**LEGAL STUDIES

Units 3 & 4 – Written examination**

# PES

# 2018 Trial Examination 1

**SOLUTIONS & MARKING GUIDE**

**SECTION A**

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| **Instructions for Section A**Answer **all** questions in the spaces provided. |

**Question** **1** (3 marks)

Marika is having her criminal case heard in the Magistrates Court. She believes that:

1. She has been charged with an indictable offence
2. Her trial will be heard by a judge and jury
3. The standard of proof is on the balance of probabilities

Explain why each of these statements is incorrect.

1. She has been charged with an indictable offence

**Marking guide**

* Award one mark for each explanation.
* Students must go further than just state the correct statement

**Solution**

The Magistrates Court only deals with summary offences and as the case will be dealt with in the Magistrates Court it can’t be an indictable offence unless it is one of the scheduled indictable offences that can be heard summarily.

1. Her trial will be heard by a judge and jury

**Solution**

The Magistrates Court does not involve the use of a judge or a jury. Juries are never used in the Magistrates Court and judges are used in the County and Supreme Courts. A Magistrate will determine the outcome of this case.

1. The standard of proof is on the balance of probabilities

**Solution**

The standard of proof required in a criminal trial is beyond reasonable doubt. The balance of probabilities is the standard required for a civil case.

**Question 2** (3 marks)

Explain how Victorian Legal Aid (VLA) assists the criminal justice system to achieve the principle of access.

**Marking guide**

* Award one mark for the role of the VLA
* Award two marks for the explanation as to how it can improve access

**Solution**

Victorian Legal Aid offers is a government agency that provides free legal advice to the community, and low-cost or no-cost legal representation for people who can’t afford to pay for legal representation. VLA helps people with legal problems, and focuses on people who need it the most and can’t get legal assistance any other way.

The VLA therefore helps to achieve access as through them more people are able to access legal advice and then take legal action that they otherwise may not have been able to. They are able to have themselves defended in court and obtain advice about evidence, witnesses and factors such as plea negotiations

**Question 3** (3 marks)

Kiara, 18 years of age, is the complainant in a sexual offence case.

Explain Kiara’s right to give evidence as a vulnerable witness.

**Marking guide**

* Award one mark for definition of a vulnerable witness
* Award one mark for detail of special arrangements that can be provided
* Award one mark for why a person may be treated as a vulnerable witness

**Solution**

In some criminal cases the victim of a crime is also a witness to the crime. As such they are often called upon to give evidence in an effort to help the prosecution prove their case. If the case is a sexual offence or involves a child or a person who has a cognitive impairment, the prosecution may ask that the victim be treated as a vulnerable witness.

This status, if granted by the court, allows for special arrangements to be made to allow the witness to give their evidence in a safe and less vulnerable position. Such special arrangements include allowing the witness to give evidence from another room, have a screen erected so the witness doesn’t have to face the accused or have a support person with the victim as they present their evidence. This right is provided to ensure impressionable victims are not made to feel uncomfortable and not jeopardise the validity of their evidence.

*Students could now refer to a proposed government reform that will no longer allow victims of domestic violence to be cross-examined*

**Question 4** (2 marks)

Explain **one** purpose of sentence indications.

**Marking guide**

* Award one mark for detail as to what is meant by sentence indications
* Award one mark for the purpose of sentence indications

**Solution**

A sentence indication is a statement made by a judge to an accused party in a criminal case about the sentence they could face if they plead guilty to the offence they are on trial for. This indication is designed to encourage accused persons to consider pleading guilty and hence save the court time and money by not having to go through a full trial.

**Question 5** (4 marks)

Discuss the ability of imprisonment to achieve the purpose of rehabilitation and deterrence.

**Marking guide**

* Responses should be marked globally
* Students should provide one statement in support of imprisonment achieving both purposes
* Students should provide one statement explaining how imprisonment doesn’t lead to the achievement of both purposes

**Solution**

Imprisonment is the sanction of last resort and involves holding a guilty party in custody for a period of time, depriving them of their liberty and restricting their movement and actions.

A key purpose of imprisonment is to deter the offender and the general community from committing the same offence. People will see the sentence imposed on an accused person and re-consider their actions and may decide not to continue with their behaviour. This may be true for some people and some crimes but many crimes are committed ‘in the heat of the moment’ and little or no thought is given to the potential consequences. In this scenario sentences of imprisonment are not likely to be a great deterrent.

Imprisonment also seeks to provide rehabilitation for convicted persons. Education and work programs are available for people sentenced to periods of imprisonment. Inmates who take advantage of these programs can gain new skills which they could use upon their release to gain employment and not have the need to re-offend. However, there is often not enough places in these programs for all inmates and so some prisoners are not rehabilitated. It is also true that some inmates don’t want to be involved in these programs as they have no wish to be rehabilitated.

**Question 6** (4 marks)

Richelle, 26 has pleaded guilty to the manslaughter of her boyfriend, Aarush, 28, who died of multiple stab wounds. She was originally charged with murder, but this charge was withdrawn after successful plea negotiations.

Richelle admits stabbing Aarush, but initially claimed she was acting in self-defence. However, the evidence overwhelmingly supported the prosecution’s case as Richelle has not suffered any physical injuries and there are no witnesses to support her claims.

Aarush’s family do not understand why the prosecution entered into plea negotiations as they are convinced that she intended to kill him. Nevertheless, they just want to get on with their lives and are relieved they don’t have to go through the trauma of a trial.

Discuss the appropriateness of plea negotiations in this case.

**Marking guide**

* Responses should be marked globally
* Students should provide at least one advantage of plea negotiations
* Students should provide at least one disadvantage of plea negotiations
* Advantages and disadvantages should be linked to the specific case identified in the question

**Solution**

Plea negotiations are discussions between the prosecution and the accused about the charges against the accused. Plea negotiations can result in an agreement being reached between the two parties about the charges to which the accused will plead guilty.

The process generally commences when the defendant approaches the prosecution with a view to discuss the charges and then negotiations take place about what charges could be agreed to.

Plea negotiations result in quicker resolution of cases, saving time and money for all parties and result in a conviction that reflects the crime committed.

In the circumstances provided a plea negotiation was suitable. The family of the victim indicated they did not wish to go through the trauma of a trial and the guilty plea removes that requirement. While the charge is reduced, a charge of manslaughter is a good reflection of the crime that was committed.

Given the defendant was pleading self-defence, a jury may have upheld that defence and the manslaughter charge would have been sustained in that situation and so overall justice would have been served.

However, evidence presented suggested that a plea of self-defence would not have been sustained, as there was no physical evidence to support the claim. This would mean that the accused would serve less time in prison than otherwise would have occurred if the trial for murder had of taken place and a guilty plea reached.

**Question 7** (3 marks)

Explain the purposes of **one** civil pre-trial procedure.

**Marking guide**

* Award one mark for identifying a civil pre-trial procedure
* Award one mark for explaining one purpose
* Award one mark for explaining a second purpose
* Students need to provide more than one purpose as the question requires

**Solution**

Pleadings is a civil pre-trial procedure that commences the civil dispute resolution process. Pleadings involve informing the court and the defendant of the legal claim being made by the plaintiff through the issuing of a writ. It will also include other documents exchanged between the parties such as a statement of claim, counter claim, and statement of defence.

Pleadings serve a number of purposes including informing the defendant of the claim being made and the remedy being sought by the plaintiff. It allows the defendant to view the information, and make their own plans for the resolution of the dispute.

The exchange of documents also allows the parties to see the information that will be used in court and may encourage the parties to seek an out-of-court settlement. This saves the parties time and money and can free the court up for more serious cases that are contested.

**Question 8** (2 marks)

Describe **one** reason a court may need to interpret a statute.

**Marking guide**

* Award one mark for identifying a valid reason
* Award one mark for explanation of the reason

**Solution**

Statutes are written in general terms and so they may not take into account the fact that words change their meaning over time. In this instance the word needs to be interpreted so a modern context can be applied to the word in the current circumstances.

**Question 9** (6 marks)

There are a number of factors that affect the ability of parliament and the courts to make law.

1. Explain how the representative nature of parliament affects the ability of parliament to make law. (3 marks)

**Marking guide**

* Award one mark for explaining representative nature of parliament
* Award two marks for how this feature affects the ability of parliament to make laws

**Solution**

Parliament is elected by the people and as such it is expected to represent the views and values of the majority of society – those who elected them.

Because of this parliament is not likely to pass las that are controversial and/or do not have the full support of society. Members of parliament often signal their intention to legislate before they are elected and so they do not pass laws in areas not known to the voting public.

It also means parliament is likely to only pass laws in areas where the public know of the intention of parliament and support those laws.

1. Explain how the requirement for standing affects the ability of courts to make law. (3 marks)

**Marking guide**

* Award one mark for explaining standing
* Award two marks for how standing affects the ability of courts to make laws

**Solution**

Standing refers to the concept that to be a party to a case a person must be directly affected by the issues or matters involved in the case to have the right to commence a legal proceeding in court. They must have sufficient or special interest in a case to ‘stand before the court’ and be heard.

Courts can only make laws if a case is brought before them and so if there is no party with standing on an issue then the case will not make it to court. The issue must be of specific interest and cause harm to parties who have the capacity to bring legal action.

**Question 10** (10 marks)

“Costs factors have a significant impact on the ability of the civil justice system to achieve the principles of justice”.

Describe **one** recent reform and **one** recommended reform to the civil justice system that addresses costs factors. Discuss the ability of each of these reforms to achieve the principles of justice.

**Marking guide**

* Responses should be marked globally
* Students should explain the issue of costs as a factor that affects the ability of the civil justice system to achieve the principles of justice
* Reference should be made to all three principles
* Students should describe one recent reform
* Students should describe one recommended reform
* Strengths and weaknesses of the reform and the recommendation should be provided and linked to the principles of justice

**Solution**

*The following is an example of a start to a high scoring response*

Pursuing a civil claim through the civil justice system can be a costly exercise. If the dispute is dealt with by the court system then there are daily court fees, filing fees, cost of witnesses and a jury (if used) as well as the cost of legal representatives (which will vary according to the court dealing with the dispute and the experience and seniority of the representatives.

People from low socio-economic backgrounds are therefore limited in their ability to seek resolution through the court system. In some cases, the small amount of damages being sought will not justify the expense in pursuing the case through the courts and this may stop some cases from being resolved. This reflects poorly on the ability of the system to achieve fairness and access. Unresolved disputes put hurt parties at a disadvantaged as they now have less rights as one or more have been infringed. They are denied access to justice, as they are not able to afford the costs. If parties are not able to seek resolution through our civil justice system then those people are also not treated equally.

A possible reform would be to increase the funding for legal aid. Legal aid is generally a government-funded program that offers legal advice and legal representation to those who meet their criteria in relation to socio-economic status.

This will improve access as more people will now be able to pursue their claim through the courts. This treats people fairly and a greater number of people are being treated equally by the civil justice system.

A recent reform has been the introduction of e-filing in the Supreme Court. This is a system whereby documents for the court are filed electronically, either with or without the assistance of a legal representative. This saves the parties money and time in terms of having to pay legal representatives for their time in filing the information in person.

Some parties, with basic legal knowledge can file these documents without needing to engage a legal representative. This allows all parties to be treated equally as the system doesn’t discriminate between those who can afford legal representation and those who can’t.

**SECTION B**

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| **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 the information to fully answer the questions.Answer **all** questions in the spaces provided. |

**Question 1** (18 marks)

The Banking Royal Commission has heard evidence of ‘dodgy’ activities by banks in numerous areas of its operations during its time.

The Royal Commission has heard evidence of misconduct in the banking sector including alleged bribery, forged documents and charging fees for non-existent services and to clients who have died. This has already resulted in some senior managers losing their jobs.

Despite not initially wanting the Royal Commission to go ahead, the government may now be forced to introduce tougher laws to monitor banking practices.

1. Describe the role of **either** one parliamentary committee **or** one Royal Commission in influencing law reform. (2 marks)

**Marking guide**

* *Award one mark for the role of one Royal Commission or Parliamentary Committee*
* *Award one mark for how it can influence law reform – This may be through an example*

**Sample responses**

***Parliamentary committees***

One parliamentary committee is the Victorian Standing Committee on Legal and Social Issues. This is an ongoing committee that enquires into and reports on any proposal or matter concerned with community services, gaming, health, law and justice, and the coordination of government.

In 2016 the Committee released their report into ‘end of life choices’. In this inquiry, the Committee investigated and considered the need for law reform in Victoria to allow individuals to make informed decisions regarding the management of the end of their own life.

***Royal Commissions***

One recent Royal Commission was the Victorian Royal Commission (RC) into Family Violence (FV). The RC was established in February 2015 by the Victorian Governor, the Hon. Alex Chernov on the advice of the Victorian Government.

The RC was required to investigate and make recommendations on how best to change government policy, administrative procedures and the law regarding a number of matters including reducing, eliminating and preventing FV; increasing the awareness of FV; and ensuring the safety of those affecting by FV.

1. Explain two reasons why law reform may be needed other than the reason suggested by the case study.

(4 marks)

**Marking guide**

* Award two marks for each reason explained
* Explanation must be more than a statement – students need to provide detail regarding the reason.
* Examples are not required but may support the response

**Solution**

Law reform may be needed because society’s views and values change. What was once considered acceptable behaviour may no longer be considered as acceptable and so laws are changed to reflect that. An example may be same-sex marriage. Homosexuality and hence same-sex marriage was considered taboo for a long time, however, society has evolved and changed its view on this issue and so the law has been changed to reflect that.

A second reason for law reform is that changes in technology have meant that there are new ways of committing crimes. Theft has always been a crime but technology has allowed for the growth of identity theft through internet scams. Laws are changed to include this behaviour.

1. Law reform is often led by the Victorian Law Reform Commission (VLRC). Explain the role of the VLRC and, using **one** recent example, evaluate the ability of the VLRC to influence a change in the law.

(6 marks)

**Marking guide**

* Mark globally
* Explanation must focus on role and not the process.
* Evaluation requires advantages/benefits/positives and disadvantages/costs/negatives of the ability of the VLRC
* Example must be referred to and be recent
* Different students may refer to different examples – solution shown below will refer to one example only

**Solution**

The VLRC is a government-funded body charged with undertaking law reform inquiries. These inquiries are generally directed by the government, but there is also scope for the VLRC to begin its own inquiry into minor areas of law.

When tasked with an area of law to investigate the VLRC will gather input from a range of sources – experts in the area concerned, the general public who will have to abide by any new laws who may already have been impacted by the current law and raised their concerns, law-makers in other jurisdictions. This allows the VLRC to make a considered recommendation for change.

However, this process can take time, as the collection of the input can’t be rushed, as an opportunity for all interested parties to contribute must be given. Consideration must be given to the location of people who want to contribute and the means available for the collection of input – the VLRC allows for online submissions but also will hold public enquiries where people can verbally provide input.

It is also true to say that not all recommendations made by the VLRC result in law reform as the suggestions may be too controversial for the government to consider.

In 2017 the VLRC completed its inquiry into the Adoption Act 1984 and recommended it be repealed and replaced with a new act that would better consider the best interests of the child. This example reflects the extensive process undertaken by the VLRC who began its inquiry in 2015.

1. Individuals are also able to influence law reform in Victoria. Discuss two means by which individuals can influence law reform.

(6 marks)

**Marking guide**

* Mark globally
* Discussion requires the strengths and weaknesses of each of the two methods selected
* Other means may also be used
* Must link to law reform

**Solution**

Individuals are able to participate in a demonstration to voice their concern over an issue or seek law reform. A demonstration is an assembly of people who gather, often in a very public place, to show their support for an issue. The larger the number of people, the greater the show of support and the increased chance that legislators will take note of the issue. It is also more likely that the media will cover the demonstration, further increasing the possible support for the change. However, on occasion demonstrations can turn violent – either against the police who may be present, or groups who are opposed to the issue and who demonstrate at the same time. This can detract from the demonstration as the media will focus on the violence rather than the issue of concern.

A second means by which individuals can influence law reform is through a petition. A petition is a collection of signatures in support of an issue or a change in the law. When sufficient signatures have been collected, the petition is usually handed to a member of parliament who must, by law, table it in Parliament. A record of the tabling is made, through Hansard, and so the issue can be referred to later if needed. The purpose is to inform parliament of the issue in the hope that parliament will act and change the law. However, petitions may not be effective if the issue is minor in that it has no wide-reaching effect on the community, there are few signatures or it is not on the government’s agenda as an issue of concern.

**Question 2** (14 marks)

In August 2017 the High Court ruled on a claim that the Australian government can only exercise its powers outside Australia for purposes that would be legal under the law of the relevant foreign country. The High Court therefore rejected the claim that their offshore centre in Papua New Guinea was illegal.

This means the Australian government had and has the power to establish and maintain this facility, despite detention of asylum seekers there violating PNG law.

This decision ended a case that was [commenced](https://theconversation.com/high-court-asked-to-declare-manus-detention-illegal-as-859-detainees-seek-their-day-in-court-58880) in May 2016 and was initiated by a plaintiff (an asylum seeker) after a the decision of the [PNG Supreme Court](https://www.scribd.com/doc/310461159/PNG-Supreme-Court-Decision-on-Manus-Island) [found](https://theconversation.com/png-court-decision-forces-australia-to-act-on-manus-island-detainees-58439) that Australia’s detention of asylum seekers on Manus Island violated PNG law. Unlike in Australia, PNG has constitutional human rights protections, which forbid the deprivation of personal liberty in most cases where a person has not committed a crime.

1. Explain the role of the High Court in acting as a check on the law-making of parliament.

(2 marks)

**Marking guide**

* Award one mark for role of the High Court
* Award one mark for the link to check on law-making

**Solution**

The High Court is the highest court in the Australian legal system. It is the guardian of the constitution and it is one of the three powers in our legal system – executive, legal and judicial. The High Court holds the judicial power and this gives it the authority to rule on cases where a party challenges a law made by parliament (the legislative branch).

If parliament makes a law that is challenged and deemed to be outside their law-making areas then the High Court will rule it ultra vires and the law will be overruled – thus limiting the law-making ability of parliament.

1. PNG has constitutional human rights protection. Evaluate the extent to which the express protection of rights in the Australian Constitution acts as a check on parliament in law-making.

(6 marks)

**Marking guide**

* Mark globally
* Students should define express rights (no need for an example)
* Students must explain how express rights acts as a check on parliament in law-making
* Students must explain how express rights don’t act as such a check
* Evaluation requires some concluding statement

**Solution**

Express rights are statements in the Australian Constitution outlining rights that citizens of Australia are entitled to receive due to their citizenship. The Australian Constitution expressly provides five such rights including the right to a trial by jury in an indictable offence.

As they are expressly stated in the Constitution they provide a significant check on the law-making ability of parliament. Parliament is unable to pass laws that infringe on any of these five rights or else those laws can be challenged in the High Court and the High Court will likely uphold the right. The only way for these rights to be altered is through a referendum.

This protection also work the other way in that parliament can’t pass a law that strengthens that right either as any person challenging that law may find the High Court declaring the new law ultra vires as parliament may not have the authority to extend the right as that is not what the section of the constitution intended.

However, as there are only five express rights the restriction on law-making is only limited to those five areas and any other restrictions on law-making must be found elsewhere.

1. The establishment of the offshore detention centre was allowed under an international treaty signed with PNG. Discuss, with reference to **one** other example, the impact of international declarations and treaties on the interpretation of the external affairs power.

(6 marks)

**Marking guide**

* Mark globally
* Students should explain international treaties and declarations
* Students must explain how these can impact interpretation
* Students must explain how these don’t impact interpretation
* A valid example must be provided and linked to the explanations

**Solution**

As a member of the world community, the Australian government has in the past, and will likely do so again in the future, sign international declarations and treaties. The external affairs power in the Australian Constitution provides for that to occur.

Once a declaration is signed by the Australian government, such as the *Convention Concerning the Protection of the World's Cultural and Natural Heritage,* Australia has passed laws that extend the sections of the declaration to Australia and so have passed laws to implement some of the tenets of the declaration. This occurred in the 1980s when Australia provided names of certain sites to be placed on the World Heritage List. This included the Franklin River, an area the Tasmanian government wanted to dam for the purpose of building a hydro-electricity station. The Tasmanian government challenged the law passed by the government but the High Court ruled in favour of the federal government, extending the meaning of external affairs.

This means that the external affairs power can now extend the reach of the federal government into areas of residual powers as the term external affairs is very broad and the federal government is a signatory to a wide range of international treaties and declarations. Hence, the negative impact is that state parliaments lose law-making power and the federal government increases its law-making powers.

**Question 3** (8 marks)

**Source 1**

The Medical Treatment Planning and Decisions Act 2016 (Vic)

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| From 12 March 2018, new laws on medical treatment decisions were introduced which expands the role of the Victorian Civil and Administrative Tribunal (VCAT).The new laws give people more control about the medical treatment they want to receive at a future time when they don’t have the capacity to make those decisions for themselves, for example due to illness or disability.Under the new laws a person can now appoint a ‘*medical treatment decision maker’* with authority to make medical treatment decisions or appoint a support person to help them make decisions for themselves. The new laws also allow for the creation of new legal documents called *‘advance care directives’*. These directives may include legally binding instructions about future treatment the person consents to or refuses. They may also include a directive which documents the person’s values and preferences for future medical treatment. If there is dispute or uncertainty, people can go to VCAT for a decision or advice on behalf of the person needing treatment. |

Yolanda, 90 years of age, has suffered from dementia for a number of years; however, over the last 2 years her symptoms have become more severe.

In May 2018, relying on the advice of her son, Alfonso, she appointed Dr Tran, a 28-year-old General Practitioner (GP), as her medical treatment decision maker. She also signed an advance care directive including instructions that she consents to all appropriate medication and that she values quality of life over longevity.

Yolanda’s daughter, Greta, wants to challenge the validity of the advance care directive and the appointment of Dr Tran. Greta claims that Yolanda always refused medication for her dementia, believing that there was no cure, and that she would rather end her days naturally, the way God intended. She also claims that Yolanda would have preferred her regular GP for the past 30 years, Dr Rizzo, as her medical treatment decision maker.

Greta wants to have the dispute resolved as quickly as possible, as Dr Tran has started prescribing medication to Yolanda. She has been advised by a friend to take the matter to VCAT.

1. Describe the **two** different methods of dispute resolution used by VCAT at compulsory conferences and the final hearing. (4 marks)

**Marking guide**

* Award two marks for each dispute resolution method described
* Marks should be awarded for the depth of the description

**Solution**

At a compulsory conference a VCAT member will use conciliation in an attempt to resolve the issue. This is a joint problem-solving method where the parties are encouraged to tell their version of events and negotiate a settlement between themselves. The third party will make suggestions, encourage discussion and ensure both parties are able to present their case fairly. If the parties come to an agreement the third party will draw up the agreement (orders) and sign them.

If unsuccessful at the conference a final hearing may occur. At this point the third party will use arbitration. Here the parties can still negotiate a resolution but the third party will make a legally binding agreement if the parties can’t come to a resolution between themselves.

1. Discuss the appropriateness of VCAT to resolve this dispute. (4 marks)

**Marking guide**

* Award two marks for explanation as to why this venue is appropriate
* Award two marks for explanation as to why this venue is not appropriate

**Solution**

VCAT is an alternative venue for civil dispute resolution that is less formal, cheaper and generally quicker than the traditional court system.

The dispute in the scenario is a family matter where the children of the patient will have an enduring relationship once the dispute is resolved. As family members it is better that each member not have to pay court fees and lawyer fees to resolve the matter.

However, given the serious nature of the issue and the medical issues involved, VCAT may be inappropriate and the courts may be preferred as the legal reasoning and the requirement for statutory interpretation may make the issue more serious.