides for trial by jury for Victorians being prosecuted for federal offences?**

Evaluation: Rights of the accused

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

STRENGTHS	RIGHTS	WEAKNESSES
The courts have been given the power to oversee case management to help ensure that unreasonable delays in proceedings do not occur. Reducing delays minimises the stress and uncertainty that an accused person may face waiting for their criminal trial to conclude, and reduces the costs to the accused of briefing a lawyer to represent them through pre-trial, trial, and potentially appeals. The right is enforced on a case-by-case basis, as per the *Barbaro* precedent. This means that courts can be flexible, and take the circumstances into account.	**The right to be tried without unreasonable delay**	If cases are brought to trial too hastily, there may be a risk that an accused person has not adequately prepared their defence. Since the right runs from the time of the wrongdoing, police may be pressured to lay charges before they have fully investigated all angles of a crime. Some evidence may remain untested, or alternative suspects may not be investigated. As per the *Barbaro* precedent, what is classed as an 'unreasonable' delay is determined on a case-by-case basis. This makes it very difficult for accused parties to challenge the length of time their case has taken, because there is no objective standard, and makes it hard for them to enforce their right.
The protection of the accused is much greater than for a civil defendant. If a defendant failed to give evidence to rebut the plaintiff's case, the court is permitted to more readily accept the plaintiff's claims and assume that the defendant would have rebutted them if they could. Society has an interest in not having innocent people convicted of crimes because they misspoke to police or unwittingly contradicted the story given by another witness. The right against adverse inferences was introduced in Australia in 1991 because there was seen to be a need for it to protect the purpose of the right to silence. This has made the right broader in scope and more powerful. The right also protects those accused whom the lawyer is concerned would perform poorly as a witness, because of their intellect or verbal skills, or how they present visually. These people might be innocent. It is the responsibility of the prosecution to prove the case – the defence does not need to give them information to help them discharge the burden of proof. Society and victims of crime have an interest in offences being solved and the rightful accused being brought to justice. The right to silence is a barrier to this if the accused has material information that would assist.	**The right to silence**	The right is not absolute: there are exceptions in statute where the right is abrogated for a purpose the parliament has decided is more important – for instance organised crime – and indirect exceptions where procedure denies the accused the right. For instance, giving notice of an alibi. Since the 1980s there has been an increasing reliance on undercover officers, informers, and surveillance technologies. The accused cannot make an informed decision to exercise their right to silence in these cases. The right does not apply in conversations with people other than government authorities. For instance, in *R v Alexander* [1994] 2 VR 249, the accused was suspected of murdering his wife, and failed to protest his innocence in conversations with his friends. The court allowed an inference of guilt to be drawn because the conversation was not with a person in authority. In 1985 and 1987 the Australian Law Reform Commission recommended that adverse inferences be drawn from silence, because they argued that "reasonable inferences" are in the interests of fairness. They said: "If accused persons can avoid giving evidence, and being subject to cross-examination, without any adverse consequences, then there is a risk that guilty persons would escape conviction." In 1999 the Law Reform Commission of Western Australia made the same recommendation.
Trial by jury ensures that issues of fact and law are determined by the accused's peers, not by a judge alone. This ensures fairness in the adjudication of a criminal trial. 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	**The right to trial by jury**	For Victorian and Commonwealth indictable offences, there is no alternative to trial by jury. This may reduce effective access for an accused person to sufficient choice in the conduct of their trial for an indictable offence in these jurisdictions.

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. The jury judges the accused from the perspective of the common person. This provides greater equality between the parties because it minimises the power of the state. 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. Since 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 more likely to be correct, providing greater protection of the rights of the accused.		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 fairness of the criminal justice system. Juries are, by definition, composed of people who do not work in the criminal justice system. This means that their knowledge of the procedures, law and terminology is low, and these gaps and errors in understanding could unfairly influence the verdict they deliver. They also differ in their application of the standard of proof. For example, a 2008 NSW Bureau of Crime Statistics and Research survey of 1,200 former jurors demonstrated that 55.4% of them believed the standard meant they needed to be "sure," while 10.1% of them believed the standard meant only that guilt was "pretty likely."

APPLICATION EXERCISE – Rights of the accused: evaluation

The accused has a right to trial by jury that they cannot waive, but juries are not trained in giving the accused a fair trial. 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 complex, and it is difficult for 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 no check on this. The benefit is that increased finality is brought to each case, because appeal courts are reluctant to overturn a jury's findings without having clear grounds. 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 potentially stop this, so the trade-off for finality is occasional concern that the jury 'got it wrong'.

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 the accused covered in the section.

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.

Some of the principles contained in the *Victims Charter Act* are then implemented in other legislation, such as the *Criminal Procedure Act 2009* (Vic) and the *Evidence Act 2008* (Vic). These principles are then legally enforceable.

The right to give evidence using alternative arrangements

Keyword: **Vulnerable**

This right is available to only a small class of victim – not every victim has this right.

Definition
Part 8.2 of the *Criminal Procedure Act 2009* gives courts the power to order alternative arrangements for the giving of evidence by witnesses the law considers particularly vulnerable, due to giving evidence in offences involving sexual and family violence.

Detail
Part 8.2 of the *Criminal Procedure Act* gives judges the power to make alternative arrangements for some witnesses if they fall into a group thought to be specially at risk of secondary harm through the justice system. For instance, s360 in Part 8.2 gives the court the power to "direct that alternative arrangements be made for the giving of evidence by a witness" in certain types of cases.

These cases are the following:

- Sexual offences
- Family violence
- Sexual exposure
- Public behaviour that is obscene or threatening

Exam tip: The *Evidence Act 2008* used to give alternative arrangements to children and witnesses with a cognitive impairment. Since 2018, these witnesses have not been eligible for alternative arrangements unless they are in one of the above matters.

Alternative arrangements include the following:

- ✓ 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.
- ✓ Directing that the legal representatives remove their legal robes and question the witness in normal professional attire.

If the hearing or trial is for a sexual offence or assault, ss 366 and 367 of the Act give witnesses with a cognitive impairment, or who are under 18 years of age *at the commencement of trial*, additional potential arrangements: these witnesses are permitted to give evidence through an audio or audiovisual recording so that it can be done once, and the recording can be played for all hearings after that. Leave must also be given by the court for these witnesses to be cross-examined – opposing counsel cannot cross-examine as of right.

If the witness is the complainant in a sexual offence charge, the court *must* make alternative arrangements for their testimony, unless the complainant is aware of these rights and waives them. The exact arrangements are detailed from s363 in the *Criminal Procedure Act,* and include giving evidence in a place outside the courtroom.

Protected witnesses
The class of 'protected witnesses' exists in addition to the above class of vulnerable witnesses, and protected witnesses receive additional arrangements. The court may declare anyone a protected witness if they are giving evidence in a case for a sexual offence or family violence, and it prevents the accused from being able to cross-examine them in person. The rules regarding a protected witness are contained in Division 3 of Part 8.2 of the *Criminal Procedure Act.*

YOU BE THE ASSESSOR: UNIT 3

In this section, you are required to assess the responses presented for each of the questions. You should award the responses a score and justify your decision. Once complete, compare your assessment with mine (provided at the end of the Study Guide).

Question 1
Describe one method of dispute resolution that could be used to resolve a civil dispute. (3 marks)

Sample answer 1
One method of dispute resolution that could be used in either courts or the Victorian Civil and Administrative Tribunal (VCAT) is mediation. Mediation is a cooperative method of dispute resolution in which two parties sit down with each other in an informal environment and talk about the problem. There are no rules of evidence or procedure, and the role of the third party is to keep the conversation flowing and make sure everything stays positive. They are not allowed to give any advice or say anything while the parties are talking together. The decision reached in a mediation is not legally binding, which is good because neither party will feel threatened or pressured into making a decision, and if the verdict isn't fair to one of them they won't have to follow it. This can be bad, though, because it could mean the dispute has to progress to conciliation, arbitration or even judicial determination next, wasting time and money.

Score out of 3: _____

Justification:

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Sample answer 2
One method is conciliation. Conciliation is like mediation, except that the third party is allowed to give advice to the parties about what outcome should be reached. The decision made by the parties is not legally binding, but it can be enforced by VCAT if the parties choose to put it into a contract. Conciliation is mostly used for industrial or employment-related disputes.

Score out of 3: _____

Justification:

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Sample answer 3
Arbitration is an inquisitorial method of dispute resolution in which parties present arguments and evidence to an independent and impartial third party who weighs up the strength of each case and awards the claim to one party. The third party is often legally-trained, but is not sitting as a judicial officer even if they do work as a judge or magistrate. When hearing the dispute they have the ability to apply flexible rules of evidence and procedure, tailored to the needs of the individual case, and can ask parties or witnesses questions – or even encourage parties to negotiate right in the hearing room. Arbitration is often open to the public, and the award made by the arbitrator is legally-enforceable through the courts: it is binding on both parties.

Score out of 3: _____

Justification:

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Question 2
Discuss the operation of courts and the Victorian Civil and Administrative Tribunal ('VCAT') in the hearing of legal disputes. In your answer, justify the use of tribunals such as VCAT in addition to the court system. (5 marks)

Sample answer 1
VCAT exists in addition to courts to provide people engaged in relatively simple civil disputes the option to have them resolved generally more cheaply and efficiently than would happen in court. Court hearings involve a level of formality and expense, and not all cases with law and evidence that is straightforward need the scrutiny and laboured legal argument that courts supply. There are many similarities between courts and VCAT despite this overall difference, though. Both hear civil disputes between individuals, government agencies and corporate entities, and both apply the law in the area to the facts of the case to come to a decision on behalf of the parties. Both employ people to sit as independent and impartial third parties, and many of these people are legally-trained and qualified – courts use judges, and VCAT uses judges, too, sitting as the president and vice-presidents. Both have avenues of appeal that are open to parties who are dissatisfied with the outcome of their case; if either party believes that an error has been made on a question of fact or law, they can appeal their case to a higher court with a more experienced judge and have the error remedied. VCAT and courts also provide parties with options for resolution in addition to the hearing: VCAT and courts will both resolve matters at a mediation conference instead of a hearing if the dispute is of an appropriate type, or they can use a conciliation conference or a less formal hearing (such as early neutral evaluation in courts). None of these alternative options use strict rules of evidence and procedure. Finally, both VCAT and courts give binding outcomes, which gives finality to the disputes and ensures that people can move on with their lives even if they are not able to compromise and come to an agreement themselves.

Score out of 5: _____

Justification:

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Sample answer 2
There are many similarities and differences between the operation of courts and the operation of VCAT. One similarity is that both can hear civil disputes. One difference is that only courts can hear criminal disputes. One similarity is that both have third parties that are independent of the parties to the dispute. One difference is that only courts use juries. One similarity is that all court decisions in cases will be binding on the parties, whereas VCAT decisions are not binding on the parties and parties may therefore end up in court anyway, wasting valuable time and money. Other differences include that VCAT uses many more methods of alternative dispute resolution than court, including mediation and conciliation. Also, VCAT orders cannot be appealed on questions of fact; they can only be appealed on questions of law. VCAT members are also not judges and they have no legal training. Instead, they are experts in the area of law the dispute covers, so they bring more common-sense and practical experience to the hearing of the dispute. VCAT also is much cheaper than courts, as well as faster and less intimidating. This is why it is important to have VCAT as an option for people in society as well as courts, because court resolution would be too expensive and formal for the average person to want to take their dispute there and defend their rights.

Score out of 5: _____

Justification:

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Question 3
Sam, 23, has prior convictions and drug and alcohol addictions. Sam has been charged with three indictable offences, including armed robbery. The prosecution alleges that Sam was in possession of high-heeled shoes when committing the armed robbery and, therefore, possessed an 'offensive weapon' within the meaning of the *Crimes Act 1958* (Vic).

Provide <u>one</u> sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purposes. (5 marks)

Sample answer 1
Community corrections orders ('CCOs') came into effect in 2012, replacing combined custody and treatment orders, home detention, intensive correction orders and community-based orders. Sentences are mainly served in the community, but may be combined with up to one year imprisonment, and a wide range of conditions can be imposed, including rehabilitation classes or counseling, unpaid community work or restricted movement. CCOs aim to rehabilitate the offender, because the conditions attached are tailored to the circumstances of the individual and the crime; they also aim to provide specific deterrence, because negative consequences such as potential jail time are attached to encourage the offender to want to avoid these punishments in the future. General deterrence may

also be achieved if other people in the community see conditions such as jail or unpaid volunteer work and decide against committing a similar crime because they want to avoid those consequences.

Score out of 5: _____

Justification:

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Sample answer 2

A drug treatment order could be given to Sam, because of her or his history with substance abuse. This achieves rehabilitation, because the jail sentence is suspended while the offender undergoes treatment and supervision. This gives the offender the opportunity to learn from their mistakes; here, Sam might overcome her or his problems with drugs and alcohol, and not want to commit crimes again in the future. The conditions attached to the order, such as having urine tests, counseling sessions and submitting to rules regarding restricted movement, can also help rehabilitate, because they are squarely focused on the reasons contributing to the offending and not merely on the criminal behaviour: often, this behaviour is just a symptom of a larger problem, anyway. The main problem with the success the order has with rehabilitation, though, is that it could be criticised for failing to achieve any of the other aims. The fact that it can't be given in situations of sexual or violent crimes is an admission by parliament that it fails to protect society, and, because the prison sentence is deferred, the public could think it looks too soft on crime and therefore believe it doesn't punish enough or publicly denounce the offender's actions.

Score out of 5: _____

Justification:

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Sample answer 3

A prison sentence could be given to Sam. A period of time in jail would punish Sam for her wrongdoing because it would remove her from her friends and family, prevent her from working, and stop her from living as an independent person and making a wide range of decisions about her everyday life. Losing privacy and freedom is difficult. Prison therefore deters both Sam and other members of the community because of this hardship: specific deterrence may be achieved because Sam would not want to go back to jail afterwards, so might stop committing crime; general deterrence might be achieve because other people would look at what Sam has lost and not want to lose it themselves. Also, for the time that Sam is locked up, the community will be protected from future harm being caused. Because prison is the sanction of last resort it is the strongest message of denunciation the court can give to the community. One aim that is not achieved, though, is rehabilitation. Even though prisons nowadays have options for counseling and educational or employment programmes, prisoners are surrounded by other criminals so are given little incentive to be a different person, the way that non-offending family members might give them. Also, statistics show that around half of the prison population have been incarcerated before, which shows that rehabilitation does not seem to be working.

Score out of 5: _____

Justification:

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Question 4

Evaluate how effectively the jury performs <u>one</u> of its roles in a criminal trial. (4 marks)

Sample answer 1

The jury system relies on untrained members of the community looking at the case from a layperson's point of view and bringing common sense and contemporary values into their judgment. This allows non-legal members of the community to be educated in the law, but it also means their verdicts could be based on prejudice and emotion rather than the law. Untrained people in the community do not have experience looking at evidence dispassionately and objectively; in a way this is why we use them, because otherwise it would be the same as having a panel of judges, but it can mean the parties don't receive a fair trial. An example of this happening was

in the Lindy Chamberlain case, where comments from the jurors after the trial (and the fact that Chamberlain was later pardoned) suggests that the test used in deliberations was whether the jurors could picture a dingo taking a baby and not whether the prosecution had provided proof of murder beyond reasonable doubt.

Score out of 4: _____

Justification:

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Sample answer 2

One weakness of the jury system is that a lot of evidence we have suggests that coercion goes in the deliberation of a verdict, so the verdict reached is not as reliable as we might think it is. Even though each juror votes as an individual, a verdict can only be delivered if all jurors independently come to the same conclusion – or, in cases where majority verdicts are allowed, all but one. This can place an enormous amount of pressure on jurors to conform to the group, especially if there is someone with an assertive personality on the jury, someone with prior legal experience, or if deliberations are approaching a holiday or a weekend. People currently involved in the justice system such as police officers and lawyers are ineligible for jury duty to minimise this, but coercion and pressure still occur. A NSW juror study in 2011 found significant juror concern over influence and pressure – specifically, that coming from other jurors. Judges can even exacerbate it by refusing to accept a hung jury, and telling the jury repeatedly to go back and try to all come to agreement. Often it may just be the less assertive jurors caving in. It is difficult to think of a reform that would fix this entirely, but replacing a layperson jury with a jury of experts might help.

Score out of 4: _____

Justification:

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Question 5

How does the provision for class actions help enhance the effective operation of the civil justice system?
(4 marks)

Sample answer 1

Class actions are civil claims in which the party bringing the action belongs to a larger group of seven or more people and litigates on behalf of that group. Group members are not listed by name in the pleadings, and they play a largely passive role. The linking factor between them is that all members of the class share a common characteristic or interest, even if the precise harm they suffered is slightly different. Damages will therefore be allocated differently across members of the class, based on the individual damages each person suffered. Group members are not required to instruct lawyers or pay legal fees: their interests are protected and pursued by the named plaintiff in the representative proceeding.

Score out of 4: _____

Justification:

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Sample answer 2

Class actions enhance the civil justice system because they help achieve the principles of justice. They achieve fairness because it is fair for people to be compensated for harm; they achieve equality because every person in the class action has an equal opportunity to have their harm compensated; and they achieve access because it is cheaper for a class action than for every person to sue individually.

Score out of 4: _____

Justification:

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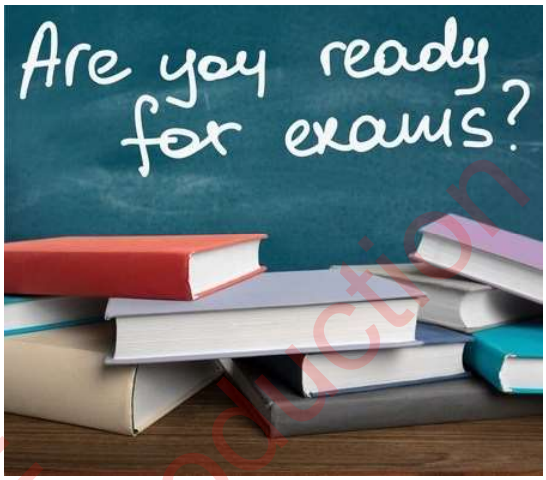
EXAMINATION ADVICE

RECOMMENDED ADMINISTRATION

Legal Studies is a content-heavy subject. If students want to perform at the top end, then organising notes and developing a revision programme from the first day will be invaluable in the long run.

Notes organisation

Class folder



For instance, you don't need to take your years-worth of notes and work to every class. In the final years of high school students should ideally move to a model of working in which their private study space – usually at home – is their focus, and they only take to class, lectures, tutes etc what they need for that day.

- Lined paper.
- Plastic pockets for new handouts.
- Only the current notes.
- Textbook if required for that lesson.

For many students, the textbook will be used more at home than at school. After all, more study and revision ought to be done at home than there is time for during scheduled classes. Many students will therefore be able to bring no more than a small display folder or ring-binder to class.

Revision folder

Every piece of new material should then be brought home and integrated into the existing notes. The goal of the year is to produce, by the end, a personal 'textbook' with a uniquely-tailored set of notes: the best material from class, combined with the best material from the textbook, combined with the best material from tutes, lectures, and any other sources. This material should include a combination of required subject keywords/definitions and wording that makes sense to you, the student; it should be edited to include only what you might reasonably need in the examination (plus a touch extra, just in case); and it should be laid out clearly with headings and sub-headings, in a way that helps you remember it.

It is recommended that you keep a large ring-binder folder at home, with five dividers: one for each Area of Study, plus a fifth for examination revision. Before the dividers should be a sheet with task word definitions.

Within each AOS:

- A one-page outcome summary, noting every topic for that outcome.
- A glossary of special terminology for that outcome.
- Topic summaries: your notes, in which you write *your* version of the course. These will often be prepared on the computer, but can be printed out once they are completed – hard copies are often easier to use for memorising.
- Past exam and practice SAC questions for that outcome.
- Sample answers and your own practice answers for that outcome.
- Lists of reminders to yourself about common mistakes in that outcome.

The examination section will hold copies of sample examinations and practice examinations, along with any feedback or lists of things you need to work on.

Task words

Your task word definition sheet should ideally be split into four categories, because there are four basic types of task word.

The following is a summary:

CATEGORY	APPROX MARKS	EXAMPLES	MEANING
Category 1 Basics	1-2 marks	Define Outline Identify "Would" something happen or be true/false: yes or no	Just give the answer, usually in a full sentence with at least one synonym of the answer to demonstrate knowledge.

		"Could" something happen: yes or no	
Category 2 Details	2-4 marks	Explain Describe Illustrate	Give the answer, as in Category 1. Then supplement the answer with detail and/or an example.
Category 3 Connections	3-8 marks	Compare Contrast Differentiate Synthesise	Show very clearly the connections between two or more things or topics – often these will come in the form of similarities and differences.
Category 4 Opinions	4-10 marks	Discuss Analyse Evaluate Critically examine To what extent… "Should" something happen	Engage thoughtfully with arguments relating to an opinion. Sometimes you will be asked to give that opinion; other times it will be given to you in the question.

ENGAGE IN CONSTANT REVISION

Revision should start from Day 1. Each and every week you should add to and edit your own notes, keeping detailed Topic Summaries. It will be much easier to review and remember the course if it is split logically into headings and sub-headings in your own words than if it is still in the textbook (no matter how great that textbook is), and *especially* if it's otherwise split across a few jumbled sources such as the textbook, class notes and worksheets, online forum conversations and private notes.

Your notes should use many detailed headings and sub-headings, and should avoid large blocks of text. You should consider, when writing them, how the information will probably be structured in an exam answer, and how many marks you could reasonably expect to get from it – this will help you decide if it's too wordy. You can also annotate your own summaries with common questions for that topic and a likely allocation of marks, to make them even more exam-focused.

You may also want to consider the following:

- Prepare a diagram or a flow chart so you have a visual representation of a topic. Colour-coding information is also helpful.
- Identify cases and examples that are appropriate for each topic area, and identify opportunities to use the same case study in more than one topic.
- Prepare a table of cases with brief factual summaries, the legal impact of each and the topics in which they can be used.
- Prepare a table of acts with brief content summaries and the topics in which they can be used.
- Maintain a continually-updated list of recent changes to the legal system, linked with the topics where they are relevant. The four Legal Updates published by CPAP each year can help with this: check if your school has a subscription.

These items should be prepared as early in the year as possible, so that maintaining them takes minimal effort – they should be revised and updated bit-by-bit each week. The ability to cite from cases, mention acts of parliament and use correct legal terminology (and Latin phrases) demonstrates a deeper understanding of the topics, and can be the factor that separates a 6/6 answer from a 5/6 answer.

Practice questions

You should see a number of Legal Studies examinations and practice SACs. There are three excellent reasons to do practice questions:

1. To help you remember the material.
2. To perfect your reading and understanding of questions, and how the marks are broken down within them.
3. To perfect your answering of questions: the clarity of your wording, the accuracy of your content, the clarity of your structure and your time management.

Remembering

- Jumping to practice questions doesn't work until you know the material roughly 75% well. If you don't remember the content yet, you risk writing dozens of terrible answers. Instead, use other memory techniques – one of which may be doing questions *with* your notes, moving back and forth between your notes and your answer, seeing how much you can remember each time.
- Once you remember most of the material, however, you can drill it into your brain and muscle memory through practice and repetition.

Processing

- Read as many questions as possible, and ask yourself what they are asking for in response.

- Identify the task word used: for example, do they want you to outline, describe, explain, evaluate or compare? Know what each type of task word requires you to do.
- Identify the content that is connected to that task word: for example, are you outlining two sanctions; describing the impact one High Court case had on the division of legislative power; explaining one reason why laws may need to change; evaluating the effectiveness of the jury system; or comparing mediation and arbitration as dispute resolution methods? Limit yourself to what the question asks for and don't include material that isn't allocated marks.
- Do dot-point breakdowns of each question, identifying where each mark comes from. Task words such as outline and identify will have fewer marks allocated to them than task words such as compare and evaluate, for example, if multiple task words are together in one larger question. Within a task word such as 'define' you should also think about whether the first mark comes from the definition and the second mark comes from detail or an example, too.
- You can use your Topic Summaries for these tasks, because the focus is reading the question properly rather than memorising the content.

Responding

- Sit down and answer, in handwriting, as many questions as possible.
- If you are answering an entire exam, allocate reading time of 15 minutes, during which no marks may be made on the paper at all. Then allocate a writing time of 120 minutes: don't give yourself extra time, don't take a break, don't have music or the TV on, and turn your mobile off. Allocate your time as you would in the examination.
- Find out what the examiners are looking for by reading assessment reports and answer schemes or suggested answers from external examinations – CPAP examinations, for example, all come with broken-down mark allocations, suggested answers and feedback from past exams.
- Mark your own questions from your Topic Summaries, swap examinations with a friend to peer-mark them, and give practice questions to your teacher for feedback.
- You don't need to sit entire examinations every time – just make sure that, before you start, you count up how many marks you are doing and multiple the marks by 1.5 minutes to find out the total time you have for writing. Giving yourself 5-10 minutes reading time for a shorter writing session is standard.

THE FINAL EXAMINATION

Overview

Description

The examination will be set by a panel appointed by VCAA. All the key knowledge and key skills from all outcomes in Units 3 and 4 are examinable, and students will not be given a choice regarding which questions or topics they wish to answer.

The *VCE Legal Studies Study Design 2024-2028* is the document for the development of the examination. All outcomes of Units 3 and 4 of the Study Design will be examined, and any content specifically listed in the Study Design can be the direct focus of a question.

Format

The following information is up-to-date as of the end of 2023.

- The examination paper will remain in its current format as a question-and-answer booklet, with lines provided for each question and extra space given at the back of the booklet.
- The examination will consist of a balance of short answer, multiple-part and extended response questions.
- The paper will be divided into two sections of equal marks. All areas of study can be assessed in either section, and the questions and task words will be similar across both sections.
- The total marks allocated for the examination will be 80.
- Approximately 40 marks will come from Unit 3, and approximately 40 will come from Unit 4.
- All questions in the examination will be compulsory. There will be no choice given as to which questions to answer – unlike in the examinations from 2010 and before.
- There will be one extended response question worth 10 marks at the end of Section A of the examination. There will be no choice of topics for students. This question will be drawn from Unit 3 or 4, or both.
- The examination paper may include questions that refer to stimulus materials such as newspaper articles, extracts from reports or case study materials. Section B will be entirely scenario-based.

Conditions

Duration: 15 minutes reading time, followed by two hours writing time. During reading time no marks may be made on the page or on any loose paper.

Length: 80 marks. This means that students have approximately 1.5 minutes to answer each mark, although more time per mark should be spent on longer questions that require detail and elaboration, with less time per mark spent on shorter questions that require only rote-learning or definitions.

Date: This date is published annually by the VCAA, and an up-to-date version of the examination timetable will be found on the VCAA website once it is published: always refer to this rather than trusting any timetable printed out by someone else. The Legal Studies examination *in 2023* was held on the Wednesday afternoon two weeks after the written English examination – it may change slightly, but the timing has been fairly consistent over the years.

VCAA examination rules will apply. Details of these rules are published annually in the *VCE and VCAL Administrative Handbook*. Examples of these rules for Legal Studies are that no calculators, dictionaries or study notes may be taken into the examination. VCAA publishes specifications for all VCE examinations on the VCAA website. Examination specifications include details about the sections of the examination, their weighting, the question format/s and any other essential information.

The examination will be marked by assessors appointed by VCAA – not by your teacher. Your examination will be marked by at least two independent assessors, and up to five independent assessors. The focus of these multiple assessments will be on reaching agreement on your mark and ensuring you have received every opportunity to be awarded marks.

Contribution to the final assessment

The examination will contribute 50% to your final Study Score.

How well your school performs in the examination will also be used to calculate your Study Score, however, as it is used to moderate your SAC scores. In other words, if your school performs very well in the examination, your SAC scores *may be* increased to reflect that. They may also be lowered, if your school cohort in general does *not* perform as well on the examination as they did in their SACs.

VCE Examination Papers

Examination papers for all studies are published on the VCAA website, and the Legal Studies ones can be found at: https://www.vcaa.vic.edu.au/assessment/vce-assessment/past-examinations/Pages/Legal-Studies.aspx

Students should read through past papers and assessment reports to get a feel for the types of questions that are asked, the task words (such as 'explain' and 'evaluate', etc) used, and the marks that are commonly allocated to each topic.

When studying past examinations, it is important to keep in mind that before 2011 (ie. from 2010 and earlier) the examination was only worth 60 marks, and a choice of the final 10-mark question was given. There will also be some content on exams prior to 2018 that is no longer examinable on the current Study Design, such as the jurisdiction of courts.

If students sit old examinations – which is highly recommended – questions on old content should be replaced by similar questions worth the same number of marks, and students should answer *both* 10-mark questions in pre-2011 exams to bring the total marks up to 70 – 15 minutes can be removed from the writing time if students wish to retain the 1.5 minutes per mark standard, but answering two 10-mark questions is challenging enough that this may not be necessary.

MINI-EXAM NO 1: UNIT 3 – MARKING GUIDE

Section A – Structured questions

Question 1 (2 marks)
Define the category of 'summary offence' as it relates to criminal disputes.

MARK RANGE	QUALITIES OF ANSWER
2 marks	• A clear and complete answer that defines a summary offence as a more minor offence that is heard in the Magistrates' Court. Answers may elaborate by explaining that summary offences are not heard by jury, receive hearings rather than trials, and that have a maximum sentence attached. They may also provide examples. This should not be required information, however, if the answer is very clear on the relative lack of severity of summary offences, and the court in which they are heard – these are the most important pieces of information.
1 mark	• An answer that omits or is vague on one of the above points, such as saying 'lower courts' only. • That provides a comprehensive definition, but then adds inaccurate information that undermines it.

Sample answer:
✓ *Summary offences are the relatively minor offences that are resolved in the Magistrates' Court without a jury.*

Question 2 (13 marks)
a. Explain the role played by Victoria Legal Aid ('VLA') in assisting accused in Victoria. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and accurate answer that states that the VLA can give both legal advice/information and possible representation; and

	• That supports this answer with appropriate detail; and • That makes use of the stimulus material.
3 marks	• It lacks detail in the description of the VLA's function. • It lacks meaningful use of the stimulus material. • It has one or more content errors. • It is overall too brief.
2 marks	• An answer that is brief and superficial. • An answer that is undermined by incorrect content. • An answer that omits more than one piece of required content. • An answer that entirely fails to reference the stimulus material.
1 mark	• More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answer:

✓ *VLA supports access to justice for vulnerable accused such as children by providing limited representation services and giving free legal advice and information. VLA can provide funded representation to children charged with burglary so they can engage a solicitor, and can also in some cases supply an in-house VLA solicitor or provide funding for a private barrister. In addition, VLA provides services such as duty lawyers at courts and tribunals, to assist unrepresented accused – particularly those being held on remand and seeking bail at the Children's Court. They also provide telephone and Internet advice, and hold drop-in sessions using volunteer lawyers.*

b. Explain costs as <u>one</u> factor that affects the ability of the criminal justice system to achieve the principles of justice. 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that defines costs as a factor; and • That draws meaningful connections between costs and *at least two* of the principles of justice; and • That provides support for the arguments in the form of specific detail and/or examples; and • That makes meaningful use of the stimulus. Note that the Study Design provides three principles of justice: fairness, equality, and access. For a 4-mark question, it is not necessary to engage deeply with all three. Assessors may wish to see all three *named*, but detailed engagement with two should be sufficient.
3 marks	• An answer that is slightly general on the concept of 'costs'. • An answer that seems to have some civil costs in mind, that a criminal accused would not have to pay. • An answer that is slightly superficial or repetitive in its treatment of the principles of justice. • An answer that tries to cover all three principles and is slightly list-like as a result. • An answer that is slightly brief or shallow in its reference to the stimulus material.
2 marks	• An answer that lacks meaningful engagement with any arguments, and instead covers basic factual information on costs. • An answer that uses only one principle and fails to identify either of the other two principles. • An answer that fails to use any specific information on costs. • An answer that fails to use the stimulus in any way. • An answer that contains fundamental errors of understanding or fact. • An answer that reads like a 'shopping list' of bullet points rather than an explanation of arguments. • An answer that is extremely brief.
1 mark	• The name of one principle of justice, but nothing more. • A comment on the stimulus material, but nothing more. • An identification of one source of costs, but nothing more. • Anything else that is more than *nothing* accurate and responsive, but is limited to one point that is something less than the 2-mark range.

Sample answer:

✓ *An accused is charged by the government, but as an individual they may not be able to afford to adequately defend themselves, or may be forced to plead guilty or self-represent and risk a poor defence, which creates an unfair playing field between them and the OPP. The parties do not have equal resources. This is particularly concerning when the accused is a vulnerable child, and where there may already be issues with poverty – 16% of children said they only stole food because they did not have enough at home. Legal representation is expensive, and there is an increasing move away from the standard use of scales of costs, so the amount varies between lawyers and could be unfair for some. Victoria Legal Aid pays counsel $401ph for preparation, but this could leave a gap of hundreds an hour that prevents access to knowledgeable representation.*

c. In your opinion, would fines or community corrections orders ('CCO') be more appropriate as sanctions in the above cases? 5 marks

MARK RANGE	QUALITIES OF ANSWER
5 marks	• A clear and complete answer that chooses <u>one</u> of the named sanctions and that shows an understanding of it, even though a freestanding definition is not required; and

	• An answer that focuses too heavily on one side of the question. • An answer that refers to the source material only superficially. • An answer that contains slight errors in fact. • An answer that is slightly short.
2 marks	• An answer that gives a good outline of media involvement in reform, but that does not go beyond this to 'analyse'. • An answer that provides a basic argument as to the impact of the media but that lacks entirely in elaboration and explanation. • An answer that fails entirely to refer to the source material. • An answer that contains fundamental errors that undermine the answer. • An answer that elaborates on only one point. • An answer that runs through a short laundry list of dot points.
1 mark	• One example that illustrates the role of the media in influencing reform. • More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample arguments:

✓ *Social media may be used by groups and individuals, and they can raise awareness by putting out social media messages and hoping they are shared. Many of the teal independents standing for election in 2022 would have relied on this to spread their policies and wished-for legislation, because they did not have party campaign machines to market them.*

✓ *The media can be used to encourage, publicise or assist other types of political action such as protesting, gathering support for petitions and lobbying members of parliament. Both of the sources are examples of this: members of the public reading them might come away more informed on policies to do with climate change and Medicare, and might then lobby their local member to support them.*

✓ *Paid campaigns generally have very clear messages that have been honed and subjected to market research. They are as powerful and memorable as possible. The last time a carbon price was introduced it suffered from a lack of public support; the media plays a significant role in this because lobby groups can use it to increase or decrease support for a reform.*

✓ *Almost all forms of the media are practised at reducing issues to simple statements and attention-grabbing headlines. This draws the interest of the public and helps them understand the content. This can be manipulated by parties who want to win elections, though, and entire policy platforms can be reduced to three- or four-word slogans. This reduces the complexity of new proposals and public understanding.*

✓ *Collectively, all the forms of media show such a diversity of opinions there is no clear direction for change to the law. Parliament often fears backlash when law-making on controversial issues, and it is impossible for law-makers to please all groups. A minority government is an example of this diversity of opinion, because there is no clear majority of the public in favour of one party policy platform.*

YOU BE THE ASSESSOR: UNIT 3 – FEEDBACK

Question 1
Describe <u>one</u> method of dispute resolution that could be used to resolve a civil dispute. (3 marks)

Sample answer 1
Feedback:

✓ Some reasonable information about mediation has been provided: for instance, that the focus is on conversation and cooperation, and that the third party tries to keep communication flowing.

× Other than that, this is not a very good answer. It has factual inaccuracies, falls into the trap of repeating common misunderstandings, and has a number of vague or overly-casual statements that are not helpful in communicating legal knowledge.

× The opening sentence repeats the question and is not required.

× It is not technically correct that there are no rules of evidence and procedure. There are no rules of evidence because evidence is not the point of a mediation; there are rules of procedure, but they are not the same as rules in court.

× The role of the third party is expressed too colloquially and vaguely. It is also incorrect to say in such a dogmatic way that they are not allowed to give advice or say anything – they do help parties explore possible solutions.

× The answer does not say how the final decision is reached or who makes it.

× It is incorrect to say that mediated decisions are not legally binding; if they are conducted through courts or VCAT they will be put into a deed of settlement or order.

× It is not logical to argue that a non-binding decision is good for the reasons given; also, the question did not ask for strengths or weaknesses.

× It is incorrect to say that a dispute progresses from one method of dispute resolution, to another, to another, in this way.

This answer might not receive more than 1 mark or 2 marks, depending on how much credit was given material that was "close enough."

Sample answer 2
Feedback:

✓ This answer contains some correct material about conciliation. It is also more clear how the final decision is reached.

× Other than that, this is not a very good answer. It is too short, it misses out key information and it contains inaccuracies.

× Stating that conciliation is like mediation is both irrelevant and unhelpful – it tricks the student into thinking they don't need to write down all the specific features of conciliation.

× The statement about conciliation not being legally binding is incorrect in the same way as the above statement on mediation was. It is also incorrect to say that negotiated settlements are enforced by VCAT: like all other VCAT orders, they would be enforced by the Magistrates', County or Supreme Courts. Finally, discussion of contracts is irrelevant and incorrect in this context because this would apply to private conciliations.

This answer might not receive more than 1 mark.

Sample answer 3
Feedback:

✓ This answer provides accurate information about arbitration with a good amount of detail, and it covers important features such as the role of the third party, the application of evidence and procedure to the process, how the outcome is reached and the role of the parties.

This answer would likely receive full marks.

Question 2
Discuss the operation of courts and the Victorian Civil and Administrative Tribunal ('VCAT') in the hearing of legal disputes. In your answer, justify the use of tribunals such as VCAT in addition to the court system. (5 marks)

Sample answer 1
Feedback:
✓ This answer responds to both parts of the question, and spends more time on the part that will be worth more marks.
✓ This answer explains the type of disputes that are likely to benefit from the existence of VCAT: this is an appropriate way to argue for VCAT's operation.
✓ This answer gives at least six different points in response to the comparison part of the question. This is a good number for the allocated marks, and there is a satisfactory amount of detail for each point.
× The response has not necessarily given any specific differences, though – and at least one difference is required, because of the task word. Without addressing difference as well as similarity, full marks cannot be awarded.
× There is a factual inaccuracy: VCAT orders cannot be appealed on a question of fact. It is also unclear whether the statement on mediation is incorrect, because the wording is ambiguous. The statement "will both resolve" isn't clearly an accurate expression of how mediation works. The answer also seems to suggest that informal hearings are alternatives to the normal process at VCAT: they *are* the normal process.

This answer might not receive more than 3 marks or 4 marks.

Sample answer 2
Feedback:
✓ This answer addresses both similarities and differences (but focuses on them like a list).
✓ This answer makes at least nine different points in response. It does also address, to some extent, the second part of the question.
× There are a number of factual inaccuracies: for instance, it is wrong to say that VCAT decisions are not binding; it is wrong to say that parties will go to court if VCAT fails at resolution; it is wrong to say that VCAT uses more non-judicial methods of dispute resolution (the phrase "alternative methods of dispute resolution" is also outdated and ambiguous now that non-judicial methods are standard, and VCAT hearings do not use these methods anyway). The description of VCAT members is also too much of a generalisation, and the wording is vague: "experts in the area of the law"?
× Overall, the discussion makes a lot of points but is not strong on either accuracy or detail, and doesn't seem to be interacting with the points on operation in a proper 'discussion'.
× The final response, to the second part of the question, is partly double-counting material that has been used in the comparison: it reads as though it is tacked on the end.

This answer might not receive more than 3 marks.

Question 3
Sam, 23, has prior convictions and drug and alcohol addictions. Sam has been charged with three indictable offences, including armed robbery. The prosecution alleges that Sam was in possession of high-heeled shoes when committing the armed robbery and, therefore, possessed an 'offensive weapon' within the meaning of the *Crimes Act 1958* (Vic).

Provide <u>one</u> sanction that may be imposed if Sam is found guilty and discuss the ability of that sanction to achieve its purposes. (5 marks)

Sample answer 1
Feedback:
✓ This answer addresses a good number of aims, and does give some explanation for each aim as to how or why the sanction might achieve it.
× This answer takes too long at the start explaining the sanction, though, and this was not asked for in the question.
× This answer fails to properly address the task word of 'discuss'; instead, it gives a list of positive statements. This is not the same as looking at something from multiple, often competing, points of view.

This answer might receive no more than 3 marks.

Sample answer 2
Feedback:
× This answer is incorrect. The Drug Court operates on the same level as the Magistrates' Court, so it would not hear this dispute: the question states that it involves indictable offences.
✓ The discussion on the aims is actually done very well – unfortunately, it cannot be counted.

Because Legal Studies generally does not award follow-on marks, this answer should receive zero marks.

Sample answer 3
Feedback:
✓ This answer identifies the sanction without wasting time on an unnecessary, lengthy definition of it.
✓ It then covers a good number of aims (specifically, all of them, even though this is not required), and looks at both strengths and weaknesses of the sanction.
× The aims discussed aren't explained with any synonym, usually. This weakens the overall quality of the answer.
× The aims are also discussed in a slightly 'list-like' way, which feels slightly more like checking them off than like a proper discussion of them.

This answer might not receive more than 4 marks.

Question 4
Evaluate how effectively the jury performs <u>one</u> of its roles in a criminal trial. (4 marks)