



LEGAL FUNDAMENTALS IN AUSTRALIA

Activity Centre: Unit 3 AOS 1

Question 1

Example points:

- *Each juror individually, as well as the jury as a whole, has the responsibility to listen impartially to the evidence and the judge's directions in order to decide questions of fact and to return a verdict of guilty or not guilty based on the standard of proof of 'beyond reasonable doubt'.*
- *Jurors must elect a foreperson to coordinate jury discussions and deliberation.*
- *Jurors must disclose known reasons that would prevent them acting impartially. Failure to inform the Juries Commissioner as soon as practicable is an offence, punishable by a fine.*

Question 2

- a. *Aisha may wish to consider the presumption of innocence before deciding to plead guilty in this case, because the presumption of innocence means it is the prosecution who must provide proof beyond reasonable doubt that Aisha committed this crime. Based on the facts, she may not be able to positively deny that she committed this crime, but the presumption of innocence means she doesn't have to; given that she is potentially facing a serious term of imprisonment, she may wish to plead not guilty and rely on the fact that the prosecution may not be able to sufficiently prove the case.*

b. Example arguments:

- *Plea negotiations give the accused more complete information about the progress of their dispute and the choices available to them. This empowers them to make better-informed decisions about a proceeding that is likely to have a significant impact on their life. In an incident like this, it may be possible that plea negotiation resulting in Aisha pleading to a lesser charge such as careless driving might make the difference between receiving a custodial sentence or not.*
 - *Plea negotiations can encourage guilty defendants to plead guilty and save the time and resources required to complete a contested criminal dispute. Hearings and trial consume huge amounts of time, money and emotional energy, and a range of stakeholders benefit if unnecessary hearings and trials are avoided or cut short – the accused and the Office of Public Prosecutions, and also the witnesses, the courts, parties to other disputes and the tax-paying public.*
 - *Plea negotiations can encourage guilty parties to take responsibility for their wrongdoings rather than to deny responsibility and hope to be found not guilty. Encouraging guilty people to fight charges not only favours accused persons wealthy enough to conduct a rigorous defence over months or years, it also supports an attitude in society that denying wrongdoing is preferable to owning our behaviour. It may be an important and therapeutic part of the recovery process for Aisha's victim to hear Aisha plead guilty and take responsibility for her actions, and perhaps even apologise.*
- c. **Example:** *A fine may be an inappropriate sanction in Aisha's case because of the relatively serious nature of her offending. Fines are typically more appropriate in summary offences, and a dangerous driving offence like this is more likely to be heard in the County Court as an indictable offence. Further, fines are not usually appropriate in cases that involve serious physical harm to victims like this one. The victim is unlikely to feel that Aisha has been sufficiently punished if she only receives a fine – no matter how large. Given recent moves by parliament and the courts to more severely punish the use of mobile phones while driving, to denounce this behaviour as unacceptable, and to deter others from engaging in this sort of dangerous behaviour, all of this points towards the more serious sanction of imprisonment*

being more appropriate in Aisha's case. Therefore, a fine is also inappropriate by virtue of the fact that imprisonment would be a more appropriate sanction in this case.

Question 3

Example points:

- *The right to be tried without unreasonable delay means criminal trials should be held as quickly as possible after the events that give rise to the charges. The concept of 'as quickly as possible' rests on the idea that the need to be properly prepared for legal proceedings – which will take time – must be balanced against the need to see justice be done and to gain closure. This is why the right is to be tried without unreasonable delay, and not without any delay at all.*
- *The right to a fair hearing includes elements such as a competent and independent arbiter to be in charge of the hearing, that the hearing be conducted impartially, that the accused have adequate legal representation (although with no guarantee of representation), and the accused should have an accurate understanding of the proceedings.*
- *The public must have confidence in the actual impartiality of the judicial officer presiding over the trial. This means that the hearing is conducted without any preference, favouritism or bias towards either the prosecution or the defence. Equally as important as avoiding actual bias is the principle that the judicial officer must avoid any perception of bias.*
- *The right to a fair hearing includes the right to adequate legal representation. This means that an accused person has a qualified legal representative to argue their case in court, if they could not get a fair trial without it. In the Charter of Rights and Responsibilities 2006, the importance of legal representation is outlined in s25: a person charged with a criminal offence is entitled "to have legal aid provided if the interests of justice require it."*
- *The law has developed to be flexible in relation to the content and form of victim impact statements. They are not designed to be onerous or to add even more stress to the experience for the victim; instead, the victim is able to choose, with a significant amount of freedom, how they want to express themselves and what they want to say.*
- *The judge or magistrate is given the power to declare any part of a victim impact statement inadmissible if it contravenes the rules of evidence, or if the presiding officer fears it will otherwise unfairly prejudice the sentencing against the offender. These restrictions are in the interests of fairness.*
- *Amendments to the Sentencing Act in 2018 also mean that judges need not specify which parts of the victim impact statements won't be relied upon during sentencing due to their inadmissibility. This is in response to criticisms that judicial commentary about the admissibility of aspects of the victim impact statement could lead to victims feeling like their experiences were being discounted, or ignored. This change can improve the experiences of victims of indictable crimes by ensuring that they do not feel like their experiences are being discounted by the judicial process.*

Question 4

- a. **Example:** *Arranging courts in a hierarchy allows for specialisation, meaning that each court is able to develop expertise in the areas of law that are particular to their place in the court hierarchy. For instance, the Magistrates' Court is the only court which deals with committal proceedings, so it is likely that Magistrates will develop expertise in that area. For example, Magistrates will have experience applying the correct legal test to determine whether there is evidence of a sufficient weight to support a conviction for the offence charged. They are also likely to be familiar with the sort of timelines that are reasonable during the committal process, and so be able to manage the process in a way that is as efficient and timely as possible. This is likely why Source 3 comments, that moving committal proceedings from the Magistrates' Court to the higher courts, is much more complex and expensive a recommendation than it first appears, since they have already been able to specialise and build up a large body of expertise.*
- b. **Example:** *On 1 July 2018 the Victorian Government launched the pilot intermediaries programme. Intermediaries are communication specialists who help vulnerable witnesses to give their best evidence. Eligible witnesses include both child complainants and complainants with a cognitive impairment, in sexual offence matters and homicide matters. This is one of the ways in which the system could better achieve the goal identified by both the VLRC and the Minister, when they say that vulnerable witnesses such as children and witnesses with a cognitive impairment need to be better protected. This programme was recommended by the VLRC in 2016 to increase access for witnesses at risk so they can give evidence with less trauma.*
- c. **Example:** *Part 8.2 of the Criminal Procedure Act 2009 gives courts the power to order alternative arrangements for the giving of evidence by witnesses in matters involving sexual offences, family violence, sexual exposure, or obscene*

and threatening public behaviour. Alternative arrangements include allowing the witness to give evidence to the court via closed circuit television from another venue, or allowing the witness to have a support person beside them while giving evidence, amongst other things. One benefit of these alternative arrangements is witnesses may feel more comfortable and safer giving evidence since they will not have to see the accused, and as a result are more likely to participate in the trial process. This may be particularly important for complainants in sexual offence cases like described in the sources, because being confronted by the accused may expose them to further trauma.

d. Example arguments:

- ✓ *Delays can affect the ability of people to use the legal system because they may want closure and to get on with their lives. Criminal defendants can also be compelled to plead guilty because they are not financially or emotionally able to defend themselves over a long period of time, and long delays can impair the ability of witnesses to give accurate evidence, hampering both the prosecution and the defence in the presentation of their case.*
- ✓ *At the same time, however, rushing parties into resolution may prevent them from being able to prepare their best case thoroughly and may mean they are not fully ready for trial. Since the trial in the 'adversary' system is one continuous event, it is not usually possible to postpone a trial until a later date if it appears some evidence has not been found or prepared thoroughly; similarly, if a party rests their case before they discover new evidence or legal arguments, it is usually not possible for them to reopen it.*
- ✓ *Fairness is compromised because delays of months or years in resolution have a significant impact on the life, and physical and mental health, of the accused, the victim and their families, and the quality of evidence degrades over time.*
- ✓ *Equality is compromised because delays will not impact on every accused the same way.*
- ✓ *Access is compromised because delays can encourage criminal defendants to plead guilty; the accused may also exhaust their funds before the end of the case, and lose their ability to properly defend themselves.*

e. Example arguments:

- ✓ *Legal practitioners have obligations to adequately advise their clients, to advocate for their clients' interests, to present the best case possible for their clients in court, and act on the client's instructions in any way that is compatible with the law, ethics, and the lawyer's duty to the court.*
- ✓ *Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give access to the accused with the need to serve justice and overall fairness in terms of the system.*
- ✓ *Experienced legal representatives are responsible for helping the accused to present their case in the best possible light. This gives the accused confidence in the system, and a better chance at a fair and just trial.*
- ✓ *The use of expert and experienced legal practitioners saves the courts time and money, because they know the correct way to prepare documents, the correct way to make legal submissions and elicit evidence from witnesses, and the best arguments to make to allow the court to home in on the significant issues. This efficiency increases overall access to the system because it allows the courts to operate more quickly.*
- ✓ *Justice may belong to the accused who is able to afford the better legal representative, rather than the accused who is truly in the right, and this decreases proper access to justice. The adversary system of trial is, after all, a battle of proof rather than a search for the truth. The 2019 trial of George Pell resulted in multiple appeals, for instance, all the way to the High Court, and serviced by some of the most powerful and successful lawyers in Australia – Robert Richter is an acclaimed senior barrister, for instance. It is unlikely that many other accused persons would have the resources to do this, and would simply have had to accept the first finding of guilt.*
- ✓ *Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation in plea negotiations because it is not always in the lawyer's best interests to register a guilty plea, or they may believe they can win a 'not guilty' verdict outright for their client; or the prosecution may reject a fair plea, or accept an inappropriate one, in order to get an easy 'win' on the board for their career and the department.*