EXTRA
EXPERIENCED TEACHER RESOURCES & ASSESSMENTS

Legal Studies
UNITS 3&4
2020 Trial Examination

Reading time: 15 minutes

Writing time: 2 hours

SOLUTIONS

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EXTRA 2020 Legal Studies Units 3&4 Trial Exam: Solutions

Section A (40 marks)

Question 1 (2 marks)

Suggested Solution:
Sufficient for 2 marks
The responsibility of a **criminal jury** is to determine their verdict based on whether the **prosecution** have proven that the defendant is guilty **beyond all reasonable doubt.** In contrast, a **civil jury** will determine their verdict based on whether the **plaintiff** has established their claim on the **balance of probabilities**.

Higher level response
The responsibility of a jury of 12 in a criminal trial, is to determine their verdict (unanimous in homicide cases and some drug offences; and majority verdicts (11/12) in other criminal indictable offences) based on whether the **prosecution** have met their burden, that is, to prove through the evidence presented, that the defendant is guilty to the standard of **beyond all reasonable doubt.**

However, a jury of six in a civil trial determines their majority verdict (at least five/six) based on whether the **plaintiff** has established their claim, (scope of liability) to a lower standard of evidence, that is on the **balance of probabilities**.

Marking guide:
- ➔ To achieve 2 marks, students need to focus on the task word, **distinguish**, that is, to **show the difference** in how civil and criminal juries fulfill their responsibilities when determining their verdicts. Using a linking word such as 'however', 'whereas' or 'in contrast' can be used to illustrate the difference.
- ➔ The question is specific to this responsibility, and therefore linked to the juries' role in determining whether specific parties (prosecution in criminal cases, and plaintiffs in civil cases) have presented evidence that has fulfilled their requirements regarding burden and standard of proof.

Question 2 (3 marks)

Suggested solution:
A **petition** is a written statement, signed by members of the community, that calls on parliament to change the law. The petition is presented to an MP, who tables it in Parliament, raising politicians' awareness of community support for law reform.

This was demonstrated by the passing of laws banning single-use plastic bags in 2017 after lobby group Plastic Bag Free Victoria's successful physical and online petition with over 200,000 signatures.

OR

Demonstrations, in the form of marches or rallies, occur when groups of people publicly unite to display community values in support for law reform. Demonstrations, that may be reported in the media, are designed to draw Parliament's attention to an issue of concern, for example tougher law and order reforms and sentencing, designed to protect the community.

For example, demonstrations resulted in the Victorian Parliament reforming laws since 2016, where courts must consider standardized sentencing and are unable to issue CCO's for the most serious offences, including child sexual assaults.

Marking guide:

- ➔ 2 marks are allocated for the depth of explanation of the means - a definition of what the means is and how it can be used to influence Parliament to reform the law.
- ➔ 1 mark is allocated for a recent example.

Question 3 (4 marks)

Suggested solution:
One similarity is that the Road Safety Amendment Act 2020 (Vic), or any other Act/ statute/ legislation, must undergo a **rigorous process** of being debated and passing through three readings, a committee stage and a vote, before being enacted and proclaimed by the Crown through Royal Assent. This may include discussing details regarding specific clauses such as speed limits or traffic infringement penalties.

A second similarity between Victoria's houses is their role in being able to **initiate or introduce bills**, although **one difference** is that appropriation or money bills that deal with the budget, must be only introduced in the Legislative Assembly (Lower House).

One difference between the Victorian houses involves their **main law-making role**, **initiating or reviewing bills**. The Victorian Legislative Assembly (Lower House) is where the Victorian people will give a mandate at election time, to a political party to form government. Since the government usually controls the majority of the 88 seats in the Lower House, the vast majority of bills, like the Road Safety Amendment Act (Vic) 2020, and all appropriation bills will be introduced here. This is designed to ensure laws represent the community's views and values e.g. legislating measures to protect the community from the coronavirus pandemic.

In contrast, the main law-making role of the Legislative Council (Upper House) is as the **House of Review**, where they provide an important check to determine whether the bill will pass and therefore become an Act of Parliament/ legislation/ statute. This is because governments rarely control the majority of the 40 seats in the Upper House and therefore if the government wants to pass its bill, it will need the support of independents or minor parties. Consequently, bills will be reviewed in greater detail, usually in the Committee Stage, where amendments are suggested and debated.

Marking guide:

- ➔ This question asks for a **comparison**, that is **similarities and differences** in the law-making role played by the two houses of the Victorian Parliament, the Legislative Assembly (Lower House) and the Legislative Council (Upper House). Students don't have to specifically use the Road Safety Amendment Act 2020 (Vic) to gain full marks, but students are given a hint "(Vic)" that they would need to explain the role of law-making by the Houses within the Victorian Parliament.
- ➔ Students need to be aware of the key law-making roles of the Commonwealth and Victorian Parliaments, and although there are similarities, students need to be careful e.g. Victoria's Legislative Council does NOT represent the States as the Commonwealth's Upper House (Senate) does. Representatives in the Legislative Council, in theory, represent one of metropolitan or regional areas in Victoria.
- ➔ Two marks for this question are allocated to an explanation of **one similarity** (or two shorter similarities) in the role of the Houses in law-making.
- ➔ Two marks are allocated for an explanation of **one difference** (or two shorter differences) in the key role between the Houses in law-making.

Question 4 (5 marks)

In June 2018, the Victorian Law Reform Commission's (VLRC) report Access to Justice: Litigation Funding and Group Proceedings made 31 recommendations to the Victorian Parliament to improve access to the law for those involved in representative proceedings (class actions).

a. *Suggested solution:*

Students could highlight that the Victorian Parliament may choose:

- **not to accept any** (i.e. reject all) of the 31 VLRCs recommendations for law reform regarding Litigation Funding and Group Proceedings.
- **to accept some, but not all,** of the 31 VLRC's recommendations for law reform, that become the basis for legislative change regarding Litigation Funding and Group Proceedings.
- **to accept all** the 31 VLRC's recommendations for law reform, that become the basis for legislative change regarding Litigation Funding and Group Proceedings.

1 mark

Marking guide:

- ➔ 1 mark is awarded for identifying any of the above options.

b. *Suggested solution:*

Despite factors that may hinder the timely resolution of civil disputes, the VRLC is correct that representative proceedings**,** commenced by a lead plaintiff on behalf of a group of at least seven people, involve access to efficient and cost-effective resolution.

Through representative proceedings, plaintiffs have access to personnel and institutions that provide them with an opportunity to protect their rights and pursue their case by seeking remedies like damages, that they would otherwise be unable to afford. This is because legal representation costs in excess of $8,500 per day for a barrister to present their case in the Supreme Court. Therefore, representative proceedings and the

recommendations suggested by the VLRC could result in cost efficient resolution in the courts, as legal costs may be covered by litigation funders, insurers and the plaintiffs as a group who could share the financial cost.

However, the VLRC may be incorrect as representative proceedings can be inefficient. Injured plaintiffs who need to access damages and be returned to their original position rely on costly legal representatives and insurance funders. For example, legal fees for the Black Saturday Bushfire class actions were estimated at $96 million. Insurance funders take the risk, but receive a sizable 20-40% of the damages payout that goes to their shareholders. This means plaintiffs will not automatically receive damages in a timely manner that cover their losses. For example, plaintiffs received less than 65% of their assessed losses, nearly nine years after Black Saturday Bushfires.

Even so, the VLRC is correct as representative proceedings improve the efficiency of the legal system. One proceeding, rather than many individual cases, could reduce the backlog of cases and the waste of resources for those who are similarly affected by the same or related facts, and require the identical legal issue to be decided by a court. As a result, plaintiffs who require damages to cover medical and other costs, are able to access institutions like the Supreme Court, specialist personnel like Judges, and procedures like mediation. For example, two representative proceedings, involving the Black Saturday Bushfires, resulted in a 16 month Supreme Court hearing and a successful mediation, that provided access for 2,300 plaintiffs affected by personal injury claims and another 13,000 plaintiffs affected by property claims. Consequently, the VLRC is correct in its assessment because representative proceedings ensured over 15, 000 plaintiffs accessed the courts and remedies, in the form of $800 million in damages, in an attempt to return them to their original position.
Therefore, the VLRC's assessment that representative proceedings result in access to timely and cost effective resolution, is not always guaranteed.

4 marks

Marking guide:

- ➔ The instruction to students is "to what extent". Therefore, students need to give a response that weighs up the ability of representative proceedings to achieve access, being the principle of justice that is explicitly stated in the question, to "efficient, timely and cost effective resolution." The answer will be marked holistically.
- ➔ Students should consider how representative proceedings **assist** (strengths, advantages, benefits) and /or **hinder** (weaknesses, disadvantages, limits) access to all, or some or none of the components, for those using representative proceedings.
- ➔ Crucially, students need to link their assessment back to the principle of justice identified in the question, that is **access.** The possible approach is to establish a clear definition of access linked to the civil justice system, that allows students to link their answer back to the principle.
- ➔ Students may commence/ conclude with a general statement about the extent to which you agree or disagree with the VLRC's statement.

Question 5 (8 marks)

a. *Suggested Solution:*
The purpose of the **two week committal hearing** involving Ristevski, was for the Magistrate **to determine the future direction of the case, that is, whether a prima facie case existed**. The purpose for the Magistrate was to determine whether the Prosecution's evidence against Ristevski was of sufficient weight, therefore likely to result in a conviction if the case proceeded to a Supreme Court trial, that presides over homicide cases.

OR

The purpose of one committal proceeding that Ristevki undertook, such as the **hand up brief**, was to ensure he was treated fairly as he could **access and assess relevant evidence** in the form of the prosecution's case against him. All evidence relied upon by the Prosecution in the case (written and signed statements from witnesses, copies or photographs of exhibits) and charges would have been disclosed to the court and to his legal representative at least 42 days before the committal mention, to help Ristevski prepare, assess the strength of the Prosecution's case against him or to help him determine how he would proceed.

2 marks

Marking guide:

- ➔ Students should describe the purpose of one committal (criminal pre-trial) proceeding that the defendant Borce Ristevki underwent, including: filing hearing, hand up brief, mention hearings and committal hearings. The task is not defining the procedure but emphasising its **purpose** or intent. The two samples have looked at different purposes that are linked with committal hearings and hand up briefs.
- ➔ One mark is awarded for appropriately describing one purpose of an appropriate committal proceeding.
- ➔ One mark is awarded for applying this purpose to the Ristevski case.

b. *Suggested solution:*

Plea negotiations that result in the Prosecution offering the accused (Ristevki), an incentive, in the form of reduced charges from murder to manslaughter to plead guilty, may be viewed as be **appropriate**. Ristevski and his legal counsel and the Prosecutors would make their **fully informed decision after accessing and assessing relevant information** such as the strength of the evidence, and therefore the likelihood of guaranteeing a conviction at a Supreme Court trial.

However, the community may feel that a plea negotiation was **inappropriate** even though Ristevki pleaded guilty, as the murder charges were reduced to manslaughter. This could be inappropriate as Ristevski decided to plead guilty to the lesser charge, even though he was **yet to fully disclose at trial all relevant evidence** regarding his role in Mrs Ristevki's death.

Plea negotiations are **appropriate** for successfully **avoiding the cost of funding an expensive and stressful 5 week trial** and therefore improve the administrative efficiency of the criminal justice system. This is because

court resources are freed up to resolve other matters, therefore reducing delays. Nearly 75% of Supreme Court and 85% County Court cases in 2018 were resolved through a guilty plea as a result of plea negotiations and sentence indications, thus avoiding costly, timely and stressful trials.

However, a plea negotiation may be viewed as **inappropriate** due to the **serious nature of the offence and the lenient sentence**, that was only increased due to an appeal. The community, the victim's extended family and the Prosecution in Ristevski's case may feel plea negotiations resulted in an offender's punishment being "manifestly inadequate". Therefore, allowing plea negotiations did not result in a sentence that reflected the gravity of his offence or his willingness to take full responsibility for his actions.

4 marks

Marking guide:

- ➔ Students need to consider the instructional word, **discuss**, therefore students must consider **both** whether plea negotiations were **appropriate** or **inappropriate**. This can also be communicated as **costs** and **benefits** of plea negotiations.
- ➔ One substantial benefit or two smaller benefits (or appropriateness) would be allocated 2 marks.
- ➔ One substantial cost or two smaller costs (or inappropriateness) would be allocated 2 marks.
- ➔ Students need to ensure their arguments are linked to this case. Without explicit links to this case, students can only receive 2 marks.

c. *Suggested solution:*
A court hierarchy allows for an appeals process, where a superior court may review a decision by a lower court and rectify an injustice**.**

This process is exemplified in Ristevski's case as the Prosecutor sought leave to appeal Ristevski's sentence on the grounds that it was "manifestly inadequate" (or too lenient). The Court of Appeal reviewed The Supreme Court's original decision, rectified the injustice by increasing Ristevski's maximum sentence from 9 to 13 years, in part due to his lack of "remorse".

2 marks

Marking guide:

- ➔ For 1 mark, students would need to briefly outline how and why a court hierarchy allows for an appeals process to occur.
- ➔ For the 2 marks, students also need to make an explicit link between the court hierarchy and the appeal involving Ristevski's case. Students may comment on where and why (the grounds) the appeal occurred.

Question 6 (8 marks)

a. *Suggested solution:*
The relationship between the High Court and the separation of powers is that they are both mechanisms within the Commonwealth Constitution. Their importance is to provide checks that minimise the abuse of power.

This is shown by the High Court fulfilling its judicial function. The High Court hears, interprets and determines Constitutional challenges, by someone with a standing in the case, who believes they have been affected by legislation that is 'ultra vires' or beyond Parliament's constitutional powers e.g. Roach Case 2007. By interpreting the Commonwealth Constitution and providing checks on laws made by Parliament where appropriate, it is ensured that Parliament remains within its legislative powers, only passing legislation within their constitutional powers.

Therefore, the link results in the High Court providing an important mechanism or check that ensures a separation of powers exists between the various branches to minimise the abuse of Constitutional powers.

3 marks

Marking guide:
- ➔ Students need to show the relationship or link between the High Court and the separation of powers. This is NOT the division of powers.
- ➔ 1 mark for the description of the relationship is between the High Court and separation of powers, that they are mechanisms or checks within the Commonwealth Constitution.
- ➔ 2 marks for exploring how and why these mechanisms act to minimise the abuse of power, or ensure that power is not centralised in the hand of one person such as the PM, or one body like the Executive and/ or Parliament.
- ➔ Students need to understand how the Commonwealth Constitution separates power between the branches of Government that operate independently of each other.

b. *Suggested solution:*

<u>The interpretation of section 7 & 24 of the Commonwealth Constitution</u>
Roach v. Electoral Commissioner (2007)
Vicki Lee Roach was serving a 6-year term of imprisonment. She challenged the validity of 2006 amendments to legislation that prohibited all prisoners from voting. Before the amendment, legislation was passed in 2004 that only prisoners serving a sentence of three years or longer were excluded from voting.

Therefore, the High Court had to determine the constitutional validity of both the 2004 legislation and the 2006 legislative amendments.

In its decision, the High Court held that the complete ban on prisoners voting, passed in 2006, was unconstitutional. This is because it interfered with the principle of representative government, where under sections 7 and 24 of the Constitution, MPs must be "directly chosen" by the people in elections.

However, the significance of the High Court's decision is that the 2004 legislation was valid because a 'limited right to vote" exists if it is "reasonable and appropriate". The High Court argued that prisoners serving more than three year-sentences lost their right to vote whilst in prison because they had engaged in conduct that took them outside of community expectations, reflected by the length of their prison sentence. Therefore, the High Court's interpretation of s 7 and 24, is that the right to vote is not an absolute right, and may be modified when circumstances are seen as "reasonable and appropriate".

OR

Impact on the division of law-making powers

Brislan Case 1935

One High Court case that had a significant impact on the division of powers is the Brislan Case 1935. Brislan challenged the validity of the Commonwealth Parliament's *Wireless Telegraphy Act 1905* where owners of wireless sets had to purchase a licence, otherwise they could have criminal charges laid against them and fined. Brislan argued that the law-making power on wireless sets was a state residual power, as the term wireless did not appear in the Constitution.

The High Court was required to interpret s.51(v). The Commonwealth Parliament had power to make laws with respect to 'postal, telegraphic, telephonic and other like services' and determine whether a wireless radio was "like service", that is, similar to other communication services like the post.

The High Court determined a broad interpretation of the phrase 'other like service'. The interpretation meant the Act covered laws relating to radio broadcasting. This is because new radio technology fulfilled a communication function that was a "like service" to those included in the Act, such as telephonic communication services.

Therefore, the significance of the case also substantially increased the Commonwealth's powers, by reducing the impact of the states' residual powers. In effect, the interpretation meant this became a concurrent power, and therefore the commonwealth would prevail if any inconsistency existed with state law. The Brislan Case is also significant in a contemporary world, considering how the Commonwealth has already relied on the High Court's broad interpretation of s.51(v) to regulate parts of the internet through the *Interactive Gambling Act* 2001 (Cth), which regulates the operation of online casinos within Australia and advertising of online gambling. Therefore, the High Court's interpretation of "like services" means the Commonwealth automatically has law-making power over any new technology that serves as a form of communication – for example, televisions and the internet that didn't exist at the time of the Brislan Case.

5 marks

Marking guide:

- ➔ Students need to briefly consider the **facts, issue and decision.** Then, the main component of the question is to consider the **legal and social significance / impact** of the case you have chosen.
- ➔ This question is marked holistically.

Question 7 (10 marks)

Suggested solution:
The law-making relationship between parliament and the courts is vital for creating necessary law reform, for the wellbeing of the community.

Even so, as supreme law maker, **Parliament's strength is that it has the ability to respond to the need for law reform by creating legislation**, 'in futuro', that is, at any time to meet the community's needs. Consequently, Parliament's extensive legislative process can be used to create effective original and amendment acts, or to codify and abrogate precedents, as a means to deal with problem issues that have arisen in the community. For example, Parliament was made aware of the need for law reform to protect the community through means like demonstrations and the media. This resulted in tougher sentencing laws for parolees since 2016.

Although unlike Parliament, **a strength of courts is their ability to resolve legal disputes, particularly in novel or test cases where legislation is unclear or non-existent**. Even though courts cannot direct Parliament to reform the law, awareness of common law can result in Parliament responding to the need for law reform through **codification and abrogation**. For example, the operation of the doctrine of precedent was used in R v. Davidson 1969 to establish access to abortion, that was not codified into legislation until Parliament responded to community pressure and VLRC recommendations, some 40 years later. Therefore, judicial activism can encourage the possibility of the law being reformed.

In addition, **a strength of Parliament is that it responds to the need for law reform because representatives have been "directly chosen by the people".** They remain answerable by listening to and being made aware of their views through petitions, submissions to expert bodies like the VLRC, Royal Commissions and Parliamentary Committee. This was recently illustrated by profoundly significant reform that assists the sick to access medicinal cannabis in 2016 and voluntary assisted dying safeguards in 2017. Therefore, Parliament is democratically fulfilling its law-making role, by responding to community pressure for effective law-reform due to changing community values or the need to protect vulnerable members of the community.

However, **a key weakness of Parliament is that it may be unwilling to reform a law that is sensitive for fear of voter backlash** or internal political pressures from within a political party which may reduce the ability of parliament to respond to community needs and values, since MPs must vote along party lines for fear of being expelled. This was evident in the area of same sex marriage until 2017.

Despite the ability of courts to interpret legislation and create or evolve the common law, the **minimal ability of courts to respond by changing precedents and therefore reforming the law, is a weakness.** This is because the doctrine of precedent is rigidly applied by conservative judges and lower courts are bound to follow the superior courts' precedent. This is evident in Justice Mason's ruling in Trigwell's case who stated the court's role is to "apply the law" and not "reform" it. Therefore, outdated law exists until community pressures may lead to parliament as supreme law-makers abrogating precedents. This reflects parliament ability and willingness to reform the law, seen by the introduction of the Wrong Animals Act five years later.

Therefore, even though superior courts may respond in creating and evolving the common law, ultimately, Parliament has the power, obligation to society and legislative processes to respond to community needs for law reform.

Marking guide:

- ➔ Students need to consider the law-making relationship between Parliaments and Court, that is, Unit 4, Area of Study 2.
- ➔ The task word **'evaluate'** requires students to effectively structure their response by weighing up the **strengths** and **weaknesses** of Courts and Parliament regarding their ability and willingness to respond to the need for law reform. Evidence should also be used from the material the students have studied, as a means to support their arguments. Students need to also establish a clear contention and or conclusion, that is reinforced by clear arguments and evidence.
- ➔ It is expected that a student's opinion in their contention statement should match the weighting of their response. For example, if a student's opinion is that Parliament is more effective than courts at responding to law reform, then there should be greater detail in the strengths provided for Parliament, or more strengths provided for Parliament e.g. two strengths/ one weakness of Parliament, one strength/ one weakness of courts.
- ➔ For 10 marks, two strengths and two weaknesses may be sufficient if provided in great detail. Further points may be required if less detail is provided. The suggested solution provides a rough guide for the appropriate level of detail required with 4-5 points.

Section B (40 marks)

Question 1 (10 marks)

a. *Suggested solution:*

All of the following are errors that may be identified:

- "Nicolette has been told she has been charged with an indictable offence".
  The Magistrates Court does **not** hear indictable offences. However, Nicolette's case could be heard in the Magistrates Court if both her and the Prosecution consents to it. This is because under the Criminal Procedure Act 2009, theft under $100,000 can be an **indictable offence heard or tried summarily.**
- **"**Nicolette has been told she has been charged with an indictable offence"… "in the Magistrates Court" before a "jury".
  If Nicolette chose to have her case heard as an **indictable offence,** she would be tried in the **County Court** before a judge and jury of 12**,** and **not** in the Magistrates Court. If Nicolette's case was heard in the **Magistrates Court**, then her case would be **presided by a Magistrate without a jury**.
- "a jury will determine whether Nicolette has proven her innocence on the balance of probabilities".
  The burden is not on **Nicolette** to prove her innocence, as she possesses the right to the **presumption of innocence,** under s25 (i) of the Victorian Charter for Human Right and Responsibilities 2006. Nicolette does not need to prove her innocence, as the **burden of proof** rests with the **Prosecution** who are initiating proceedings. The only exception is if there is a reversal of burden onus that shifts to Nicolette to prove her innocence on the balance of probabilities (e.g. if she uses a defence such as reasonable belief that the car was hers)
  The **standard of proof** in a civil case is on the balance of probabilities. As Nicolette's case is a **criminal matter**, the prosecution is responsible for proving their case to a Magistrate in the Magistrates Court, or a jury of 12 in the County Court, that the evidence against her is **beyond reasonable doubt**.

- Nicolette's case will be delayed for two years and therefore she will need to remain in prison until her trial.
  Under the Victorian Charter of Human Rights s25 (2c), Nicolette is entitled **"without discrimination"** to a guarantee that she will be tried without unreasonable delay. This protects her presumption of innocence, since she has not been convicted and therefore **cannot be deprived of her liberty by being in remand for an excessive period of time** whilst awaiting trial, unless there are "exceptional circumstances."
- As Nicolette is unemployed, she has been denied access to VLA funding, therefore must represent herself at trial.
  Since Nicolette is unemployed, she would satisfy **eligibility criteria** like a **means test** (e.g. income of less than $360 per week) and/or is likely to be in a **high priority category,** the VLA could deliver a **grant of legal assistance,** providing a lawyer on her behalf or money to pay for a lawyer of her choosing.
  Nicolette is also likely to be eligible for **access to a duty lawyer** if her case was heard in the Magistrate's Court.
- Nicolette believes that it's appropriate for her to plead guilty during her sentence indication.
  Nicolette does not need to plead guilty during the sentence indication. Nicolette has the right to request a sentence indication from the Magistrate at any time; or from a County Court judge prior to the trial. Sentence indications are appropriate because they are a statement from the court presiding over her case, to inform her that **if** she pleads guilty, whether it will result in a custodial (imprisonment) or non-custodial sentence (fine, community correction orders). Nicolette can then make a fully informed decision about her plea.
- Nicolette's jury will be informed about her previous criminal convictions.
  If Nicolette's case was heard in the County Court before a jury, they would **not** be informed about her prior convictions. Under common law and the Victorian Charter for Human Rights and Responsibilities, she is entitled to the presumption of innocence until the Prosecution, on behalf of the State, has proven her guilty beyond reasonable doubt in a court of law.

6 marks

Marking guide:

➔ Students must identify two errors from the scenario.
➔ Each correct error identified is worth 1 mark.
➔ For each of the two errors identified, students must outline in detail why it is incorrect and/ or what the correct process or outcome would be. Each of these is worth 2 marks.

b. *Suggestion solution:*

One recent reform introduced by the Victorian Government May 2017, was an increase of $34.7million in funding for the VLA to improve access to legal advice, support and information.

A strength of the reform is to increase **equality** for financially disadvantaged people, like Nicolette who is unemployed and therefore could not afford expert and necessary legal representation to help prepare and present her case to court, especially when the Prosecutor would be a skilled, trained and expert legal representative. The funding increase will assist the legal system to improve equality by creating an equal footing for 80% of people, like Nicolette that rely on access to VLA grants, to improve the likelihood of a fair

trial for people that may otherwise have to represent themselves, in a stressful environment.

However, one weakness of this recent reform is that the funding increase is substantially less than the Productivity Commission's request of a $200 million increase. Therefore, Nicolette may be one of an estimated 32,000 Victorians who remain ineligible for VLA assistance due to funding cuts and means tests. Therefore, Nicolette may be treated unequally especially if she has to represent herself, reducing Nicolette's right to a fair and equitable trial.

OR

One recommended reform referred to the VLRC in 2018 is abolishing committal hearings. Former DPP Jeremy Rapke argued committal hearings "should be abolished, like in Western Australia and Tasmania, as they're a waste of time and money".

A strength of abolishing committal hearings is to remove a criminal pre-trial procedure. This would reduce delays, costs and stress for Nicolette and improve her **access** to timely resolutions. Nicolette would not need to represent herself, access VLA funding or fund a legal representative, to argue that the prosecution have not met their burden in proving a prima facie exists and therefore she should be tried in the County Court. By abolishing committal hearings, delays in the entire process could be reduced, limiting Nicolette's suffering distress and financial hardship.

However, a weakness of abolishing committals is that delays may be increased in the higher courts where trials are heard. Committal hearings improve the criminal justice system's access to administrative convenience by saving time and resources. This is because it's a criminal pre-trial procedure that identifies and filters out 20% of cases where the Magistrates Court determines that there is insufficient evidence (not a prima facie case). Therefore, access to timely resolution occurs as weak cases don't proceed to trial and create a backlog of delays for other defendants waiting for their trial.

4 marks

Marking guide:

- ➔ Students must identify, describe and consider the **strengths and weaknesses** of a change or reform.
- ➔ The question is providing students with a choice between a **recent** change/ reform (in other words must be in the last 4 years as outlined in the study design) or a r**ecommended** change/ reform (in other words a change that could be introduced or has been suggested as a possible improvement.
- ➔ Students must link their discussion to how their change (recent or recommended) has or could improve the criminal justice system's ability to achieve one principle of justice (fairness, equality, access) for Nicolette.
- ➔ If students only describe the reform, they cannot score more than 1 out of 4 marks.
- ➔ If students consider the strength and weakness of their reform or change, but without explicit links to Nicolette's case the maximum, then a score 3 out of 4 marks is awarded.

Question 2 (17 marks)

a. *Solution:*
Plaintiff - Gordon Cheng
Defendant - Isabel Lok

2 marks

Marking guide:

- ➔ 1 mark for each part correctly identified.

b. *Suggested solution:*
Scope of Liability
In considering the scope of liability, Cheng will need to determine if the Supreme Court (in this case the judge who will determine the verdict) will have access to the **evidence** (e.g. reviews on *Google my business*) to determine if the defendant (Lok) was **legally responsible** for the harm or loss suffered (e.g. loss of Cheng's reputation, 80% of his income).

Cheng will also need to consider whether the evidence he has accessed will meet the **legal standard** (balance of probability) required by the court. The evidence will need to show that Lok was responsible in causing Cheng harm and it is reasonable to hold her liable. (Students could also consider whether Lok is the only defendant, that is, whether the scope of liability extends to Google, if they are partly responsible or liable for his harm or loss because they did not delete defamatory reviews from *Google my business*.)

Limitation of action
Cheng would need to consider the limitation of action, which is the **time period that a plaintiff must commence or initiate their case against a defendant**, under the legislation.

For example, the limitation period for **defamation cases is 1 year** from when the plaintiff suffered or knew of the infringement to their rights and the harm caused. Cheng commenced legal proceedings within the time period as he was aware of the harm to his business reputation and the loss of 80% of his clients and income within 4 months of Lok's reviews.

Limitation of action would ensure the Supreme Court has access to all relevant evidence that would otherwise be lost or forgotten. Cheng could ensure that his civil action could be resolved in a timely manner, as he is awarded damages, to return him to his original position prior to Lok's defamatory reviews.

3 marks

Marking guide:

- ➔ When analysing, students are expected to examine the factor Cheng would need to consider before initiating or proceeding with civil action.
- ➔ 1 mark is awarded for briefly outlining limitation of action or scope of liability.
- ➔ 2 marks are awarded for possible considerations made by Cheng, relevant to the facts of the case.
- ➔ 2 out of 3 marks can only be achieved if students do not refer to the facts of the case.

c. *Suggested solution:*
Under judicial powers of case management, Judge Bochner has the **power to give judicial directions** or make specific orders she considered appropriate, before or during the trial. The purpose is to improve access to prompt resolution by ensuring the parties are prepared and ready for trial.

For example, Judge Bochner could establish a timetable for Cheng and Lok to exchange and access all relevant documents as outlined in the discovery phase.

OR

For example, Judge Bochner could limit expert witnesses, like Cheng's accountant Karen Phu to specific issues. Judge Bochner may want to access all relevant evidence**,** like how Phu calculated the impact of the reviews on the loss of Cheng's reputation, clients and income; in order to assess damages.

2 marks

Marking guide:

- ➔ Students need to briefly describe a judicial direction to achieve 1 mark, and then also describe its purpose to achieve 2 marks.
- ➔ There are two examples of the types of directions a judge can give the parties outlined in the suggested solution. Others include mediation, determining the list of witnesses and time allocated.

d. *Suggested solution:*
Fairness is achieved when parties are treated impartially when hearing and settling civil disputes in institutions such as the Supreme Court. Fairness relies on impartial personnel, like Judge Bochner, who must fulfil their responsibilities by ensuring the rules of evidence and procedure are applied fairly to the parties during the civil trial.

Fairness was evident in the *Chang v Lok* case as Judge Bochner managed the trial as she acted as an impartial and independent 'umpire' when giving the parties directions and deciding on the admissibility of evidence, such as Chang's expert witness. If she didn't, Lok could have appealed.

Her Honour would have excluded inadmissible evidence like hearsay that cannot be fairly tested by the parties during the examination process. This ensures fairness in the way evidence is allowed and could determine, for example, Lok's scope of liability, that she defamed Chang and the extent of damage or harm caused was substantial.

Despite there being no jury, Judge Bochner was fair, in the way she followed procedures to determine Lok's liability. Judge Bochner outlined reasons in her judgment that reflected how she had considered all the evidence before determining her verdict since the plaintiff had established his claim against the defendant on the balance of probability. In assessing damages, Judge Bochner revealed that the process was fair, as she used the principles or precedent in the *Duffy v Google* case and her comments were recorded to reflect how she justified not only the amount of damages, but also the type of damages.

However, the judge's role within the civil justice system is a largely **passive** one, managing the trial. Despite their level of legal knowledge and expertise, the judge **cannot assist and unfairly favour one party over another,** especially if litigants are **self-represented**, or in the case of Lok not present.

Even so, Judge Bochner fulfilled her key responsibilities by remaining an unbiased administrator of justice in the *Chang v Lok* case.

4 marks

Marking guide:

- ➔ Students need to consider the role of the Judge, in this case, and the extent to which Judge Bochner managed the trial fairly, that is fulfilled her responsibilities.
- ➔ With 'discuss' being the command word, students need to weigh up or evaluate the judge's responsibilities in terms of strengths and any weaknesses linked to the principle of fairness.
- ➔ Students could establish the principle of fairness at the start of their response, as a way to link their arguments back to the principle.
- ➔ For 4 marks, students could provide two points for and against the fairness of a judge's trial management. However, fewer points could be offered if done so with a thorough degree of detail.

e. *Suggested solution:*
Statutory interpretation occurs when a court is adjudicating a case. Courts will review and apply Parliament's purpose or intent, found in relevant legislation.

Judge Bochner had to interpret and apply the South Australian Parliament's purpose or intent found in the words and phrases within section 32 of the Defamation Act 2005.

In doing so, Judge Bochner was able to determine her decision by showing the "relationship" or link between the "harm sustained" by Chang and the nature and "amount of damages" he should be "awarded" due to Lok's defamatory comments.

3 marks

Marking guide:

- ➔ For one mark, students need to identify the purpose or intent of statutory interpretation, that reveals a relationship between Parliament and courts in law-making.
- ➔ For two marks, students need to explicitly link how and why Judge Bochner interpreted and applied the South Australian Parliament's Defamation Act 2005 in the *Chang v Lok* Case.

f. *Suggested solution:*

The Victorian Supreme Court would **not** be restricted by a precedent set by the Full Court of the South Australian Court in *Duffy v Google* case 2017.

This is because precedents established by any court in a **different state hierarchy**, like South Australia, is **a persuasive precedent** and **not** a binding precedent that must be followed.

If a Justice in the Victorian Supreme Court was presiding over a defamation case in the future, where the material facts of the cases were similar, they may **consider, be influenced or be guided** by the legal principles or **persuasive precedent** set in the *Duffy v Google* case.

However, the Victorian Supreme Court does **not** "rely" or have to follow the precedent or "principles" set in *Duffy v Google* because it is a persuasive and **not** a binding precedent.

3 marks

Marking guide:

- ➔ Students need to be aware of the role of courts in law-making and how the doctrine of precedent operates.
- ➔ 1 mark is for students establishing that the Victorian Supreme Court is **never** restricted or bound to follow a precedent from the South Australian Full Court of Supreme Court.
- ➔ 1 mark is for students who identify why *Duffy v Google* would be a persuasive and not a binding precedent, and therefore not restrict the ability of Victoria's Supreme Court to make law in similar cases in the future.
- ➔ 1 mark is allocated for students identifying the impact of persuasive precedents in future cases with similar material facts.

Question 3 (13 marks)

a. *Suggested solution:*

Exclusive Powers are law-making powers that can **only** be exercised by Commonwealth Parliament, and not the states. Therefore, laws like the *Biosecurity Act 2015* and the determination made in 2020 are consistent throughout Australia, meaning they apply to **all** Australians. This is because under s.51(ix) of the Commonwealth Constitution, only the Commonwealth has exclusive power to make laws regarding "quarantine" and can therefore pass laws to "prevent the entry or spread of a listed human disease (Covid-19)" in Australia.

However, under s106-7 of the Commonwealth Constitution, **residual powers** are law-making powers that are not specifically listed, but are left to the States**.** Therefore, each state can make laws in these areas that can **vary** from state to state if they desire. For example, Western Australia adopted strict border restrictions under the *Public Health Act 2016* (WA), whereas, South Australia has opted not to enforce border restrictions. Therefore the laws regarding Covid-19 have varied in these states.

4 marks

Marking guide:

- ➔ This question is from Unit 4, Area of Study 1.
- ➔ 2 marks are awarded for explaining how **exclusive** and **residual** powers allow for some laws to vary (different) whilst other laws to be consistent (uniform, same).
- ➔ 2 marks are awarded for the application of examples for how each power has been utilised to deal with the Covid-19 crisis.

b. *Suggested solution:*
One reason why s.109 may be required in this situation is because it is a constitutional means/ mechanism that is designed to resolve constitutional disputes where inconsistencies between State and Commonwealth laws exist.

Laws passed by the Commonwealth and South Australia regarding how to deal with Covid-19 may be viewed as concurrent powers that are shared. Therefore, the High Court would be required to interpret and determine whether an inconsistency existed - for example, if there were conflicting laws regarding whether or not individuals could move across state borders for work purposes - and resolve the constitutional dispute under s.109 of the Commonwealth Constitution.

2 marks

Marking guide:

- ➔ This question is from Unit 4, Area of Study 1.
- ➔ Students would need to connect the purpose of s109, that is, to resolve constitutional disputes, by determining whether Commonwealth and State legislation is inconsistent.
- ➔ 1 mark for explaining a reason why s.109 can be applied. Only one reason can be given.
- ➔ 1 mark for connecting this reason to why the Commonwealth may have challenged South Australian laws e.g. to ensure there is not confusion amongst society if conflicting laws exist.

c. *Suggested solution:*
Sufficient for four marks
I believe a Justice in the High Court would rule in favour of the Commonwealth.

The first reason for this is that Commonwealth Parliament does have **exclusive power** under s51(ix) to make laws for all Australians regarding **'**quarantine'. As a result, the Commonwealth would be able to successfully argue that they have the power to make laws such as the *Biosecurity Act 2015*, and the determinations in 2020, to protect all Australians by "preventing the entry or spread of a listed human disease", in this case, from backpackers who may have Covid-19.

The second reason in support of the Commonwealth would be the High Court's use and interpretation of s.109 if it was determined that laws in this area were concurrent powers to be shared by the Commonwealth and the States. Under s.109, the Justice would argue that South Australia's laws under s.3 of the *Public Health Act 2011* that do not "enforce border restrictions" and therefore allow the backpackers to cross the border for work, would be inconsistent with the Commonwealth's law that allows them to introduce measures to "prevent the entry or spread" of movement if it is seen as posing "a severe or immediate threat."

Additional point

The third reason in support of the Commonwealth law prevailing relates to the High Court's interpretation of the Commonwealth Constitution's express right. Under the Constitution, s.92 allows the "absolutely free" right for trade between the States. Even though South Australia is arguing that they are upholding the backpackers' guaranteed Constitutional express right under s.92 to be free to move "across borders" in order to work, the High Court's previous interpretation of s.92 in the *Nationwide News Case* (1992) stated that the Commonwealth Parliament can "prohibit movement if the law is to protect the State or its residents from injury". Whilst the High Court is not bound by its own decisions, it is highly unlikely that they would overrule this interpretation given the similarity in application. The Commonwealth would argue that it is trying to "protect the state", and its residents, including the backpackers, "from injury" in the form of contracting the Covid-19 virus.

4 marks

Marking guide:

- ➔ This question is from Unit 4, primarily relating to material from Area of Study 1.
- ➔ As the question asks 'In your opinion', students would need to establish a position on who the High Court's ruling may favour. 1 mark should be deducted if an opinion is not given. Students are able to give points that oppose their opinion, as long as the majority of their reasoning supports their stance.
- ➔ There are three grounds in favour of the Commonwealth: exclusive powers, concurrent powers and the High Court's likely interpretation based on the Nationwide News Case 1992.
- ➔ 2 x 1 mark is awarded for the explanation of each reason for or against the student's proposed ruling.
- ➔ 2 x 1 mark is awarded for the connection of each reason to the stimulus material.

d. *Suggested solution:*

- Impact on backpackers
  The impact of the High Court's interpretation of s.109 would **not** allow the backpackers to leave South Australia and enter Western Australia until the restrictions were lifted under laws from the Commonwealth and Western Australia.

- Impact on South Australia's *Public Health Act 2011* (SA)
  The impact of the High Court's use of s.109 on South Australia's *Public Health Act 2011*, would be two-fold. Section 3 of the *Public Health Act 2011* (SA) "opt[s] not to enforce border restrictions"; this is **inconsistent** with the Commonwealth's laws, and would therefore "no longer prevail" or be applied. The rest of the *Public Health Act 2011* (SA) would still "prevail" or be applicable in other cases, as long as these sections were **not** inconsistent with the Commonwealth's laws.

- Impact on Commonwealth's *Biosecurity Act 2015*
  The impact of the High Court's interpretation would be that the Commonwealth has and can use its exclusive power under s.51(ix), with respect to 'quarantine', to create the *Biosecurity Act 2015*. The impact is that the determinations by the Health Minister in 2020 under s.477(1), would allow measures that restrict borders in order to "prevent the entry or spread of a listed human disease (Covid-19) if movement poses a severe and immediate threat".

3 marks

Marking guide:

- ➔ Students can include one specific impact on each of the three affected parties to the case to earn 3 x 1 mark.