Legal Studies – Sample Essays

To what extent are courts the only means of achieving justice within the criminal justice system?

While considered to be the main pathway for achieving justice, court action is not the only way to achieve justice, and in some cases, is not the most effective. Once a formal charge has been laid against a person, a hearing or trial will take place. Which court the matter is heard in depends on a number of factors; seriousness of the matter, nature of the offence, age of the accused, type of hearing and whether the alleged crime is under state or federal law.

The Australian criminal justice system is based on an adversarial system of law which relies on a two-sided structure of opposing sides, or adversaries, presenting their cases to an impartial judge and (sometimes) a jury. Supporters of this system claim it is fairer and better equipped to achieve justice as it allows each party an equal opportunity to present its case and is less prone to abuse or bias by the official. Critics of the system however, argue that in many cases the competing sides are not equal before the law with potential imbalances in resources, skills or knowledge. Despite the clear positives of the adversary system in achieving justice, errors may still occur, as found in the famous case Chamberlain v R.

In the Australian criminal justice system, the accused is considered innocent until they have been proven guilty by the prosecution; hence why the burden of proof is on the opposition to prove the defendant's guilt beyond reasonable doubt. Both the burden and standard of proof are essential components in achieving justice; however, the concept of remand works against this, thus potentially inhibiting the deliverance of justice. While remand is typically reserved for people who have committed particularly violent crimes, dangerous criminals, repeat offender or those who are believed to be a flight risk, sometimes errors can be made; resulting in the imprisonment of innocent people. In 2014, the Bureau of Crime Statistics and Research found that prison populations rose by 2.4% to 10385 due to the number of prisoners on remand, and also that there were a growing number of children being remanded rather than released on bail. The standard of proof in criminal cases (beyond reasonable doubt) is much higher than that of civil cases (on the balance of probabilities) due to the fact that there is much more at stake. Generally, the DPP will not bring a case before the courts unless it feels that the jury will be convinced by the evidence; if the jury does not reach a verdict then money, time and resources have been wasted and, depending on the severity of the case, a retrial may be ordered, thus delaying the achievement of justice.

While court action presents significant benefits for achieving justice, for some types of offenders such as young people or those of Aboriginal Torres Strait Islander descent, alternative methods of sentencing such as circle sentencing, and restorative justice have proven to be more effective in correcting the issues associated with recidivism and traditional sentencing forms. Introduced in 2002 on a trial basis, circle sentencing is an alternative court for the sentencing of adult Indigenous Australians. The Circle Courts, which have the full sentencing powers of the court, are based on Indigenous Customary Law and traditional forms of dispute resolution and are designed for those who have committed serious crimes, or, repeat offenders. Through the involvement of community members which sit in a circle with a magistrate to discuss the crime and decide a suitable punishment, the decision is made more meaningful to the offender and improved the confidence of the community in the criminal justice system. The NSW Bureau of Crime Statistics and Research has found that Indigenous offenders were no less likely to reoffend 15 months after circle sentencing than those sentenced in a traditional manner. Despite these findings, a recent evaluation of the program has found that the objectives are being met, leading to the expansion of the program to more communities. Circle sentencing aims to improve understanding and trust between Indigenous communities and the criminal justice system in order to reduce recidivism.

Restorative justice involves bringing together the offender and victim of the offence in order to give the offender an opportunity to take responsibility for their actions and recognise the impact their behaviours had on others. While restorative justice is confronting for both parties involved, it is voluntary and will typically accompany a traditional form of sentencing, however, it also provides the victims with a voice, an opportunity to confront the offender and a vehicle through which damage can be repaired. As an important part of the rehabilitation process, victims are able to ask questions about the offence and the offender has the opportunity to apologise for their actions. Australian studies based on youth conferencing initiatives have shown that through restorative justice, a 15 – 20% reduction in reoffending is possible. Despite these findings and the testimonies of many victims who have found the restorative justice program a valuable part of the rehabilitation process, it is unlikely that the program will be expanded from dealing with minor infringements and youth justice. In Wagga Wagga in 1991, one of the first Australian restorative justice models was initiated and has proven a valuable part of the recovery process. This model is run by the Restorative Justice Unit of Corrective Services NSW and involves safe, private conferencing and mediation services which are facilitated by a trained professional.

Despite the proven effectiveness of courts in achieving justice, the potentially high levels of cost, resources and time required often provide obstacles. Alternative methods of sentencing such as circle sentencing and restorative justice have been proved more beneficial for certain groups in society, thus calling into question the superior ability and power of the courts to achieve justice.

The criminal investigation procedure followed in Australia is designed to ensure the best protection of and balance between the rights of victims, suspects and society. This process combines the powers of police to detain suspects, interrogate, search and seize property, interrogate, detain and release suspects, all through the use of warrants and other legal measures. Australia's criminal investigation procedure is not without its flaws; however, it does work to protect the rights of victims, suspects and society.

Through their role in the criminal investigation process, police are granted special powers which are contained in the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW). It has been argued by many civil libertarians that the granting of extra powers to police diminishes the powers of average citizens. The extreme case of this would result in what is called a 'police state,' however, this does not apply in Australia. To address these concerns, the NSW Ombudsman and the Police Integrity Commission (PIC) has be power and authority to investigate complaints made against police, thus protecting those people who feel that their rights have been breached by the extent of extra police powers. In the case of the Michael Leveson's murder, it is argued by many that the rights of the accused were overpowering the rights of the victim and the victim's family.

The special powers of search and seizure granted by the Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) enable police to 'search people and seize and detain things' in certain circumstances where they believe on reasonable grounds, a person to be carrying anything stolen or used in commission of an indictable offence, a prohibited plant or drug, or a dangerous article in a public place. These powers are quite controversial as they represent intrusion into people's privacy and personal space and can be confronting or embarrassing, especially when conducted publicly. This can be seen in the case of Darby v DPP. In NSW, police can use sniffer dogs without a warrant to search for illegal drugs at pubs, clubs, on public transport and at certain public events. However, as shown in Darby v DPP, this power can be challenged. Darby was found by a sniffer dog to be carrying cannabis and methamphetamines. The sniffer dog touched its nose to Darby's pocket and remained there until police attended the scene. The judge found that as only police are entitled to search as seize, not sniffer dogs, the evidence was obtained unlawfully and as such was not permitted for use in the court. The guidelines for these circumstances and procedures which police must follow in order to protect the rights of the accused are outlines in the same Law Enforcement (Powers and Responsibilities) Act 2002. These guidelines help to safeguard the rights of ordinary citizens when police are gathering evidence. The same applies for warrants, a form of judicial oversight ensuring that police powers are not misused.

Citizens play an important role in the criminal justice system in reporting crime. There are a wide range of community programs, (i.e. Neighbourhood Watch and Crime Stoppers) which have been established to encourage the public to report suspicious activity and in turn, aid police work and promote a sense of community involvement. Programs such as Crime Stoppers are valuable resources for when people may want to remain anonymous or not become involved in a police investigation. In the period between July 2014 and June 2015, Crime Stoppers NSW received 83,000 phone calls which aided in the arrest of 1180 offenders and the issuing of 440 charges. Despite the vehicles available to report crime, it is mainly property offences that are reported, due to the incentive of insurance claims. It is estimated that 85% of sexual and domestic assaults in Australia are not reported, largely due to the shame and embarrassment felt by victims, as well as the unwillingness to revisit the ordeal during questioning. The protection of the rights of such victims are gradually becoming more protected, legislation has been passed to allow victims of sexual or domestic assault to give evidence via CCTV rather than being in the court room, face to face with the victim, who, in order to best protect their rights, is presumed innocent until proven guilty by the prosecution.

Once police receive information regarding a crime, they use their discretion to determine whether or not to pursue an investigation. This decision is made based on the severity of the offence, the likelihood of success and the availability of resources or priorities. While some crimes do go un-investigated, thus violating the rights of the victims, time and resources are redirected to serious and more high priority crimes which pose the greatest risk to society. It is the role of the prosecution to prove the defendant's guilt beyond reasonable doubt and it is the defence's role to place doubt in the prosecution's case. Both sides are able to submit evidence, provided that it is considered to be admissible (authentic, obtained legally, not tampered with and non-corrupt). Guidelines surrounding evidence are included in the Evidence Act 1995 (NSW). Oral testimony is among the most commonly used types of evidence. Both the defence and prosecution may call upon witnesses to testify. Victim's may also provide oral testimony, thus providing a chance to voice their side of the story. It is up to the prosecution to prove the defendant's guilt, hence the defence's right to innocence until proven guilty is protected.

To what extent does the criminal investigation process balance the rights of victims, suspects and society?

The use of technology in regard to evidence collection is frequently used by police, however it is difficult for the law to keep up with new technology. While the scientific and technological advancements that allow police to use fingerprint and DNA evidence, cross check databases and more efficiently process information assist with the criminal investigation process, in some criminal cases the wait for DNA evidence can be up to 12 months. In NSW the backlog ranged from 3500 cases to over 10200. The danger of relying too heavily on DNA technology was highlighted in 2009 when a number of wrongful convictions were discovered in NSW and Victoria. It is vital that new technology is extremely reliable to avoid the risk of presenting inadmissible evidence in court which may lead to a wrongful conviction, thus violating not only the rights of offenders, but also of the victim and society as the actual perpetrator was not convicted.

The powers of police to arrest and detain suspects on reasonable grounds protects the rights of society by detaining potentially dangerous criminals. In regard to bail and remand, many argue that placing an innocent person in remand could have more serious repercussions that allowing a criminal to walk free. The concept of bail works based on the presumption of innocence and refers to the temporary release of an accused person awaiting trial. Bail arrangements can take many forms such as the lodgement of a specified sum of money as a guarantee that they will appear in court, personal recognisance; a promise to turn up based on the understanding that failure to appear will result in being fined and arrested and surety; when someone else agrees to put up money on behalf of accused as a promise that the accused will appear in court. If the accused fails to appear in court the bail money is forfeited. It is difficult to obtain bail for violent offences, when the accused is considered a risk to the community, a potential reoffender, or display signs that they may attempt to flee to another country. While bail does protect the rights of accused to the assumption of innocence, crimes such as the Bourke St car crash, the Lindt Café Siege and the rape / murder of Jill Meagher were all committed by convicted criminals released on bail. While the Bail Act 2013 states that bail will be refused if the person is deemed an unacceptable risk, cases such as these have raised awareness for the need for law reform to more adequately protect the rights of society.

Remand on the other hand, goes against the assumption of innocence, thus limiting the rights of victims, in exchange for better protection of victims and society. Remand is typically reserved for people who have committed particularly violent crimes, dangerous criminals, repeat offender or those who are believed to be a flight risk. In 2014, the Bureau of Crime Statistics and Research found that prison populations rose by 2.4% to 10385 due to the number of prisoners on remand, and also that there were a growing number of children being remanded rather than released on bail.

As a whole, the criminal investigation procedure in Australia is both effective and ineffective in balancing the rights of suspects, victims and society. The presumption of innocence until guilt is proven, limits on police powers and the requirements of 'reasonable grounds' for search and seizure all work to protect the rights of the accused, however, concepts such as bail can violate the rights of society and victims of crime. In order to achieve a holistic balance of the rights of the involved parties, law reform in the areas of bail and remand, DNA evidence and police powers is required.

"The criminal justice system must treat young offenders differently in order to achieve justice"
To what extent is this statement true?

It is the responsibility of the criminal justice system to provide all offenders with a fair and equitable method of achieving justice, hence the recognition of minimal life experience, and differing levels of responsibility by the community which results in the differential treatment of young offenders. This differentiation is necessary in achieving justice, however, this unique approach must not include excusing criminal behaviour. Factors including age, psychological and social pressures are unique to young offenders; thus, the need for the unique approach to youth crime which emphasises the need to protect young people from crime and assist in rehabilitation.

The *Children (Criminal Proceedings) Act 1987* (NSW) is silent on responsibility of children 10 and older, leaving common law to state that the presumption of doli incapax is rebuttable only for children between 10 and 13. This principle recognises that children may have the mental capacity to commit the crime of which they are accused. This is seen in the case of *R v LMW* [1999], one of the few cases in which the application of doli incapax has come under scrutiny. LMW, a 10-year-old boy was charged with the manslaughter of Corey Davis (6); the defendant dropped Corey into the Georges River despite being aware of the victim's inability to swim. LMW was found not guilty as the jury supported the defence's case that the drowning was "an act of bullying gone wrong." The issue with the presumption of doli incapax was raised in this case as the prosecution argued that the defendant knew that his actions would lead to serious injury or death. While doli incapax helps to remind us, that children develop their sense of right and wrong at different stages, as seen in R v LMW, rebutting this principle is extremely difficult.

After the age of 14, the presumption of doli incapax no longer applies as the accused is deemed mature enough to know right from wrong and is able to be found criminally responsible. However, the law continues to protect young people in a number of ways, particularly under the *Children's (Criminal Proceedings) Act 1987. (NSW)* ;

- Full criminal responsibility and the ability to be tried publicly does not occur until the age of 18
- Those under 16 cannot have a criminal conviction recorded against them unless it was an indictable offence
- The offence cannot be considered by the court if the offender reappears later in life
- The inclusion of the child's name in court reports is prohibited
- The matter is heard in the Children's Court

The Children's Court is unique in that it deals solely with crimes committed by those under the age of 18 and is presided over by a specially trained magistrate and no jury. The court has jurisdiction to hear any offence other than indictable offences committed by a child as well as committal proceedings of any indictable offence where the accused is a child. To ensure the equitable treatment of children by the law the Children's Court follows principles set out under the *Children's (Criminal Proceedings) Act 1987 (NSW)*. These are inclusive of:

- Children have rights equal to adults
- Children are responsible for their actions but require guidance and assistance

To ensure the protection of the child involved and to foster their opportunities for rehabilitation the trials of the Children's Court are conducted according to different formalities and procedures than the equivalent adult court. Proceedings are conducted in a closed court, the media may not publish the name of the child, the court must ensure that the child understands the proceedings and, sentencing options differ from those of ordinary courts. These differences often raise questions such as 'is it fair? Is it equitable? Is it effective?'

In NSW, the Young Offenders Act 1997 provides the main alternative program for young offenders. Its aim is to discourage recidivism by encouraging rehabilitation and in turn, reducing the burden of minor youth offences on the court system. While alternatives to court are offered for minor offences, serious crimes such as robbery, sexual offences, murder or manslaughter are not afforded this same opportunity. Within the Act, youth justice conferences may be used when a young offender willingly admits to an offence. This measure removes remorseful youth from the court system through a conference with addresses the negative behaviour in a more general manner, allowing the offender to take responsibility for their actions and promote understanding of the catalyst issues within the family. The NSW Juvenile Justice, Young People in Custody Health Survey found that factors such as poor parental supervision, drug / alcohol abuse, homelessness, negative peer associations and difficulty in school / employment contributed heavily to youth crimes, hence the need for out-of-court measures, involving family to address the issues surrounding youth offenders.

The *Young Offenders Act 1997 (NSW)* is a well-received model due to the fact that it embraces the welfare model of justices and encourages rehabilitation. Its main criticism is that the conferencing facility is not used for a wide enough range of offences. In Australia, people under 18 represent only a small proportion of those involved in crime and a BOSCAR study found that 'very few juveniles receive more than 3 cautions or youth justice conferences.' While children can do little to control their personal circumstances (hence the need for differential treatment by the criminal justice system), the rate of youth detention has decreased by 50% since 1981, suggesting an improvement in preventative strategies and the development of effective alternative programs, such as the Youth Justice Conferences.

In order to achieve justice, the criminal justice system must treat young offenders differently to adults, taking into account their lack of life experience, as well as the psychological and social pressures which are unique to youth. While there must be differential treatment, it is vital that the criminal justice system does not excuse criminal behaviour; thus, it is predominantly true that the criminal justice system must treat young offenders differently in order to achieve justice.

'A court's decision whether to allow an accused person bail or to hold them in remand reflects the tension between community interests and individual rights and freedoms.'
Assess this statement with reference to the criminal justice system.

The Australian legal system in regard to indictable offences aims to achieve justice for all involved; the victim, the perpetrator and society. The concept of bail is based on the presumption of innocence and entails the temporary release of an accused person awaiting trial. Remand however, goes against the concept of the assumption of innocence until guilt is proven. If bail is denied, the accused will be held on remand in either police custody, or at a remand centre. Remand is typically reserved for those who have committed particularly violent crimes, dangerous criminals, repeat offenders and those thought to be a flight risk.

A bail arrangement can take many forms such as the lodgement of a specified sum of money as a guarantee that the accused will appear in court, personal recognisance - a promise to turn up based on the understanding that failure to appear will result in being fined and arrested or surety, where someone else agrees to put up money on behalf of accused as a promise that the accused will appear in court. If the accused fails to appear in court the money will be forfeited. While bail is preferred by the concept of procedural fairness, the fair treatment of individuals before the law and the court system, it is difficult to obtain bail for offences such as drug trafficking and serious domestic violence as after much social pressure, the Bail Act 1978 (NSW) was amended in 2014 to add restrictions on these types of offences in order to minimise the crimes committed by those released on bail. This amendment was highly justified by recent events. The Lindt Cafe Siege of 2014 was committed by Man Haron Monis who was out on bail for 40 sexual offences, a falsified robbery and subsequent insurance claim, as well as accessory before and after the fact for the murder of his ex-wife. While the concept of bail is based upon the presumption of innocence, in the case of violent criminals already known to police, the risk to society is heightened significantly. The Australian Bureau of Crime Statistics and Research found that in 2014 prison populations rose by 2.4% to 10385 as a result of the number of prisoners in remand. This study also found that the average daily number of young people in custody was 434 in 2009 compared to 315 for 2014. This sparked opposition towards the heightened laws surrounding bail, however it is argued that it is a grosser violation of justice to hold an innocent person in remand.

The Australian Institute of Criminology published the Compensation for Wrongful Conviction article in November 2017 which stated that "wrongfully convicted people commonly feel emotions ranging from anger and loss to paranoia and betrayal. The long-term effects have been likened to that of war veterans; many wrongfully convicted people experience ongoing psychiatric dysfunction and have long-term difficulties reintegrating into society." Those held in remand who are found guilty and subsequently sentenced will have the time spent in remand taken off their total sentence, however, those wrongfully held are often not compensated for the error. The system for making ex gratia payments is highly discretional and is often criticised for being erratic and inconsistent. The lack of specific legislation or guidelines for wrongful conviction makes it difficult for those wrongfully held in remand to achieve justice for themselves, their families and in turn, society. However, it can be argued that it is 'better to be safe than sorry.'

There has been significant media attention towards crimes such as the Lindt Cafe Siege which have been committed by accused criminals released on bail. Other incidences include the rape and murder of 29-year-old Jill Meagher. It is widely accepted that this particular case could have been avoided by revoking Adrian Bayley's parole as soon as he had breached it. At the time of the incident Bayley was on parole for 16 previous counts of rapes after spending 8 years in jail. He was also on bail pending an appeal of a three-month sentence for king-hitting a man in 2011. The legislation surrounding this case has since been amended, highlighting the need for law reform in order to protect the balance between community interests and individual rights and freedoms.

Assess the role of circle sentencing as an alternative method of sentencing

While considered to be the main pathway for achieving justice, court action is not the only way to achieve justice, and in some cases, is not the most effective. Once a formal charge has been laid against a person, a hearing or trial will take place. Which court the matter is heard in depends on a number of factors; seriousness of the matter, nature of the offence, age of the accused, type of hearing and whether the alleged crime is under state or federal law.

The Australian criminal justice system is based on an adversarial system of law which relies on a two-sided structure of opposing sides, or adversaries, presenting their cases to an impartial judge and (sometimes) a jury. Supporters of this system claim it is fairer and better equipped to achieve justice as it allows each party an equal opportunity to present its case and is less prone to abuse or bias by the official. Critics of the system however, argue that in many cases the competing sides are not equal before the law with potential imbalances in resources, skills or knowledge. Despite the clear positives of the adversary system in achieving justice, for some groups such as Aboriginal and Torres Strait Islander peoples, alternative methods of sentencing (circle sentencing) have proven to be more effective in correcting the issues associated with recidivism and traditional sentencing forms

Introduced in 2002 on a trial basis, circle sentencing is an alternative court for the sentencing of adult Indigenous Australians. The Circle Courts, which have the full sentencing powers of the court, are based on Indigenous Customary Law and traditional forms of dispute resolution and are designed for those who have committed serious crimes, or, repeat offenders. Through the involvement of community members which sit in a circle with a magistrate to discuss the crime and decide a suitable punishment, the decision is made more meaningful to the offender and improved the confidence of the community in the criminal justice system. The NSW Bureau of Crime Statistics and Research has found that Indigenous offenders were no less likely to reoffend 15 months after circle sentencing than those sentenced in a traditional manner. Despite these findings, a recent evaluation of the program has found that the objectives are being met, leading to the expansion of the program to more communities. Circle sentencing aims to improve understanding and trust between Indigenous communities and the criminal justice system in order to reduce recidivism.

Aboriginal elders such as Uncle John (interviewed by Karina Marlow for SBS) who has been involved in the Circle Sentencing Program for many years, are in a unique position to "appreciate the second chance that circle sentencing provides to offenders." His son was the first person awarded the opportunity to go to Circle Sentencing, Uncle John believes that "it changed the way he looked at life and didn't commit any further offences." It is frequently reported by subjects of the Circle Sentencing program that the punishments are more likely to be respected and valued as they are handed down by elders of their community in a" safe space", rather than the harsh environment of a court room. In bringing together the justice system (court officers, police officers and a magistrate) and the wider Aboriginal community, an appropriate action plan for the offender is able to be designed in a more valued alternative to a formal court proceeding. Officer for the Nowra program, Rebecca Phillis states "by taking the sentencing process out of the court room and into the community with the respected elders and community members it reduces the barriers between the Aboriginal Community [and the justice system]"

Despite the proven effectiveness of courts in achieving justice, the distrust between the Aboriginal community and the justice system provides obstacles. Alternative methods of sentencing namely circle sentencing have proved more beneficial for the Aboriginal community in Australia.

Evaluate the effectiveness of the law in protecting victims of domestic violence

Domestic violence refers to acts of physical, psychological, sexual, financial or emotional violence against someone with whom the perpetrator currently has or has previously had a domestic relationship with. While the law attempts to protect victims of domestic violence through measures such as Apprehended Domestic Violence Orders (ADVOs) under the *Crimes (Domestic and Personal Violence) Act 2007* and various forms of dispute resolution, the rapidly changing nature and prevalence of domestic violence makes it difficult for the law to keep up.

In 2009, the Australian Law Reform Commission conducted an inquiry in response to National Council to Reduce Violence against Women and their Children, Time for Action. This inquiry examined the existing federal and state domestic violence laws and considered the role of police and bail, the effectiveness of protection orders, the prevalence of domestic violence and child protection. Legislation changes have been made in response not only to this inquiry, but also to changing social values and increasing concerns for the protection of domestic violence victims.

The 2013 amendment to the *Bail Act 1978* has added restrictions on granting bail for serious domestic violence offenders. This amendment removing the presumption of bail after increased rates of stalking and killing of women by men on bail reflects the societal belief that too many crimes are committed by those released on bail. As recorded by the Sydney Morning Herald in June, the community-run Facebook page *Counting Dead Women Australia* has recorded 234 'femicides' between 2014 and 2016, highlighting the prevalence of female deaths at the hands of their current or ex-partners; ¼ of which were subject to domestic violence orders at the time of the homicide. A majority of these deaths, such as in the case of Jill Meagher were preventable, however the missed opportunities for intervention and the previously lax restrictions on bail resulted in a lack of protection for the victims of domestic violence.

Under the *Children and Young Persons (Care and Protection) Act,* children may be included on the AVO or ADVO application of an adult or on a separate child protection order which must be applied for by police if the child is under 16. This legislation protects child victims of domestic violence as it prohibits intentional acts resulting or likely to result in physical injury, sexual abuse, emotional / psychological harm, harm to health or physical development. ADVOs are an important means in reducing the incidence of domestic violence. While they are a quick, inexpensive and accessible form of protection, they are only effective if policed, however, they are supported by the full weight of criminal law should a breach occur. Critics argue that ADVOs are too easy to obtain and allow parents to make false claims of domestic violence during parenting order decisions. Others argue that ADVOs would only be effective against law abiding citizens, and do little to deter persistent offenders, however, according to the Australian Bureau of Statistics, they are 'more effective that critics claim.' The breach rate of these orders is less than 50% and in 4 out of 5 cases, they cease violence, intimidation and harassment.

Laws have slowly evolved in response to community pressure and specific instances of domestic violence. As seen in the case of R v Kina, Battered Wife Syndrome is now a recognized defence to criminal charges citing provocation. While this defence originally only applied to wives of heterosexual marriages; it is now applicable to same sex and de facto relationships. Both the *Firearms Act* and the *Surveillance Devices Amendment (Police Body-Worn Video) Act* have been also amended in response to incidences of domestic violence. The *Firearms Act* now allows police to revoke gun licenses or permits if the individual should become subject to an apprehended violence order (AVO) or an ADVO. During the prosecution of domestic violence cases, police may now use videos from their body-cameras as evidence. In 2011, the *Family Law Legislation Amendment (Family Violence and other Measures) Act* redefined domestic violence to include actual or threatened conduct that causes a family member to reasonably fear for or be concerned for their

safety. This amendment also specifically includes the safety of children when making decisions about family arrangements.

According to the *Family Law Act*, any decisions that directly impact upon children must be made "in the best interests" of that child, this act ensures that children are protected from physical or psychological harm from abuse, neglect or violence, and that children have the right to know and be cared for by both parents. Family dispute resolution (FDR) is defined by the act as a non-judicial process in which an independent practitioner helps people affected by a separation or divorce resolve some of their disputes with each other. Separating couples who have children must attend FDR before initiating court action, however, if there is a history of family violence, FDR is often inappropriate. While couples may choose private providers of FDR, individual counseling is available to any child with separating parents. The Magellan program within the Family Court is designed to deal with and protect victims who have made serious allegations of physical or sexual child abuse. The priority of this program is to protect the child until the matter comes before the court; the rigorous judicial management ensures that the matter is decided within a strict timeframe of 6 months, enabling action to be taken against the offender in order to restore the safety of the child. A legal-aid-funded independent children's lawyer is designated to each child involved in a Magellan trial. Ideally this lawyer and the rest of the Magellan team (judges, registrars and family consultants) remain the same for the duration of the case to ensure the child feels safe and comfortable with the proceedings.

Domestic violence is a major social, judicial and economic issue defined by the *Crimes (Domestic and Personal Violence) Act* as 'personal violence committed against someone with whom the offender has or has had a 'domestic relationship' – a marriage, de facto relationship or another close personal relationship." While there are many reasons for experiencing interpersonal problems, the law has responded and strengthened in response to changing social experiences and priorities in order to better protect the safety of victims.

To what extent does state sovereignty affect the resolution of conflict for indigenous peoples?

There are 370 million indigenous people across the world who, through tradition, retain unique social, political, economic and cultural characteristics that are distinct from those of the dominant societies in which they live. The international recognition of a nation state and its sovereignty is determined by United Nations membership, as such the sovereignty of indigenous peoples is not internationally recognised as they are not eligible to become members of the UN. Aside from issues arising in regard to self-determination, state sovereignty also diminishes the effectiveness of international instruments such as the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), which as international law, are not binding on individual nation states.

The United Nations plays the most fundamental role in protecting indigenous peoples and has been the leader in formulating and protecting rights on a global basis. After the publication of the Declaration on the Rights of Indigenous Peoples, the Expert Mechanism on the Rights of Indigenous Peoples was established to provide the Human Rights Council with advice on the rights of Indigenous peoples in order to ensure the holistic protection of their rights and to avoid further conflict.

The concept of a 'nation state' is one of an independent unity, with its own territory and system of government, meaning that each nation state is autonomous and able to make laws for the benefit of itself without any external influence. In order for Indigenous Peoples to gain protection, the state must give up its domestic jurisdiction. Many countries, including Australia rejected article 4 of the UNDRIP as it encouraged the sovereignty of Indigenous groups. These nations fear that if they were to recognise the self determination of its Indigenous peoples, the national entity and identity would fragment.

With sovereignty comes self-determination – the right and opportunity to decide for oneself. Article 3 and 4 of the UNDRIP focus on self-determination, particularly the fact that it is an essential condition for the effective guarantee and strengthening of human rights. Ideally, complete autonomy for indigenous peoples would entail having independent finances. However, this will never be the case if governments maintain control of the resources found on natural lands. Without financial independence, indigenous peoples will find it significantly difficult to determine their own future, thus creating more conflict between the interests of indigenous people and the interests of governments.

In 2009, riots broke out in western china between the indigenous peoples of the Xinjiang province and government forces. The Xinjiang province is rich in agricultural and mineral resources, and as such, the Chinese government actively encouraged millions of Han Chinese to move to the province to help exploit the resources. This active exploitation of indigenous land was the catalyst for the riots which fuelled international suggestions that while China's indigenous people may resent the loss of land and resources, the Chinese government is also fearful of losing the wealth associated with the province if its people decide to separate from China and become autonomous.

Indigenous peoples living inside a sovereign state are subject to its laws. While in some cases, such as that of Canada's Nunavut Land Agreement, the laws of the nation will clarify and protect the rights of its Indigenous peoples, guaranteeing them a life free from discrimination, laws may be silent on, or inhibit the rights and freedoms of Indigenous peoples. In Canada, the Inuit people traded undefined title to land for defined rights to land, money, renewable resources and social and political development, all of which are guaranteed protection. This land claim agreement is the largest in Canada's history, and allowed Nunavut territory ('our land') to be governed by a public government operating within the principles of Canadian parliamentary democracy. This arrangement

has been successful in resolving conflict between indigenous and non-indigenous Canadian groups as it used a collaborative and cooperative approach, rather than a paternal one. By arriving at an agreement that best suited each of the involved parties, Canada has successfully decreased the potential for future conflict.

In contrast, the Basongora pastoralist community of western Uganda lost 90% of their traditional lands between 1900 and 1955 in the establishment process of the Queen Elizabeth National Park. This indigenous group was forcefully evicted from their native home by the government without being provide with alternative settlements. The nation's leaders have done little to address the social injustices suffered by the community, instead dedicating more Basongora land to development projects and military use without community consultation. Because state sovereignty allows nations to govern their people freely, conflicts often arise between the interests and needs of indigenous peoples, and the countries concern with economic growth.

Despite Australia's track record of signing and being party to international human rights documents, some of the countries laws and government policies have had a significantly negative impact on the right of Indigenous Australians to self-determination ratified in 29175, the International Covenant on Economic, Social and Cultural Rights has yet to be entrenched in domestic law. Australia was also strongly criticised by the UN and Amnesty International for the partial suspension of the Racial Discrimination Act. This suspension placed Australia in breach of its international legal obligations, highlighting that the main issue with state sovereignty in regard to the resolution of issues regarding Indigenous peoples is that international law allows nation states to legislate at will about the rights of their indigenous people.

Australia's federal system is reactive, not proactive, and many issues facing the countries indigenous people are dealt with after the fact. For example, the Mabo Case of 1992 successfully overturned the concept of terra nullius, proving that it was an inappropriate legal description of Australia's status at the time of European colonization. The Native Title Act 1993 made it easier for indigenous groups of Australia to claim native title if they were able to prove continuing connection to the land. While this was a significant development, it really was only effective for those groups' native to remote areas of Australia as most of the land in more central areas had been overtaken by European civilization, impeding upon any possibility of maintaining the connection with the land. In 1998, the Native Title Amendment Act (10-point plan) again made it more difficult for indigenous peoples to claim land rights. As state sovereignty allows individual nations to govern themselves as deemed suitable by its leaders, it is important for independent authorities such as the Australian Human Rights Commission to be established in order to monitor the standards of human rights protection in the respective country. The AHRC is a statutory body funded by but operating independently of the Australian government. By investigating alleged infringements under Australia's anti-discrimination legislation, the commission responds to the needs of indigenous peoples. However, while this is a step towards successfully resolving conflict, it is also a reactive measure rather than one to prevent rights from being breached in the first place.

It is clear that while state sovereignty does offer nation states with great legislative freedom regarding the way each country is governed, it also ensures that international law is not considered legally binding. Should a country choose to pass laws which would breach the rights of their indigenous peoples, no legal action could be taken. International law is merely a measure of persuasion, an attempt by the international community to hold countries accountable for their actions.