LEGAL STUDIES

Units 3 & 4 Course Work Notes

Area of Study *(Key Knowledge)*	**Assessment of *Key Skills* for Outcome 1**
1. Parliament and the citizen • Introduction a the principles of the Australian parliamentary system: representative government, responsible government, the principle of separation of power, the structure of State and Commonwealth Parliaments and the roles played by the Crown and the Houses of Parliament; b the legislative process outlining the progress of a bill through Parliament; c reasons laws may need to change, using examples to illustrate; d the role-played by a formal law reform body in assessing the need for change; for example, the role of: - Australian Law Reform Commission - a parliamentary committee - Victorian Law Reform Commission - a government inquiry - a Royal Commission e the means by which individuals and groups participate in influencing change in the law; f the strengths and weaknesses of law-making through Parliament,	**Assessment Task - Folio of exercises** ***Marks allocated = 30*** *Task:* Describe the role and effectiveness of parliament as a law-making body, evaluate the need for a change in the law and analyse the ways in which change can be influenced. Each exercise will consist of short-answer questions and may include stimulus material. Short-answer questions will be similar to those contained in the end of year examination. *Conditions:* Both exercises will be conducted over 40 minutes plus reading time. <u>Analytical 1 – (a) The principles of the Australian parliamentary system</u> *(3.75% of overall result)* ***To be held Wednesday February 14th (7.45 – 8.30)*** <u>Analytical 2 – (b-f) legislative process; reasons laws change; a formal law reform body; the means to influence change; strengths and weaknesses of law-making through parliament</u> *(3.75% of overall result)* ***To be held Wednesday March 1st (7.45 – 8.30)***

Area of Study 1(a): The Principles of the Australian parliamentary system

Representative government:

Refers to a government that represents the views of the majority of people, chosen at regular elections to represent the needs of people. If they don't they may be voted out at the next election.

Responsible government:

A government that is answerable to the people for its action. Minister are accountable to Parliament and may be called upon to explain their actions or actions of their departments. They can be questioned by other members of parliament, in question time and forced to resign eg. Scully was forced to resign about misleading parliament a second time on the Cronulla riots report.

The principle of separation of powers:

Provides a system of checks and balances to prevent corruption so that no one body holds absolute authority to preform all the functions of a legal system, because "absolute power corrupts absolutely". There are three types of powers held by the Commonwealth:

1. Legislative Power: power given to parliament to make laws
2. Executive Power: power given to the government to administer laws and manage the business of government
3. Judicial Power: power given to the courts and tribunals to enforce the law and settle disputes

In Australia, the legislative power and executive power are combined. The prime minister and the cabinet are part of the governing body, the executive power, and are also part of parliament, legislative power. Likewise, the governor-general is part of the executive power, as well as being part of the structure of parliament, legislative power.

The structure and state of Commonwealth parliaments:

The Commonwealth and state parliaments (except Queensland) operate on a bicameral system, which means parliament consisting of two houses and a Crown. The structure of Commonwealth parliament is the Queen's representative (governor-general), the Senate (upper house) and House of Representatives (lower house). The structure of state parliaments is the Queen's representative (governor), the Legislative Council (upper house) and Legislative Assembly (lower house).

The role played by the Crown:

One of the main roles of the Crown is to give royal assent to acts of parliament, where the governor-general signs the proposed bill to make it an act. Another role is appointing the executive council. In the executive council, the role or the Crown is to make delegated legislation, while acting in council with relevant ministers as the executive council. The governor-general also has reserve powers, these powers are to make sure the country continues to be governed.

The role played by the houses of parliament:

The main role of parliament is to make laws on behalf of the people for the good government of society. Parliament also provides for the formation of government, provides a forum for popular representation or scrutinise the government, delegate some of its law-making powers to subordinate authorities and balance the books (money).

The House of Representatives is also known as the 'people's house', because it reflects the current opinion of the people at elections, and the 'house of government', because the political party that achieves the highest number of elected members become the government of the day.

The role of the House of Representatives is to initiate laws, determine the government, represent the people (in house debate), control government expenditure (collection of taxes and spending money) and publicise and scrutinise government administration.

The Senate has two main roles. 'The States' house', which is to equally represent and protect the interests of the states, so the smaller states are not dominated by the larger ones, and 'the house of review', which is the task of reviewing and making possible amendments of bills passed in the lower house.

The Victorian Parliament operates in the same way as the Commonwealth with an upper house, Legislative Council, and a lower house, Legislative Assembly.

Area of Study 1(b): The Legislation process outlining a process of a bill through parliament

Initiation of Legislation:

Prior to legislation being introduced to parliament, there are a number of processes which are followed. It begins with pressure for change. These can be formal e.g. political parties or MPs, or informal e.g. pressure groups and individuals.

Drafting Legislation:

The parliamentary counsel drafts legislation as instructed by cabinet. There are problems with drafting legislation:

- It is not always possible to foresee future circumstances
- The meaning of words change overtime
- It is difficult to cover all situations that might arise
- The proposed legislation might be in conflict with existing legislation

The Scrutiny of Bills:

At both federal and state levels bills are scrutinised by parliamentary committees. This scrutiny can occur during the progress of a bill.

Process of a Bill through Parliament:

Original House

Initiation
Leave is sought to introduce the bill

First Reading
The title of the bill is read, copies of the bill are given to members of the house and the bill is placed on the agenda for a future day

Second Reading and Debate
The relevant minister makes a speech outlining the purpose of the bill. A debate takes place later in time, where the relevant ministers take it in turn to speak from the opposition and government. A vote is taken at the end of the debate

Committee Stage and Adoption of the Report
The speaker in the lower house or President in the upper house, leaves the house and the house is in the committee stage, where each clause of the bill is discussed in detail and amendments are made. The speaker then returns to their chair and asks the parliament to accept the committee's report. This stage may be eliminated if the House unanimously agrees.

Third Reading
The long title is read. There may be further debate on the bill.

Second House
After passing the first house, the bill goes through the same procedure as the first house. Any amendments must be approved by both Houses to become law.

Royal Assent
When the bill is passed through both houses, it is presented to the governor-general for royal assent. This is where the governor-general signs the bill on behalf of the crown.

Proclamation
The act comes into operation on the day stated in the act or proclaimed by the governor-general in the Government Gazette. If not otherwise stated, the act comes into operation 28 days after royal assent.

Area of Study 1(c): Reasons laws may need to be changed

Characteristics of an effective law:

Laws are necessary to protect society and keep it functioning effectively. This means they must be:

- Known to the public
- Clear and easily understood
- Acceptable
- Enforceable
- Able to be changed

Key reasons for change:

Changing values and attitudes

Each society has a set of common values and benefits reflecting the majority of the people. However these change overtime and in order for the law to remain effective, as above, laws must change to keep in line with these changing values.

Example: The recent change in the law that recognises de facto relationships and same sex couples in terms of property and health issues.

Advances in technology

Technology is constantly developing and creating new situations which need to be covered by the law to reduce the possibility of exploitation or harm to individuals or groups.

Example: The Crimes Act protects people from being stalked electronically, which didn't exist prior to the advancement of technology

Protection of the community

A major role of the law is to protect individuals from harm, whether it be physical harm, or unfair or unscrupulous practices.

Example: The Road Safety act protects road users through the compulsory wearing of bicycle helmets.

Protection of rights

The protection of individual rights is a keystone to any democratic society. The law reflects these values through acts.

Example: Equal Opportunity and Anti-discrimination acts which promote tolerance and acceptances of differences. Also provides compensation for victims of discrimination through various bodies such as courts and tribunals.

Area of Study 1(d): The role played by a formal law reform body in assessing the need for change

The role played by formal groups:

In line with the principles of responsible and representative government, parliament is not only answerable to the people, but most also respond to the need for reform. Failure to do so will be damaging to society.

Formal processes involve the parliamentary system and its network of institutions from which it can seek advice regarding the need for change eg. law reform bodies, cabinet. Parliament is not bound to follow their recommendations, but governments are often influenced by them.

Victorian Law Reform Commission:

The Victorian Law Reform Commission (VLRC) is an independent government-funded organisation, established to develop law reform and monitor and coordinate law reform activity in Victoria. The VLRC answers to the Attorney-General. It has a core body of members, but it might also draw upon outside experts or researches for specific areas of enquire

Five main functions of the VLRC

1. Referred Matters: Make recommendations for law reform on matters referred to it by the Attorney-General

2. Self-Referred: The commission can recommend changes in the law relating to issues that have been brought to the commissions notice by the members of the public

3. Suggested Referrals: Suggest to the Attorney-General that he or she refer a law in need of investigation to the commission

4. Community Education: The commission works with the groups in the community to ensure that changes in the law are effective

5. Monitor and Coordinate Law Reform: The commission works with other law reform bodies to ensure effective law reform in Victoria

Process undertaken by the VLRC

The commission receives a reference from the Attorney-General or begins a community law reform project

The commission's staff and experts undertake initial research and investigation

An Issues or Consultation paper is drawn up

Receive submissions from the public and relevant agencies

A report is published with recommendations for changes to the law

The Attorney-General tables the report in parliament

Parliament decides whether to implement the recommendations (in whole or in part) through legislation

Area of Study 1(e): The means by which individuals and groups are able to participate in influencing change in the law (informal)

The role played by informal groups:

Individuals and groups are able to participate in the law-making process and have a range of methods they can use. People have a voice, but may need to use the media for it to be heard.

Pressure Groups:

Pressure groups may be formed due to dissatisfaction with a current law or the need for a new law. These groups may represent a particular institution or body from a particular section of the community (eg. National Farmers Association) or a special interest group which promotes a particular attitude or single issue (eg. Right to Life).

Methods used to influence change:

Demonstrations and Protests
Demonstrations are held to alert the government to a need in the change of law. For these to be successful, it is necessary that a large group of people show their support for change in the law and attend demonstrations. Protests may also be held on local issues.

e.g. The abortion protest, where coat hangers where placed in front of government was effective, because the coat hangers represented how many women died from abortions.

Defiance of the law
Occurs when someone feels strongly enough to break the law, despite the risk of being punished, in an attempt to show the general public and the law makers that injustices are occurring because of an outdated law.

e.g. This method is very effective, because it grabs the parliaments attention. But, parliament does not like to give into people that break the law. An example is Sunday Trading.

Petitions
A petition is a formal, written request to the government for action in relation to a particular law that is considered outdated or unjust. It usually has a collection of signatures on it, which have been gathered from supporters

e.g. the petition allowing doctors to commit euthanasia, upon the patients request.

Lobbying
Lobbying can be done by individuals or groups to their local members of parliament, or by professional lobby groups who charge a fee for their services. These lobbyists are employed by individuals or pressure groups to influence policy change, usually at the federal level.

e.g. Right to Life Australia – against abortion.

Media
Editorials and Letters to the editor: It is possible for an individual to write letter to the editor of a newspaper that might be published. Such letters can alert the public and the law makers to a need for a change in the law.

Radio and Television: Talkback shows on radio, and television programs, allow individuals to communicate their opinions about defects in the law and need for change. Television programs can also investigate injustices and problems.

e.g. Today Tonight reporting on injustices and problems in the community in relation to the law.

Area of Study 1(f): The strengths and weaknesses of law-making through parliament

Strengths are the ways in which parliament have power, influence and authority to make effective laws.

Weaknesses are the ways in which this power, influence and authority is restricted.

Strengths / Effective law maker	**Weaknesses / Restrictions on law making**
It provides and arena for debate which can lessen the chance for unjust laws being passed and allows different views to be heard. Members can point out advantages and flaws of a proposed bill during a number of stages during its process through parliament, and even proposed amendments e.g. the committee stage.	However, the process of debate and the passage of a bill through parliament can be very time consuming. Opposition to a bill can result in it not being passed or considerably watered down through amendments e.g. the Liberal party had to remove GST from basis foods to get support. Currently with a majority in both houses, one could question the amount of debate which actually occurs.
It is parliament's primary role to make laws, as parliament is a supreme law-making body in its own jurisdiction. It can change law previously made by parliament and also laws made by the courts.	However, parliament is not always sitting, Often less than 60 days per year, and they cannot change the law quickly if the need arises (Although They can if they have a double majority but the process if done properly is slow). Parliaments also restricted to making law only within their jurisdiction. Parliament can not change many laws due to constitutional restrictions e.g. The federal parliament cannot make laws within a state's jurisdiction
Parliament can investigate topics and make comprehensive laws. This is because parliament has access to expert information and is therefore more able to keep up with society than courts.	However, investigations can be expensive and lengthy (eg. Law Reform Bodies) and parliament is not always able to keep up with changes in society and there may be many issues that require the attention of parliament.
Parliament can delegate its power to make laws to expert bodies, such as subordinate authorities, that have expertise in particular areas. It also saves time, so Parliament can focus on more important issues.	Delegated authorities (other than local councils) are not elected by the people and it may be that there are too many bodies making laws. This is known as 'over governing' and it creates too many laws for society to keep up with.

Area of Study *(Key Knowledge)*	Assessment of *Key Skills* for Outcome 2
2. Constitution and the protection of rights a the division of power between State and Commonwealth Parliaments under the Commonwealth Constitution: explanations and examples of specific, concurrent, exclusive, residual powers and the impact of Section 109; b restrictions imposed by the Commonwealth Constitution on the law-making powers of the State and Commonwealth Parliaments; c the process and impact of change by referendum under Section 128 of the Commonwealth Constitution; d the significance of High Court cases that interpret the Commonwealth Constitution and their impact on the law-making powers of the State and Commonwealth Parliaments; e the protection of democratic and human rights by the Commonwealth Constitution; f comparisons with the approach adopted for the constitutional protection of democratic and human rights in one of the following countries: United Kingdom; United States of America; Canada; New Zealand or South Africa.	**Assessment Task – Two tests made up of structured questions** ***Marks allocated = 40*** *Task:* Explain the role of the Commonwealth Constitution in defining law-making powers within a federal structure, and evaluate the effectiveness of the Commonwealth Constitution in protecting democratic and human rights Each test will consist of short-answer questions and may include stimulus material. Short-answer questions will be similar to those contained in the end of year examination. *Conditions:* Both tests will be conducted over 40 minutes plus reading time. Test 1 – (a-c) The division of power between State and Commonwealth Parliaments; restrictions imposed by the Commonwealth Constitution; the process and impact of change by referendum. *(5% overall result)* ***To be held Wednesday March 21st (7.45 – 8.30)*** Test 2 – (d-f) The significance of High Court cases; the protection of democratic and human rights by the Commonwealth Constitution; a comparison of democratic and human rights in one other country. *(5% of overall result)* ***To be held Tuesday April 24th (7.45 – 8.30)***

Area of Study 2(a): The division of powers under the constitution

The commonwealth of Australia Constitution Act 1900(UK) – the constitution provides a legal framework within the Commonwealth Parliament and the High Court were created. It is the most important legal and political document affecting the lives of Australia. The powers given to the Commonwealth Parliament are set out in the constitution. It tells the states and the Commonwealth what they can and cannot do with respect to law-making. The constitution came into force on 1 January, 1901.

Specific Powers:

The constitution gave the Commonwealth Parliament specific powers to 'make laws for the peace, order and good government of the Commonwealth'. Most of these are set out in S51 and are either exclusive or concurrent. E.g. Marriage s51 (xxi)

Exclusive powers:

These powers can only be exercised by the Commonwealth parliament, no other authority has the power to make laws in these areas. Most are made exclusive by other sections of the Constitution. Eg. S51 (xxi) gives the Commonwealth power over currency, coinage, and legal tender and S115 says a state shall not coin money.

Concurrent Powers:

These powers cover areas over which both the commonwealth and state parliaments share jurisdiction. E.g. the powers to make laws in relation to taxation S51 (ii) is given to the commonwealth, such as income tax and GST, but state parliaments can also levy taxes such as stamp duty and payroll tax. Although a concurrent power, marriage S51(xxi) is virtually an exclusive power these days.

S109

In relation to the concurrent powers S109 states that where the law of a State is inconsistent with that of the Commonwealth, the Commonwealth law shall prevail and the state will be invalid to the extent of the consistency. S109 makes concurrent powers potentially exclusive

Concurrent powers are still important but have declined as the commonwealth has legislated on these areas because of S109.

Residual Powers:

In addition to concurrent powers, the State also has residual powers. All areas of law-making powers not specifically listed in the constitution remain the powers of the State Parliaments. They are, and were always intended to be, the bulk of the law-making powers. E.g criminal law and road laws.

Area of Study 2(b): Restrictions imposed by the constitution on the Law-making powers of the State and Commonwealth Parliaments

State and Commonwealth Parliaments are supreme law-making bodies within their own jurisdiction which is limited by restrictions in the Commonwealth of Australia Constitution Act. They are not bound by other acts or Court decisions if they remain within their jurisdiction.

Restrictions on State Parliament (powers):

Exclusive Power
Some of the powers given to the Commonwealth under S51 are by their nature exclusive to the commonwealth.

Eg. S51(xii) gives power to the Commonwealth Parliament over currency, coinage and legal tender. S115 states that the States shall not coin money. The coining of money is therefore an exclusive power of the Commonwealth Parliament.

S109
The power of the States is also restricted by S109 which states that State power is restricted by the fact that in areas of concurrent power, where there are inconsistencies between state and federal legislation, federal law prevails over state, to the extent of inconsistency.

Restrictions on Commonwealth Parliament (powers):

Residual Power
The Commonwealth Parliament is restricted from legislating in areas of residual powers. These powers were given to the states at the time of Federation and they are not listed in the Constitution. Eg. criminal law, education and public transport.

Certain sections of the Constitution
S106 and S108 guarantees the State's Constitutions, power and laws remain in force. Therefore, the Commonwealth Parliament cannot pass any laws that interfere within the State's powers and laws.

Area of Study 2(c): The process and impact of change by referendum under S128 of the Commonwealth Constitution

A Referendum is a compulsory vote on a proposed change of the wording of the Constitution. The words can only be changed after a successful referendum.

Procedure for changing the Constitution (under S128):

1. A bill setting out the proposed alteration is passed by both houses of the Commonwealth Parliament or on house twice within 3 months

2. It must be put to all elections not less than 2 months and not more than 6 months of a bill being passed

3. Submitted to all electors required to vote for the House of Representatives

4. Must be passed by double majority i.e. majority of voters in Australia (50% + 1), and a majority of voters in a majority of States (4/6). If a proposed change affects one particular State, then a majority in that State is required

5. Royal Assent – Presented to the Governor-General for signing of the bill into law

6. The wording of the Constitution is then changed

Impact (effectiveness) of change by referendum:

Only 8 out of 44 referendums have passed since 1901. Most fail. Why?

Strict formula of success

- S128 provides difficult criteria for a referendum do be successful ie. double majority (explain)

- This should be the case to protect states and individuals from an overpowerful federal government

- Issues which have the support of most Australians fail because there was not a majority of States eg. 1977 Simultaneous elections (example)

Bipartisan Support

- Must be bipartisan support, which is that Both major parties need to support the referendum. Parties that do not support a proposal will urge their supporter to vote against it

Referendums will generally succeed if all side of politics support them. This is uncommon eg. 1967 Aboriginal people (explain)

Complexity of proposal

- Referendum proposal are often complex and difficult to explain in simple terms and at times voters receive information setting out arguments for and against the proposals

- If the voters do not understand the issue, they are unlikely to support it and therefore, remain with the current eg. 1999 Republic (explain)

Reluctance to change the balance of power

- Most changes aim to change the balance of power towards the Commonwealth, and people are reluctant to increase and give the Commonwealth greater powers eg. 1946 Social Services (explain)

- We are a conservative country suspicious of change, therefore we tend to vote no

- Each change means the balance of power between the State and Commonwealth powers also change

Area of Study 2(d): The significance of the High Court cases that interpret the Commonwealth Constitution and their impact on the law making powers of the State and Commonwealth Parliaments

- The High Court was established under S71 of the Constitution

- S76 gives the court the jurisdiction to hear disputes arising under the Constitution or its interpretation as most disputes relate to a parliament legislating outside its power (ultra vires). Such as:

1. Claims that the Commonwealth has interfered with residual powers from the States
2. Claims that the States have exceeded their authority or acted outside in an area of exclusive powers
3. A disagreement between two or more States over law-making powers

- The High Court is unable to change the wording of the Constitution directly, however the interpretation can add meaning, by broader or narrower interpretation, to the Constitution and change the balance of power between the States and the Commonwealth

- The significance of High Court decision in cases has been much greater in altering the law-making powers of parliaments than S128 through referendum

Legislative Movement of Power

The referral of powers
S51(xxxvii) gives the Commonwealth Parliament power over any matters referred to it by the states, but that power can only operate in those states that have referred the power.
eg. The area of ex-nuptial children in family law matters.

Unchallenged legislation
If the act is not challenged, then it stands and operates unchallenged, Even if it is encroaching on exclusive or residual powers.

Cases

The Franklin Dam Case
In 1983, the Tasmanian government intended to dam the Franklin River for a hydo-electricity source. However, the Commonwealth signed a world treaty which preserved the dam. It came under S51 (xxix) 'external affairs'.

The High Court decide that as all aspects of Australia's relationships with other countries are included under the external affairs power and since the Franklin River was covered by an international treaty, it came under the external affairs power.

The Commonwealth was therefore able to intervene in an area of power previously held by the states. This meant that the High Court's interpretation of the external affairs power shifted the balance of law-making power in favour of the Commonwealth

Brislan Case
In 1935, the Commonwealth required all owners of wireless sets (radios) to hold a license, however it was not in the Constitution. This case comes under S51 (v) gave the Commonwealth power to legislate on postal, telegraphic and other like services.

The High Court decided that 'other like services' in S51 (v) included wireless sets. Therefore this case confirmed the Commonwealth Parliaments power to legislate regarding wireless sets and clarified the meaning of S51 (v) of the constitution.

Jones Case
In 1965, the Commonwealth purchased land to be required for the Australian Broadcasting Commission (ABC). This came under S51 (v) postal, telegraphic, telephonic and other like services.

The High Court decided that the words 'other like services' also included television. Therefore it gave the Commonwealth Parliament the right to make laws relating to television and it was seen as a valid use of Commonwealth power.

Tied grants Case
In 1926, the Commonwealth Parliament made grants available to the state of Victoria on the condition that they used to build roads, but the state challenged this. This case comes under S96 gives the Commonwealth the power to make financial grants to any state on such terms and conditions as the Parliament sees fit.

The High Court decided that the act was valid and thereby confirmed the right of the Commonwealth to make tied grants to the state. The decision increased the law-making powers of the Commonwealth by allowing them to attach conditions to financial grants thereby influencing areas of residual power originally left with the states.

First Uniform Tax Case
In 1942, the Commonwealth increased income tax and passed an act declaring that Commonwealth taxes take priority over state taxes. This case comes under S51 (ii) gives the Commonwealth the right to levy taxation.

The High Court accepted the validity of this scheme and the effect was that the State governments where prevented from levying their own income taxes, even though they have the right to do so. Therefore the Commonwealth gained power and states lost power. Also they made a concurrent power an exclusive power.

Area of Study 2(e): The protection of democratic and human rights by the the Commonwealth Constitution

Democratic Rights

Those considered necessary to make our democratic system of government work, eg:
- The right to vote for MPs
- The right of freedom of speech to criticise the government

Human Rights

Those rights that allow an individual to live with dignity, eg:
- education

Australia and Rights

Australia is a signatory to a number of international treaties which set out certain rights, eg. International Convention on the rights of a child, which mentions rights to education, and protection against neglect, cruelty and exploration. However, these rights do not automatically become part of Australian law. They are only protected in the following circumstances:

If they are protected by the Commonwealth Constitution
If rights have been expressly protected in the Constitution or implied by a High Court decision.

Rights protected by the Commonwealth Constitution

There are five expressed or entrenched rights which are written in the Constitution or implied by a High Court decision. They can only be removed from the Constitution by referendum, whereas common law or legislative rights can be removed by the Commonwealth Parliament legislating to override them.

Entrenched Rights

Freedom of Religion: S116 the Commonwealth shall not make any law in respect to religion. They can not:
- establish a state religion
- impose the observance of a particular religion
- prohibit the free exercise of any religion
- test religion for Commonwealth office

Interstate trade and commerce: S92 Trade among the states to be free
This is and economic right. Interstate trade and commerce is free

Discrimination based on state residence: S117 Protection against discrimination on the basis of the state where you reside
The acquisition of property on just terms: S51 (xxxi), That the Commonwealth may make laws to acquire property but must pay fair compensation for the property

Jury trial for indictable Commonwealth offences: S80, This is a limited right because:
- most indictable offences are crimes under state law, and S80 only applies to Commonwealth offences
- the High Court has ruled that indictable means ‘crime tried on indictment’

Implied Rights

There is only one implied right which is freedom of political communication. This was identified in a High Court case, the Australian Capital TV case, where the Commonwealth passed legislation banning political advertising on radio and television. The High Court held that the act was invalid because the ban limited the implied right of freedom of speech to make an informed vote, which is essential to uphold the principle of representative government.

The right is not stated in the Constitution but exists to the extent that Parliament has not passed laws which limit this implied right.

Enforcement of Rights

Expressed and implied rights are fully enforceable by the High Court. If an act of the Commonwealth Parliament infringes one of these rights, the High Court can declare the law unconstitutional and therefore invalid. If the High Court declares legislation invalid, Parliament can:

- amend the legislation so that the unconstitutional provisions are removed from it
- try and remove the expressed right by amending the Constitution in accordance with S128

Bill of Rights

- This is a document that lists certain democratic and human rights which protect the individuals in a community

- A bill of rights entrenched in the Constitution can set limits on the power of the government in relation to its citizens

- A Statutory bill of rights allow parliament to amend or repeal the bill at anytime, or to overcome interpretations of the courts

Area of Study 2(f): A comparison of democratic and human rights in one other country – United States of America

- The USA has 50 states and a central federal government
- Federal law takes precedence over state law
- In general, matters that lie within state borders are the exclusive concern of the states, eg. criminal code
- It has three separate branches:
- executive (headed by president)
- legislative (congress consisting of the House of Representatives and the Senate)
- judicial (headed by the Supreme Court)
- The Constitution contains a Bill of Rights

Entrenched/Expressed Rights

The first ten amendments are referred to as the Bill of Rights, although sixteen more have been added. Since these rights are fully entrenched, they can only be removed by amending the Constitution, a lengthier and more complex procedure than Australia

Process to change the US Constitution
Firstly, it must be passed by a two-third majority of both houses of Congress. Then approved by three-quarters of the States. The bill can specify that a special state people's convention is required.

1st amendment
Guarantees free speech, free press, right to peaceful assembly, freedom of religion and the separation of church and state and the right to petition the government for a redress of grievances.

The similarities to Australia are that religion is protected by the Constitution under S116 and freedom of speech is the only implied right in Australia, which is political interpretation.

2nd amendment
Provides for 'a well regulated Militia, being necessary to the security for a free state, and the right of the people to keep and bear arms shall not be infringed'

5th amendment
Guarantees the right not to answer a question which might incriminate; the right not to be tried twice for the same crime; the right to a grand jury; the right not to be deprived of liberty without due process of law; just compensation when property is taken.

Similarities to Australia are that there is a jury for indictable offences; the Commonwealth can acquire property on just terms; the right to silence; double jeopardy passed in some states; innocent until proven guilty.

10th amendment

Provides that powers not delegated to the United States by the Constitution are retained by the States.

The similarities are that areas of law that are not mentioned in the Australian Constitution are known as residual powers. These powers are retained by the states and can not be legislated on by the Commonwealth.

Other amendments

The 13th Amendment was the abolition of slavery. The 15th Amendment, passed in 1869, gives full rights of citizenship to people of any race or colour (including the vote). The 26th Amendment, passed in 1971, gave the right to vote to those who are 18 years or older.

Similarities to Australia are that slavery in Australia is illegal, Australian citizens (no matter what race) have the right to vote and citizens over 18 have the right to vote.

Implied Rights

The right to privacy has been identified by the US Supreme Court as an implied right in the Griswold case. This was when the Supreme Court, in 1965, overturned the Connecticut law, from 1879, that prohibited the use of contraception because it infringed upon people's right to privacy when consulting a physician.

Although the Bill of Rights does not explicitly mention 'privacy', the majority found that the 'right to privacy' is implied in other amendments. Express and implied rights are fully enforceable by the courts. If legislation infringes the Bill of Rights, it can be declared invalid.

Similarities and Differences

- Entrenched Rights
- Amending the Constitution (referendum vs. complex procedure)
- The High Court (Supreme Court) have found implied rights in the constitution
- The High Court (Supreme Court) can declare laws invalid
- Separation of powers and general government
- Limited State jurisdiction where federal law prevails
- Different procedures for amending the constitution
- Number of entrenched rights (5 v 26)
- Level of separation of powers
- Voting (compulsory v not)

Area of Study *(Key Knowledge)*	Assessment of *Key Skills* for Outcome 3
3. Role of the courts a the operation of the doctrine of precedent and the ability of judges to make law; b statutory interpretation and the reasons for the interpretation of statutes; c the effect of interpretation by judges. d the strengths and weaknesses of law- making through the courts; e the relationship between the courts and Parliament in law-making.	**Assessment Task – Structured questions** ***Marks allocated = 30*** *Task:* Describe the role and evaluate the effectiveness of the courts in law-making and their relationship with parliament. The task will consist of a number of short answer and extended response questions. *Conditions:* This will be a test conducted over 80 minutes plus reading time. *(7.5% of overall result)* ***To be held Wednesday May 23rd (7.55 – 9.30)***

Area of Study 3(a): Operation of the doctrine of precedent and the ability of judges to make law

Judges make law by:

- Deciding on a new issue when there is no previous binding precedent that applies to the current situation

- Interpreting the meanings of the words in an act of parliament by statutory interpretation

The Doctrine of Precedent

Superior courts of record
Courts that are high in the hierarchy, usually appeal cases, are the courts involved in making law

Stare decisis
The process where lower courts follow the decisions of higher courts, to stand by what has been decided

Binding precedents
Precedents in a superior court in the same hierarchy dealing with similar legal principles and material facts

Material Facts
Facts that are vital to the reason for the decision

Ratio decidendi
The binding part of a judgment made by a judge. The legal reasoning of the decision

Obiter dictum
An obiter dictum is a statement made by the judge that is not part of the reason for the decision, but is an important statement that can influence decisions in the future.

Persuasive
A persuasive precedent is not binding. They are considered to be influential.
Instances when a precedent is considered to be persuasive:
- from a court on the same level
- superior courts do not have to follow precedents set in lower courts
- a decision in another hierarchy
- obiter dictum

Definition of the doctrine of precedent

Precedent is the process of judges in the same hierarchy following the decisions of a superior court when deciding cases with similar material facts. This is based on the principle of stare decisis which means to stand by what has been decided.

A precedent may be binding, which means the ratio decidendi, or binding part of the decision must be followed, or it may be persuasive, decision which are considered noteworthy but are not binding eg. the obiter dictum in a case which is part of a judgment but is not binding, or decisions from courts in another hierarchy.

Restrictions on judges in law-making

- Judges can only develop or change law when they have to decide a specific case and it must be brought by a person who is directly affected or has 'standing' in the case

- Judges can make laws on a new issue that has not previously been considered by the courts or parliament

Techniques to avoid following
There are four ways that a judge may avoid following a binding precedent (Hot **RODD**):

Reversing
A case that created a precedent is taken to a higher court on appeal and the precedent is reversed. The superior court decision creates the precedent to be followed in the future.

Overruling
A higher court in the same hierarchy may overrule a precedent set in a lower court. The new ratio decidendi becomes the precedent to be followed in the future.

Distinguishing
If the main facts of the case are sufficiently different from the main facts in a binding precedent, a lower court may not have to follow the precedent

Disapproval
- In some instances a court is bound by a precedent (due to being a lower court), but expresses its disapproval of the precedent in the obiter dictum; or

- A court on the same level may choose not to follow the earlier decision, meaning that there are two precedents in force until another case is taken to a higher court which can overrule the previous decision and create a new decision

Area of Study 3(b): Statutory Interpretation and the reasons for the interpretation of statutes

Statutory Interpretation

- Is another way judges make law, it refers to the process by which the courts interpret the words in an act of parliament to give the words meaning, they do not amend words

- A case must come before the court, and it decides whether the meanings of the words in an act apply to the dispute

- The judge interpretation can set a precedent that will be either binding or persuasive on other judges. In future cases the act and the precedent are read together and form law

- Therefore judges are law-making by restricting or extending the existing law to clarify certain situations, as words have their current meaning

Methods of Statutory Interpretation

If the meanings of words of an act are unclear, courts will find a way to apply the intention of parliament, at the time the act was passed, to the situation before them. This can be done by:

Intrinsic materials (inside the act)
- the words
- the long title
- the preambles
- headings
- schedules

Extrinsic materials (outside the act)
- parliamentary debates
- Hansard
- Reports from committees and law reform bodies
- Interpretation acts
- Halsbury's Law of England

Reasons for Statutory Interpretation

The meaning of words maybe ambiguous or vague as most legislation is drafted in general terms by the parliamentary counsel to cover all sorts of situations as they try to use language with the least amount of uncertainty, therefore courts need to interpret the words to decide on the meaning according to the interpretation of the act.

- eg. a regulated weapon has to be an article which is intended to be used for an offensive purpose not a studded

An act might be silent on an issue and the courts may need to fill in the gaps in legislation. Situations can arise that where not foreseen as circumstances change which may result in gaps.

- eg. under the Infertility Act, it is unlawful to give or receive a payment or reward in relation to a surrogacy agreement, however it does not state whether it is illegal to act as a surrogate mother for a friend

The meaning of the words can change overtime due to changes in circumstances such as medical technology. Due to the ability to medically change gender, the words ‘man’ and ‘woman’ may seen to have changed overtime.

- eg. the marriage act did not interpret the meaning of a ‘man’ and a ‘woman’ and in the Kevin case the court decided whether someone was a man or woman should be determined at the date of marriage

The act might not have taken into account future circumstance because it cannot cater for everything eventually that may arise, and therefore, a situation may occur the parliament did not consider.

- eg. the constitution gives the commonwealth the power to legislate over the ‘naval and military defence’ of the Commonwealth S51(vi). Id does not refer to air force because it was not envisaged at the time the act was drafted

Area of Study 3(c): The effect of interpretation by judges

Courts give meaning to the words in an Act of Parliament. Process:

- When a case comes before the courts

- The court must apply the law to the case

- The court cannot change the words but can give meaning through interpretation

Courts set precedents for future cases to follow. Why?

- To set a binding precedent for lower courts to follow unless appealed by a higher court and reversed

- To interpret the words in an act so that the act and interpretation are read together to form a precedent

- This can extend or change the meaning of the act

eg. Franklin Dam case – the scope of the act was changed by extending the meaning of the term 'external affairs' in the Constitution.

Courts may overrule or reverse a decision of courts.

The case can be taken to a higher court on appeal and the previous decision can be reversed and a new precedent set. As was in the Deing and Tarola case. However, if a case comes before a higher court, where there is a lower court precedent, the higher court can overrule the precedent.

Why would the courts be reluctant to do this?

- It may be seen to be a major change best left to parliament

- Parliament is able to investigate a whole area of law, not just the case before them

- Judges are reluctant as law-makers and therefore not responsible to the community for decisions they make

Parliament can cancel law made by courts.

If parliament believes the interpretation is not in line with its intention in passing the act, eg. rape in marriage case, parliament can cancel the statutory interpretation made by courts. Parliament can do this because Parliament is a supreme law-making body

Area of Study 3(d): The strengths and weaknesses of law-making through courts

Strengths / Effective law maker	**Weaknesses / Restrictions on law making**
Courts are independent of the political process and not subject to the whims of the electorate when making a decision as judges are appointed and not elected. This enables them to remain unbiased as they assess issues of fact and law in cases that come before them.	Courts are not an elected body and judges may be out of touch with current community values when making a decision. This conservatism may result in an outdated precedent being applied when there is a reluctance by judges to change the law, as was evident in the Rape in marriage case where the husband was found not guilty.
The courts are very flexible in changing the law in that the courts can change the law where is has become outdated, if a case is brought before the courts. By distinguishing, reversing or overruling past decisions, a court may change an established legal principle. eg. Studded-belt	A courts' ability to change law is restricted by the doctrine of precedent. It may be bound by decisions of an earlier case from a higher court in the hierarchy that is not able to be distinguished. Unless it is a novel case or High Court case, courts are bound by the doctrine of precedent.
The doctrine of precedent ensures a level of consistency in that each new case is decided in the same way as previous cases. This provides an element of certainty as people can look back to previous cases to give them some idea of how a court will decide a particular case	Finding the relevant precedent can be time consuming and expensive. Also conservative judges may be reluctant to depart from outdated precedents which may lead to injustice for the parties concerned.
Parliament can make law about a whole range of issues but may not cover every set of circumstances that could arise. The court fills in these gaps through Statutory Interpretation.	It takes time in filling in the gaps of legislation as a case needs to be brought to the courts, with the person directly affected by the issue. Also court decisions are made retrospectively (ex post facto – after the fact). Which means an action takes place and the courts decide whether its legal.
Courts can interpret words of an act of parliament to give a more just result. Meaning, that if meanings of words change overtime, Courts can meet these changes.	Parliament is sovereign and can override court-made law. Judges tend to be conservative and prefer to leave law-making to parliament. Eg. Trigwell case
Others: • Develop areas of law • Change law as the need arises	 • Can't investigate a whole area • Must wait for a case

Area of Study 3(e): Relationship between the courts and parliament in law-making

Courts apply and interpret the law made by parliament and subordinate authorities

The courts must apply the statutes, or delegated legislation, to the case before them. To do this, it is sometimes necessary for a court to interpret the meaning of the words of an act or piece of delegated legislation. Decisions about the meaning of the words in statutes form precedents that become part of the law to be followed in the future.

eg. The High Court was asked to interpret the words in the Constitution for the Franklins Dam Case. It expanded the meaning of the words 'external affairs' to refer to any area covered by an international treaty. This gave the Commonwealth parliament the right to legislate in an area the Tasmanian Government felt was a residual right.

Parliament can change or confirm laws made by courts

Parliament is the supreme law-making body within its jurisdiction and can make law that confirms a precedent set in a court. It can also change the law to override a decision that has been made through the courts because:

- On occasions, the courts interpret the meanings of the words in a statute in a way that was not the intention of parliament, or

- That it doesn't reflect the current meaning of the act

- Courts also sometimes interpret the common law in a conservative way that no longer reflects the current values in the community

Parliaments pass acts to establish courts

Parliament has the power to establish courts and delegated bodies. It can abolish and amend law made by those bodies. Each court and tribunal owes its existence to an act of parliament eg. the Supreme Court Act 1986 (Vic).

Consistency and stability requires that courts are not abolished although their powers may be amended eg. an increase in their civil jurisdiction. Under the Constitution, only the High Court has power to interpret the Constitution, this cannot be changed by Parliament.

Parliament can also appoint but not dismiss judges.

Court decisions may influence changes in the law by Parliaments

- Courts are not able to change the law made by parliament, but statements within a court decision may influence parliament to change the law

- Also, a progressive decision reached by the courts could alert parliament to the need for a major change in the law

Courts may also be too conservative and reluctant to change the law by setting a new precedent, leaving it to parliament. eg. The Trigwell case, the High Court favored the insurance commission. However, in their obiter dictum, they noted that, 'a duty of care ought to be owed by stock owners and that parliament ought to change the law'. As a result, the Victorian parliament adopted the Wrongs (Animals Straying on Highways) Act 1984.

Area of Study *(Key Knowledge)*	Assessment of *Key Skills* for Outcome 1
1. Criminal cases and civil disputes a the reasons for the existence for the court hierarchy b the functions and original and appellate jurisdiction of the following courts: Magistrate's Court, County Court, Supreme Court, High Court, Children's Court, Coroner's Court, Family Court; c alternative methods of dispute resolution: negotiation, mediation, conciliation, arbitration; d the effectiveness of the alternative dispute resolution methods e the reasons for the existence of tribunals; f the jurisdictions of the Victorian Civil and Administrative Tribunal (VCAT) lists deal with the following areas: anti-discrimination, residential tenancies and disputes between consumers and traders in relation to small claims; g the strengths and weaknesses of the operation of the courts, tribunals and alternative methods of dispute resolution.	**Assessment Task – Short answer tests** ***Marks allocated = 40*** *Task:* Describe and evaluate the effectiveness of institutions for the resolution of civil disputes and the adjudication of criminal cases and of alternative dispute resolution methods. Each test will consist of short-answer questions and may include stimulus material. Short-answer questions will be similar to those contained in the end of year examination. *Conditions:* Both tests will be conducted over 40 minutes plus reading time. <u>Test 1 (a-d)</u> *(10% of overall result)* *Date: (Term 2)* ***Wednesday 20 June*** ***(7.40 – 8.25)*** <u>Test 2 (e-g)</u> *(10% of overall result)* *Date: (Term 3)* ***Wednesday 1 August*** ***(7.40 – 8.25)***

Area of Study 1(a): Reasons for a Court Hierarchy

Our legal system operates with a court hierarchy where the courts are graded, or ranked, in order of importance to determine the severity of the cases they hear, with the Magistrates' Court at the bottom dealing with less serious issues and the High Court at the top dealing with more complex issues.

Doctrine of precedent

The Doctrine of precedent provides consistency in that similar cases are treated in a similar manner. It also provides predictability, in that solicitors are able to inform clients on the law and the likely outcome. This system would not be possible without a hierarchy of courts because there would be no higher courts to make precedents for lower courts to follow.

However precedent may be distinguished or not appropriate.

Appeals

Someone who is dissatisfied with a decision can, if there are grounds to appeal, take the matter to a higher court. This provides fairness and should allow any mistakes to be corrected. If there where no higher courts in the court hierarchy, a system of appeals could not operate.

However it could be said that there a too many appeals.

Administrative convenience

This allows for more efficient distribution of cases and legal personnel according to their seriousness. The more serious and complex cases are heard in the higher courts as these take longer to hear and require judges who are experts on complicated points of law. Minor cases can be heard quickly and less expensively in lower courts. This reduces delays by allocating appropriate time to the relevant court.

However more administrative personnel are needed to run different courts.

Specialisation

Within the system of hierarchy of courts, the courts have been able to develop their own areas of expertise. The lower courts are familiar with smaller cases that need to be dealt with quickly and efficiently. The higher courts develop expertise in hearing complex cases involving major crimes or large sums of money.

However there are more courts

Area of Study 1(b): The functions and jurisdiction of courts

Magistrate's Court

The Magistrates' Court is the lowest court in the court hierarchy. It is presided over by a magistrate and there is no jury. There is no appellate jurisdiction. The magistrate decides on:

- the facts of the case and relevant law
- In a criminal case on the guilty and not guilty and the appropriate sanction
- In a civil case who is in the wrong and the remedy

Civil Jurisdiction

The Magistrates' Court hears all claims up to $100,000 eg. contracts. It can also act as a Family Court in certain matters eg. urgent injunctions and child support agents. If the claim is less then $10,000 then the dispute will go to arbitration. Arbitration is a method of resolving disputes without the formal process.

Criminal Jurisdiction

The Magistrates' Court hears five matters:

Summary Offences
These are minor criminal offences eg. road traffic offences

Indictable Offences hear summarily
These are serious offences that can be heard before a judge and jury in superior courts eg. burglary, handling stolen goods. Conditions:

- Either side may apply for the hearing
- The court must be satisfied it is suitable
- The defendant consents to it being dealt with summarily

Committal Hearings
Committal or preliminary hearings are pre-trial procedures for indictable offenses. Their aim is to establish a prima facie case, i.e. on the face of it, one with enough evidence to support a conviction. The DPP has the power to overrule the decisions of a magistrate.

Warrants
Some warrants may be issued by the Magistrates' Court eg. warrant to arrest, seize property.

Bail Applications
The Magistrates' Court may hear bail applications. This allows for the defendant to go free until the time of trial

County Court

Original Civil Jurisdiction

- Hears all civil claims for personal injury
- Personal actions where the amount claimed does not exceed $200,000 (unless the parties consent in writing to exceed the limit)
- Matters specified by an act of parliament

The judge, or jury of six (8) if present, decides on the facts in favour of one party on 'the balance of probabilities' and the amount of damages awarded.

Original Criminal Jurisdiction

Most indictable offences (eg. rape) are heard in the County Court, except serious indictable offences (eg. murder). When the accused pleads not guilty, the matter is heard before a judge and jury of twelve (15).

The jury decides wether the accused is guilty or not and the judge instructs the jury on the relevant law, sums up the evidence to the jury and sentences the accused if found guilty.

Appellate Civil Jurisdiction

The County Court does not have the jurisdiction to hear appeals in civil matters except when an act specifically provides for it to be heard.

Appellate Criminal Jurisdiction

From the Magistrates' Court against a conviction or against the sentence

Supreme Court – Trial Division

Original Civil Jurisdiction

- Judge alone or jury of six (8) if the parties agree
- Unlimited civil jurisdiction and can hear civil claims claiming any amount

Original Criminal Jurisdiction

- Judge alone or jury of twelve (15) if the defendant pleads not guilty
- The most serious criminal cases, eg . murder, treason

Appellate Civil Jurisdiction

- The Magistrates' Court on a point of law
- The Victorian Civil and Administrative Tribunal (VCAT)

Appellate Criminal Jurisdiction

- The Magistrates' Court on a point of law

Supreme Court – Court of Appeal

- The Court of Appeal has no original jurisdiction
- The court usually sit with three judges, but can have five if the matter is of 'significant importance'

Appellate Civil Jurisdiction

The grounds of appeal from the County or Supreme Courts are:

- A point of law, question of fact, the amount of damages
- From VCAT when constituted for the purpose of making and order by the president or vice-president

Appellate Criminal Jurisdiction

A person found guilty in the County or Supreme Courts may appeal on the grounds of:

- A point of law, a conviction, severity of sanction

The DPP may appeal against the leniency of the sentence

The High Court

Original Jurisdiction

Single Judge
- Matters arising out of laws made by the Commonwealth
- Under a treaty where the Commonwealth is a party
- Between states or residence of different states
- Where an injunction is sort against an officer of the Commonwealth
- Criminal cases such as treason and sedition

Full Court of the High Court (two or more justices)
- Matters involving special leave to appeal

Full Bench of the High Court (seven justices)
- Interpretation of the Constitution

Appellate Jurisdiction

Two main grounds where an appeal will be granted:

- Where a question of law of public importance is involved (eg. Marbo case)
- Where the interests of the administration of justice require consideration of the matter by the High Court (eg. Dietreach case)

Full Court of the High Court
- A single justice exercising original jurisdiction on the High Court
- Any other federal courts or courts exceeding federal jurisdiction
- State Supreme Courts

Full Bench of the High Court
- The court is invited to depart from one of its previous decisions
- Courts consider the principle of law to be of major importance

Children's Court

Family Division

The role of the Family division is to deal with:

- Protection applications for children 17 who may be in need of care
- To hear applications for intervention orders, where any party is under the age of 18 years

Proceedings are conducted in an informal matter. The standard of proof is on the balance of probabilities. This is to ensure that the proceedings are comprehensible to the child.

Example of matters dealt with by the Family division of the Children's Court:

- Permanent care order
- Supervision order
- Interim protection order

Criminal Division

The criminal division hears and determines charges against young people aged between 10 and 17 years at the time of the alleged offence. If the young person has turned 19 by the time their court case is commenced in the Children's Court, the case will be transferred to the Magistrates' Court.

Example of matters dealt with by the Criminal division of the Children's Court:

- Summary Offences
- All indictable charges heard summarily except those causing death
- Committal proceedings
- Bail applications

Coroner's Court

Its most important role is to identify circumstances of death that might be avoided in the future. It can lead to public debate and changes in the law. It is bound by rules of evidence but not rules of procedure. It is an investigative court therefore not adversarial in nature. This is because the aim is to find the truth ie. cause of death.

Jurisdiction

The Coroner's Court conducts inquests into reportable deaths and fires.

Deaths

A reportable death is one where the body must be found in Victoria, the death must have occurred in Victoria, the person must have resided in Victoria at the time of death, or the cause of death occurred in Victoria and death was unexpected, unknown identity...

Fires

Fires occurring in Victoria when they involve death, serious injury, significant damage to public property, or when there is community concern about the fire.

Family Court of Australia

Original Jurisdiction

- Matters arising under the Family Law Act such as divorce, parenting orders
- Matters under other acts such as the Marriage Act 1961 (Cth)
- Matters that have been referred to it by the state parliaments eg. Parental responsibility relating to the residence of, contact with and maintenance of ex-nuptial children

Appellate Jurisdiction (Full Court of the Family Court)

Appeals tend to come from:

- Single judge of a family court
- Any family court

Area of Study 1(c): Alternative Methods of Dispute Resolution: Negotiation, Mediation, Conciliation, Arbitration

Negotiation

Negotiation is the process used by two or more parties when they attempt to reach an agreement about their dispute. This is for minor disputes between consumers and traders or between neighbours, therefore there is discussion and cooperation to reach and agreement between individuals.

Negotiation is not legally enforceable, it is used because:
- Inexpensive compared to other courts
- Less time consuming
- Maintain a good relationship between parties

It depends on the cooperation of the parties therefore there is usually no legal representation. One advantage of having legal representation is that the lawyer will make sure you have a reasonable result. One disadvantage of having legal representation is the cost, just for minor disputes.

Mediation

Mediation is a cooperative method of resolving disputes and is widely used in our legal system. It is a tightly structured, joint problem-solving process in which the parties in the conflict sit down and discuss the issues involved, develop options, consider alternatives and reach an agreement through negotiation, with the assistance of mediators. Mediation is not legally binding

Mediators do not interfere and do not offer solutions, rather they allow the parties to explore options and resolve the dispute by reaching a mutually acceptable agreement.

Mediation is different from a court hearing, as it allows the parties to have their say without being restricted by rules of evidence and procedure, and without having to prove fault on the other side.

Mediation is not appropriate when there is a gross imbalance between the parties in terms of power and resources, rather appropriate when an ongoing relationship is required.

Conciliation

Conciliation is the process of dispute resolution with the assistance of a third party, within which the parties reach a decision between themselves. The third party does not make the decisions, but listens to the facts, make suggestions and assists the parties to come to their own decision.

The decision made by the parties is not binding, but is more likely to be followed because it has been made in front of a third party.

Uses of Conciliation:
- Equal Opportunity Commission may be required to conciliate between parties to the dispute
- VCAT can order the parties to a dispute to take part in a compulsory conference to identify and clarify the nature of the issue and promote a settlement
- Pre-hearing conference to try to reach an out-of-court settlement or to resolve complicated issues prior to going to court

Arbitration

Arbitration is when the parties refer the dispute to a third party to make a decision. It tends to be more formal then mediation or conciliation, although not as structured as a court hearing that leads to a judicial decision. The parties have previously agreed to follow the decision. The arbitrator makes an award or decision in favour of one party. The order is binding. It is mainly used for commercial disputes.

Arbitration is used in the Magistrates' Court for civil claims under $10,000. This avoids the need for legal representation, although it is acceptable for the parties to be legally represented if they wish. It avoids the formality of the courts and strict rules of evidence and procedure. It can also save time and could be less costly.

Area of Study 1(d): The effectiveness of Alternative Dispute Resolution Methods

About 85% of all disputes that use Alternative Dispute Resolution (ADR) methods reach an argument over some or all sorts of issues so it is effective. However, as with all aspects of the law there are advantages and disadvantages associated with this system.

Effectiveness/Advantages

Generally cheaper than courts eg. Mediation at the dispute settlement centre of Victoria (DSCV) is free, and the matter is usually dealt with more quickly as there a fewer people involved and legal representation is not always necessary.

Much less formal than courts as the strict rules of evidence and procedure are not followed and the setting is usually in a more suitable venue than a court room, so that parties to a dispute are more comfortable to tell their side of events and reach an agreement.

Not adversarial as parties attend on a voluntary basis which indicates an intention to resolve the dispute, or at least to clarify the issue, and they can leave at anytime. Both parties come away feeling as they have won, win-win situation.

More able to address the needs of the parties by identifying issues and maintaining an ongoing relationship, rather than the focus on who is right or wrong. This is more likely to reach an outcome that will be followed because the parties have reached the decision together and will be more committed to it.

Ineffectiveness/Disadvantages

Other than arbitration, the decisions made through ADR methods are not binding therefore there is no guarantee that the agreement will be followed through by the parties.

In some cases, ADR methods my not be timely as the process can mean going through a number of stages. If a decision can not be reached it may need to go to a court anyway, delaying the final resolution and adding to any subsequent costs in the matter.

One party my compromise too much in trying to be co-operative, or maybe intimidated or pressured into an agreement by the other party who is stronger or manipulative, particularly without legal representation.

ADR is not for all. One party may refuse to attend the resolution process as there is no compulsion to attend in most cases.

Area of Study 1(e): The reasons for the existence of tribunals

The tribunal system was introduced to reduce the workload of traditional courts whilst working in tandem with them to create a system that is more accessible and less adversarial than the traditional system of dispute resolution. As with the courts, the decision of the tribunal is binding. Unlike the courts, there is restricted access to appeals. The Act of Parliament is the Victorian Civil Administrative Act 1998 (Vic).

Specialisation

Tribunals operate in specialised jurisdiction eg anti-discrimination list. This allows the parties to have their disputes heard before members of the tribunal who have developed a high level of understanding in one area of law and are fully versed in their area of expertise.

Low cost of proceedings i.e. legal costs

Many proceedings, the parties only need to pay a small fee to file a claim. Most fees are $33.30 with no fee payable in the Anti-discrimination List. The parties tend to represent themselves, so the cost is less than going to court. Also legal representation is either discouraged or not allowed.

Less delay in hearing a matter

A matter heard in the tribunal can be heard in less time than a matter in court. It is usually not necessary for the parties to wait for their case to come up. Some cases may take 15 minutes to resolve, while others may take a day. In exceptional circumstances, it may take several weeks to hear a case due to the complex nature of the issues involved.

Legal procedures are less formal

Tribunals encourage the process of mediation and conciliation for the early resolution of disputes, in some instances it is mandatory. Hearings are less formal than the courts and are not bound by strict rules of evidence and procedure. Telephone and video conferences can be held in the case of absence, as well as entirely only the use of documents.

There is less emphasis on the adversarial process

Tribunals use a more conciliatory process than an adversarial process used by courts, where parties fight to win. Parties may be directed to attend a compulsory conference or mediation. The decision is binding on the parties which bring with it a degree of certainty and appeals are limited by a point of law.

Area of Study 1(f): The jurisdictions of the Victorian Civil and Administrative Tribunal (VCAT) lists

VCAT

VCAT was established to incorporate the work of a number of tribunals and to overcome the problems of having too many separate tribunals. This would lead to a reduction in administrative cost, confusion and duplication

Dispute Resolution

VCAT is considered to be an informal method of dispute resolution as the formal rules of evidence and procedure used in courts do not apply, although a person attending the tribunal can give evidence, and will be given the opportunity to examine, cross-examine and re-examine the witnesses. Some proceedings can be conducted via telephone conference or even entirely on the basis of documents without the physical appearance of the parties

Disputes may be resolved by three Resolution methods

Mediation - see AOS 1(c)

It gives the parties the opportunity to explore the reasons for the dispute and to maintain a relationship with the other party. It is the preferred form of ADR. If successful, the mediator will notify VCAT which will make out the necessary orders to give effect to the agreed settlement.

Compulsory Conference

The tribunal may require the parties to attend one or more pre-hearing compulsory conferences or directions hearings. The aim is to:

- identify and clarify the nature of the issue in dispute
- promote a settlement
- identify the question of fact and law to be decided by the tribunal
- allow directions to be given concerning the conduct of the proceedings

The VCAT member expresses a view to the parties as to the likely outcome if the matter were to proceed to a hearing.

Hearings

In a hearing, the parties are given the opportunity to present evidence, question witnesses and make submissions. The member of VCAT adjudicating the dispute will make a legally binding decision regarding the case. The only grounds of appeal is on a question of fact and legal representations is only allowed for claims above $10,000.

Anti-Discrimination List

The list deals with matters relating to discrimination on certain grounds or attributes and in certain places.

Jurisduction

The jurisdiction of this list is set out in the Equal Opportunity Act 1995 (Vic). It deals with discrimination on certain grounds such as:

- age: young, old
- impairment: disease, disorder, loss of body parts
- martial status: single, married, divorced, widowed
- race: colour, descent, nationality, ethnicity
- sex: male, female

Places of unlawful discrimination under this act include:

- employment: including who is offered employment, access to training programs, denial of promotion, terms of employment
- education: refusal of admittance, terms of admittance, denying or limiting a students' access to benefits
- sport: refusing or failing to select a person in a sporting team, or excluding a person from participation, exclusion from participation where strength, stamina or physique is not relevant

The act also makes it unlawful to harass a person sexually in areas such as employment, education or accommodation. Sexual harassment consists of unwelcome comments about a person's sex life or physical appearance, suggestive behaviour, unnecessary familiarity, suggestive comments, physical contact, indecent assault or rape.

Dispute resolution

- Parties will be directed to attend a directions hearing to clarify the dispute and prepare the case for hearing.
- Parties may also be referred to mediation as the member of the list ties to assist the parties to reach a resolution.
- The tribunal hears both sides, each party is given the opportunity to ask questions including the member.
- Legal representation is allowed if permitted by the tribunal or if all parties agree

Orders

- To stop discriminating
- To pay compensation

- To preform a specified act to redress any loss, damage or injury suffered by the complainant as a result of the discrimination

Appeals

Appeals are granted only on a point of law. If it was made by the president or vice-president of VCAT, it goes to the Court of Appeal. All others to the Supreme Court Trial Division.

Disputes between consumers and traders – Civil Claims List

Jurisdiction

The list deals hears disputes between consumers and traders in regards to small claims under $10,000 as set out in the Fair Trading Act 199 (Vic), and some disputes under the Motor Car Trades Act 1986 (Vic). The filing to make a claim is $33.30.

Dispute Resolution

Under the Fair Trading Act 199 (Vic), disputes that could arise are claims for negligence, nuisance or trespass that relates to the supply or possible supply of goods or services.

Under the Motor Car Trades Act 1986 (Vic), disputes that could arise are claims relating to a purchase of a used car, claims against a motor car trader where the odometer is false or description of car is wrong.

The process undertaken is the member tries to resolve the dispute without a full hearing. If there is no agreement the hearing begins. Parties and witnesses give evidence under oath. The members decision is binding, and reasons for the decision are not given. Legal representation is not allowed for claims under $10,000.

Orders

- Require a party to pay money
- Require a party to preform work to rectify a defect in the goods or service
- Dismiss the claims

Appeals

Appeals are granted only on a point of law. If it was made by the president or vice-president of VCAT, it goes to the Court of Appeal. All others to the Supreme Court Trial Division.

Disputes relating to residential tenancies – Residential Tenancies List

Jurisdiction

The list deals hears disputes relating to tenancy agreements including agreements in relation to caravan parks and rooming houses where the amount claimed does not exceed $10,000 under the Residential Tenancies Act 1997 (Vic) and the Landlord and Tenant Act 1948 (Vic).

Landlords, tenants, rooming-house owners, residents, caravan park owners and caravan owners can apply for the Residential Tenancies List.

Types of disputes that may arise are:

- Tenants may owe rent
- Tenants may claim that maintenance work has not been carried out by landlord
- Tenants may refuse to vacate the premises when the landlord requests

Dispute Resolution

The process undertaken is conciliation first. If that does not work, the member will listen to both sides. The tribunal will consider the evidence. Tribunal is not bound by strict rules of evidence or procedure. Once evidence is given, the tribunal will make a decision and give reasons for the decision.

Legal representation is generally not allowed unless the proceedings are for a possession order; the other party is a minor; the tribunal is satisfied that the other party should be represented; the other party is a body corporate or a legal practitioner.

Orders

- Ordering a tenant to pay arrears of rent
- Ordering a tenant to return goods taken from the premises
- Ordering a landlord/agent or tenant to carry out repairs to the premises

Appeals

Appeals are granted only on a point of law. If it was made by the president or vice-president of VCAT, it goes to the Court of Appeal. All others to the Supreme Court Trial Division.

Area of Study 1(g): Reasons for a Court Hierarchy

Courts – Strengths

Court decisions are binding and enforceable through the courts

This means that both parties have received equal treatment before an independent decision maker and must accept that decisions as final, although in some instances it can be appealed against, if there are grounds for appeal.

The use of legal representation ensures the parties are represented equally and able to argue their case

For the adversary system to operate effectively there should be legal representation as it allows both parties the opportunity to present their case giving their version of the events. If they can not afford a lawyer they may be able to access one through legal aid.

Rules of evidence and procedure ensure that all parties are treated in a fair manner.

This ensures equal treatment for all. Only admissible evidence is allowed to be heard so that irrelevant or inadmissible evidence will not influence the decision maker. Both sides have the right to question and cross-examine witnesses. Both sides have the right to present the best case they can.

Ability to have a trail by jury

In indictable criminal cases and in some civil cases parties have the right to be tried by their peers. This ensures that the prevailing values of societies are recognised as juries tend to decide on issues based on current values not outdated precedents.

Courts – Weakness

Going to court is expensive

The cost of the court fees and the need for legal representation may put it out of reach for many people denying them access to mechanisms for the resolution of disputes as legal aid is not readily available, particularly in civil matters.

The court depends on the adversarial process whereby both sides fight to win a case.

This means that there has to be a winner and a loser and the outcome of the case can depend on the quality of the legal representation. A more experienced barrister may be better prepared and present the case in the court more effectively. It also means that the truth may not come out as both sides will present the evidence that is favourable to their side.

There is a need for legal representation

Someone who is not legally represented is clearly disadvantaged and may be denied a fair hearing by not receiving equal treatment as they would not have the same opportunity as their opponent. They would be more likely to be convicted is criminal matters and the sanction may be more severe. In civil matters the size of the remedy awarded to or against a party may be commensurate with the quality of the representation.

Delays are common

Parties are expected to present the best case possible for their side. It can be very time consuming to collect evidence, organize legal representation, witnesses and documents. In criminal matters, this could be made more difficult if the accused is on remand. In criminal matters, pre-trial procedures can take up a great deal of time. Eg. The exchange of documents.

Tribunals – Strengths

Tribunal decisions are binding and enforceable through the courts

See courts

Cheaper methods of dispute resolution

The low application fees, (explain) and the ability of parties being able to represent themselves (explain) make tribunals a more cost affective alternative to courts giving individuals greater access to the legal system.

Speedier resolution

Tribunals offer a faster method of dispute resolution . VCAT aims to hear disputes within30 days, and hearings range from 15 minutes to a few hours. Applications can be completed online and the lack of legal representation also speeds up proceedings. Parties are encouraged to resolve the dispute themselves through mediation, compulsory conferences or directions hearings. Allocated hearing time.

Informal atmosphere

Due to the absence of formal rules of evidence and procedure, parties are less intimidated by proceedings. They are encouraged to tell their side of the story in an uninterrupted manner where the truth is more likely to come out and the parties are more likely to maintain a relationship.

Tribunals – weaknesses

Tribunals can only hear civil disputes

Almost all criminal cases go through the courts therefore limiting access to those who have been charged with an offence. Tribunals are also not really appropriate to settle large civil claims leading to delays in the legal system as matters are not delt within a timely matter

Involvement of the parties.

Some people may not feel confident to present their case without a legal representation. The mediation process or compulsory conference may not be useful if the parties have an unequal relationship resulting in an advantage to one side.

The tribunal is adversarial whereby both sides fight to win a case.

Even though ADR is encourage it is not always successful and there has to be a winner and a loser, and the outcome of the case can depend on the quality of legal representation, if it is allowed, or the ability of the parties to present their case. It also means that the truth may not come out as both sides will present their evidence that is favourable to their side. Tribunals do not allow for an ongoing relationship between the parties involved.

Limited access to appeal

Appeals can only be made to a point of law to the supreme court or, if the tribunal was presided on by the President or Vice-President, to the Court of Appeal (should have the right to go through further)

Alternative Dispute Resolution – Strengths

Generally cheaper than litigation

Eg Mediation at the Dispute Settlement Centre of Victoria (DSCV) is free, and the matter is usually delt with more quickly as there are few people involved, and legal representation is not always necessary and sometimes restricted.

Less formal than courts and therefore less intimidating

Much less formal as there are no strict rules of evidence and the procedure is organized so that parties to a dispute are more comfortable to tell their side of events to reach an agreement.

Not adversarial as parties attend on a voluntary basis

This indicates an intention to resolve the dispute, or at least to clarify the issues, and they can leave at anytime. It does not allocate blame, rather it aims to find a solution to the issue which is acceptable to both sides. Both parties can come away from the process feeling as if they have won, what is known as a "win – win" situation.

Helps to preserve relationships

More able to address the needs of the parties by identifying issues and maintaining on ongoing relationship rather than focus on who is right or wrong. This is more likely to reach an outcome that will be followed because the parties have reached the decision together and will be more committed to it..

Alternative Dispute Resolution – Weakness

Other than arbitration the decision is not binding

The parties are therefore under no obligation to follow the agreement and the dispute may still end up in court, prolonging the issue.

Involvement is voluntary

ADR is not for all. One party may refer to attend the resolution process as there is no compulsion to attend in most cases. Parties may refuse to attend or withdraw at anytime. ADR will only work if both parties are prepared to co operate.

ADR methods may not be timely

In some cases the process can mean going through a number of stages. If a decision can be reached it may need to go to court anyway. Delaying the final resolution and adding to any subsequent costs in the matter.

One party may compromise too much

In trying to be cooperative, or may be intimidated or pressured into an agreement by the other who is stronger or manipulative particularly without legal representation..

Area of Study ***(Key Knowledge)***	**Assessment of *Key Skills*** **for Outcome 2**
2. Court processes and procedures *Criminal Procedure* a the elements of an effective legal system: entitlement to a fair and unbiased hearing, effective access to mechanisms for the resolution of disputes, timely resolution of disputes and the recognition of prevailing values and basic human rights; b criminal pre-trial procedures, including examples of police powers and the rights of individuals, bail and remand, committal and directions hearings; c criminal trial procedures including burden of proof and the purpose of sanctions (including examples of sanctions); *Civil Procedure* d Supreme Court civil pre-trial procedures including: letter of demand, writ, pleadings, discovery and directions hearings; e civil trial procedures including burden of proof and the purpose of remedies (including examples); f the problems in criminal and civil procedures and the purpose of possible solutions;	**Assessment Task – Folio of exercises (2)** ***Marks allocated = 60*** *Task:* Explain the elements of an effective legal system; evaluate the processes and procedures for the resolution of criminal cases and civil disputes and discuss their effectiveness; describe and compare the adversary system with the inquisitorial system of trial; review the operation and effectiveness of the jury system; and assess the problems in gaining access to the law. Each exercise will consist of short-answer questions and/or extended response questions and may include stimulus material. These questions will be similar to those contained in the end of year examination. *Conditions:* The exercises will be closed book conducted over 50 minutes and 70 minutes plus reading time respectively. Test 1 (a-f) *(12.5% of overall result)* *Date: (Term 3)* ***Wednesday 29 August*** ***(7.30 - 8.25)***

Area of Study 2(a): The Elements of an Effective Legal System

Fair and Unbiased hearing

Parties to a dispute are governed by the same rules of evidence and procedure eg. to cross-examine witnesses. Equal treatment which means an equal opportunity to present their own case and have legal representation. The presumption of innocence allows for a fair hearing. Also the standard of proof is consistent for all.

Without discrimination all people are treated the same before the law. Independence of the judiciary allows for an unbiased hearing. The judiciary should be seen as totally independent of all prejudices.

Effective Access to Mechanisms for the Resolution of Disputes

The courts are effective as the court decisions are binding and enforceable through the courts. Legal representation also ensures the parties are represented equally and able to argue their case. Rules of evidence and procedure ensure that all parties are treated in a fair manner. Specialisation in the courts means that appropriate cases are heard by expert personnel

Tribunals offer a cheaper method of dispute resolution, as there are low application fees and parties may represent themselves. Tribunals offer a faster method of dispute resolution, as they aim to hear cases within 30 days and hearings from 15 minutes to a few hours. Also there is an informal atmosphere as there is an absence of formal rules of evidence and procedure found in the courts.

Alternative Dispute Resolution (ADR) for resolving civil disputes, can overcome some of the problems experienced through taking matters to court. They are more accessible, cheaper, less formal and intimidating, with fewer delays.

Timely resolution of disputes

Criminal – Mention hearing

It is a hearing in the Magistrates' Court when the accused can indicate how he or she is going to plead. If the defendant is pleading guilty, the matter can be dealt with immediately. If pleading not guilty, it is postponed to a contest mention hearing. This reduces delays as the magistrate can commit the defendant to trial if pleading guilty.

Criminal – Hand-up brief

The hand-up brief method of committal proceedings is quicker than a full committal hearing because it mainly relies on the written evidence, rather than the lengthier process of cross-examination of witnesses.

Civil – Directions hearings

Directions hearings allow parties to make admissions that will speed up the process.

Civil – ADR

ADR allows for parties to take their dispute elsewhere and allow for a speedier settlement.

The recognition of prevailing values and basic human rights

Some values have changed over time such as the sanctity of life – murder. Other values have resulted in a change in the law eg. protection of children – child abuse and domestic violence.

Some basic rights we have include the right to be treated as innocent until proven guilty; the right to silence; sentences that reflect community values; double jeopardy; the recognition of cultural differences; recognition of rights of victims.

Area of Study 2(a): The Elements of an Effective Legal System – Criminal Procedure

Elements to a Fair and Unbiased hearing

Rules of evidence – hearsay is excluded as is opinion unless an expert

This is fair and unbiased as these are excluded to reduce the opportunity of the court being influenced by irrelevant and perhaps incorrect information

Rules of procedure in questioning a witness

This is fair as in criminal trials, the witnesses are able to be questioned by the prosecution and the defence in order to bring out the truth. The examination-in-chief by the other lawyer brings out the truth as witnesses have little idea about what they are going to ask.

Right to silence during police questioning

This is fair as it avoids the situation where the accused might say something in a nervous state that could be misleading. Also they are not obliged to say anything without their lawyer being present to protect their rights. It is the police's job to prove the case not the defendant's to prove their innocence

Jury system – the accused is tried by his peers

This is unbiased as it provide a situation where the accused is tried by his or her peers, thereby making it a fairer situation and less likely to be biased as it reflects community values

Effective Access to Mechanisms for the Resolution of Disputes

Different courts according to the severity of the crime

This provides access to mechanisms as an accused is tried according to the seriousness of the crime they committed, eg. serious indictable offences such as murder are tried in the Supreme Court.

Legal aid

This provides access to mechanisms as people who can't afford legal representation may be able to get some assistance through Legal aid

Timely resolution of disputes

Directions Hearings

This is timely as directions hearings enable issues to be resolved so they do not need to be discussed during the trial. This allows only relevant information to be heard during the trial and it also allows the parties to assess the strength of the arguments, which may lead to a change in plea.

Committal Hearings

These are held to assess whether a prima facie case exists. This is not timely as the prosecution need to gather all the evidence together and it must be of sufficient weight to support a conviction. The committal hearing and the trial itself way be seen as two hearings on the same crime, which will prolong the outcome of the case.

The recognition of prevailing values and basic human rights

A person cannot be jailed without being brought before the courts

This reflects prevailing values and basic human rights as everyone is presumed innocent until proven guilty, so it would be wrong to put someone in jail before they have been in court and been proven guilty.

A person can only be questioned for a reasonable time

This reflects prevailing values and basic human rights as it stops people becoming so tired during a police questioning that they confess to a crime they have not committed. Also it prevents people being held in custody for many days, just to be questioned by the police.

Area of Study 2(b): Criminal pre-trial procedures

Police powers and the rights of individuals

Police questioning

The police can question a suspect for a reasonable amount of time before the suspect is released unconditionally or on bail or brought before the Magistrates' Court. They can also demand for a name and address of a person who is suspected on reasonable grounds of having committed an offence or being about to commit an offence.

Suspects are entitled to remain silent when being questioned by the police, other than give their name and address when required. Suspects also have the right to stay mute and not be questioned, or cross-examined during their trial. A suspect has the right to communicate to lawyers, family and friends before being questioned by police.

Fingerprinting

The police can take fingerprints if the suspect is suspected, on reasonable grounds, have committed an indictable offence, some summary offences, has been charged with an offence or they have been summonsed to answer to a charge for an indictable offence or a summary offence.

The police must inform the suspect of the purpose of which the fingerprints will be used, the offence that the person is believed to commit, that the fingerprints may be used in evidence in the court, that reasonable force may be used to obtain the fingerprints and that the fingerprints will be destroyed within six months if found not guilty or charges dropped.

Searches

A police officer may obtain a warrant to search, from the magistrate, if it is believed that there are stolen goods, goods that might be evidence of a crime or the goods might be used in a crime.

A police officer may search a person without a warrant if the officer lawfully arrests the person and the officer reasonably believes that the person is in possession of stolen property, drugs or a weapon.

Bail and Remand

Bail is the release from custody of a person accused of a crime and awaiting a hearing or trial, on the undertaking that the person will attend the hearing or trial. The aim of granting bail is to allow the accused person time out of custody to prepare their case. Someone who is not granted bail will be kept in remand until the trial.
A police officer, Magistrate or bail justice can grant bail. Conditions of bail and include regular reporting to police stations or a surety who will guarantee that they will attend court.

When can bail be refused

- Charged with murder, treason or arson causing death
- Already in custody for another crime
- Charged with drug trafficking

When granting bail the defendant's past history, character, home environment, possible hardships that might be caused and the seriousness of the crime will be considered. There is right to appeal against a refusal of bail to a higher court.

If the person is later found guilty, the time in remand will be deducted from any prison sentence given. However, someone who is found not guilty may be entitled to compensation, this is very rare.

Committal Hearing

A committal hearing is held in the Magistrates Court for indictable offences prior to a case going to trial in the County or Supreme Court. The aim of this is to:

- Clarify issues prior to attending trial and thereby avoid taking a matter to trial where the evidence is flimsy
- Determine whether a prima facie case exists, that is whether the evidence is of sufficient weight to support a conviction in a higher court
- Allow the defendant to see the prosecution's evidence against them

Types of committal hearings:

- The traditional method relies on oral evidence

- The hand-up brief was introduced as an alternative to committal proceedings to speed up the process by the use of written statements. It is served on the defendants to inform him of the committal mention date. It contains a copy of the charge sheet, sworn statements, documents, photographs and exhibits to be used in evidence

Steps of committal hearings

- A special mention hearing is held to set a timetable of events
- A committal mention hearing is conducted after the defendant has received the hand-up brief
- A contested committal mention hearing is held where leave has been granted for witnesses to appear to give oral evidence

Plead:

- If the defendant pleads guilty, the Magistrate can commit him to the County or Supreme Court without continuing the committal hearing
- If the defendant pleads not guilty, he is then either discharged or committed for trial after the committal hearing

Directions Hearings

Directions hearings are hearings that are held before a full trial so that the court can give directions to the parties about how the action should proceed. This can be at the instigation of the court or on the application of the party.

Parties are encouraged to identify areas that are not in contention, i.e. make admissions, and directions can be given on points of law and issues can be clarified.

They were introduced due to the lack of funds available for legal aid. The demand for legal aid has increased and the state government has taken steps to try to reduce the costs of criminal procedures for all concerned.

The purpose of a directions hearing is to:

- Make the whole process quicker
- Make the process shorter for the accused and therefore less expensive
- Reduce pressure on the court system

At the hearing parties will provide information such as:

- Estimated time needed for the trial
- Number of witnesses to be called
- Whether the parties will be legally represented

Area of Study 2(c): Criminal trial procedures and sanctions

Burden of proof

The burden of proof relates to the party that has the responsibility to prove the facts of the case, also referred to as the onus of proof. In criminal cases the burden lies with the prosecution. In civil cases the burden lies with the plaintiff

Standard of proof

The standard of proof refers to the strength of the evidence needed to prove the case. In criminal cases the standard of proof is beyond reasonable doubt. In civil cases the standard of proof is on the balance of probabilities.

Rules of evidence

Under the rules of evidence, evidence that could be prejudicial to the accused is not permitted, such as hearsay evidence (evidence given by a third party). Also irrelevant evidence and a record of prior convictions is not allowed. However, propensity evidence is allowed. This is evidence that demonstrates that the accused has a tendency to engage in the offence in question is allowed.

Trial procedure

Arraignment and presentment (*)

Calling the accused at the beginning of the trial, and reading of the presentment, which is a document detailing all the charges against the accused. The accused is then asked if they wish to plead guilty or not guilty.

Empanelling the jury (*)

Potential jury members will be brought into the court room one by one. The name and occupation of each juror will be given. There are six challenges without reason and unlimited with reason. 12 jurors are empanelled with up to a maximum of 15.

Prosecutions opening address (*)

The prosecution starts with a summary of the case that explains:
- The nature of the alleged offences
- The elements that must be proved by the Crown
- The evidence that the prosecution will present to prove the charges

Defence Reply

The defence counsel must reply to the opening speech of the prosecutor to outline issues in a trial and indicate briefly the facts and inferences that can be made from those facts that are not contested.

Judges address to the jury (*)

The presiding judge must address the jury on issues in the trial and the relevant law and the relevance of any admissions made, directions given or mattes decided during the directions hearing. This occurs after the defence response to the prosecution opening, or at any other time when the judge thinks it's appropriate.

'Order out' of witnesses

Witnesses may be order out so they are not influenced by anything said in court

Prosecution's case (*)

The prosecution outlines its case to the court and explains how they prove the guilt of the accused. The evidence is presented orally by examining the witnesses. Each witness is subject to:
- Examination-in-chief by the prosecution (to bring out the required evidence)
- Cross-examination by the defence (to show errors and weaknesses in the evidence given)
- Re-examination by the prosecution (to clear up any points brought up by the defence during cross-examination)

No case to answer (*)

After the prosecution has presented their evidence the defence may argue there is no case to answer. If the judge agrees the jury will be directed to acquit the accused.

Defence's case (*)

Same procedure as the prosecution is followed, however the accused has two options:

- Remain silent and not present any evidence
- Give sworn evidence which allows the prosecution to cross-examine

Final address (*)

Both the prosecutor and the defence counsel sum up their case. The prosecutor addresses the court first. Both counsels explain to the jury the strengths of their case and the weaknesses of the other side's case. They also address the judge on relevant points of law.

Judge's summing up (and direction to quit) (*)

The trial judge summaries the evidence and explains the relevant points of law to the jurors, including the burden of proof and standard of proof. If the judge believes there is insufficient evidence for the jury to return a guilty verdict, ha can direct the jury to acquit the accused. The jury does not have to follow this direction.

Verdict (*)

- The jury retires to decide on the facts before it
- They must first try to reach an unanimous verdict, if this is not possible a majority verdict of 11/12 is accepted in cases other than murder or treason
- After six hours the jury may ask the judge to dismiss the case because they cannot reach a verdict (hung jury)
- The jury has three options: guilty beyond reasonable doubt; not guilty of the offence charged but guilty of a lesser offence; not guilty

Sentencing procedure

Disclosure of the accused prior convictions. Plea in mitigation of sentence

Prior to sentencing, the accused's prior convictions are read out. The defence counsel will then make a plea as to the appropriate sentence. Character references may be used.

Sentencing

When an accused has been found guilty, the judge must follow guidelines under the Sentencing Act, such as:

- The maximum penalty prescribed for the offence
- Current sentencing practices
- The nature and gravity of the offence
- The offender's culpability and degree of responsibility for the offence

A Victim Impact Statement (VIS) is made to the court by the victim, in writing by statutory declaration or in writing and orally, to provide the victim with the opportunity to explain the impact of the crime to the court, and to assist the court in determining the appropriate sentence for the offender.

Aims of Criminal Sanctions

Criminal punishments imposed by the courts are known as sanctions. The Sentencing Act 1991 deals with the power of courts to pass sentences. It now provides for greater consistence in sentencing. The nature of sanctions has now changed from the harsh punishments of the past. A judge needs to consider the following aims:

Punishment

The offender should be punished to an extent and in such a matter that is just in all the circumstances and so that society can feel there has been retribution. It is necessary for society to feel that there has been some revenge against the offender. The offender must be punished in some way in order that the victim of crime and society as a whole feel avenged. The punishment must be appropriate for the offence committed.

Deterrence

The punishment should be such that it will deter the offender or other people from committing the same or similar offences. Punishments are aimed at discouraging other people from committing similar crimes, known as general deterrence. Deterring the offender from committing the same offence is known as specific deterrence.

Rehabilitation and Reform

The punishment should establish conditions within which the court considers it is possible for the offender to be rehabilitated. The aim of punishment should be to assist offenders to change their attitudes and be ready to take their place in society on release. An example is a Community Based Order (CBO).

Denunciation

This reflects the court's disapproval of a type of behaviour resulting in a harsher sentence eg. violent crime.

Protection

It is necessary to protect the community from the offender, such as being removed from society (put in prison) to be physically prevented from re-offending. Under Section 6D of the Sentencing Act, a court can give a serious offender a longer sentence.

Types of Criminal Sanctions

Release on adjournment with or without conviction

On being found guilty the court can adjourn proceedings for a period of up to five years and an offender can be released with or without conviction or an undertaking to be of good behaviour for a specified length of time. The court may also attach certain conditions eg attend specific programs such as drug and alcohol programs. If no conviction is recorded, records will be kept by the police and may be referred to when determining the sentence for subsequent offences.

Fine

A fine is a monetary penalty which is expressed in levels as penalty units. Under the Sentencing Act, it is currently $100 per unit. If a fine is not paid the offender can be imprisoned or ordered to do community work. Fines may be paid in instalments to assist the defendant. In fixing a fine the court will consider the financial circumstances of the offender and may also consider such things as loss or damage to property.

Imprisonment

A convicted person can be sentenced to be detained in jail for a period of time. It is the most severe sanction.

Reason for imprisonment:
- May lead to rehabilitation because of the various programs offered.
- It removes the offender from society as punishment for offending against society as protection for society.

Against imprisonment:
- Criminal sanction should be aimed at rehabilitating offenders
- More likely to lead to further crimes because of influence of other prisoners
- Difficulty of normal life due to time spent in prison

Prisons sentences are to be served in full, as there is no reduction in sentence for good behaviour. If an offender has been held in custody prior to sentencing, any time spent in prison will be taken as part of the sentence to be served. Maximum term of imprisonment is life, minimum is 6 months.

If there are two or more sentences, they will be served concurrently or cumulative. A concurrent sentence runs at the same time as another sentence. A cumulative sentence will be served after another sentence.

Intensive Correction Orders (ICOs)

ICOs are designed to be the most severe punishment after imprisonment. ICOs are aimed at offenders who would have received a short prison sentence. If the court is considering a convicted offender to a term of imprisonment and has received a pre-sentence report, the court can impose a sentence of imprisonment of not more than one year and order that it be served by way of intensive correction in the community. While serving an ICO, the offender should follow conditions such as:

- Not re-offend
- Attend a community corrections centre for 12 hours a week
- Not leave Victoria without permission

Community-based Orders (CBOs)

A CBO can only be made if the offender has been found guilty of an offence on a conviction or a fine more than five penalty units. The offender must agree to a CBO. CBOs can last up to two years. CBOs are less restrictive than ICOs. They require the offender to:

- Stay in the state
- Not commit another punishable offence
- Report to a community correction centre within two days
- Receive visits from a community corrections officer

There may be other conditions to a CBO, such as unpaid community work.

Youth Training Centre Orders (YTCOs)

A young person (18-21) may be sent to a youth training centre if a pre-sentence report has been received and there are reasonable prospects for rehabilitation. The court will consider the offender's age, character, nature of the offence, and whether the offender is likely to be undesirably influenced in an adult prison. The maximum time an offender can be obtained is:

- 24 months – Magistrates' Court
- 36 months – County Court or Supreme Court

Area of Study 2(f): Problems in criminal procedures and the purpose of possible solutions

Problem (pre-trial) – Delays caused by committal hearings

Committal hearings are held to assess whether a prima facie case exists, i.e. that there is sufficient evidence to support a conviction, in a higher court before a judge and jury. Yet committals can be seen to be 'mini trials' which unnecessarily prolong the pre-trial procedure of going to trial and increased costs. Some committals can take months which can result in the accused remaining in remand for unacceptable periods of time.

Solution – The use of the hand-up brief

The use of the hand-up brief reduces delays and has led to more court time being available for other matters as it relies on written evidence rather than oral evidence, although the reliability of that evidence can not be questioned. There are also time limits in place. The hand-up brief informs the defendant of the committal mention date. It also contains a copy of the charge sheet, sworn statements, documents, photographs and exhibits to be used in evidence

Problem (pre-trial) – The right to silence makes criminal investigation difficult

It is the role of the police to ensure that laws are obeyed and the offenders are brought to justice. To carry out this task effectively, the police need more sufficient powers. The right to silence interferers with the purpose of the investigation (to find out the truth).

Solution – Grant the police greater powers of investigation

The police can demand the name and address of a person who is suspected on reasonable grounds of having committed an offence or being about to commit an offence. Under the Major Crimes (Investigative Powers) Act, police have increased powers of questioning in relation to organised crime offences. This includes an interview where the suspect has to provide correct information and answer every question.

Problem – Access to mechanisms for dispute resolution can be limited due to social and cultural issues

Koori people are greatly over-represented within the criminal justice system, more so than any other cultural group. There is also a high level of recidivism, repeat offenders, within the Koori community. The problem highlights a need to provide facilities, support staff and training for those who deal with Aboriginal offenders.

Solution – The establishment of a network of Koori courts

It was established to provide a fair, equitable and culturally relevant justice services to the Aboriginal community, as well as providing greater protection and participation in the sentencing process for summary offences. In the first two years of operation, only 9 of 167 defendants have re-offended. This indicates a huge reduction in the incidence of recidivism and the effectiveness of culturally aware solutions to problems.

Area of Study 2(a): The Elements of an Effective Legal System – Civil Procedue

Elements to a Fair and Unbiased hearing

Rules of evidence – hearsay is excluded as is opinion unless an expert

This is fair and unbiased as these are excluded to reduce the opportunity of the court being influenced by irrelevant and perhaps incorrect information. The rules of evidence regarding hearsay evidence is fair to all parties concerned.

Rules of procedure in questioning a witness

This is fair as in civil trials, the witnesses are able to be questioned by the plaintiff and the defence in order to bring out the truth. The examination-in-chief by the other lawyer brings out the real truth as witnesses have little idea about what they are going to ask.

Inconsistency in damages

This can be unfair and biased as it is difficult in assessing the amount of damages required to compensate the injured party. If damages awarded are too high, it might be a harsh burden for the defendant, who has to pay the large sum of money. If damages awarded are too low, those receiving the compensation may feel that it is not high enough to compensate them for what has happened

Timely resolution of disputes

Delays

Both parties to a dispute can be severely disadvantaged if it takes a long time to resolve the dispute. Some effects include that the plaintiff is out of work with little or no money. The defendant could be in a stressful situation with the heat of the court case.

Causes of delays include increased litigation as in general, people whose rights have been infringed are likely to pursue their rights. Also increased volume and complexity of information, due to reasons such as technology, allows for the situation where there is more likely to gather information.

The recognition of prevailing values and basic human rights

Legal action

Legal action is necessary to ensure the recognition of prevailing values and basic human rights. This is because the threat of civil action is often enough to ensure that people treat others fairly and in accordance with prevailing values and basic human rights.

Effective Access to Mechanisms for the Resolution of Disputes

Different courts according specific jurisdiction

This provides access to mechanisms as the plaintiff can go to a court with a specific jurisdiction allowing the court to have an area expertise in the matter, eg. the Supreme Court deals with issues for unlimited amounts of compensation. It also allows for appeals to higher courts.

Alternative dispute resolution and tribunals

These allow for effective access to mechanisms for the resolution because most of the time, tribunals and ADRs are more accessible than courts. Tribunals and ADRs also tend to specialise in civil disputes, allowing for a quicker, cheaper and less formal means of dispute resolution, eg. the Anti-Discrimination List in VCAT specialises only in discrimination matters, allowing it to be a more quicker and cheaper method.

Legal representation

This limits the access to mechanisms as lawyers are often a necessary element of achieving a fair outcome, due to the complexity of the law and the legal system. Legal representation is very costly and although Legal aid is available for people who can't afford legal representation, many people are not eligible for Legal aid.

Area of Study 2(d): Supreme Court civil pre-trial procedures

Aims

- The main aim is to inform both parties of information relating to the dispute
- This allows the parties to discover whether it is worthwhile proceeding with the case
- It may lead to an out-of-court settlement which is reached between the parties before the court hearing
- A settlement may also be reached once the trial begins

The benefits include:

- Not going to court therefore avoiding the cost, trauma, inconvenience and publicity
- Should the matter still go to court there is more information known which will speed up the trial and reduce the cost and other factors above

Letter of Demand (*)

If there is a legal problem, the plaintiff will consult a solicitor to send a letter of demand which is a warning of impending court action. The letter of demand informs the other party of the nature of the claim against them and suggests the compensation or other remedy sought. The letter gives the defendant a set time in which to comply with the wishes of the plaintiff, usually two weeks. If the matter is not resolved at this stage, legal proceedings can then be commenced.

Pleadings

The pleadings stage contains the details of the claim and the remedy sought by the plaintiff and any defence by the defendant. Its purpose is to clarify the issues before going to court, provide an opportunity to gather evidence and provide the court with a written record of the case. This will save time and expense and assist an out-of-court settlement if appropriate.

Writ of summons and Statement of claim (*)

The plaintiff or their solicitor will issue a writ against the defendant. This is to explain an action being taken against them and inform them of the place and mode (that is which court and whether a jury will be present). A statement of claim explains the nature of the claim, the cause of the claim and the remedy sought and is usually endorsed on the writ.

Notice of appearance

Someone who wishes to defend the case must enter a notice of appearance. This informs the court and the plaintiff that the defendant wishes to defend the case.

Statement of defence and Counterclaim

The statement of defence is used by the defendant in response to the statement of claim. This provides the plaintiff with the defendant's version of facts, and to show which facts are admitted or denied. A counterclaim is made in a document called the 'defence and counterclaim'. Generally it is heard in the same trial as the plaintiff's claim. This means that the defendant is claiming that the plaintiff was either partly or completely responsible.

Further and better particulars

The particulars or facts are outlined in the pleadings stage may not be enough to clarify the facts of the case. Therefore it may be necessary for either party to ask for further information. If they are not received the court may order the defaulting party to comply.

Discovery

The discovery procedure allows the parties to get further information on matter that might remain unclear regarding the facts of the case.

Interrogatories (*)

These are written questions either party may serve on each other relating to the known facts of the case. There are strict limits governing when they must be returned, and if one of the parties does not answer, a notice of default can be served on that party.

Documents (*)

The parties are obligated to disclose and even produce documents which are relevant to the matters in dispute, even if they are damaging to their chance of winning the case. Failure to do this disqualifies the party from using it as evidence. Documents that could be requested include medical reports, contrast, letters, photographs, films.

Directions hearings (*)

Similar to criminal, although it focuses on giving directions to the parties rather than clarifying points of law or areas of contention. The aim is for a more timely resolution of disputes. They may occur at any stage of the pre-trial proceedings. It is a hearing by a judge who may give directions, order to assist the parties in a trial.

The court may give any direction for the conduct of proceeding that will assist effective, complete, prompt and economical determination of the case, eg. make admissions which can speed up proceedings, refer matters to mediation or arbitration.

Certificate of readiness of trial

Both parties sign this document to indicate that they are ready to proceed to trial. It states where the trial will take place and the expected length. When the proceeding has been entered into a list for trial, the court or registrar may order the parties to attend a pre-trial conference, which is to ensue the parties are ready for trial.

Area of Study 2(e): Civil trial procedures and remedies

Burden of proof

The burden of proof relates to the party that has the responsibility to prove the facts of the case, also referred to as the onus of proof. In civil cases the burden lies with the plaintiff

Standard of proof

The standard of proof refers to the strength of the evidence needed to prove the case. In civil cases the standard of proof is on the balance of probabilities.

Trial Procedure

Empanelling a jury

Six jurors are used in the County or Supreme Courts. An additional two may be empanelled for longer trials. Either side can challenge up to three of the potential jurors without a reason, this is known peremptory charges.

Plaintiff's case (*)

The opening address outlines the case for the plaintiff and explains what evidence will be presented to prove their case. Each witness is questioned by both the plaintiff's barrister and the defence barrister. After all witnesses, the plaintiff's barrister closes their case.

Submission of no case to answer

When the plaintiff's counsel has finished calling their witnesses, the defence counsel can make a submission to the court that the plaintiff has not been able to bring sufficient evidence to prove the case and there is no case to answer.

Defendant's case (*)

The defendant or their legal representative makes an opening address and presents their case by calling the witnesses for the defence. Each witness is questioned by both the defendant's barrister and the plaintiff's barrister. The defence barrister then closes the case after all witnesses presented.

Final addresses

The defendant's barrister closes their case and makes the final address first which sums up their case and appeals to the jury, if present, or the judge to find in favour of their client. Then the plaintiff does the same.

Judge's summing up

The trial judge summaries the evidence and explains the relevant points of law and how they relate to the case before the court. The jury, if present retires to consider its verdict.

Verdict and type of remedy (*)

If the jury is present, the decision must be unanimous or a majority of five out of six, finding in favour of the plaintiff or the defendant. If the defendant is successful the case is dismissed. If the plaintiff is successful the judge (if there is no jury) decides on the type of civil remedy and, if appropriate, the amount of damages to be awarded to the plaintiff.

Remedies

The aim of civil remedies is to restore the injured party (plaintiff) to the position they where in before the harm had occurred.

Damages

Damages are a sum of money granted to the plaintiff in satisfaction of a claim made by the plaintiff. If damages are awarded, interest may be calculated on it as the plaintiff would have been able to earn interest if they put it in the bank immediately after the incident.

- Compensatory Damages

The aim is to restore the person whose rights have been infringed to the position they were in before the infringement. It may not be possible to do this in a physical sense eg. permanent injury, but compensation will make up for suffering in the future.

Specific damages can be given an actual and precise monetary value and can be listed, such as medical expanses or lose of wages.

General damages are assessed by the court according to the magnitude of the wrong done and the long-term consequence of the wrong, taking into consideration such matters as future loss of wages, long-time job prospects and pain and suffering (past and future).

- Nominal Damages

Damages that are usually very small. They are awarded when the plaintiff is seeking to make a point about being legally in the right and to show that their legal rights have been infringed.

- Contemptuous Damages

Damages that are awarded when the court feels that the plaintiff has a legal right to compensation, but does not have a moral right. The amount is usually very small.

- Exemplary Damages

Damages awarded in a civil case to seek punish the defendant for an extreme infringement of rights. They are usually very high.

Injunction

An injunction is a court order directing someone to stop doing something or to do something. The purpose is to rectify a situation cased by the person who was found to be in the wrong. There are two types of injunctions.

- Restrictive

Ordering a person to stop (or refrain from) doing something, eg. pulling down a building.

- Mandatory

Ordering a person to do a particular act, eg. pulling down a backyard dwelling that has been built unlawfully.

Ordering for specific performance

This is an order telling a person to carry out the specific terms of a contract rather than to pay damages, eg. to enforce a contact for the sale of land.

Costs

Costs are usually awarded against the losing party based on a scale of costs by the Law institute. This may not be extra costs between the client and solicitor.

Enforcement procedures

There are a number of orders the court can make if the defendant does not provide the remedy awarded to the plaintiff

- Warrant of seizure or sale

Seizing goods or land and selling them to pay the money owed, with the remainder given to the defendant.

- Attachment of earnings

The court can order the defendant's employer to pay the debt at regular intervals directly out of the defendant's wages

Area of Study 2(f): Problems in civil procedures and the purpose of possible solutions

Problem (trial) – Inconsistency in Damages

The aim of damages is to restore the plaintiff to the position they where in before. However when this is not possible it is difficult to assess the amount of general damages as juries decide on the amount of damages, which are inconsistent and vary greatly. This is unfair as damages awarded are inconsistent which is unfair to all parties involved. If damages are high, it leaves a harsh burden for the defendant who has to pay the amount specified by the jury.

Solution – Remove juries from the process and introduce caps on damages claims

This is a good solution as judges would remain fairly consistent in the amount of damages awarded as they could use their own knowledge and also have set guidelines. However, this is a bad solution as if you take away juries, you take away the human element and the right to be tried by your peers.

Problem (pre-trial and trial) – Costs involved in taking a matter to court

Cost factor in taking a matter to court is very big. There are legal fees to prepare pleadings and discovery materials as well as the daily court fee. All fees are a harsh burden to the average Australian. Legal aid can be of assistance, however not everyone gets Legal aid as there are strict guidelines to receive it.

Solution – ADR and Tribunals

ADR methods are used in the court room. For example, matters under $10,000 are referred to Arbitration and parties may be referred to Mediation. This results in a cheaper method of dispute resolution. Also VCAT now has specialist lists, such as the Anti-Discrimination list, which reduce time and cost in resolving a matter.

Problem (pre-trial and trial) – Delays in getting a matter to court

Delays include that individuals failure to take the initial step to seek legal advice. Also due to increased litigation, as people now tend to pursue their rights when they have been infringed. Also increased volume and complexity of information, due to technology, allows for the situation where there is more likely to gather information.

Solution – Direction hearings and pre-trial conferences

Direction hearings and pre-trial conferences reduce delays, as it makes the trial shorter and promote an out-of-court settlement. Directions hearings also allows for the parties too see the strength of the opposing party. Issues are also settled during directions hearings. About 75% of civil disputes are resolved at directions hearings or pre-trial conferences.

Area of Study 2(g): Major features of the adversary system of trial

The adversary system is the system of trial used in Australia in which two opposing sides try to win the case. They prepare and present their case according to strict rules of evidence and procedure. The judge (and jury), or magistrate acts as impartial arbitrators.

Role of the Parties

Parties control their own case by having complete control over decisions as to how the case will be run provided they follow the rules of evidence and procedure. This acts to protect the rights of individuals as it is assumed that each party will present the best possible case to support their arguments. They:

- Institute proceedings: In a civil case, the person whose rights have been infringed decides to bring a case against the other party. In the criminal case the state brings the proceedings

- Investigate the facts: The parties choose the methods they will use to investigate the facts and bring the facts before courts

- Decide which facts should be brought before the courts: Each side will decide which evidence it thinks will best suit its case, although not all evidence will be brought out by either side, the truth should emerge through cross-examination

- Investigate the law: Each party is responsible for finding out the law that is relevant to their case

- Choose whether to have legal representation: Parties choose to have legal representation or to represent themselves

Role of the Judge

Ensures that the court processes and procedures are carried out according to the strict rules of evidence and procedure and each of the parties is treated fairly. They:

- Must act impartially without favouring either side
- Act as an independent decision-maker making the decision based on the facts brought before the court, where there is no jury

Therefore during trial they:
- Ask questions, recall witnesses, call new witnesses
- Decide on the admissibility of evidence and deciding questions of law
- Ensure that the onus of proof has been discharged to support the case

At the conclusion of the trial, if the jury finds the defendant guilty, the judge imposes the sentence.

Need for rules of evidence and procedure

Each court hearing is governed by rules of evidence, which aim to ensure a fair and equal treatment. Evidence is concerned with proof of facts. This can be presented as:

- Oral evidence given by the witness in the form of answers to questions from the barrister
- An affidavit is evidence given in the form of a sworn statement
- An object is evidence, such as murder weapon or stolen goods
- Circumstantial evidence based on a set of circumstances or facts indicating that a certain event has happened

Rules of evidence ensure that the parties are treated fairly, the jury is not distracted by irrelevant material, unreliable or illegally obtained evidence is not heard by the court, the evidence is not unduly prejudicial to the defendant and in criminal cases, the court only hears information about the case. This means that prior convictions can not be mentioned, unless it is heard as propensity evidence.

Inadmissible evidence:

- Hearsay evidence is evidence given about something said by another person who is not called as a witness. This is inadmissible because you can not test the evidence due to the person who made the alligation is not in court to be cross-examined

- Evidence of bad character is not permitted by the other party as it could unduly prejudice the court against the other party

Rules of procedure provide the frame work in which the court case can take place. All cases presented before a court are dealt with in a uniform manner in the presentation of arguments and evidence, eg. the swearing in of witnesses, rules of oral evidence such as cross-examination.

Standard and burden of proof

The burden of proof refers to who has the responsibility of proving the case against the other party. Whoever initiates the proceedings must bear the burden of proof. In a criminal case it is the prosecution on behalf of the state, and in a civil case it lies with the plaintiff, which follows the concept of party control in the adversary system.

The standard of proof refers to the strength of evidence, or the amount of proof required to prove the case. In a criminal case the prosecution must prove the case beyond reasonable doubt. In civil disputes the plaintiff must prove the case on the balance of probabilities.

Need for legal representation

For the adversary system to work effectively there should be equal representation and each party should have an equal opportunity to present their case. The adversary system depends on each side presenting their own case to the best of their ability and both sides trying to win. The truth should emerge through each party presenting their own case to the best of their ability and the other side showing the flaws in the evidence being presented.

Area of Study 2(h): The Strengths and Weaknesses of the Adversary system

Role of the Parties and Party Control

Strength/Advantage

More likely to be satisfied with the result as they control the conduct of the case and fight their own battles. In criminal matters the defence is responsible for its own defence to present the best case possible. In civil matters parties can settle their differences with little interference from the state aiming for an out-of-court settlement.

Weakness/Disadvantage

It relies on the parties to bring out all the evidence that is favourable to their case and vital evidence may be missed resulting in an unfair decision by the court.
The adversary system is more concerned with winning than finding out the truth so the parties will only bring out the facts which benefit their side. In civil matters, it may lead

The Role of the Judge

Strength/Advantage

The judge is an impartial umpire and ensures that the rules of evidence and procedure are followed and that the parties are treated fairly. Because the judge makes decisions on the facts before them, and have no preconceived ideas about the parties, there should be a fair and unbiased hearing. Also promotes confidence in the system because they are impartial.

Weakness/Disadvantage

Even though judges have a large amount of experience in court processes, they do not involve themselves in the running of the case, which is a waste of their expertise. They can't help if a party's legal representation is not doing a good job, and are not responsible for any of the evidence, and therefore the truth might not come out.

Rules of Evidence and Procedure

Strength/Advantage

Rules of evidence and procedure have been developed over the years and promote consistency in treating both sides alike. The use of oral evidence provides both sides with the opportunity to assess the sincerity of the witnesses by watching them give evidence. The process of cross-examination is likely to show up false evidence. The rules also provide guidelines to ensure that evidence is relevant and admissible.

Weakness/Disadvantage

The rules of evidence and procedure are complex and the outcome of the case can rely on the quality of the lawyer to ask the right question and the truth may not come out. Oral evidence relies on memory and delays can result in memories fading. Oral evidence is also presented in a manner that is piecemeal and difficult for a jury to remember.

There have been cases where evidence has not been allowed as it was considered inadmissible due to the way it was attained, despite the fact that it would assist in establishing the truth. Expert evidence may be more available to the side that has access to the greater facilities to collect evidence, eg. the prosecution.

The Burden of Proof and the Standard of Proof

Strength/Advantage

Under the adversary system, the person who is making the allegations is responsible for proving the facts. This is fairer than having a judge responsible for finding out the facts and deciding who is in the wrong

Weakness/Disadvantage

Parties need to prove their case to win, so both sides only show the facts that are beneficial to their case and some facts might not come out. This is particularly relevant when the parties are unequally represented. If the court does not hear all the facts, the truth might not come out and the party in the right might not win the case.
to greater animosity between the parties and the high cost of litigation can result in abandoning a claim.

Legal Representation and Unequal Representation

Strength/Advantage

The ability to be represented by legal personnel provides those accused of a crime or parties to a civil case with the opportunity to present their side of the facts in the best light possible. The parties can choose their best legal representation to bring out the evidence.

Weakness/Disadvantage

Parties in a civil or criminal dispute can be greatly disadvantaged by inexperienced or poorly prepared legal representatives, or representation that is not the same standard as their opponent's legal representation. Someone not represented is severely disadvantaged as they may not know the rules of Evidence and procedure. The adversary system relies on both sides being equally represented so the truth can come out through the strength of the legal argument.

Area of Study 2(i): Features of the inquisitorial system of trial and a comparison with the adversary system of trial

Features of the Inquisitorial System

It is divided into two parts, the examining or pre-trial stage and the trial stage.

Pre-trial Stage

When an offence is reported the state appoints an investigating magistrate to undertake the pre-trial investigation. They have extensive powers to:

- Collect evidence; locate and interview witnesses; decide as to whether charges are laid; and ultimately arrest and charge a suspect
- All evidence is documented in written form

Trial Stage

Because of the extensive pre-trial procedures, only the strongest cases reach the trial stage. The accused is still innocent until proven guilty, but once they have been charged there is a strong presumption of guilt. The trial is then conducted by a different judge, the presiding judge, who is given the file:

- Parties do not have control. They can be involved, but it is largely limited to requesting actions from the judge

- There are no strict rules of evidence and procedure. The judge reviews all evidence and decides how reliable and relevant each piece is
- The jury does not play as a large role and some countries do not have juries
- There is an intermediate verdict of 'not proven', which means that the Judicial Officer can postpone the trial to collect more evidence

Post-trial Stage

There is still the right to appeal to a higher court.

Comparison with the Adversary system

Role of the parties

Inquisitorial System	Adversary System
The parties have little control over the proceedings as control is mainly with the judge	Parties control the evidence that is collected, what is presented in court and the way it is presented
The parties are dependant on directions of the court	Parties decided the law that will be argued and how they will argue it in relation to the facts

Strengths/Advantages of the inquisitorial system this comparison highlights:

- The truth will come out
- Witnesses are less likely to be biased
- The cost of trial is on the state

Weaknesses/Disadvantages of the inquisitorial system this comparison highlights:

- Parties may feel as being at the mercy of the judge rather than being in control
- Parties are not able to call their own expert witnesses
- Written evidence denies parties to test the evidence in the cross-examination

The need for legal representation

Inquisitorial System	Adversary System
Legal representation is not essential, because the judge controls proceedings and the parties are not strongly disadvantaged by not being represented	Legal representation is vital as it relied heavily upon
The judge completes the examination and then legal representatives may ask questions, to help the judge find the truth, if permissions is obtained	Legal representatives decide which witnesses will be called, in what order, and control the questioning of them

Strengths/Advantages of the inquisitorial system this comparison highlights:

- There is less reliance on legal representation, that is particular important if one party is not well represented
- Legal representation is there to assist the judge in finding the truth and make sure their client has a fair trial

Weaknesses/Disadvantages of the inquisitorial system this comparison highlights:

- Legal representation is not needed and it is costly to have it when the judge does all of the work

The role of the judge

Inquisitorial System	Adversary System
The decision-maker takes an active role in investigating the truth. They do not leave it to opposing parties to bring out evidence that is favourable to their own side	The judge leaves the conduct of the cases to the parties. In criminal matters it is the police that investigates and gets evidence. In civil matters it is up to the parties
Evidence is collected by the investigative judge. The court judge questions the parties and relevant witnesses	The judge has little control over what evidence is tendered (apart from ruling it admissible or inadmissible)
A member of the judiciary investigates the crime and prepares a dossier on the suspect	The judge's main involvement is when the matter is brought to court

Strengths/Advantages of the inquisitorial system this comparison highlights:

- The decision-maker takes a more active role to find out the truth, rather than to parties which will bring evidence favourable to their side
- The decision-maker controls the evidence and therefore relevant evidence is brought out

Weaknesses/Disadvantages of the inquisitorial system this comparison highlights:

- The judge is less impartial than in the adversary system. The decision-maker in the inquisitorial system gets involved and could be influenced by outside issues
- The judge is aware of past history, which may form a biases

The rules of evidence and procedure

Inquisitorial System	Adversary System
The system relies mainly on written statements, although some witnesses are interrogated at the time of trial.	The system relies on oral evidence so that its reliability and relevance can be tested in court. Most documents must be tendered through a witness who can verify them
Character evidence and evidence on the accused's past record are available to the judge and included in the dossier	Character evidence and past records not usually available. Except for propensity evidence
Witnesses tell their story uninterrupted by questions. There are no strict rules of evidence or procedure	Witnesses are only allowed to respond to a question and are often cut off if they try to elaborate a point

The standard and burden of proof

Inquisitorial System	Adversary System
No formal burden of proof is set on any party, as the judge is responsible for bringing evidence and finding out the truth. Only goes to trial if a very strong case	The burden of proof is on the state to be able to prove their case.
The pursuit of truth is the main objective in this system of trial	There is a standard of proof that must be met to ensure that frivolous or unfounded actions do not succeed

Strengths/Advantages of the inquisitorial system this comparison highlights:

- Witnesses are mostly called by the judge, therefore likely to be less biased. Particularly with expert witnesses whose obligations would be to the court, rather than one of the parties
- As the decision-maker controls the production of evidence it is more likely that all the relevant evidence is brought out

Weaknesses/Disadvantages of the inquisitorial system this comparison highlights:

- Greater reliance of written evidence denies the parties the same opportunity to test the evidence such as cross-examination to show any flaws in the statements made
- As the judge collects the evidence it is more likely that all facts would be revealed, but the powers of the state lead to outweigh the rights of the accused

Area of Study 2(j): Possible improvements to the adversary system

A greater investigative role for the judge

The reform will involve that the judge or magistrate can ask questions and call witnesses, but this is usually done to clear up points made in the proceedings. This power could be increased to allow a judge to ask questions and call witnesses to ensure that cases are decided correctly.

This could create a more effective legal system as it brings in the element of a fair and unbiased hearing. The judge clears up points made and does not act favourable to one side. Also the trial may be speedier allowing for a timely resolution of dispute.

This reform could be seen ineffective as the judge could be seen as being biased towards one side or the other by bringing out evidence that would benefit one side, and a judge who 'descends into the arena' loses the advantage of being an uninvolved observer.

Greater use of written statements

This reform will involve court time and money saved with the use of written statements, where possible during the trial. This means professional witnesses, such as doctors, do not have to attend the trial to prove the accuracy of the statements.

This could create a more effective legal system as it reduces delays in getting professional witnesses in court to orally present evidence, allowing for a more timely resolution of dispute. Also professional witnesses don't have to attend court, allowing for a speedier and cheaper trial which is access to mechanisms of dispute resolution.

The reform could be seen as ineffective as the evidence in written statements can not be tested in court as effectively as oral evidence, which is cross-examination. The use of written statements could also lead to an increase in legal fees as the solicitor would need to draw them up and the barrister would have to examine them. If anything within the written statement was disputed, the person who made the statement would have to be brought in court as a witness to be cross-examined.

Area of Study 2(k): the operation of the jury system

The jury system is a trial by peers. This means that the defendant is tried by people who represent a cross-section of the community. The jury is the voice of society as it reflects its values and judges the accused accordingly

The jury acts as an independent decision-maker and is the decider of facts in criminal and some civil trials. The jury must also apply the facts to the law. The role of the jury is to:

- Listen to all the evidence and make sense of it
- Understand the points of law as explained by the judge
- Put aside any prejudices or biases
- Take part in the deliberations in the jury room
- Make a decision on the facts of the case

12 people can sit on a criminal jury and 6 people can sit on a civil jury. However, up to three additional jurors may be added for such reasons as the case may take a long time. Only 12 or 6 jurors will vote on the verdict, if there are still additional jurors.

In a criminal trial

Where the accused pleads not guilty, a jury of 12 (15) hears all criminal trials in the County and Supreme Courts in their original jurisdiction.

The jury must make a decision on the guilt of the accused beyond reasonable doubt.

It must try to reach a unanimous verdict, if this is not possible after six hours, a majority verdict (11/12) can be accepted in cases other than murder, treason, large drug charges or Commonwealth offences.

With a hung jury, it is the prerogative of the Crown to proceed with another trial.

The judge can direct the jury to acquit if the judge believes the evidence does not support a conviction. The jury can also find the accused guilty beyond reasonable doubt or not guilty of the offence charged but guilty of a lesser offence. Eg manslaughter instead of murder.

There is no juries in criminal cases when the accused pleads guilty, when a case in on appeal or when the case is held in the Magistrates' Court.

In a civil trial

The jury must make a decision on the balance of probabilities, that is which party is most probably in the right and which party is most probably in the wrong. They also decide on the appropriate remedy if the plaintiff is successful.

Juries are optional in civil cases, Either party can request a jury, however the person requesting will bear the ultimate cost of a jury trial.

The decision can be a majority verdict (5/6) after three hours of deliberation.

Selection of jurors

Anyone whose name is on the Electoral Role for the House of Representatives can be called up for jury duty. Their names will be selected randomly, and a questionnaire will be sent to determine whether they are eligible.

Disqualified

Those jurors deemed unable to serve on a jury due to a past act they have committed. People with criminal records or those who are bankrupt may be seen as unreliable and biased towards the accused.

Ineligible

Those jurors unable to serve on a jury due to their occupation or their inability to do something. People who are employed in a legal profession are ineligible for jury service because their opinion may carry too much weight. People may also not have the ability to make an appropriate decision on the facts before them, eg. deaf people.

Excused

A person can apply to be excused for jury service for the whole or any party of the jury service period. The jury commission will decide whether to excuse the person or not. Reasons include poor health, distance to travel is over 50 km inside Melbourne.

Liable for service

Those who are 18 years old or older and are a registered voter are qualified and liable to serve as jurors and placed in a jury pool. Those who have been selected will be summoned to appear in court for one or two days unless they have been chosen for trial.

Empanelling the Jury

Information potential jury members are told:

- the type of action or charge
- the name of the accused in a criminal trial or the names of a party in a civil trial
- the name of the principle witnesses expected to be called in the trial
- the estimated length of the trial
- any other information that the court considers relevant

Someone may be excused if:

- the person will be unable to consider the case impartially
- unable to serve for any other reason

Jurors are taken from the jury pool and in criminal cases the names and occupations of the jurors are randomly called out, and the parties have a chance to challenge them before they reach the jury box. In a civil case a random list of jurors is collated, and each party has a chance to cross people off the list.

Challenges

If your name is selected, there are two ways you might be challenged:

- Peremptory challenge is when an objection is made without a reason given
- Challenge for cause is when a reason is given and the judge decides the success or failure of the challenge

There are unlimited challenges for cause in criminal or civil trials. In criminal trials, there are 6 peremptory challenges each for one accused and when there are two accused, there 10 challenges for the Prosecution and 6 for the Defendant. In civil trials, there are 3 peremptory challenges each.

Either side would challenge a jury as challenges are based on the assumption that the juror might not be favourably disposed to the side of the challenger.

Role of the foreperson

Once a jury is empanelled, a foreperson is elected. The role of the foreperson is to ask the judge questions and deliver the verdict. During the jury's deliberations the foreperson is responsible for the conduct of the deliberations, although their vote does not carry any extra weight and they should try to not be influential to other jurors in any way.

Jury verdicts

A unanimous verdict is where all jurors agree on the verdict.

A majority verdict requires one less of the total amount of jurors agreeing (11/12 or 5/6)

The jury must deliberate for six hours in a criminal trial or three hours in a civil trial before a majority verdict can be accepted.

The four types of offences that must be decided by a unanimous verdict include murder, treason, Commonwealth offences and large drug offences.

The jury does not have to provide a reason for their verdict.

A hung jury is a jury that can not reach a verdict, even if a majority verdict can be reached. This means that the jurors will be discharged and a new trial will take place.

Arguments for majority verdicts in criminal trials

- A majority verdict should be reached more quickly if there is a disagreement among the jurors
- There are fewer hung juries, therefore there are fewer retrials which add cost and delay to the final outcome
- The view of one juror can frustrate the will of the majority of the jurors if a unanimous decision has to be reached

Arguments against majority verdicts in criminal trials

- A majority verdict undermines the notation of 'beyond all reasonable doubt' because if one person believes a person is not guilty, there must have been some evidence that created doubt
- A unanimous verdict is more likely to be accepted by the accused, the court and society
- A unanimous verdict increases the likelihood that the verdict will be right

Area of Study 2(l): Advantages and disadvantages of the jury system

Advantages

Reflects a cross-sections of the people

A jury reflects a cross-section of the people as they are made up of average men and women who are not selected as people in a position of authority, but rather people from the community. This is a strength as a person on trial can feel confident that they are not being oppressed by authority, but are being tried by people like themselves within society.

Being tried by your peers in court allows for a fair and unbiased hearing, in which the decision will be fair, unbiased and reflect current in community values.

Involves the general community

This involves the general community as serving as a jury is seen as part of a citizen's civic duty. A person who serves on a jury is able to participate in the legal system and see the legal system in operation. This is a strength as it can help members in society improve their knowledge and gain confidence in the legal system.

This is a fair and unbiased hearing as it involves the general community which would produce a fair decision in the court room that reflects community values. Its is also fair because of the selection process of the jurors, allowing for a fair and unbiased hearing.

Reflects community values

The jury system reflects community values as jurors are able to take into account the social, moral and economical values of the time, and make a decision form the point of view of an ordinary person, rather than a legal reasoning a judge may give. This is a strength as decisions given by jurors will reflect current community values.

This creates a fair and unbiased hearing as the reason behind the juror's decision will reflect current community values, rather than an outdated or unfair law or precedent.

Spreads the responsibility

The use of the jury allows the decision-making to be spread over more shoulders, rather than being placed solely in the hands of a judge. This is a strength as if 12 people decides on a persons guilt, the decision is more likely to be correct than a decision made by one person.

This creates a fair and unbiased hearing as if there are 12 people deciding of the guilt of a person, people are more likely to feel confident in the decision made.

Ensure less legal jargon

The presence of a jury should ensure that evidence is given in a clear and non-technical way, with legal jargon kept to a minimum. This is a strength as legal personnel have to explain legal concepts to the jury throughout the trial, enabling the parties to the case to have a better understanding of what is going on within the court.

If jurors know what the judge, plaintiff/prosecution and defendant are arguing, they can provide a fair and unbiased hearing as they understand the evidence provided.

Disadvantages

Not a true cross-section of the people

Even with the random selection process it is unlikely that a jury will truly represent a cross-section of the community, because communities comprise of interest groups with very different needs. Also being ineligible, disqualified or excused from jury service does not allow for a jury to represent a cross-section of the community. This is a weakness as the decision of the jury may not reflect current community values. Also the fact that people can be challenged can affect the make up of the jury

This is not a fair and unbiased hearing as if the jury does not represent a true cross-section of the community, a decision that reflects current community values can not be reached.

Difficult task and unfamiliarity with legal procedure

Jurors are expected to collate, remember, analyse and interpret the facts of the case and to follow instructions of the judge. Also they will have little knowledge or experience of court room procedure, which may confuse or overwhelm them. This is a weakness as jurors may not be able to concentrate for long periods of time as well as know what is happening in terms of court room procedure.

This does not provide a fair and unbiased hearing as jurors may feel overwhelmed as they face the difficult test of being on a jury, facing unfamiliar legal procedure. This may influence their decision as they may feel the pressure to deliver the right verdict.

Counsel could influence jury

Jurors could be influenced by emotional elements of the trial or a moving and powerful closing speech of a barrister, rather than the logic of the case put by both sides. This is a weakness as jurors are distracted from the key facts of the case, that has been presented through evidence, and may make a decision due to the influence of legal representation.

This does not provide a fair and unbiased hearing as jurors could reach a wrong verdict due to being influenced by clever legal representatives.

Media influence

If the case caught public interest, it is likely that the jury members will have already heard or seen something about the case in the news. This is a weakness as jurors may be influenced by media reports of a case, therefore they may have formed some preconceived ideas about these cases and to put them aside before hearing the evidence is difficult to do so.

This does not provide a fair and unbiased hearing as the jurors are influenced by media reports, therefore may have difficulty in reaching a right verdict due to media coverage of the trial.

Jurors could be biased

Jurors could be biased as they might hold biases against specific groups in the community, such as racial prejudice. This is a weakness as jurors with personal biases may not be able to put out of their minds any biases they may hold that could be relevant to the case before them.

This does not provide a fair and unbiased hearing as jurors with personal biases will find them hard to ignore when they try to reach a verdict, which may lead to a wrong verdict.

Jury not required to give a reason

Jury members are not required to give a reason for their decision, they are able to base their decision on whatever they feel appropriate. This is a weakness as the jury might decide not to follow the points of law as explained by the judge. They could make a decision according to what they think is right in the circumstances rather than what the law dictates.

This does not provide a fair and unbiased hearing as jury members can make their decision on the basis of whatever they want, rather than what the law dictates.

Area of Study 2(m): Reforms and alternatives to the jury system

Recent changes

Making the jury more representative of the community

Jurors are often criticised for not being a true cross-section of the community. In recent years the rules regarding jury duty have changed in an effort to make the composition of juries more representative of the whole of society.

It can be argued that the jury does not truly represent a cross-section of the community as peremptory challenges do not allow the accused to be tried by their peers. This is because the use of peremptory challenges, ie challenges without a reason, allows parties to weigh the jury to favour one side by removing potential jurors that will most probably swing against them.

The category of ineligibility for jurors in a trial was changed so that the classes of people who are ineligible have been reduced, eg a minister for religion now has to sit on a jury.

In 2001, the ability to be excused as a right was removed, so teachers and other professions are no longer automatically excused if they would prefer not to attend. Also the distance a person lives from court has been changed from 32 km to 50 km.

These changes make the jury more representative as they allow for potential people and professions who could not have a say nor required to serve on a jury if they are called up and can't give a reasonable excuse.

The advantage of having a more representative jury is that the jury reflects a greater cross-section of the community, which allows for an even greater fair and unbiased hearing.

Suggested reforms

Require juries to give reasons for their decision

When the jury has reached its verdict the foreperson will state 'guilty' or 'not guilty' in a criminal trial, or will say that they find for either the plaintiff or the defendant in a civil one. Even though a civil jury also gets to decide on the remedy, in neither case is the jury required to give any reasons for their decision.

Because the jury does not have to give reasons it is able to allow for wider considerations than the law and matters of evidence. The judge, as a trained, impartial legal professional, is limited to these in their summing up, but the jury can also consider factors such as public interest, contemporary values and 'common sense'. If a jury verdict appears not to accurately apply the law to the evidence it may be called a perverse verdict, but there is nothing stopping a jury from returning one of these.

Appeals are usually limited to points of law or a judicial error, and appellate courts are reluctant to query a jury's findings.

It would be a good idea to require juries to give verdicts as the accused in a criminal trial would know why the jury had decided the way it did. The parties in a civil trial would also know whether due attention had been given to points of law.

Some drawbacks in requiring a jury to explain their decision in a criminal trial is that it could lead to more appeals, especially if it was thought the jury had not followed the law as explained by the judge. Also since there are 12 jurors, coming up with one reason for the verdict would be difficult as there are possibly 12 different reasons.

Introduce a 'not proven' verdict

This would be a good idea in criminal trials as if a not guilty verdict is given by a jury, evidence that comes to light after the trial can not be used to trial the person again. This means that a person could admit their guilt after being found not guilty, and nothing could be done about it. A not proven verdict would allow the prosecution to get further evidence to strengthen their case for another trial.

Some drawbacks allowing this option to juries is that the jury may be tempted to take the 'soft option' of not proven, rather than thoroughly examining the evidence and reaching a final verdict. Also if a new trial takes place, it increases the cost and time it would take to resolve the dispute.

Reduce challenges and exemptions

Some sections of the community are not properly represented therefore the jury is not a true cross-section of the community, eg. those from the legal profession, and too many people are allowed to be excused. Jurors could benefit from their experience when reaching a decision. Peremptory challenges can also effect the make-up of a jury and lead to a jury that does not reflect the general view of society.

The major drawbacks in allowing those involved in the legal profession to sit on a jury is that they may unduly influence others in their decision-making, and there should be an allowance for those with a genuine excuse, eg. a carer. The option of peremptory challenges ensures that either side feels they have had a fair and equal choice in choosing a jury.

An alternative to the current system

Employing professional jurors

One of the alternatives to the randomly selected group of average men and women that we have now, is a jury comprised entirely of government-employed, professional jurors.

Advantages of employing a professional jury would be that they would have a better understanding of the court procedure and legal processes. They could also develop expertise in certain kinds of cases. Also a specialist jury could be jury made up, eg. medical experts in a case involving complicated medical evidence.

Some problems of employing a professional jury would be that they may have formed a biases because of the many cases they have seen previously instead of seeing a case fresh for the first time. Also, being employed by the state would lose the advantage of being an independent body.

Employing a professional jury would affect the random nature as there would be a limited number of juries to pick from and it wouldn't represent a true cross-section of the community. The jury would not be peers of the defendant as they are professionally employed by the state and could be seen as peers to the state.

Area of Study 2(n): Problems and difficulties faced by individuals in gaining access to the law

Financial restraints (Cost)

Need for legal representation

Legal representation is necessary for the effective operation of a legal system as everyone has the right to be legally represented before the courts. Not everyone can afford to exercise this right. To achieve a fair outcome, legal representation is desirable because of the complexity of the law and the nature of the adversary system. The law is found in statutes and precedents that have been decided in higher courts and are binding on lower courts. A non-lawyer may find it difficult to find the relevant law or relevant precedent, as well as making decisions regarding the case and how it should be pursued.

High cost of cases

The cost of going to court are high due to the complexity of the case, length of legal proceedings, fees charged by individual lawyers and cost of running the practice.

Provision of legal aid

Victorian legal aid (VLA) provides access to the legal system by giving assistance to many people seeking legal advice and representatives. It is government funded. Its main function is to provide legal aid in the most effective, economic and efficient manner, to provide the community with improved access to justice and legal remedies.

There are conditions attached to aid and legal aid is dependant on eligibility. The means test assess whether the person can or can not afford legal aid and the reasonableness test determines the likelihood of their case's success. VLA also has guidelines for specific types of cases, eg. criminal, family law and civil.

However, the main problems are lacking of funding, many are not eligible for legal aid, and the backlog of cases.

Structural restraints (Delay)

Causes of delays in civil cases

Increased litigation, the number of cases brought to court; and the increase in volume and complexity of information allows individuals to pursue those rights if they have been infringed. (Refer back to AOS 2a)

Causes of delays in criminal cases

Difficulties in collecting evidence such as forensic testing to prepare the case due to increased complexities of crimes and the increased claims on police resources. Problems facing the legal system include staff shortage, delay in getting evidence, long time in remand and also a long time to wait for a case outcome.

Committal proceedings may be seen as a mini-trial, also hand-up brief doesn't allow the testing of oral evidence. (Refer back to AOS 2b)

Social or Cultural restraints (Discrimination)

Aboriginal people have suffered discrimination as a result of the legal system. They are over represented before the courts and this has been recognised in recent years.

Those people who are not familiar contemporary Australian society are likely to experience difficulties in giving evidence in courts and in resolving disputes under the current legal system.

Aborigines face problems when they are being questioned as a witness. These include that they are not familiar with contemporary Australian society and are likely to experience difficulties in giving evidence in courts. Also they may have difficulties in understanding the English language, as well as the issues that arise during a trial or hearing.

When resolving disputes with Aboriginal people, it is more informal and involves emotional responses compared to the formal atmosphere and controlled response in a court. Communications are mainly oral and there are no strict rules of evidence.

Area of Study 2(o): Recent changes in the operation of the legal system to enhance the effective operation of the legal system

Area of Study 2(p): Recommendations for further changes in the operation of the legal system to enhance the effective operation of the legal system

Financial (Legal rep, court costs, legal aid)

Methods of alternative dispute resolution

The courts have shown a commitment to greater use of mediation, conciliation and arbitration to try to resolve civil actions faster and with less expense. This has proved very successful at reducing backlogs in courts and assisting the parties. However, except for arbitration, decisions reached between parties are not binding, so the matter still could end up in court.

Roundtable dispute management (RDM)

The RDM was set up by Victoria Legal Aid, which is an alternative to ADR in family law cases. RDM allows parties with legal representation to access a non-litigation pathway to resolve their dispute. The RDM chairperson conducts the conference. Their role is to assist the parties to resolve their family law dispute, and to complete a report following the conference to recommend whether a party should continue to receive legal aid.

Increase the jurisdiction in the Magistrates' Court

An increase in jurisdiction in the Magistrates' Court would enhance the legal system as more cases would be able to be heard in the Magistrate's Court, allowing for a speedier and less costly trial compared to other superior courts in the court hierarchy. A cheaper means of resolution results in improved access to the law.

Social/Cultural (aboriginal, occupation, social issues)

Magistrate's Court (Koori Court) Act 2002

To Koori court is a sentencing court established to provide a fair, equitable and culturally relevant justice services to the Aboriginal community, as well as providing greater protection and participation in the sentencing process for summary offences. The court operates with as little formality and technology as possible. The defendant has to plead guilty and the court also ensures that proceedings can be understood by the defendant, their family and any member of the Aboriginal community present. An elder is present to advise the court on Aboriginal cultural issues and to assist the Magistrate in determining an appropriate sentence. It is very successful with only 9 out of 167 re-offending.

Structural (increased litigation, difficulties in collecting evidence – more complex – grater claims on police resources, committals)

Neighbourhood Justice Centre (NJC)

The objective of the NJC is to simplify access to the justice system and apply therapeutic and restorative approaches in the administration of justice. NJC aim to reduce the local crime rate and increase community confidence in the justice system. It also reduces delays, which increases access.

Directions hearings (criminal and civil) and pre-trial conference

Direction hearings and pre-trial conferences reduce delays, as it makes the trial shorter and promote an out-of-court settlement. Directions hearings also allows for the parties too see the strength of the opposing party's arguments. Issues are also settled during directions hearings, Such as clarifying issues that are not in contention thereby reducing the time needed in court. About 75% of civil disputes are resolved at directions hearings or pre-trial conferences.

Hand-up brief committal proceedings

The use of the hand-up brief reduces delays and has led to more court time being available for other matters as it relies on written evidence rather than oral evidence, although the reliability of that evidence can not be tested through cross-examination. There are also time limits in place. The hand-up brief informs the defendant of the committal mention date. It also contains a copy of the charge sheet, sworn statements, documents, photographs and exhibits to be used in evidence.