



Legal Studies 2019 – Assessment Guide

Section A

VCAA Key
Knowledge

Question

Answer guide

The reasons for a Victorian court hierarchy in determining criminal cases, including specialisation and appeals.

Question 1 (2 marks)

Outline **one** benefit of having a criminal court hierarchy in Victoria.

Answer:

- *One benefit of having a criminal court hierarchy in Victoria is that it enables a party who is dissatisfied with a lower court's decision to appeal that decision to a higher court so that the higher court can review the decision of the lower court and correct any errors in the lower court's decision. If there was no court hierarchy, then there could be no appeals as there would be no lower and higher courts.*
- *One benefit of having a criminal court hierarchy is that it enables courts to specialise in different matters. This means that a court can develop an expertise in certain matters. For example, the Magistrates' Court specialises in summary offences. If there was no court hierarchy, but just one court that dealt with all matters, then there would not be different courts with different areas of expertise.*

Marking protocol:

Two marks for either of the above points. The answer must outline (not just identify) the benefit and clearly relate the benefit to the Victorian criminal court hierarchy.

Other possible benefits are administrative convenience and precedent, although the Study Design specifically identifies appeals and specialisation.

Question 2 (6 marks)

Jake purchased a new coffee-making machine for his home from Beans R Us. Unfortunately, the coffee machine was defective and, when Jake turned it on, it gave him a serious electric shock which knocked him to the ground. As Jake fell, he hit his head on the kitchen bench and fractured his skull. Jake had to spend one month in hospital, during which he was unable to earn any money because he was self-employed. Jake is now considering suing Beans R Us for around \$120,000 for the hospital expenses he has incurred, loss of income, and pain and suffering.

Factors to consider when initiating a civil claim, including negotiation options, costs, limitation of actions, the scope of liability and enforcement issues.

Question 2a (2 marks)

Describe **one** factor that Jake should consider before issuing a proceeding against Beans R Us.

Answer:

- *One factor that Jake should consider is whether it is possible to negotiate a resolution instead of issuing a proceeding. It may be possible for Jake to directly negotiate a resolution of the dispute with Beans R Us or for the parties to resolve the dispute with the assistance of a mediator or a conciliator. However, this will depend upon the willingness of Jake and Beans R Us to compromise which will depend upon matters such as the relationship between them, whether Jake's claim is reasonable and the strength of their cases.*
- *One factor that Jake should consider is costs. The costs of initiating a civil claim include legal fees and disbursements, such as court fees (both filing*

fees and daily hearing fees) and expert witness fees (e.g. fees for witnesses to give medical evidence about Jake's injuries). In addition, if Jake loses his case, then the court may make an adverse costs order against him, which means that he must pay the legal costs of Beans R Us.

- *One factor that Jake should consider is limitation of actions. For negligence, the plaintiff has six years within which to bring a claim against the defendant. If Jake does not bring his claim against Beans R Us within this limitation period, then Beans R Us will have a defence that Jake's claim is time-barred.*
- *One factor that Jake should consider is enforcement issues. If Beans R Us is unable to pay any damages that a court may order it to pay Jake, then Jake might win the case but get no compensation for his losses. Alternatively, Jake might need to go back to court to obtain a warrant of seizure and sale so that assets of Beans R Us can be sold, with the sale proceeds being used to pay the damages that are owed to Jake.*

Marking protocol:

Two marks for any of the above points. For full marks, the answer must describe (not just identify) the factor and clearly relate the factor to Jake's dispute.

While another factor is the scope of liability, this is not particularly relevant to Jake's case.

The purposes of remedies. Damages and injunctions, and their specific purposes.

Question 2b (4 marks)

Describe **one** purpose of the damages that Jake is seeking and discuss the extent to which damages achieve this purpose.

Answer:

- *Jake is seeking both specific damages (for his hospital expenses and lost income) and general damages (for his pain and suffering). The purpose of these types of damages is to restore the plaintiff to their original position by compensating the plaintiff for loss or damage that the plaintiff has suffered.*
- *Specific damages compensate the plaintiff for losses that can be calculated objectively and given a precise monetary value, and so are very effective to achieve this purpose.*
- *On the other hand, general damages compensate the plaintiff for losses that cannot be precisely calculated, either because they occur in the future, or because they cannot be given a precise monetary value. This means that they might not perfectly compensate the plaintiff for their losses, although they will go some way to relieving them.*
- *However, the ability of damages to compensate the plaintiff depends on whether the defendant is able to pay them. If the defendant cannot afford to pay the damages then the plaintiff will not be compensated for their losses.*

Marking protocol:

One mark for each of the above points.

To be a "discussion" the answer must weigh up how damages are effective to achieve their purpose against the limitations on damages in achieving their purpose. A good way of doing this "weighing up" is to use words such as "however", "on the other hand", "in contrast", "while" and "whereas".

The purposes and appropriateness of Consumer Affairs Victoria (CAV) and the Victorian Civil and Administrative Tribunal (VCAT) in resolving civil disputes.

Question 3 (4 marks)
Describe **two** advantages for a party in having a dispute dealt with by the Victorian Civil and Administrative Tribunal (VCAT) rather than Consumer Affairs Victoria (CAV).

Answer:

- *One advantage of having a dispute dealt with by VCAT rather than CAV is that VCAT has a broader jurisdiction to deal with disputes. VCAT can hear disputes about consumer matters, residential tenancies, retail tenancies, decisions of government agencies and discrimination. On the other hand, CAV can only deal with disputes of \$40,000 or less between consumers and suppliers (where the complaint is brought by the consumer) and disputes between tenants and landlords (where the complaint is brought by the tenant).*
- *Another advantage is that, while VCAT will try to resolve disputes by mediation and conciliation, a decision made by VCAT in a final hearing is binding on the parties and can be enforced by one party against the other party. In contrast, CAV can only resolve disputes by conciliation, which means that it is up to the parties to try to agree a resolution to their dispute and that any agreement that the parties do reach will only be binding on them if they sign a settlement deed.*
- *Another advantage is that VCAT has the expertise and resources to deal with large and complex disputes. However, CAV is only equipped to deal with smaller and simpler disputes.*

Marking protocol:

Two marks for any of the above points, to a maximum of four. For full marks, the answer must contrast the advantage of having VCAT deal with the dispute against a corresponding disadvantage of having CAV deal with the dispute.

The principles of justice: fairness, equality and access. Factors that affect the ability of the civil justice system to achieve the principles of justice, including in relation to costs, time and accessibility. Recent and recommended reforms to enhance the ability of the civil justice system to achieve the principles of justice.

Question 4 (4 marks)
Discuss the extent to which **one** recommended reform to the civil justice system may assist in achieving justice.

Answer:

Online dispute resolution

- *The Victorian Government's 2016 Access to Justice Review recommended that an online dispute resolution system for small civil claims should be introduced in Victoria. Assuming that the processes are simple, this would increase fairness because it would not be necessary for the parties to have the knowledge and skills of a lawyer to enable them to properly present their cases.*
- *This reform would also increase equality because it would enable people in rural and remote areas to enforce their rights despite not being close to a court.*
- *In addition, this reform would increase access because it would be cheaper than court proceedings, available to people irrespective of their location, and have procedures that are intended to enable people to represent themselves rather than be represented by lawyers.*
- *However, the cost and time of establishing this online dispute resolution system means that it is likely to take a long time to put in place. This may restrict access to justice until such a system is implemented.*

Civil dispute funding

- *Submissions by bodies such as the Law Institute of Victoria and the Australia Institute to the Productivity Commission's 2014 Access to Justice Arrangements Report suggested that the government could establish a*

fund to make low-interest loans to parties in civil disputes where those parties are ineligible for legal aid (i.e. because they do not satisfy the means test). This would increase fairness because a party needs a lawyer so that the accused has a reasonable opportunity to put their case. This is because lawyers understand the law and the rules of evidence and procedure, and are experts at preparing and arguing cases.

- *A party also needs a lawyer so that they are treated equally. If the other party has a lawyer, then a self-represented party will be disadvantaged because they will not have the same level of legal knowledge and skills. In addition, lawyers are necessary for parties to access the legal system because lawyers are able to advise parties about their legal rights.*
- *However, legal aid is generally not available for civil matters except family law matters. According to the Productivity Commission, only the bottom eight per cent of households are likely to satisfy the means test for legal aid, leaving most low and middle-income earners unable to afford a lawyer. This lack of legal aid for civil matters is likely to restrict access to justice for these groups in society.*
- *However, there is a risk that low-income earners will not be able to repay the loan, and charging a low rate of interest on the loans means that the government is effectively subsidising the loans using taxpayer funds which could be used for other purposes (e.g. education and health).*

Marking protocol:

One mark for each of the above points for either of the two recommended reforms.

There are other recommended reforms that could be described. These include the greater use of alternative dispute resolution, such as arbitration, in family law disputes (recommended by Bryant CJ of the Family Court); more flexible and integrated legal, dispute resolution and social services (recommended by the Victorian Government's 2016 Access to Justice Review); and the better use of technology (also recommended by the Victorian Government's 2016 Access to Justice Review). However, the answer must clearly state the source of the recommendation and the reform must relate to the civil justice system (not the criminal justice system).

To be a "discussion" the answer must weigh up how the recommended reform could achieve justice against the limitations on the recommended reform in achieving justice. A good way of doing this "weighing up" is to use words such as "however", "on the other hand", "in contrast", "while" and "whereas".

The significance of one High Court case which has had an impact on the division of constitutional law-making powers. The impact of international declarations and treaties on the interpretation of the external affairs power.

Question 5 (6 marks)

With reference to one relevant High Court case, explain how the High Court's interpretation of the external affairs power, in relation to international treaties, has had an impact on the division of law-making powers.

Answer:

- *Section 51(xxix) allows the Commonwealth Parliament to make laws about external affairs. In the Tasmanian Dam case, the High Court interpreted 'external affairs' very broadly to mean any matters that are the subject of an international treaty that has been signed by the Commonwealth Government.*
- *The Commonwealth Parliament therefore has the power to make laws about matters that are covered by the State Parliaments' residual law-making powers where those matters are also an external affair. The result is that, where a matter that is covered by the residual law-making powers is also the subject of an international treaty that has been signed by the Commonwealth Government (i.e. is an external affair), then the power to make laws about that matter is a concurrent law-making power.*
- *In this way, it can be seen that the broad interpretation that the High Court has given to the external affairs power has increased the Commonwealth Parliament's law-making powers.*
- *Section 109 applies so that, if the Commonwealth Parliament makes a law under this concurrent law-making power and a State Parliament makes an inconsistent law, then the State law is invalid to the extent of the inconsistency.*
- *Section 109 therefore operates to increase the Commonwealth Parliament's law-making powers where there is an external affair and to reduce the State Parliaments' law-making powers.*
- *International treaties cover a large number of matters, including discrimination, human rights, employee rights, children's rights and environment protection. The High Court's interpretation of 'external affairs' includes any matter that is the subject of an international treaty that has been signed by the Commonwealth Government, which gives the Commonwealth Parliament the power to make laws about all of these matters even if they would ordinarily be covered by the State Parliaments' residual law-making powers.*

Marking protocol:

One mark for each of the above points.

While the answer refers to the Tasmanian Dam case, other relevant cases include the Lemonthyme Forest case and the Seas and Submerged Lands case. The points referred to in the answer are equally applicable to these cases.

The means by which the Australian Constitution acts as a check on parliament in law-making, including the express protection of rights, the role of the High Court in interpreting the Australian Constitution, and the requirement for a double majority in a referendum.

Question 6 (8 marks)
Evaluate the effectiveness of express rights as a check on parliament in law-making.

Answer:

- *Express rights are not a very effective check on parliament in law-making. This is because there is only a limited number of express rights.*
- *The Constitution provides for five express rights. Each of these operates directly as a restriction on parliament's law-making powers. For example, section 116 prohibits the Commonwealth Parliament from making a law that establishes a religion or prohibits the free exercise of any religion.*
- *However, some of the express rights only operate as a restriction on the Commonwealth Parliament's law-making powers and not on the State Parliaments' law-making powers. This means that the State Parliaments are able to pass laws that affect these express rights. For instance, the Victorian Parliament could validly pass a law that requires everyone in Victoria to follow a particular religion (although it is unlikely).*
- *If a law breaches an express right, that law will be invalid, which is a check on parliament's law-making power.*
- *However, for a law to be invalid, a party that has standing (i.e. is directly affected by the law) must bring a case to the High Court. The party will also need to have the time and money to bring the case. If no case is brought, then the law will continue to operate even though it breaches an express right.*
- *Express rights are effective as a check on parliament's law-making power because they are entrenched in the Constitution, which means that parliament cannot change those rights by itself. Instead, these rights can only be amended by a referendum.*
- *On the other hand, it is not easy to amend the Constitution to include new express rights because it is difficult to satisfy the double majority requirement for referendums. (Only eight out of 44 referendums have been successful)*
- *The most significant limitation on the effectiveness of express rights is that there are only five express rights in the Constitution. For example, there is no express right that protects freedom of speech.*
- *The five express rights are also limited in scope. For instance, the right to trial by jury only applies to Commonwealth, not State, indictable offences.*
- *Accordingly, while express rights are a check on parliament in law-making, they are not very effective.*

Marking protocol:

This answer is globally marked (i.e. an overall mark is awarded for the entire answer). The following criteria could be used to assess a response:

7-8 High	• Gives an opinion that is supported by the arguments considered in the response. • Demonstrates comprehensive understanding by addressing all of the relevant arguments in some detail (including by using examples): extent to which existing express rights restrict law-making, requirements for infringing law to be declared invalid, entrenchment of express rights, and limited number of express rights. • Weighs up the "for" and "against" arguments by using words such as "however", "on the other hand",
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		“in contrast”, “while” and “whereas” and by attributing weight (e.g. a “significant” benefit/limitation).
4-6 Medium		• Gives an opinion that is supported by the arguments considered in the response. • Demonstrates reasonable understanding by addressing some of the relevant arguments in some detail (including by using examples): extent to which existing express rights restrict law-making, requirements for infringing law to be declared invalid, entrenchment of express rights, and limited number of express rights. • Weighs up the “for” and “against” arguments by using words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”.
1-3 Low		• Gives a basic opinion or no opinion. • Addresses some of the relevant arguments: extent to which existing express rights restrict law-making, requirements for infringing law to be declared invalid, entrenchment of express rights, and limited number of express rights. • Describes “for” and/or “against” arguments rather than weighs them up.
0 No score		• Response does not address the question.

To be an “evaluation” the answer must:

- express an opinion that responds to the question; and
- weigh up the arguments “for” and “against” the proposition (i.e. how express rights are, and are not, an effective check on parliament in law-making). A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”.

It would be possible to argue that express rights are an effective check on parliament in law-making as: they operate as direct restrictions; a law will be invalid if it is found to breach an express right; and they are entrenched, meaning they cannot be easily changed. However, in such a case it would also be necessary to explain why these arguments would be stronger than the arguments above in favour of the view that express rights are not a very effective check on parliament in law-making.

The roles of the Victorian courts and the High Court in law-making. The reasons for, and effects of, statutory interpretation. Factors that affect the ability of courts to make law, including the doctrine of precedent, judicial conservatism, judicial activism, costs and time in bringing a case to court, and the requirement for standing. Features of the relationship between courts and parliament in law-making, including the supremacy of parliament, the ability of courts to influence parliament, the interpretation of statutes by courts, the codification of common law, and the abrogation of common law. The ability of parliament and the courts to respond to the need for law reform.

Question 7 (10 marks)

“Because parliament has been elected by the people, parliament should be responsible for making laws and the courts should not make law.”

Discuss the extent to which you agree with this statement.

Answer:

- *While parliament does have an important role in making laws because it has been elected by the people, it is neither appropriate nor practical for the courts to be prevented from making laws.*
- *An important role of the courts is to interpret the statutes made by parliament for the purpose of applying those statutes to specific cases. Statutes are often drafted broadly because parliament cannot foresee all circumstances, and so parliament relies on the courts to apply its statutes to specific circumstances.*
- *If the courts were not able to interpret ambiguous words in statutes or fill in the gaps left by statutes, then parliament would have to continually amend its statutes to deal with specific cases. This would take time because parliament can only pass a law if it has been passed by both houses and has been debated in the second reading stage in both houses.*
- *Importantly, parliament still retains control over the way in which its statutes are interpreted. Only parliament, and not the courts, can change the actual words in a statute, and if parliament disagrees with an interpretation that has been adopted by the courts then it can abrogate that interpretation by passing a law that overturns it. Parliament can also abrogate law that is made by the courts (common law). For example, when the High Court in *Trigwell's case* upheld the common law rule that a farmer was not liable for loss caused by the farmer's livestock straying onto the public highway, the Victorian Parliament amended the Wrongs Act to overturn this rule.*
- *Similarly, there are a number of areas where parliament has not made law but where the law consists of precedents that have been made by the courts. These include significant laws such as the laws of negligence. If the courts were not able to make law through precedents, then parliament would need to continually pass statutes to develop the law in these areas. This would not be practical.*
- *Indeed, the courts have been responsible for making some significant laws that parliament might never have made. For example, in the *Mabo case*, the majority of the High Court overturned the principle that Australia was *terra nullius* when it was settled by the British and decided that, despite British settlement, Australia's Indigenous people did retain rights over the land, known as “native title”. The Commonwealth Parliament subsequently passed the Native Title Act 1993 to regulate this interest by providing mechanisms to determine whether native title exists over particular land.*
- *However, the courts do need to be careful not to overstep their role in law-making. Parliament is the supreme law-maker because it represents the people, whereas the courts only make law as part of their role in resolving disputes. Judges are not elected by the people and do not have the authority to make laws like parliament does.*
- *It is for this reason that many judges adopt the approach of judicial conservatism, i.e. they are cautious about making a major or controversial change to the law and base their decisions on legal considerations. In contrast, judges who adopt the approach of judicial*

activism are prepared to make a major or controversial change to the law based on social and political values (as well as legal considerations).

- *A particular area where the High Court plays an important role in law-making that cannot and should not be taken over by parliament is in the interpretation of the Constitution. Under section 76 of the Constitution, the High Court is responsible for interpreting the Constitution, and parliament cannot abrogate such an interpretation. This is important because, apart from the High Court's interpretation of the Constitution, the operation of the Constitution can only be changed by amending its words through a referendum. That is, the Commonwealth Parliament cannot, by itself, change the Constitution.*
- *As the guardian of the Constitution, the High Court has interpreted it in such a way as to keep it up to date and to reflect community values. For example, in the Tasmanian Dam case, the High Court interpreted "external affairs" to mean any matter that was covered by an international treaty that was signed by the Commonwealth Government. This was important because it enabled the Commonwealth Parliament to make laws to implement Australia's obligations under international treaties, even if the subject matter of those laws would otherwise only have been within the State Parliaments' residual law-making powers.*
- *In conclusion, the courts have an important role in law-making that cannot and should not be taken over by parliament.*

Marking protocol:

This answer is globally marked (i.e. an overall mark is awarded for the entire answer). The following criteria could be used to assess a response:

8-10 High	• Gives an opinion that is supported by the arguments considered in the response. • Demonstrates comprehensive understanding by addressing all of the relevant arguments in some detail (including by using examples): statutory interpretation, parliamentary supremacy, precedents/common law, judicial conservatism/judicial activism, and High Court as guardian of the Constitution. • Weighs up the "for" and "against" arguments by using words such as "however", "on the other hand", "in contrast", "while" and "whereas" and by attributing weight (e.g. an "important" role). • Uses relevant technical legal vocabulary e.g. "ambiguous", "parliamentary supremacy", "abrogate", "judicial conservatism", "judicial activism", "guardian of the Constitution", "referendum".
5-7 Medium	• Gives an opinion that is supported by the arguments considered in the response. • Demonstrates reasonable understanding by addressing some of the relevant arguments in some detail (including by using examples): statutory interpretation, parliamentary supremacy, precedents/common law, judicial

		conservatism/judicial activism, and High Court as guardian of the Constitution. • Weighs up the “for” and “against” arguments by using words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”. • Uses some technical legal vocabulary.
	1-4 Low	• Gives a basic opinion or no opinion. • Addresses some of the relevant arguments: statutory interpretation, parliamentary supremacy, precedents/common law, judicial conservatism/judicial activism, and High Court as guardian of the Constitution. • Describes “for” and/or “against” arguments rather than weighs them up.
	0 No score	• Response does not address the question.

Note: “Discuss the extent to which you agree ...” requires an evaluation. To be an “evaluation” the answer must:

- express an opinion that responds to the question; and
- weigh up the arguments “for” and “against” the proposition (e.g. parliament should be solely responsible for making laws as against the courts should have some role in making laws). A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”.

Section B

Question 1 (17 marks)

The police have charged Chelsea with intentionally causing serious injury, which is an indictable offence under the Crimes Act 1958 (Vic). According to the prosecution, 22 year old Chelsea and 24 year old Ali armed themselves with baseball bats and broke into Daniel’s house. Daniel was a drug dealer, and the prosecution alleges that Chelsea and Ali intended to steal \$150,000 which they believed Daniel kept hidden in his house. The prosecution says that, when Daniel refused to hand over the money, Chelsea and Ali attacked Daniel with their baseball bats, breaking six of Daniel’s ribs and severely fracturing Daniel’s skull. Daniel is now in a coma and is unlikely to regain consciousness before Chelsea’s trial.

The prosecution’s case against Chelsea relies on two principal pieces of evidence. First, the attack was witnessed by Daniel’s girlfriend, Carmen. However Carmen has told the police that she is extremely nervous about testifying in court because she is frightened that Chelsea or Ali might try to attack her. Second, the police have obtained a sworn statement from Jacinta, a convicted con artist who shared a prison cell with Chelsea while Chelsea was on remand. According to Jacinta, Chelsea told her that she wanted Daniel’s money so that she could “party on drugs and booze for a year”.

In her defence, Chelsea claims that she was only involved in the attack on Daniel because Ali threatened to kill her if she did not help him rob Daniel. As yet the police have been unable to question or arrest Ali, and they believe that he may have escaped overseas.

The maximum sentence for intentionally causing serious injury is 20 years’ imprisonment. However, Chelsea is ready and willing to plead guilty to the lesser charge of negligently causing serious injury, the maximum sentence for which is 10 years’ imprisonment. Daniel’s parents are extremely upset at the injuries that Daniel has suffered and they are opposed to any plea negotiation with Chelsea.

The purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases.

Question 1a (1 mark)

Define what a plea negotiation is.

Answer:

- *A plea negotiation is a pre-trial discussion that takes place between the prosecution and the accused, which is aimed at resolving a criminal case by agreeing on the charges the accused will plead guilty to.*

Marking protocol:

One mark for the above point.

The rights of an accused, including the right to be tried without unreasonable delay, the right to a fair hearing, and the right to trial by jury.

Question 1b (2 marks)

Outline two rights that Chelsea has as a result of being charged with the offence of intentionally causing serious injury.

Answer:

- *Chelsea has the right to a trial by jury because she has been charged with intentionally causing serious injury, which is a Victorian indictable offence.*
- *Chelsea also has the right to have her trial held without unreasonable delay because she is an adult.*

Marking protocol:

One mark for each of the above points.

An alternative right that Chelsea has is the right to have the charge decided by a competent, independent and impartial court after a fair and public hearing.

The purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases.

Question 1c (3 marks)

Distinguish between a plea negotiation and a sentence indication.

Answer:

- *A plea negotiation is not a negotiation about the sentence that will be imposed on the accused, as that can only be decided by the magistrate or judge.*
 - *In contrast, a sentence indication is a statement by a magistrate or judge to an accused about the sentence the accused is likely to face if the accused pleads guilty to an offence at the first available opportunity.*
 - *In addition, a successful plea negotiation results in the accused pleading guilty to less serious, or a lesser number, of charges, whereas the accused does not have to plead guilty where a sentence indication is given.*
- OR
- *In addition, a plea negotiation is a pre-trial discussion between the prosecution and the accused, whereas a sentence indication is given by a magistrate or judge during a hearing or trial.*

Marking protocol:

One mark for each of the above points

“Distinguish” means to identify and explain differences. It is not sufficient just to juxtapose the definitions of “plea negotiation” and “sentence indication”. Instead, the answer must clearly point out differences between them. A good way of doing this is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”.

The principles of justice: fairness, equality and access.
The purposes and appropriateness of plea negotiations and sentence indications in determining criminal cases.

Question 1d (5 marks)
In your view, would a plea negotiation be suitable to determine Chelsea's case? Give reasons for your answer.

Answer:

In my opinion, a plea negotiation would be suitable to determine Chelsea's case.

- There are two factors in favour of a plea negotiation in this case. The first factor is the strength of the prosecution case. The prosecution case depends on the credibility of a key witness, Jacinta, but she is not entirely credible. This is because Jacinta is a convicted con artist whose evidence could be challenged because she might have an incentive to "frame" Chelsea in exchange for more favourable treatment in the prison system.*
- The success of the prosecution case also depends on the accused not having a credible defence. However, in this case, Chelsea might have a defence that Ali forced her to help him rob Daniel, otherwise Ali would kill her.*
- The second factor is that key prosecution witnesses are either reluctant or not able to give evidence against Chelsea. Carmel, Daniel's girlfriend who witnessed the attack on Daniel, is nervous about giving evidence because she is frightened that Ali or Chelsea might attack her. In addition, Daniel is in a coma and so he cannot give evidence.*
- On the other hand, there are two factors against a plea negotiation in this case. The first factor is that the charge that the accused is willing to plead guilty to does not adequately reflect the accused's criminality. The maximum sentence for negligently causing serious injury is 10 years' imprisonment, but the assault on Daniel was extremely violent, resulting in him suffering six broken ribs and a fractured skull. (It is quite possible that, if Chelsea is found guilty, an appropriate sentence would be more than ten years in jail.)*
- The second factor is that Daniel's parents are opposed to a plea negotiation. While their view is not determinative, it does carry some weight.*

Overall, I think that a plea negotiation would be appropriate because the strength of the prosecution's case is dependent on key witnesses who are not credible, are reluctant, or are not available.

Marking protocol:

One mark for each of the above points.

Note: To avoid the answer becoming merely a summary of the case study facts, it is a good idea to state the general principle (i.e. the factor that is relevant to having a plea negotiation) and then apply the specific facts of the case study to that general principle. The response must answer the question by giving an overall view as to whether or not a plea negotiation is suitable to determine Chelsea's case.

The purposes of sanctions: rehabilitation, punishment, deterrence, denunciation and protection. Fines, community corrections orders and imprisonment, and their specific purposes.

Question 1e (6 marks)

Assume that Chelsea pleads not guilty and that she is convicted of intentionally causing serious injury to Daniel. Discuss the ability of imprisonment to achieve the purposes of criminal sanctions in Chelsea's case.

Answer:

- *Imprisonment is the most serious punishment because the offender loses their freedom and jail is an unpleasant place to be in. Imprisonment would punish Chelsea for intentionally causing serious injury to Daniel.*
- *In addition to punishing the offender, imprisonment also acts as a general deterrent to other people committing a similar offence. Imprisoning Chelsea would deter other members of the community from intentionally causing serious injury.*
- *Imprisonment also removes the offender from the community and so protects the community from the offender. For example, where the court is satisfied that a person who has committed a very serious offence is a serious danger to the community, then it may impose an indefinite sentence. The vicious nature of the assault on Daniel suggests that Chelsea can be very violent, and so it is appropriate to protect the community from her.*
- *Finally, imprisonment for a long time can be used to denunciate (show the court's disapproval of) an offender's behaviour where the offender is particularly blameworthy. One possible reason for denunciation in this case is to show the court's disapproval of people who seriously injure others in order to obtain money from them.*
- *On the other hand, imprisonment might not act as a specific deterrent - that is, it might not deter Chelsea (the offender) from committing a similar offence in the future. This is because her criminal record might prevent her getting a job when she is released, and so she might become a recidivist by robbing other people for money.*
- *Imprisonment might also adversely affect an offender's rehabilitation. While Chelsea might be able to undertake further education and training in prison, so as to prepare her for her release back into society, she will be mixing with other criminals in prison. Accordingly, there is a risk that Chelsea will be drawn into the criminal lifestyle and criminal activities.*

Marking protocol:

One mark for each of the above points.

To be a "discussion" the answer must weigh up how imprisonment can achieve the purposes of a criminal sanction against the limitations of imprisonment in the purposes of a criminal sanction. A good way of doing this "weighing up" is to use words such as "however", "on the other hand", "in contrast", "while" and "whereas". The purposes of a criminal sanction are punishment, general deterrence, specific deterrence, community protection, denunciation and rehabilitation. It is necessary to consider the application of these purposes to Chelsea's case.

Question 2 (10 marks)

Following several media reports about the mistreatment of greyhounds in the dog-racing industry, the Victorian Government is considering a range of options for regulating the training and racing of greyhounds in Victoria. Some of the options have generated a lot of controversy. Animal rights activists have held a number of public demonstrations in the city during peak hour in support of outlawing greyhound racing in Victoria altogether. On the other hand, greyhound racing enthusiasts have collected a number of petitions, which they have sent to members of the Victorian Parliament, urging the government not to impose further restrictions on greyhound racing and training. The government has referred some of the options to the Victorian Law Reform Commission (VLRC) with terms of reference that require the VLRC to recommend an appropriate option.

The ability and means by which individuals can influence law reform including through petitions, demonstrations and the use of the courts.

Question 2a (4 marks)

Discuss the effectiveness of **one** method that may be used by individuals to influence a change in the law regarding the treatment of greyhounds in the racing industry.

Answer:

Demonstrations

- *One method individuals may use to influence a change in the law regarding the treatment of greyhounds in the racing industry is a demonstration, which is a public gathering of people to support a change in law by bringing the issue to the attention of the community and law-makers.*
- *A major strength of demonstrations is that, if they are large, then they might persuade parliament that the issue has widespread community support and that parliament should therefore change the law.*
- *On the other hand, if the demonstration turns violent (e.g. because others oppose it) or causes considerable inconvenience to the public, then this may reduce support for the issue. By holding their demonstrations during peak hour in the city, the animal rights activists may have annoyed other members of the public who might therefore oppose the change in law that is supported by the demonstrators.*
- *A disadvantage of demonstrations is that they can be difficult to organise and coordinate. However, this is not such an issue nowadays because social media provides an efficient way to notify people of proposed demonstrations that they can join.*

Petitions

- *One method individuals may use to influence a change in the law regarding the treatment of greyhounds in the racing industry is petitions. A petition is a formal written request to the parliament for a change in law which is signed by one or more people and is tabled ("presented") in the house to which it is addressed by a member of that house.*
- *Petitions are more likely to be effective if they are signed by a large number of people as this will represent widespread support for the change in law.*
- *On the other hand, a petition with a small number of signatures is unlikely to be influential and, if there are opposing petitions, this may reduce the impact of the petition. The effectiveness of the greyhound industry's petitions could be reduced by animal rights activists submitting their own petitions to parliament.*
- *Another weakness of petitions is that they are not very visible. Parliaments receive many petitions, and cannot respond to every single one, and there is no guarantee that parliament will discuss or respond to a petition unless it has been picked up by the media.*

Marking protocol:

One mark for each of the above points for either of demonstrations or petitions.

To be a “discussion” the answer must weigh up the strengths/advantages and weaknesses/disadvantages of either demonstrations or petitions. A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”. It is necessary to consider these strengths/advantages and weaknesses/disadvantages in the context of the case study.

Another way in which individuals can influence a change in the law is through using the courts. However, it is not clear how individuals could use the courts in the context of this case study to change the law, as there is no law that the courts are being required to interpret.

The role of the Victorian Law Reform Commission and its ability to influence law reform.

Question 2b (6 marks)

Discuss the ability of the VLRC to influence the reform of the law relating to the treatment of greyhounds in the racing industry.

Answer:

- *One significant strength of the VLRC is that it consults with the community about any law reform proposals. It does this by holding consultations and receiving submissions. In its investigation of the options for regulating the treatment of greyhounds in the racing industry, the VLRC would consult with greyhound owners and trainers, greyhound racing clubs, vets, animal rights activists and members of the public. This ensures that the VLRC’s recommendations for change take into account the views of the community, and so parliament is more likely to implement them.*
- *However, there is no obligation on the Victorian Government to support the VLRC’s recommendations or on the Victorian Parliament to pass legislation to implement the VLRC’s recommendations. As a result, the VLRC’s recommendations on its preferred option for regulation might never be made into law.*
- *Having said this, because the VLRC is independent of parliament, its recommendations are less likely to be biased and so are more likely to be given considerable weight by parliament.*
- *In addition, because the issue has been referred to the VLRC by the Victorian Attorney-General, the Victorian Government is presumably interested in the VLRC’s views and so is more likely to act on its recommendations.*
- *Nonetheless, the VLRC’s ability to investigate and make recommendations about a law reform proposal may be restricted by the terms of the reference to the VLRC. For example, if the terms of reference do not include an option for regulation that the VLRC thinks would be appropriate, then the VLRC cannot investigate that option.*
- *A final strength of the VLRC is that it is able to comprehensively investigate the different proposed options, so that parliament can have confidence that the proposal has been properly considered.*

Marking protocol:

One mark for each of the above points.

To be a “discussion” the answer must weigh up the ability of the VLRC to influence law reform against any limitations on the ability of the VLRC to influence law reform. A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”. It is necessary to consider these issues in the context of the case study.

Question 3 (13 marks)

In 2017, the Commonwealth Parliament passed the Marriage Amendment (Definitions and Religious Freedoms) Act 2017 (Cth) (the Marriage Amendment Act). The Marriage Amendment Act amended the Marriage Act 1961 (Cth) by expanding the definition of “marriage” from the union of a man and a woman to the union of two people. The purpose of this amendment was to allow same-sex couples to marry. However, the Marriage Amendment Act permits ministers of religion to refuse to marry a same-sex couple if same-sex marriage is inconsistent with the minister’s religious beliefs. The Equal Opportunity Act 2010 (Vic) prohibits a person from refusing to marry a person because of their sexual orientation.

The division of constitutional law-making powers of the state and Commonwealth parliaments, including exclusive, concurrent and residual powers.

Question 3a (2 marks)

Explain whether the power to make laws about marriage is a concurrent law-making power, an exclusive law-making power, or a residual law-making power.

Answer:

- *The power to make laws about marriage is a concurrent law-making power because both the Commonwealth Parliament and the State Parliaments have the power to make laws about marriage.*
- *In contrast, an exclusive law-making power is a power that can only be exercised by the Commonwealth Parliament and a residual law-making power is a power that can only be exercised by the State Parliaments.*

Marking protocol:

One mark for each of the above points.

The significance of section 109 of the Australian Constitution

Question 3b (4 marks)

Discuss the extent to which section 109 of the Australian Constitution acts as a restriction on the power of the Victorian Parliament to make laws.

Answer:

- *Section 109 acts to some extent as a restriction on the Victorian Parliament’s power to make laws. Section 109 states that where a State law is inconsistent with a Commonwealth law, the Commonwealth law overrides the State law to the extent of the inconsistency.*
- *Section 109 only operates on laws, such as laws about marriage, that are made in the exercise of the concurrent law-making powers. In this case, there is a clear inconsistency between the Equal Opportunity Act 2010 (Vic) and the Marriage Amendment Act because the Equal Opportunity Act prohibits a minister from refusing to provide marriage services to a couple because of their sexual orientation whereas the Marriage Amendment Act permits a minister to refuse to provide marriage services to a same-sex couple.*
- *In contrast, section 109 does not restrict the Victorian Parliament’s power to make laws in the exercise of its residual law-making powers. This is because the Commonwealth Parliament cannot exercise residual law-making powers in the first place.*
- *Further, a State law will not be invalid under section 109 until the High Court has declared the State law to be invalid, and the High Court can only do this if a case challenging the State law is brought before the court by a party that has standing (i.e. that is directly affected by the law). Accordingly, even though the Equal Opportunity Act and the Marriage*

Amendment Act are inconsistent, the Equal Opportunity Act will continue to prohibit ministers from refusing to marry same-sex couples until a case is brought to the High Court and the High Court declares that section 109 applies to make this prohibition invalid.

Marking protocol:

One mark for each of the above points.

To be a “discussion” the answer must weigh up how section 109 restricts the Victorian Parliament’s law-making powers against any limitations on the application of section 109. A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”. It is necessary to consider these issues in the context of the case study.

Factors that affect the ability of parliament to make law, including the roles of the houses of parliament, the representative nature of parliament, political pressures, and restrictions on the law-making powers of parliament. The roles of the Crown and the Houses of Parliament (Victorian and Commonwealth) in law-making. The means by which the Australian Constitution acts as a check on parliament in law-making, including the bicameral structure of the Commonwealth parliament.

Question 3c (7 marks)

The legalisation of same-sex marriage was quite controversial. According to a survey taken just before the Marriage Amendment Act was passed, 62% of Australians supported the legalisation of same-sex marriage. However, the legalisation of same-sex marriage was strongly opposed by many religious organisations.

Discuss the ability of the Commonwealth Parliament to make laws that reflect the majority view.

Answer:

- *The Australian parliamentary system is based on representative government, with the result that the Commonwealth Parliament should make laws that reflect the majority view. This is because, if its members do not reflect the views of voters, then they risk being voted out at the next election.*
- *However, members of parliament might be reluctant to support a law which is opposed by a vocal minority or which is controversial because they are concerned about losing votes. For example, while the majority of Australians supported legalising same-sex marriage, the Commonwealth Parliament took a long time to pass a law legalising same-sex marriage because many religious organisations vigorously opposed it.*
- *In addition, lobby groups, such as business groups, employee organisations and environmental groups, might place significant political pressure on parliament to make laws that favour their interests or causes, even if those laws are not necessarily in the interests of the broader community. For instance, business groups have lobbied the Commonwealth Government to introduce laws that cut the corporate income tax rate.*
- *Some of these groups might also use substantial donations to political parties as a way of trying to influence those political parties to support laws that are in their interests. An example is the recent revelation that individuals with links to the Chinese government have made significant donations to both the Liberal and Labor parties at the Commonwealth level in an attempt to persuade them to adopt policies that are favourable to Chinese investment in Australia.*
- *Another restriction on the ability of the Commonwealth Parliament to make laws that reflect the majority view is the bicameral nature of the Commonwealth Parliament. Laws that are supported by the government need to be passed by both the House of Representatives and the Senate before they can come into operation. While the government (which is expected to represent the views of the majority) will typically control the House of Representatives, it might not control the Senate.*
- *If the Senate is controlled by the opposition, it might act as a hostile Senate by rejecting Bills without properly considering them. If the balance*

of power in the Senate is held by the independents, then the government might only be able to have its Bills passed by the Senate if it agrees to amendments that those independents require in exchange for voting for the Bills. Those amendments might not reflect the views of the majority of voters in Australia.

- *Finally, Parliament might be restricted in its ability to make laws, even where they reflect the majority view, because of international treaties that have been signed by the Commonwealth Government. For example, Australia has signed trading agreements with several other countries and these agreements may restrict the Commonwealth Parliament from making laws that protect Australian businesses from international competition (e.g. laws that impose tariffs on cheap imports that compete with Australian products).*

Marking protocol:

One mark for each of the above points.

To be a “discussion” the answer must weigh up the ability of the Commonwealth Parliament to make laws that reflect the majority view against any limitations on the ability of the Commonwealth Parliament to make laws that reflect the majority view. A good way of doing this “weighing up” is to use words such as “however”, “on the other hand”, “in contrast”, “while” and “whereas”. It is necessary to consider at least some of these issues in the context of the case study.