

2017 VCE Legal Studies examination report

General comments

Students responded well to the 2017 Legal Studies examination. Most students attempted all questions, and there were a number of high-quality responses to Question 10. When provided with stimulus material, such as in Question 7, many students were able to incorporate that material into their response.

For students to have received high marks, responses needed to be both specific and accurate. Critical points about the concept or issue being addressed also needed to be included. Students with a deep understanding of the legal concepts and principles being assessed were able to respond more accurately to questions. Students who made inconsistent or inaccurate points, wrote prepared answers or did not specifically address the question were not awarded full marks.

Advice for students

- Students need to address the specific command or task words in each question. For example, in Question 8 students were required to both identify the error and provide the correct outcome or process.
- It is not necessary to define legal terms before answering a question (unless the question specifically asks for this). In some instances it may be necessary to explain what a legal term means, but this is best done within the response.
- Students should avoid the use of prepared answers. For example, in Question 7d. many students elected either the court or VCAT to resolve Sam's dispute, but then made arguments against that choice by addressing weaknesses of their chosen body. This did not specifically address the question asked.
- If the question asks for a certain number of reasons/points, etc. (for example, in Question 1d.), students should provide no more than the number that is asked for.
- Students are advised to use paragraphs and properly signpost their responses when writing an extended response.
- If students continue an answer in the extra space at the end of the question and answer book, they must make sure that this is clearly indicated.
- Students should attempt all questions. Marks are not deducted for incorrect answers.

Specific information

Note: Student responses reproduced in this report have not been corrected for grammar, spelling or factual information.

This report provides sample answers or an indication of what the answers may have included. Unless otherwise stated, these are not intended to be exemplary or complete responses.

The statistics in this report may be subject to rounding resulting in a total more or less than 100 per cent.

Question 1a.

Marks	0	1	2	Average
%	6	22	72	1.7

This question was answered well. One mark was awarded for a brief response or if only the sanction was identified. Repetitious answers were also awarded one mark (for example, stating that imprisonment is when a person is imprisoned). Two marks were awarded for a full description.

Sanctions accepted were imprisonment (by far the most popular response), a community correction order, fine or a court secure treatment order. Sanctions that were not accepted were home detention and a suspended sentence (both of which are no longer available as sanctions), a youth justice centre order or youth residential centre order (because Simon is not a youth) and a drug treatment order (because Simon was not sentenced in the Drug Court).

The following is an example of a high-scoring response.

Simon may have been imprisoned as a result of being found guilty for kidnapping. Imprisonment is a criminal sanction where the offender is detained in custody for a specified period of time.

Question 1b.

Marks	0	1	2	3	Average
%	26	30	15	29	1.5

One mark was awarded for correctly identifying the court (Court of Appeal). Two marks were awarded for stating that the Court of Appeal hears criminal appeals from the County Court and the Supreme Court (Trial Division).

Many students incorrectly stated that the Supreme Court's Trial Division would hear this appeal. Others outlined the appellate jurisdiction incorrectly.

Question 1c.

Marks	0	1	2	3	Average
%	10	17	44	30	2

To gain full marks, students were required to accurately explain one reason for a court hierarchy (other than to allow for appeals), with reference to the case. The reference to the case needed to be meaningful, for example, an explanation of how specialisation might assist Simon or the case generally.

Many students did not achieve full marks because the reference to the case was inadequate. Other students did not provide sufficient explanation to gain full marks.

The following is an example of a high-scoring response.

In this case a court hierarchy is particularly beneficial as it allows judicial officers and other members of the legal system to become specialised in a particular area of law. For example, the judge in Simon's case at the County Court will be specialised in hearing cases for indictable offences, except for those more serious cases of murder, such as Simon's kidnapping. This may lead to a more efficient and timely trial.

Question 1d.

Marks	0	1	2	3	4	Average
%	11	10	22	31	26	2.5

This question was generally answered well. Most students chose to describe the role of the judge and the fewer rules of evidence.

The following is an example of a high-scoring response.

If Simon's trial was heard under the inquisitorial system, one feature of his trial would be that the judge would take a more active role in uncovering the facts of the case as their main purpose is to discover the 'truth'. This means that the judge (or panel of judges) assist in calling and questioning witnesses as well as gathering evidence.

A second feature of Simon's trial would be the less strict rules of evidence and procedure used. In the inquisitorial system, a greater range of evidence is permitted, such as prior convictions and some hearsay, with the judge determining the weight of such evidence. Additionally, the more lenient rules of procedure mean that Simon would be able to tell his account without interruption.

Question 2

Marks	0	1	2	3	Average
%	24	16	28	32	1.7

Three ways in which a residual power may become a concurrent power were accepted:

- the referral of powers by a state to the Commonwealth, pursuant to section 51(xxxvii) of the Constitution
- changing the text of the Constitution by way of a referendum, so what was once a residual power then becomes a concurrent power
- by way of High Court interpretation, where the High Court decides that a law-making power that was once assumed or seen to be a residual power was found to be a power of the Commonwealth.

For full marks, students needed to provide a sufficient explanation of how a residual power becomes concurrent. For example, if students selected the referendum process, they needed to explain that this would result in the altering of the words of the Constitution.

Students were expected to use examples accurately. For example, many students who chose High Court interpretation discussed the Tasmanian Dam case, and stated that the case changed an area of residual power (environment) into a concurrent power. This was too simplistic an explanation of that case. More detail needed to be given about when the Commonwealth may be able to legislate in an area of residual power – that is, by explaining the external affairs power and the Commonwealth being able to legislate to give effect to an international treaty obligation.

The following is an example of a high-scoring response.

One way a residual power may become a concurrent power (that is, a power of solely the states to one shared by the Commonwealth and states) is through a referendum. A referendum under S128 is the mechanism whereby the people will vote on a change to the actual wording of the Constitution. This can, as a result shift the division of law-making powers. This was the case in the 1967 Aboriginals referendum, in which the amendment of S51(xxvi) granted the Commonwealth the power to legislate for Aboriginal people, thereby shifting the division of law-making powers and making a residual power into a concurrent area of law-making.

Question 3

Marks	0	1	2	3	4	Average
%	12	26	14	30	18	2.2

This question assessed students' knowledge of the separation of powers, and more particularly the constitutional requirement that the judiciary be independent and separate from the legislature. If this law were to be passed, members of the legislature would effectively be acting as judges, which would contravene this constitutional protection. For full marks, students needed to address the fact that this law would contravene the constitutional protection of separation of powers.

Many students did not discuss the separation of powers in their response. Others mentioned this briefly or did not refer back to the particular law in the stimulus material.

The following is an example of a high-scoring response.

This law would not be valid. This is because it is unconstitutional, and therefore the courts are able to declare the law ultra vires and therefore invalid. This is because, the separation of powers is established in the Constitution. This separation divides the legal system into three branches; the legislative function (power to make laws), exercised by parliament, the executive function (administration of law) exercised by the Governor-General, and the judicial function (power to interpret and apply the laws exercised by the courts. These branches were created to ensure no one body could hold absolute authority and prevent an abuse of power. Therefore, the constitution's separation of power ensures that only the courts, and not members of parliament are able to hear and determine court disputes, making the law they made invalid and unconstitutional.

Question 4

Marks	0	1	2	3	4	Average
%	13	14	26	28	19	2.3

Many students provided what appeared to be prepared answers to this question. These answers explained the role of the Victorian Law Reform Commission (VLRC) rather than the relationship between the Victorian Parliament and the VLRC. The role of the VLRC was not the focus of the question, and so students who gave this explanation were not awarded full marks. Higher-scoring responses described various features of the relationship between the two bodies. For example, these responses mentioned that:

- the VLRC is a creature of statute; that is, the Victorian Parliament created it and gave it its powers
- the Attorney-General, a member of parliament, can refer to the VLRC a matter relating to law reform
- the VLRC can make recommendations to the Attorney-General on any proposal or matter. Its report is tabled in parliament
- there are no obligations on the Victorian Parliament to adopt the recommendations made by the VLRC
- the VLRC can make recommendations to the Attorney-General on any minor legal issues that are of general community concern.

Question 5

Marks	0	1	2	3	4	Average
%	24	18	25	23	10	1.8

The circumstances in which a court's interpretation of a statute will become a persuasive precedent include:

- the statutory interpretation took place in a lower court, a court of the same level or a court in another hierarchy
- the cases are similar fact situations
- the precedent has not been abrogated, overruled or reversed
- *obiter* comments made in higher courts are also persuasive.

Many responses lacked sufficient description to attain full marks for this question. Few mentioned that a precedent may remain persuasive so long as it had not been abrogated, overruled or reversed, though this point was not necessary to gain full marks. Many students referred to *Donoghue v Stevenson* and *Grant v Australian Knitting Mills* as examples of persuasive precedent; however, the question was about statutory interpretation, and those cases did not involve statutory interpretation.

The following is an example of a high-scoring response.

As per the doctrine of precedent, the ratio decidendi of a case will be binding on all lower courts in the same court hierarchy where the material facts of the case being heard are similar. As a result there are numerous circumstances in which statutory interpretation (predicated that it has formed precedent) will not be binding but only persuasive. If another case is being heard by a court on the same level of the hierarchy or by a court higher in the hierarchy the precedent will only be persuasive. For example, in the Studded belt case (1993), the precedent created by the Supreme Court (Trial Division) through the interpretation of the term "regulated weapon" will not be binding on the Court of Appeal or the High Court. Secondly, the precedent is not binding on any courts from different hierarchys nor will it be binding if it is reversed on appeal, overruled in the future in a different case or abrogated by parliament. This precedent will then act as persuasive on all these courts in the future. Moreover, if a lower court is able to distinguish the material facts of the case, they will not be bound by the precedent but it will be persuasive on them. If the statutory interpretation is simply that of a phrase and does not form precedent, it will also be persuasive on courts who may have to interpret the same phrase.

Question 6

Marks	0	1	2	3	4	5	Average
%	9	18	22	24	17	10	2.5

To gain full marks, students needed to provide their contention and sufficient reasons to support their response.

This question did not ask for the strengths and weaknesses of judges as law-makers, and therefore depending on the student's contention, it was not necessary to consider both strengths and weaknesses. Higher-scoring responses pointed to a variety of strengths and/or weaknesses of judge-made law.

Lower-scoring responses described the role of the judge generally and in the context of resolving disputes. They displayed little to no understanding of the role of the judge in making laws when hearing cases.

The following strengths could have been considered:

- Courts are free from political influences. They are independent and unbiased and do not have to worry about being re-elected (in comparison to members of parliament).
- Courts are able to change the law quickly once a case comes before them – a decision can be handed down within days of a proceeding being heard, though that depends on the judge and their workload, and the complexity of the case. (This does make them effective, regardless of the fact that they are unelected.)
- Courts are able to fill in the gaps of legislation when interpreting statutes and can consider a whole range of issues that may not have been considered by parliament. (Again this makes them effective, regardless of whether they are elected.)
- Courts can expand on areas of law such as negligence.
- Courts are not required to consider issues such as community values when making a decision.

The following weaknesses could have been considered:

- Judges are not elected and therefore may not reflect community values or trends when making a decision.
- Courts may be bound by precedent and therefore not be able to change laws easily.
- Courts must wait for a case to come before them; as taking a case to court is costly, it may be that courts do not get the opportunity to interpret legislation or change precedent.
- Courts are not able to fully investigate an area of law – for example, they cannot seek out submissions from the public.
- There can be reluctance on the part of courts to change a law.

The following is an example of a high-scoring response.

Though one strength of judges as law makers is that they do not hold political intentions, I do not agree that this is the only reason judges are effective law makers.

The fact that judges are not concerned about being 're-elected' may make them more effective law makers as they have no political bias when creating precedent or interpreting statute and are thus able to create just laws for the community. However, as they are not elected representatives, judges may make decisions that do not reflect the views and values of society, limiting their effectiveness as law makers.

Another reason why judges are effective law-makers is because, through statutory interpretation, they are able to ensure statutes remain relevant to current situations. For example interpreting a 'man' to include someone who had changed their gender from female to male under the Marriage Act in 'Kevin's case' (2003). However, except for in constitutional disputes, parliament (as the supreme law making body) has the power to abrogate these laws, limiting the courts ability to be law-makers. Therefore, though there are some limitations of judges as law-makers, there is more than one reason that makes them effective with one example being their ability to interpret and adapt legislation.

Question 7a.

Marks	0	1	2	Average
%	33	6	60	1.3

To gain full marks, students needed to state that there would be no committal hearing in this case because it is a civil case, and not a criminal one.

While many students achieved full marks for this question, some students did not score any marks because they either did not answer the question or stated that there would be a committal hearing.

Question 7b.

Marks	0	1	2	3	Average
%	7	15	35	43	2.2

To gain full marks, students were required to state that Sam's case could be heard before a jury should he choose to initiate a claim in court and if Sam (or the defendant) opted to have the case heard before a jury.

Many students did not mention court in their answer; others did not mention the requirement for a party to request a jury in a civil case (or the judge can decide that the trial is to be heard before a jury, though this is rare). Students should know that it is not automatic that a civil jury occurs (as opposed to in criminal trials).

The following is an example of a high-scoring response.

Sam's case could be heard before a jury if it was heard in the courts. A jury may be used in civil cases upon request of one party. This will be a jury of 6. They will listen to the case and decide whether the defendant is liable on the balance of probabilities.

Question 7c.

Marks	0	1	2	3	4	5	Average
%	5	9	20	29	23	13	3

The remedy accepted was damages, or a form of damages (such as compensatory damages). That is, students were able to either discuss damages generally or select a specific type of damages.

Many students were able to make some points about damages, but few provided sufficient detail about the benefits and limitations of damages in the context of Sam's case. Students who extracted the relevant parts of the stimulus material to develop their discussion scored higher. For example, how severe was Sam's spinal injury, and will she be unable to work in the future? To what extent can she be compensated for her pain, suffering and humiliation? What about the costs she will incur – are those recoverable? How exact can general damages be? Even if damages are awarded, what if the defendant has no capacity to pay? A consideration of those questions could have led to a much deeper discussion and would have likely received full marks.

The following is an example of a high-scoring response.

Sam may be awarded damages (compensatory damages). Damages involves the defendant (local designer) giving the plaintiff (Sam) a sum of money in an attempt to restore Sam to her original position. Damages may only be able to restore Sam to her original extent to some extent in her case. Damages will be effective for Sam, as she has some specific damages, which are those that are quantifiable and easily calculated, for example past medical expenses and loss of income, as giving her the money for this economic loss will restore her to her original financial position. However, it is less effective for general damages, which are those that are not so easily calculated, such as Sam's future medical expenses and loss of income, pain and suffering and humiliation. This is because it is difficult to determine the amount of money that would be appropriate, and therefore may not be enough. Even if money is awarded, it may not restore her to her original position, as money will not help to completely restore and help recover from pain and suffering, and humiliation. Damages are also ineffective if the local designer does not have \$1 million to award Sam. If they do not have the money, then Sam will not be completely restored to her original position, as she will not receive all the money she is awarded.

Question 7d.

Marks	0	1	2	3	4	5	6	Average
%	5	11	19	23	21	14	9	3.2

To gain full marks, students were required to elect whether a court or VCAT should hear Sam's case. Both choices were acceptable and could gain full marks, depending on the points raised. Some students did not choose either body and discussed courts and VCAT generally. These students were unable to get full marks.

Many students, once they had stated that a court/VCAT should hear the dispute, then went on to explain the weaknesses of the chosen body – thus effectively diluting their arguments as to why that body was the better choice. This type of response appeared to be a prepared response, which did not directly address the question, and therefore was not awarded full marks.

Students who were able to support their response with adequate reasons scored more highly. Many students were able to draw out the various elements of Sam's case to justify their response. For example, many stated that a court should hear this dispute because of its size and complexity, and because the doctrine of precedent and the right to appeal would assist the parties.

There remain common misconceptions about VCAT. For example, many students wrote that a court was better because it can make binding decisions, without acknowledging that VCAT also makes binding decisions. Other students wrote that a court was better because it could refer the case to mediation, but VCAT also uses mediation and other methods of dispute resolution (such as compulsory conferences) to resolve disputes.

The following is the beginning of a high-scoring response.

I think that Sam's dispute should be resolved by the courts. VCAT is a tribunal that is well equipped for dealing with minor civil disputes. However, \$1 million in damages being sought is a large amount of money, and the courts may be more able to resolve a dispute to this amount. The courts' legal personnel and judges are experts, and are well trained in areas of law. While VCAT also has expertise, they do not have the experience and resources to the extent that the courts do.

Question 8

Marks	0	1	2	3	4	5	6	Average
%	4	3	7	10	16	34	26	4.4

The three errors and the corresponding corrected outcome/process were:

- The Supreme Court (Trial Division) interpreted the Commonwealth Constitution. Instead, the High Court is the one with the power to interpret the Constitution in this dispute.
- The court decided the matter in conciliation. Instead, the judge would have made a binding decision in the case. (Students could have mentioned judicial determination.)
- The decision that a Victorian law prevails to the extent of the inconsistency. Instead, the Commonwealth law would prevail pursuant to section 109 of the Constitution.

The error that was most commonly missed by students was the use of conciliation to decide the matter. While many could identify the error, few were able to correct it.

Despite the question and answer book providing structure for students to set out the errors and the corrections, many students did not follow this structure (for example, some students stated all the errors and then all the corrections, making it difficult to decipher which error they were correcting). More practice with these types of questions is required.

Question 9

Marks	0	1	2	3	4	5	6	Average
%	11	14	18	19	17	12	8	2.9

To gain full marks, students needed to explore the strengths and weaknesses of the protection of rights through express rights, and provide a conclusion. The conclusion needed to be meaningful, rather than one that merely said, 'Overall the strengths outweigh the benefits and therefore it is an adequate method of protection.'

Many students focused on one strength and one weakness only; this produced an insufficient evaluation that could not gain full marks. Others discussed implied rights and structural protection instead, which was not the focus of the question. Some simply explained the five express rights, which was not what the question was asking for.

Some of the points that could have been made were as follows:

- There are five express rights in the Constitution:
 - o freedom of religion (s116)
 - o free interstate trade and commerce (s92)
 - o freedom from discrimination based on state (s117)
 - o 'just terms' when property is acquired by the Commonwealth (s51(xxxi))
 - o trial by jury for indictable Commonwealth offences (s80).
- Many of the rights are limited by their nature – for example, the trial by jury.
- The five express rights can only be removed by amending the Constitution by way of a referendum; this is a difficult process, making it unlikely that these rights will be removed easily.
- Because of the referendum process, it is going to be difficult to include any further rights in the Constitution.
- The express rights are not as comprehensive as a bill of rights. (Students could have used other countries as a comparison to develop this point.)
- They are enforceable through the courts and courts can find legislation to be *ultra vires* if they encroach on these rights.

The following is the beginning of a high-scoring response.

The express rights in the Australian Constitution are very limited in the number of individual rights given to the people. With only 5 rights in the Constitution, express rights only provide for a small protection of individual rights.

These rights however, are entrenched and can only be removed via a S128, referendum process. This means that unless the people vote to have the right removed, the protection of the right is ensured for the people.

Express rights are also very limited in their scope of protection, only protecting the people from a Commonwealth abuse of individual rights, but not from the states.

Question 10

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	5	6	10	12	14	14	14	10	8	4	2	4.7

To gain full marks, students needed to provide their opinion or view about the statement, and discuss both parts of the question – namely, whether the Victorian Parliament represents all Victorian people, and whether everyone in Victoria has access to our legal system. On the latter

point, either a focus on criminal cases or civil cases was acceptable. Many students addressed both.

Many students were able to provide a sufficient discussion about access to the legal system. Some discussed VCAT, the Koori Court, the significant costs, people in rural and remote areas, the use of technology and the lack of awareness of legal rights. However, many students were unable to expand their discussion on the first part of the question; other than mentioning that sometimes parliament is not representative of everyone, students did not develop that point any further.

The following points could have been made. (Other points were also accepted.)

Parliament

- Conflicting views. There are so many conflicting views in society that it is almost impossible for parliament to make laws that represent all views.
- Changes of view. There are often changes of view, and often these changes occur immediately following an event, in which case parliament's processes and understanding of those views may not necessarily be reflective of people's views at any one point in time – that is, parliament cannot necessarily keep up with changing views all the time.
- Majority representation. Parliament will more often than not have to adopt the majority's views when representing everyone.
- Hostile upper house. A hostile upper house may vote against laws even if these represent the majority of people.
- Constitutional restrictions. Parliament may not have legislative powers to change laws so as to reflect people's views (for example, the state parliaments have limited powers to legislate with respect to marriage, given the Commonwealth law in this area).
- Access to expert information. Parliament has access to expert bodies and to law reform bodies to assist them to keep up with changes.
- Political and democratic pressures. Parliament may be disinclined to pass laws that are controversial or contrary to their own political party's views, even if those laws reflect the will of the people.

Legal system

- Access to courts and dispute resolution bodies. VCAT is an alternative to court that enables access for people to resolve their civil disputes. Most courts use the circuit system and so are accessible from a physical perspective.
- Increased use of dispute resolution methods other than trial or hearing. The use of mediation in particular enables parties' access to methods to resolve disputes without going to trial.
- Appeals. The appeal system enables parties to seek a review of a decision that may not have been correct.
- Legal representation. The cost of legal representation can deter parties from pursuing their civil claims or defending their criminal matter. This is particularly so for people of low socio-economic backgrounds.
- Complexity. The complexity of procedures is such that people have difficulty understanding the legal system. Migrants, people who speak English as an additional language, and Aboriginal and Torres Strait Islander people are often affected from a communication perspective.
- Lack of awareness of legal rights or legal bodies. This can make it difficult for certain parties to seek redress for infringed rights, or understand their legal rights in a criminal matter. For example, young people, newly arrived migrants and those who do not speak English will have difficulty knowing and understanding rights.

The following is the beginning of a high-scoring response. The student also addressed access to the legal system in the remainder of the response.

The Victorian parliament are voted in and elected by the people through regular elections, and therefore represent the people and are responsible to the people for their actions. If parliament fail to reflect the needs and values of the people in their law making or act without integrity in their role as Victorian representatives, they are expected to stand down from their roles, or are voted out in the following election.

Whilst parliament represent all Australians, they cannot represent and reflect all of the views and values held by each individual as many may be conflicting. Hence, the parliament can only be representative of the majority in their law making. This may mean that the views and values of minority groups are not seen and reflected in laws made for the whole society.

Furthermore, as parliament are an elected body, they fear voter backlash from the people from the laws they make as government. Hence, the parliament will avoid making laws in areas of conflicting views, to ensure re-election in the next vote. This however leads parliament to fail to legislate for the needs and wants of the people, therefore failing to reflect a community want in parliamentary law, as no law is made.