

Legal Studies Units 3 and 4 practice exam and suggested answers

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The following practice exam for VCE Legal Studies Units 3 and 4 consists of two sections with a total of 10 questions worth 80 marks. Students are required to answer all questions in the spaces provided.

The command/task words in each question, the corresponding number of marks allocated and the number of lines provided after each question give a guide to the appropriate length of responses. Additional space is provided at the end of the question and answer book. Suggested answers to this practice exam follow the question and answer book.

Please note that the questions and answers have no official status. Teachers are advised to preview and evaluate all practice exam material before distributing it to students.

Name: _____ Teacher: _____

LEGAL STUDIES UNITS 3 AND 4

Practice written examination 2018

Reading time: 15 minutes

Writing time: 2 hours

QUESTION AND ANSWER BOOK

Structure of book

Section	Number of questions	Number of questions to be answered	Number of marks
A	7	7	40
B	3	3	40
			Total 80

- Students are permitted to bring into the examination room: pens, pencils, highlighters, erasers, sharpeners and rulers.
- Students are NOT permitted to bring into the examination room: blank sheets of paper and/or white-out liquid/tape.
- No calculator is allowed in this examination.

Materials supplied

- Question and answer book of 23 pages.
- Additional space is available at the end of the book if you need extra paper to complete an answer. Clearly label all answers with the appropriate question number.

Instructions

- Write your name and your teacher's name in the spaces provided above on this page.
- You should make use of stimulus material where it is included. However, it is not intended that this material will provide you with all the information to fully answer the question.
- All written responses must be in English.

Students are NOT permitted to bring mobile phones and/or any other unauthorised electronic devices into the examination room.

b. Explain **one** benefit of having the Victorian courts arranged in a hierarchy in this case.

2 marks

Question 5 (3 marks)

Explain how section 109 of the Australian Constitution affects the legislative power of state parliaments.

SECTION B

Instructions for Section B

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

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

Question 1 (12 marks)

Source 1

The following is an extract from the Victorian Law Reform Commission (VLRC) website.

[Referral to the Commission pursuant to section 5(1)(a) of the *Victorian Law Reform Commission Act 2000* (Vic.) on 16 December 2016.]

ACCESS TO JUSTICE LITIGATION FUNDING AND GROUP PROCEEDINGS

Terms of Reference

The Victorian Law Reform Commission is asked to report on the following issues to ensure that litigants who are seeking to enforce their rights using the services of litigation funders and/or through group proceedings are not exposed to unfair risks or disproportionate cost burdens.

Source: 'Litigation funding and group proceedings: Terms of reference', Victorian Law Reform Commission, January 2017, <http://www.lawreform.vic.gov.au/projects/litigation-funding/litigation-funding-terms-reference>

Source 2

The following is an extract from the Victorian Government directory website.



Access to Justice - Litigation Funding and Group Proceedings - June 2018 - Report

The Commission's report, Access to Justice - Litigation Funding and Group Proceedings was tabled in the Victorian Parliament on 19 June 2018.

Type: Report

Category: Justice

Victorian Law Reform Commission

Source: 'Publications: Justice, Victorian Law Reform Commission', Victorian Government directory, June 2018, <http://www.vic.gov.au/publications/justice.html?dep=70>

Suggested answers

SECTION A

Question 1 (5 marks)

Tyson, aged 24 years, has been charged under section 79A of the *Crimes Act 1958* (Vic.) with aggravated carjacking after threatening a driver at gun point and using force to steal their motor vehicle. He has been denied bail prior to committal proceedings.

- a. Explain whether Tyson has been charged with a summary offence or an indictable offence. Provide *one* reason for your decision. **2 marks**

Tyson has been charged with an indictable offence **[1 mark]** because he is awaiting committal proceedings, which takes place in cases where the accused has been charged with one or more indictable offences. A committal proceeding is not used in summary offences. **[1 mark]** Tyson has also been charged under the *Crimes Act 1958* (Vic.) and offences under this Act are deemed to be indictable.

Additional information:

In accordance with the Crimes Act 1958 (Vic.) aggravated carjacking is an indictable offence, which carries a maximum penalty of 25 years imprisonment. Section 10AD of the Sentencing Act 1991 (Vic.) generally requires a minimum three year, non-parole period to be imposed on offenders.

Marking guide:

1 mark for stating that the offence is an indictable offence

1 mark for providing a reason why the offence is indictable

- b. Discuss the extent to which *one* purpose of committal proceedings can be achieved. **3 marks**

Note: *The following answers are three of a number of possible answers to this question.*

One purpose of committal proceedings is to ensure that a case against a person accused of an indictable offence will only proceed to trial if the prosecution can show the court that it has sufficient evidence against the accused to support a conviction in a higher court. **[1 mark]** This function of committal proceedings promotes access to the criminal justice system by acting as a filtering system, thus saving the accused time, financial cost and emotional stress associated with a trial that is unlikely to succeed. **[1 mark]** However, committal hearings might not act as an effective filtering system as the Director of Public Prosecutions can overrule magistrates' decisions to not proceed to trial. **[1 mark]**

Alternative answer:

One purpose of committal proceedings is to improve access to the criminal justice system and promote a timely resolution of a criminal case. This is done by determining whether or not it is appropriate to hear an indictable offence summarily in the Magistrates' Court.

[1 mark] However, some of the stages and hearings that take place during committal proceedings, such as contested committal hearings, can be complex and confusing for an accused, particularly if they do not have legal representation. **[1 mark]** This disadvantages the accused, as it limits their ability to understand criminal processes and therefore limits their access to the criminal justice system. **[1 mark]**

Alternative answer:

One purpose of committal proceedings is to enable the accused to be informed of the case against them early in the criminal process. This promotes fairness by giving the accused the opportunity to prepare their case adequately and as early as possible. For example, committal proceedings enable the accused to hear or read the evidence against them, cross-examine the prosecution's witnesses and, if they so choose, make an early submission of their case. **[1 mark]** However, defended committal proceedings are rare due to the high cost of legal representation and the high cost of preparing written submissions. **[1 mark]** This is unfair for the accused as there is likely to be an imbalance between the financial resources of an accused and those available to the prosecution. In addition, the majority of committal hearings result in the accused being committed to stand trial. **[1 mark]**

Note: *The reaccredited VCE Legal Studies Study Design (2018–2022) requires students to discuss the purposes of committal proceedings rather than simply focus on committal hearings. Students should be aware that committal proceedings are the pre-trial processes and hearings that take place in the Magistrates' Court for indictable offences in which the accused does not make an early guilty plea. Committal proceedings generally include a committal hearing, which is held to determine whether or not the prosecution has sufficient evidence against the accused to secure a conviction at trial.*

The task word 'discuss' in the question requires students to examine the extent to which one purpose of committal proceedings can be achieved, by identifying any weaknesses or issues relating to it.

Purposes of committal proceedings include:

- *to determine if there is evidence of sufficient weight to support a conviction for the offence charged*
- *to promote a timely resolution of a criminal case*
- *to determine whether a charge for an indictable offence is appropriate to be heard and determined summarily*
- *to enable the accused to be informed of the case against them early in the criminal process*
- *to enable the issues in contention in the case to be adequately defined*
- *to determine how the accused proposes to plead to the charge*
- *to ensure the prosecution case is adequately disclosed if it goes to trial.*

Marking guide:

1 mark for providing the characteristics and features of one purpose of committal proceedings

2 marks for discussing the extent to which the stated purpose of committal proceedings can achieve its aim

Question 2 (5 marks)

Evaluate the extent to which the separation of the legislative, executive and judicial powers acts as a check on parliament in law-making.

The principle of the separation of the legislative, executive and judicial powers acts as a check on parliament in law-making by ensuring no one body holds all of the three types of power in the Australian parliamentary system or exceeds its power. **[1 mark]** For example, the independent judiciary, which holds the power to apply and interpret the law to resolve disputes, can check that the parliament does not make laws that exceed its legislative power. **[1 mark]** Although it can be argued that the parliament can pass legislation that indirectly impacts on the independence of the judiciary. **[1 mark]** For example, it could be argued that the anti-terrorism laws introduced in 2016, allowing the Commonwealth Government to strip dual nationals involved in terrorist activities of their Australian citizenship, removed the determination of criminal guilt in such matters, from the judiciary to the government. This potentially breached the separation of powers, although such legislation remains valid unless challenged in the courts. Judges are also appointed by the executive, which might result in the perception that the government of the day might be able to influence the composition of judges in superior courts. **[1 mark]**

The separation of powers also allows for the executive, which is responsible for the administering the law and managing the business of government, to be scrutinised by the legislature. For example, the government can be scrutinised by the parliament during question time. **[1 mark]** Although this checking function is limited, in reality the legislative and executive powers are combined. For example, at the federal level, the executive consists of the Governor General who, in reality, acts on the advice of the Prime Minister and some senior ministers, who are also members of the legislature. **[1 mark]**

Marking guide (global):

1–3 marks for a lower-order response that outlines how the separation of the legislative, executive and judicial powers acts as a check on parliament in law-making

4–5 marks for a high-order response that details the powers, provides examples and makes a judgment, such as a limitation or a strength, based on the criterion of the separation of powers acting as a check on parliament in law-making

Note: The sample response contains more than 5 marks.

Note: The reaccredited VCE Legal Studies Study Design (2018–2022) has a key skill that requires students to evaluate the ways in which the Australian Constitution acts as a check on parliament in law-making, including the means by which the separation of the legislative, executive and judicial powers acts as a check on parliament in law-making.

Question 3 (4 marks)

a. State one High Court case that has had an impact on the division of constitutional law-making powers. **1 mark**

Note: The following answers are two of a number of possible answers to this question.

The *Brislan case* (1935) is one High Court case that has impacted on the division of constitutional law-making powers.

Alternative answer:

The *Franklin Dam case* (1983) is one High Court case that has impacted on the division of constitutional law-making powers.

- b. Explain how the case stated in *part a.* has impacted on the division of constitutional law-making powers. 3 marks**

Note: *The following answers are two of a number of possible answers to this question.*

The High Court's decision in the *Brislan case* (1935) altered the division of law-making powers between the Commonwealth parliament and state parliaments by expanding the Commonwealth's law-making power. **[1 mark]** In this case, the High Court was called on to interpret whether the specific constitutional power of the commonwealth to make laws on 'postal, telegraphic, telegraphic, and other like services', under section 51(v), included wireless sets (radios). In deciding in favour of the commonwealth, the High court effectively increased the Commonwealth's power (to legislate in the area of radios) through their interpretation of the Constitution. **[1 mark]**

The *Brislan case* also established a legal principle, which was followed in later cases, such as *Jones v Commonwealth* (1965), to further expand the power of the commonwealth allowing it to make laws in other areas of communication, including television, internet and cable, unimagined at federation. **[1 mark]**

Alternative answer:

The High Court's decision in the *Franklin Dam case* (1983) altered the division of law-making powers between the Commonwealth parliament and state parliaments by expanding the Commonwealth's law-making power. **[1 mark]** In this case, the High Court's broad interpretation of the external affairs power, under section 51 (xxix), allowed the Commonwealth parliament to make laws on any matters covered by an international treaty, even if these areas related to a residual power. **[1 mark]** The immediate impact of the High Court decision was to allow the federal government to make laws to stop the dam from being constructed in order to protect the heritage area and fulfil its commitment under the World Cultural and Natural Heritage convention. This is an international treaty, to which Australia is a signatory, designed to protect listed areas of natural and cultural heritage. The long-term impact has allowed the commonwealth to pass legislation in other areas covered by international treaties, for example, the passing of the *Human Rights (Sexual Conduct) Act 1994* to override state laws that were considered to be discriminatory and in breach of Australia's international obligations under the International Covenant on Civil and Political Rights (Article 17). **[1 mark]**

Marking guide:

2 marks for outlining how the immediate High Court ruling either expanded or limited the Commonwealth's law-making power

1 mark for outlining the importance of the High Court's ruling in terms of its future impact on the Commonwealth's law-making powers

Question 4 (8 marks)

Malcolm is a 19-year-old student who works part-time in a bakery. On his way home from work one night he lost control of his motor vehicle and collided with a cyclist. As Malcolm was speeding at the time of the incident he was charged, in accordance section 319 of the *Crimes Act 1958* (Vic.), with dangerous driving causing serious injury. Malcolm is worried about his case because he knows very little about the legal system and believes he cannot afford legal representation.

- a. **With reference to one principle of justice, explain why it is important for Malcolm to seek legal advice, and discuss how Victoria Legal Aid may be able to assist him.**

6 marks

Note: The following answers are two of a number of possible answers to this question.

It is important for Malcolm to seek legal advice to ensure that *fairness* is achieved in his case. For example, as the accused, it is important that Malcolm is able to seek legal advice so he is informed about, and understands, the charges and basic evidence against him and the criminal processes involved in his case. **[1 mark]** It is also important that Malcolm is made aware of his legal rights so he might receive a fair hearing and have his case prepared and presented in the best possible manner. **[1 mark]**

Victoria Legal Aid (VLA) might be able to assist Malcolm in a number of ways. Firstly, VLA can provide Malcolm with legal aid if he cannot afford to pay for it and has no other avenues of assistance. This can include providing free legal information, such as access to publications and information about criminal case from their website or via the phone, and free advice, given in person, via online conferencing or phone. **[1 mark]**

VLA might also provide Malcolm with free or low-cost legal representation if he meets the strict eligibility criteria, meaning satisfying a means test. In this way VLA can help ensure that Malcolm has access to assistance and legal representation so he understands his legal rights and the criminal processes he might be facing. **[1 mark]**

The provision of free or low-cost legal representation might also help ensure that Malcolm has a fair hearing and trial because lawyers can ensure accused people have their cases prepared and presented in the best possible manner, including the cross-examination of witnesses. Legal representation can also assist an accused to pursue an appeal if reasonable grounds exist. **[1 mark]** However, due to a lack of funding by the Commonwealth government and state governments, the services provided by legal aid organisations, including Victoria Legal Aid, are limited. For example, only accused persons who meet the strict eligibility criteria are able to receive a grant for legal representation from VLA. Similarly, due to an over demand for its services, the VLA's 'in person advice' is given to people who are most in need, including people who cannot afford a lawyer, have a disability, homeless, children, cannot speak English and are at risk of family violence. **[1 mark]**

Alternative answer:

It is important for Malcolm to seek legal advice to ensure that he is able to access the criminal justice system. For example, given Malcolm knows very little about the legal system, he will need legal advice to ensure he understands his legal rights and the legal processes surrounding his case. **[1 mark]** This might include Malcolm needing to be informed about his basic legal rights, such as the right to silence and an interpreter, if needed, the complex pre-trial processes and strict rules of evidence and procedures that must be followed during any pending trial. **[1 mark]** Malcolm will also need advice regarding the availability of assistance from various legal organisations. For example, depending on Malcolm's financial status and circumstances he might qualify for free or low-cost legal assistance and representation from Victoria Legal Aid. **[1 mark]** This is especially important because if accused people are unable to seek legal advice and representation, they are most likely to be at a significant disadvantage compared to the well-resourced and experienced prosecution. **[1 mark]** It is also important that Malcolm is provided with legal advice should he wish to pursue an appeal if reasonable grounds exist. **[1 mark]**

Note: Students might also examine the significance of an accused having legal advice to achieve the principle of justice, equality and be treated as equal before the law. This means the accused must have an equal opportunity to present their case irrespective of their personal characteristics, such as their gender, race, religion, age, sexuality, and their economic and social circumstances.

Marking guide (global):

1–2 marks for explaining, with reference to one principle of justice, why it is important for Malcolm to seek legal advice

1–4 marks for discussing how Victoria Legal Aid might be able to assist Malcolm

Note: Students must explain why it is important for Malcolm to seek legal advice in order to achieve one principle of justice—fairness, access or equality

b. Explain one benefit of having the Victorian courts arranged in a hierarchy in this case. 2 marks

Note: The following are two possible answers to this question.

One benefit of having the courts arranged or ranked in a hierarchy from lowest to highest according to the seriousness or complexity of the cases is that it allows a system of appeals to operate. **[1 mark]** This means if Malcolm is dissatisfied with the outcome of his case he might, with reasonable grounds, be able to appeal the decision to a higher court, for example the Supreme Court of Appeal, where the decision can be reviewed by more senior judges. This would not be possible if there was no court hierarchy. **[1 mark]**

Alternative answer:

One benefit of having the courts arranged or ranked in a hierarchy from lowest to highest according to the seriousness or complexity of the cases is that it allows cases to be heard by a court that specialises in hearing specific types of cases. For example, this case would be heard in the County Court, which specialises in hearing indictable offences (other than murder and murder related offences), such as dangerous driving causing death. **[1 mark]** This allows for court personnel to develop their expertise, such as a judge becoming an expert in hearing indictable offences, and for a more efficient resolution of the dispute. For example, procedures can be streamlined, and personnel and facilities can be tailored to suit a court's specialisation. **[1 mark]**

Marking guide:

1 mark for identifying one benefit of having the courts arranged in a hierarchy from lowest to highest according to the complexity of the cases they can hear

1 mark for explaining a benefit, in the context of this case

Question 5 (3 marks)

Explain how section 109 of the Australian Constitution affects the legislative power of state parliaments. 3 marks

Section 109 of the Australian Constitution is significant because it limits the legislative power of state parliaments by stating that when state law and Commonwealth law is inconsistent, the Commonwealth law will prevail and the state law will be invalid, to the extent of the inconsistency. **[1 mark]** As such, section 109 can act as a restriction on the law-making powers of the state parliaments if Commonwealth laws already exist to govern a certain area. However, any inconsistent state legislation will remain law until it has been successfully challenged in, and declared invalid by, the courts. **[1 mark]**

By placing this limitation on the state's law-making powers, section 109 can also limit the states' legislative powers by making the states reluctant to create law in concurrent areas of power for fear the law will be declared invalid, **[1 mark]** although the states clearly still retain the sole power to make laws in residual areas of power.

Marking guide:

1 mark for explaining one way that section 109 affects the legislative power of state parliaments (x three = 3 marks)

Question 6 (5 marks)

George rents a small house from Amal. Under the terms of the rental lease Amal, as the landlord, is required to carry out necessary repairs to reasonably maintain the property. One night a large storm damaged the front gate, which now does not close, and cracked three windows in the rental property. George has contacted Amal several times requesting she repair the front gate and the windows, which he believes are unsafe, but she is unwilling to do so. George does not wish to take the matter to court but definitely wants Amal to be compelled or ordered to undertake the repairs.

Explain why Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) might both be appropriate bodies to resolve George's dispute.

Both Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) are appropriate bodies to resolve this dispute because both have the jurisdiction to hear residential tenancies disputes such as this case. **[1 mark]**

CAV also might be an appropriate body to resolve this dispute because it offers a free dispute settlement service to resolve residential tenancies disputes involving \$40 000 or less, which might suit George and Amal if they wish to avoid all legal costs, including application fees. **[1 mark]** CAV also resolves disputes through conciliation meaning that an independent conciliator will be provided to assist George and Amal to discuss their dispute and offer advice and suggestions to assist them reach their own mutually acceptable agreement. **[1 mark]**

VCAT, however, might be a more appropriate avenue of dispute settlement because, while CAV does not have the power to make legally binding orders, in the event that the parties cannot reach a mutually acceptable agreement at VCAT (via mediation or a compulsory conference), their dispute might be resolved at a legally binding hearing. This might particularly suit George who wants Amal to be ordered to undertake the repairs. **[1 mark]**

Both CAV and VCAT are also appropriate dispute resolution bodies because they will most likely be able to resolve the dispute relatively quickly—typically within 2–3 weeks—which will benefit George given he believes the windows are unsafe and the repairs are relatively urgent. **[1 mark]**

Marking guide (global):

1–3 marks for a lower-score response that outlines some essential features of CAV and VCAT as avenues of dispute settlement

4–5 marks for a high-score response that shows the appropriateness of each body to resolve this dispute

Question 7 (10 marks)

Discuss the extent to which parliament is able to respond to the need for law change. Support your response with an explanation of one parliamentary committee or one Royal Commission and a discussion of its ability to influence law reform.

Given that parliament is the supreme law-making body, with the power to make and change any law within its constitutional jurisdiction, it has a great ability to implement legislative reform so the law keeps pace with changes in community views and values, technological advancements, changing domestic and international circumstances and the like. However, range of limitations, including structural, political and financial restraints, can limit parliament’s ability to respond to law change.

One main feature of our parliamentary system that enables it to effectively respond to the need for law change is that it is based on the principle of representative government. This means that our parliaments consist of elected members who must make laws that reflect the changing views, values and needs of the majority of the community or risk re-election. **[1 mark]** However, in an attempt to win voter support, members of parliament might be more likely to implement popular law reforms rather than risk losing voter support by introducing more necessary but politically sensitive or controversial laws. **[1 mark]** For example, over recent years the Victoria Government has made various changes to Victoria’s sentencing laws, including introducing more mandatory minimum sentences for certain offences and limiting the use of community correction orders. While being popular with voters who wish to see ‘tougher’ sentencing, these changes might lead to an unjust outcome by restricting the ability of judges to use their discretion when sentencing offenders, particularly first-time and young offenders. **[1 mark]**

Furthermore, parliaments can be slow to respond to the need to change the law if it has difficulty measuring prevailing community views, especially in controversial areas, such as allowing for the use of medicinal cannabis and the introduction of safe injecting rooms. **[1 mark]** For example, although the Victorian parliament passed the *Voluntary Assisted Dying Act 2017* allowing certain people with terminal illnesses, under very strict circumstances, to choose to lawfully end their life, this law reform took many years to achieve. **[1 mark]** Similarly, the Commonwealth parliament took over a decade to change the law to allow marriage equality due to the controversial nature of the law reform and possible voter backlash.

While parliament can at times be slow to implement law reform, being the supreme law-making body, it does have the ability to respond relatively quickly to change the law if desired and make laws *in futuro* or with the future in mind. This is a strength of parliament, especially compared to the courts, which must wait until a relevant case is brought before them for resolution before they can establish a legal principle. **[1 mark]** For example, during the period 2009–2010, the Commonwealth parliament was quick to introduce new quarantine laws to respond to the swine flu outbreak, and in 2017 the Victorian parliament quickly introduced changes to the bail laws after the Bourke Street tragedy, where an accused man, released on bail, drove through crowded streets killing six people and injuring many more. **[1 mark]**

However, while the bicameral nature of the Commonwealth and Victorian parliaments allows them to effectively discuss and debate proposed law reform, the ability of the parliament to change the law can be lessened if the government does not have a majority in the upper house or if there is a minority government, which relies on the support of the crossbench to pass laws and respond to change. Financial constraints might also limit the ability of the parliament to implement changes in the law. **[1 mark]**

Another reason why parliament is able to respond to the need for law change is because it is able to investigate the need for law reform and has access to independent law reform bodies. For example, both the Commonwealth parliament and state parliaments have committee systems that allow for parliamentary committees to be established to investigate issues, the need for law reform and the ability to initiate Royal Commissions to investigate matters of public importance or concern. **[1 mark]** For example, in 2016 after a television program (*Four Corners*) began publicly highlighting the poor and unjust treatment of youth in detention centres in the Northern Territory (the Don Dale and Alice Springs Detention Centres) the federal government announced the commencement of the Royal Commission into the Protection and Detention of Children in the Northern Territory to examine how children were being treated in detention centres in the Northern Territory and to also look into the state's welfare system. **[1 mark]**

This Royal Commission had the power to hear directly from members of the community who had been involved with welfare or had interactions with the state youth justice system over the past 10 years. Based on these findings, the commission prepared a report, which included recommendations for law reforms. Indeed a strength of Royal Commissions is that they have special powers to gather information in a variety of ways, including compelling people to give evidence under oath at special hearings. **[1 mark]** The Royal Commission into the Protection and Detention of Children in the Northern Territory held a number of public community meetings throughout the Northern Territory and collected more than 480 witness statements and 400 submissions from a range of community groups, service providers, health care professionals, former government ministers, current and former staff at the youth detention centres, teachers and most importantly, from those who had served time in one of the Youth Detention Centres. **[1 mark]**

In late 2017, the Royal Commission released its report, which included over 220 recommendations for change, including closing the current Don Dale Youth Detention Centre and High Security Unit and raising the age of criminal responsibility to 12 years and only allowing children under 14 years to be detained for serious crimes. However, one limitation of Royal Commissions is that parliament is under no obligation to accept and implement their recommendations. In this case, the Northern Territory government did accept nearly all of the 227 recommendations (either entirely or 'in principle'). **[1 mark]**

Royal Commissions are also very expensive and time-consuming. The Royal Commission into the Protection and Detention of Children in the Northern Territory, for example, cost \$54 million. While they are very effective at gathering information and highlighting potential need for law change, they are only established to inquire into significant issues of public importance or concern. **[1 mark]** Also they generally need the support of both major political parties to be most effectual.

In addition to parliamentary committees and Royal Commissions, the Commonwealth parliament and state parliaments are also able to use law reform bodies. In Victoria the Victorian Law Reform Commission (VLRC) investigates the need for law change and makes recommendations to parliament on possible areas of reform. **[1 mark]**

Overall, despite having some limitations, parliament is most able to respond to the need for law change. In addition to having the ability to thoroughly investigate the need for law change, through its extensive committee system, ability to initiate Royal Commissions and access to other law reform bodies, parliament, as the supreme law-making body, can pass legislation. Within its constitutional authority, parliament can make and change the law when the need arises and can abrogate or cancel court-made law, with the exception of High Court decisions in constitutional matters. **[1 mark]**

Marking guide:

This answer could be marked globally or marked using the following guide:

3 marks for discussing one way the parliament is able to respond to the need for law change. Better responses might include a discussion of three ways the parliament can respond to the need for law change, including a discussion of the ability one parliamentary committee or one Royal Commission to influence law reform (x three = 9 marks)

1 mark for outlining the role of one parliamentary committee or one Royal Commission

Note: The sample response contains more than 10 marks.

SECTION B

Question 1 (12 marks)

In March 2018, the Victorian Law Reform Commission (VLRC) completed its report *Access to Justice—Litigation Funding and Group Proceedings*. The report contained a range of recommendations to improve access to the civil justice system for those litigants who use the services of litigation funders or participate in representative proceedings.

a. Define the term ‘representative proceedings’. **1 mark**

A representative proceeding is a legal proceeding in which a group of people who have a claim based on similar or related facts (called group members) bring that claim to court in the name of one person (called a lead plaintiff). It is also called a group proceeding or class action.

Marking guide:

1 mark for stating the meaning of representative proceeding

b. Explain the role of the Victorian Law Reform Commission and discuss its ability to influence law reform. 7 marks

The Victorian Law Reform Commission (VLRC) is an independent, government-funded organisation that develops, monitors and coordinates law reform in Victoria. One of the major roles of VLRC is to investigate any proposal or issue referred to it by the Victorian Attorney-General and make recommendations for law reform. **[1 mark]** Interestingly, VLRC can also investigate and report on any relatively minor legal issues or matters it believes are of general community concern without a reference from the Attorney-General, although it can only undertake such investigations if it does not use too many of its limited resources. This can limit the ability of VLRC to influence law reform as investigations, even minor community law reform projects, can be costly and time-consuming. **[1 mark]**

One strength of VLRC is its ability to consult with the public when conducting its investigations into a designated area of law reform. These community views and values are reflected in its recommendations. **[1 mark]** For example, after receiving a reference from the Attorney-General or commencing a community law reform project, VLRC undertakes preliminary research of the area of law reform and prepares a consultation paper to use as the basis for community discussion. Members of the community, including individuals, groups and interested parties (such as police, magistrates, community welfare workers, medical practitioners and experts in fields of interest), are invited to make submissions (via public meetings, surveys, forums, written submissions etc.) in an effort to gather a wide range of views and suggestions regarding possible changes to the law. **[1 mark]**

By undertaking broad community consultation, VLRC is able to ensure any recommendations for amending existing legislation and/or implementing new legislation contained in its final report (which is tabled in the Victorian parliament by the Attorney General) reflect prevailing community attitudes. This should increase the likelihood of any recommendations being accepted by the parliament as, in an attempt to win voter support elected members are more likely to support law reform which reflects the views and values of the community. **[1 mark]** VLRC's ability to influence law reform is limited; however, because parliament is under no obligation to implement any of its recommendations. **[1 mark]**

While VLRC is independent of the Victorian parliament and is therefore able to conduct its investigations objectively and make unbiased recommendations for law reform, **[1 mark]** its ability to investigate and make recommendations in areas referred by the Attorney General is restricted also by the inquiry's terms of reference. **[1 mark]** Although VLRC can make suggestions for new references to the Attorney General, as a part of its role in monitoring and coordinating law reform in Victoria. **[1 mark]**

A final role of VLRC is to undertake educational programs and inform the community on any area of the law relevant to its work. VLRC has a very informative website that explains its role, aims, processes and procedures and contains information to keep the community informed about its current and completed projects. **[1 mark]**

Note: If students wish to abbreviate Victorian Law Reform Commission to VLRC they are recommended to write the name in full when first mentioned with the abbreviation followed in brackets, as shown in the response.

Marking guide:

This answer could be marked globally or marked using the following guide:

3 marks for explaining the role of VLRC

4 marks for explaining reasons why VLRC has the ability to influence law reform and its limitations

c. Explain one factor that can limit the ability of an individual to access the civil justice system. 4 marks

Note: Two alternative answers are provided for this question.

One factor that can limit the ability of an individual to access the civil justice system is the cost involved in pursuing or defending a case. For individuals to use the civil justice system, especially the court system, to resolve their civil matters they will generally need to be able to seek legal advice and assistance so they understand their legal rights and the legal processes surrounding their cases. It is also important that cases are prepared and presented in the best possible manner. **[1 mark]** In general, the high cost associated with seeking legal advice, engaging legal representation and paying disbursements, such as court filing and hearing fees, witness fees, expert reports, can deter an individual from pursuing or defending a civil claim or force an individual to settle or withdraw their claim because they are unable to afford ongoing costs. **[1 mark]**

High legal costs can particularly limit the ability of an individual to pursue a civil matter. In these cases the parties are responsible for the costs involved in preparing and presenting their case **[1 mark]** Victorian Legal Aid (VLA) can help improve access by providing legal advice, information and representation to low income earners and disadvantaged groups; however, a lack of legal aid funding and the need to give priority to criminal cases means that VLA must limit its assistance in civil matters to those people who need it most and to certain types of cases, for example, legal aid is not available for business disputes, wills and deceased estates and other matters. **[1 mark]**

Alternative answer:

For individuals to be able to access the civil justice system they should be able to understand their legal rights and the legal processes surrounding their cases and be able to approach and use various bodies that can provide legal advice and assistance. **[1 mark]** Unfortunately, lack of communication capabilities can limit the ability of an individual to access the civil justice system. **[1 mark]** Some individuals might be prevented from pursuing or defending a civil matter because they are unable to adequately receive and understand information relevant to the case. **[1 mark]** For example, an individual might not understand English (because it is not their first language) or might have a mental or cognitive impairment. Such barriers to communication can prevent an individual from understanding their legal rights, such as whether they have a claim or a defence to pursue, and the processes used to pursue their rights, including seeking legal advice, assistance and representation. **[1 mark]** Barriers to communications can also limit their ability to understand the methods and processes used to resolve a dispute.

Marking guide:

This answer could be marked globally or marked using the following guide:

2 marks for explaining one factor that might limit access to the civil justice system

2 marks for explaining how the selected factor limits access to the civil justice system

Note: A variety of factors could be examined in this response. For example, other accessibility factors could include a lack of services for people living in rural and remote Victoria which can limit a person's ability to seek legal advice and assistance, and access resources and information about their case. This can impact on the ability of a person to pursue their legal rights and seek compensation for any wrong that they have suffered.

Students might also examine a range of time factors that can limit an individual's ability to access the civil justice system including court delays and the appeal process.

Question 2 (18 marks)

In August 2017, the owner of a vineyard (grape-growing business) was awarded damages after Supreme Court Justice John Dixon found the defendant had carelessly sprayed his land with toxic chemicals that drifted onto the plaintiff's property and destroyed his grapevines. The defendant was ordered to pay the owner of the destroyed vineyard \$6.54 million for economic losses, including loss of grape sales, the cost of re-establishing the vineyard and loss of future earnings while the vineyard is being reconstructed.

Reference: *Riverman Orchards Pty Ltd v Hayden*, Supreme Court of Victoria, June 2017, <https://tinyurl.com/yysl4g8z>

- a. **Other than costs, explain two factors the plaintiff might have considered when initiating his civil claim.** **4 marks**

Note: Two alternative answers are provided for this question.

The plaintiff, the owner of the destroyed vineyard, might have considered negotiation options when initiating his civil claim, which is whether or not he and his neighbour would be able to negotiate or directly cooperate with one another to try and resolve the dispute between them rather than through the courts. **[1 mark]** This would generally have involved the two parties engaging in informal discussions (either with or without legal representation) about the claims, facts or issues in dispute and the possible remedies. **[1 mark]**

Another factor the plaintiff might have considered when initiating the claim is the limitation of actions, which refers to the restriction placed on the time within which a civil action can be commenced. **[1 mark]** For example, being a negligence and nuisance case, the plaintiff generally would have needed to commence the proceeding within 3–6 years. Once that period has passed, the defendant may be able to raise a defence that the plaintiff is out of time and can no longer bring the claim. In some situations, the court may extend a limitation. **[1 mark]**

Alternative answer:

The plaintiff might have also considered the following scope of liability and enforcements issues when initiating his civil claim. **[1 mark]** The scope of liability refers to the plaintiff needing to determine who he should sue, namely who are the possible defendants and to what extent the defendant might be liable. **[1 mark]** For example, the neighbour who conducted the chemical spraying might have been insured, in which case the insurance company could have acted in the name of the defendant as it would be making any final payment. **[1 mark]** Alternatively, there might have been another person who assisted or organised the wrongful crop spraying and therefore had accessorial liability.

Enforcement issues include whether or not the defendant would be able to pay any damages awarded and the options available to force the defendant to comply with any remedy awarded. **[1 mark]**

Marking guide:

2 marks for explaining one factor the plaintiff might have considered when initiating his civil claim, other than costs (x two = 4 marks)

- b. A number of civil pre-trial procedures took place in this case. Describe two main purposes of civil pre-trial procedures. Use examples to support your response. 4 marks**

Two main purposes of civil pre-trial procedures are for parties to notify their intention to sue and defend a case [1 mark] and to encourage a timely resolution of the dispute, hence saving the cost of a lengthy action. For example, pleadings aim to ensure the parties are fully informed of the details of the case, such as the claim or action being taken, defences and remedies sought, [1 mark] and discovery ensures both parties have an opportunity to discover additional information relating to the facts of the case [1 mark] so they might consider the merits of their case and whether it is worth pursuing. [1 mark]

Having the opportunity to discover the other party's evidence can also prompt the parties to negotiate and compromise and achieve an out-of-court or early settlement, which reduces costs and save expense at trial. [1 mark]

Marking guide:

1 mark for describing one main purpose of civil pre-trial procedures (x two = 2 marks)

1 mark for providing a relevant example (x two = 2 marks)

Note: Students might also refer to judge's directions and case management as examples of pre-trial procedures. For example, the judge might give directions during the pre-trial case management requiring the parties to undertake any actions to assist an efficient settlement of the case and allow for the clarification of legal issues prior to the trial. For example, the judge might direct the parties to file and disclose particular documents by a certain date and encourage the parties to discuss key issues, make admissions and provide each other with a summary of witnesses' evidence.

- c. Discuss the responsibilities of the judge, Justice Dixon, in this case. 6 marks**

The main role of the judge in this case would have been to act as an independent and impartial adjudicator (umpire) and manage the trial to ensure it was fair. [1 mark] For example, Justice Dixon would have been required to ensure both parties presented their cases in accordance with the strict rules of evidence and procedure, including making orders regarding the presentation and admissibility of evidence and being responsible for clarifying and determining questions of law. [1 mark]

However, while Justice Dixon would have been able to ask questions to clarify evidence, being required to remain independent would have meant that he would not have been able to call or question witnesses to help establish the facts of a case (to discover the truth). This might waste his legal expertise and experience and decrease the chance of a correct verdict. [1 mark]

Likewise, being required to remain impartial would have prevented Justice Dixon from assisting either party if important evidence or argument was missed or omitted. [1 mark]

Being a civil trial, Justice Dixon would have also been responsible for case management, including giving directions or making any orders he considered to be appropriate to assist a fair efficient, timely and cost-effective resolution of the dispute. [1 mark] This could have been undertaken at any stage of the proceeding, for example, pre-trial or during the trial, and might have included referring the proceeding, or a part of the proceeding, to mediation. In fact, most civil proceedings in the Supreme Court go to mediation before trial. [1 mark]

Given no jury was present during this trial, Justice Dixon was also responsible for determining the verdict and the amount of damages awarded. He would have also been responsible for making a decision on costs. **[1 mark]** Having the judge determine the verdict might assist the achievement of a fair outcome by utilising his experience, knowledge and expertise but may not allow the plaintiff the sense that the verdict and damages were assessed by 'ordinary people' rather than legal authorities. **[1 mark]** In this case; however, Justice Dixon did award a significant amount of damages indicating that he was sympathetic to the plaintiff's claims and the losses suffered.

Marking guide:

3 marks for explaining the strengths associated with the responsibilities of the judge in this case

3 marks for explaining some weaknesses associated with the responsibilities of the judge in this case

Note: The sample response contains more than 6 marks.

- d. Describe the remedy awarded in this case and discuss the extent to which it would be able to achieve its purpose. 4 marks**

The plaintiff in this case was awarded compensatory damages. This means an amount of money to be paid to him by the defendant (his neighbour who sprayed toxic chemicals that leaked onto his land) to reimburse or make up for the loss he suffered and restore him, as far as possible, to the position he was in prior to the breach of rights. **[1 mark]**

The ability of the damages awarded in this case to achieve its purpose would depend on a range of factors. For example, given the loss suffered was mainly economic or financial, the courts would be more likely to be able to precisely calculate the extent of the losses suffered, for example, the loss of sales for grapes and the cost involved with re-establishing the vineyard/land, and award specific damages to compensate for loss. **[1 mark]** However, the estimation of specific damages would depend on the assumption that the plaintiff's land could be re-established and produce plentiful crops of grapes in the future. If the land takes longer than anticipated by the court to regenerate, the plaintiff might not be fully compensated. **[1 mark]**

It might also be difficult to award general damages for pain and suffering, such as the emotional stress caused by the defendant's wrongful actions. **[1 mark]**

Marking guide:

1 mark for describing the remedy awarded in this case (compensatory damages)

3 marks for explaining the extent to which compensatory damages can achieve the aim of restoring the plaintiff to the position he was in prior to the breach of rights

Question 3 (11 marks)

It has been over 25 years since the High Court of Australia made its significant decision in the Mabo case [*Mabo v Queensland (No. 2)* (1992) 175 CLR 1]. The decision was to grant Aboriginal and Torres Strait Islander peoples land rights by overturning the longstanding but false legal principle that Australia was an ‘empty land belonging to no one’ (terra nullius) before British colonisation. In making its ruling in this case, it is widely acknowledged that the justices of the High Court were activists in their approach to legally recognising the right of Indigenous Australians to make claims over their traditional land.

a. Describe the meanings of the terms ‘judicial conservatism’ and ‘judicial activism’.

4 marks

Judicial conservatism refers to the idea that the courts should show restraint or caution when making decisions and establishing legal principles (precedents) that could lead to significant changes in the law. **[1 mark]** The rationale behind judicial conservatism includes that parliament as the supreme law-making body, which has been elected by the people to make laws on their behalf, has more authority for making significant changes in the law compared to unelected judges, whose views might not represent the broader community view. As such, judges should ensure their decisions are based on legal considerations and not on their own political opinion or what they perceive to be the community’s opinion on a given issue.

[1 mark]

By contrast, judicial activism refers to the idea that judges should consider social and political views, including the views and values of the community, when interpreting legislation and making decisions, especially in situations where their rulings have the potential to recognise the rights of the people and address community concerns on a given matter.

[1 mark] In fact, those who support judicial activism argue judges have a duty to the court to adopt a more progressive or activist approach when interpreting and applying legislation to ensure community values are recognised and justice is achieved. For example, it could be argued the more activist approach taken by the High Court in the Malaysia Solution case, where it was held the government’s proposal to resettle 800 Australian asylum seekers in Malaysia was unlawful, helped protect the human rights and uphold Australia’s international obligations under the Convention Relating to the Status of Refugees, in which Australia has agreed to treat refugees and asylum seekers with respect and compassion. **[1 mark]**

Marking guide:

2 marks for providing the meaning and essential features of judicial conservatism

2 marks for providing the meaning and essential features of judicial activism

b. Discuss how the doctrine of precedent and the requirement for standing are able to affect the ability of courts to make law.

6 marks

Despite parliament being the supreme law-making body, judges are also able to make law, via the doctrine of precedent, when resolving disputes in which there is no existing law. This means when there is no existing legislation or binding precedents or the existing legislation is unclear and in need of interpretation before it can be applied to resolve the case. **[1 mark]** In such cases, the legal principles established by the judges might become precedents, namely law, which must be followed by lower courts in the same hierarchy, in cases where the material facts are similar.

However, judges are limited in their ability to make law via the doctrine of precedent, because they must wait for a relevant case to be brought before them, and only superior courts, namely the Victorian Supreme Court (Trial division) or higher can make law, which is reliant on parties being willing and able to afford to bring a case before the courts and being determined to see the action through the appeals process (both of which can be costly and time-consuming). **[1 mark]**

Judges are also limited in their ability to make law by the requirement of a party to have standing (referred to as *locus standi*) in a case before the party can bring their case before the courts. This means the party initiating the case must be directly affected by the issues or matters involved in the case, meaning being overtly affected by the law or issue in dispute rather than a member of the general community, to have the right to commence a legal proceeding in court. **[1 mark]** For example, the party initiating the action must stand to gain a calculable advantage, such as standing to gain money or property rather than just the satisfaction of winning, if it succeeds in the action. **[1 mark]**

Further, judges in superior courts are only able make law in relation to the issues or matters raised in the case before them. **[1 mark]**

Judges in superior courts might also be reluctant to change the law through reversing or overruling on appeal, existing precedents, preferring to leave the law-making to parliament, which in its aim to be representative should strive to make laws that reflect the views and values of the electorate. **[1 mark]** For example, in the *Trigwell case* (1979), the High Court did not overrule an earlier precedent set by the Supreme Court of Appeal in *Brisbane v Cross* (1978), stating that landowners are not responsible for damage caused by their stray animals, preferring parliament to legislate in this area. **[1 mark]** Similarly, judges in courts of the same standing, by convention, consider their own court's previous decisions to be highly persuasive and rarely overrule them (with the exception of the High Court, which will overrule its own decisions to allow the law to develop over time). **[1 mark]** Judges are not; however, bound to follow persuasive precedents from other hierarchies, such as interstate and overseas or from lower courts in the same hierarchy.

Judges in lower courts are limited in their ability to change the law because according to the doctrine of precedent they are bound to follow all precedents set by higher courts in the same hierarchy in cases where the facts are similar. While they can distinguish between the facts and avoid following a binding precedent, any new decision will only create a precedent if the court is of sufficient standing. **[1 mark]** Lower courts; however, which are bound by existing precedent, can always express their disapproval and this in turn might encourage a party to appeal the existing decision to a higher court. Ultimately this might reverse the precedent and change the existing law; **[1 mark]** however, such change is reliant on parties being willing to pursue an appeal. **[1 mark]**

Judges are also significant law-makers in their role of statutory interpreters and the parliament relies on judges being able to clarify the meaning of words and phrases in legislation so it can be applied to resolve disputes. Although a judge's interpretation will not directly change the actual wording of legislation, it might form a precedent to be followed in future cases. **[1 mark]** Judges can only interpret legislation after a dispute has arisen and so clarifies the law after a dispute has arisen (*ex post facto*) rather than before a conflict arises. **[1 mark]** Judges might also be conservative in circumstances where their interpretation might lead to a major or controversial change in the law. Again they might prefer parliament, the elected representatives of the people, to investigate and make controversial legislative changes. **[1 mark]**

Parliament, as the supreme law-making body can also, with the exception of High Court decisions in constitutional matters, legislate to override court-made law and thus limit the ability of the judges to make and change the law. **[1 mark]** With respect to constitutional matters; however, the justices of the High Court have the ability to resolve disputes and change the law by declaring any legislation that is made in breach of the Australian Constitution to be invalid. **[1 mark]**

Note: *This sample response contains many points—students must ensure they provide sufficient depth and points to earn 6 marks. They must also directly address the part of the question requiring them to explain how the ‘the requirement for standing’ can limit the ability of judges to make law.*

Marking guide:

This answer could be marked globally or marked using the following guide:

2 marks for explaining the impact of the requirement for standing to influence a judge’s ability to make law

4 marks for discussing how the doctrine of precedent affects a judge’s ability to make law

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