



VCE LEGAL STUDIES 3/4

CPAP Practice Examination No 1 2019

SUGGESTED RESPONSES / ADVICE

SECTION A

Question 1

Differentiate between punishment and rehabilitation as two aims of criminal sanctions. (3 marks)

Advice: 'Punishment' and 'rehabilitation' do not need separate definitions. In 2018 the Chief Assessor wrote "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "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."

MARK RANGE	QUALITIES OF ANSWER
3 marks	- A clearly-explained difference that revolves around punishment being a negative expression of retribution or hardship, and rehabilitation being a positive expression of support and recovery, OR that punishment is more concerned with past acts whereas rehabilitation is more concerned with future acts; and - Either further differences or detailed elaboration. Note that similarities may be used as meaningful content, as long as the focus is not on simply listing similarities. Similarities can be used to enhance the clarity of overall differences.
2 marks	- The clearly-explained difference noted above, but with something lacking in the description and elaboration; or - A reliance on separate descriptions, with very little in the way of direct differentiation; or - A reliance on examples, so that the answer itself is something less than explicit; or - An answer with the qualities of a 3 mark answer, but with errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole.
1 mark	- An answer with two of the problems identified in the 2 mark range; or - An answer that is composed entirely of separate points, with no attempt at differentiation made; or - An answer composed entirely of examples, with no attempt at explicitly answering the question; or - An answer with significant errors in understanding or content; or - An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example answer:

- ✓ *Punishment is an aim focused on a negative experience in that its purpose is to cause the offender to suffer some hardship, whereas rehabilitation is a more positive aim, in that its purpose is to support the offender and help them recover from a dependency, disability, developmental difference or antisocial tendency. Both aim to prevent further reoffending, but punishment tries to achieve it by essentially making the offender suffer, while rehabilitation wants to help the offender not need or want to reoffend again.*

Question 2

In July 2019 the Commonwealth Parliament passed a range of tax cuts that gave 39% of the financial benefit to the top tier of income earners in the country. The State of Victoria responded by passing legislation to reverse these tax cuts, and require the highest income earners to pay a higher level of income tax.

- a. Describe one means by which the Victorian public might have influenced the state parliament to pass this law. (3 marks)

Advice:

Note that only material relating to the *first* means the student identifies should be marked. In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones.

Markers should use their judgment as to when the student strays into multiple answers – for instance, an answer may elaborate on demonstrations by saying that their effectiveness can be increased with media coverage; this would be an acceptable elaboration of the first means, demonstrations, rather than the start of a second method (media).

In 2017 the Chief Assessor commented that the use of the hypothetical facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate."

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A single clearly-explained means that is appropriate to the scenario; and • That has been clearly linked with its ability to influence parliament; and • That has sufficient elaboration, which may include an example; and • That includes a connection to the question scenario. Note that the means listed on the Study Design are not the only ones that can be used.
2 marks	• The clearly-outlined means noted above, but with something lacking in the description and elaboration; or • A reliance on one or more examples rather than proper description; or • An inadequate explanation of how the means could influence parliament; or • An answer that lacks any connection to the question scenario; or • An answer with the qualities of a 3 mark answer, but with errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole.
1 mark	• An answer with two of the problems identified in the 2 mark range; or • An answer with significant errors in understanding or content; or • An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example answer:

- ✓ *A petition could have been put together and submitted to the Legislative Assembly or Council for tabling, stating a clear request to increase the top tax threshold and signed by Victorian residents. Petitions enable elected members of parliament to be representative of the needs of their communities because they inform the MP on public opinion. The role of an MP is to speak on behalf of their constituency in parliament, so if they are presented with a petition on an*

issue, brought to them by a member of their electorate and with signatures from other voters in their electorate, they can choose to table that petition in parliament to stimulate debate or influence proposed legislation.

b. To what extent might section 109 of the Australian Constitution impact the Victorian law? (4 marks)

Advice: The task phrase 'the extent to which' requires a meaningful opinion on the extent in order to receive full marks. In 2017 the Chief Assessor said clearly: "To gain full marks, students needed to provide their opinion or view about the statement."

MARK RANGE	QUALITIES OF ANSWER
4 marks	- An answer that clearly identifies that both the state and Commonwealth parliaments can make law on matters that fall under the concurrent powers (or that are 'held concurrently'), and that they may both legislate on the same topic; and - That clearly identifies the potential impact of s109 being that the Victorian law could be invalidated to the extent of its inconsistency, in favour of the conflicting Commonwealth law; and - That gives one or more additional subjective or analytical arguments about the impact of s109; and - That makes meaningful use of the question scenario.
3 marks	An answer that fulfils the criteria for a 4 mark answer, but that displays one of the following weaknesses: - It explains the concept, but fails to use the term 'concurrent' (or 'concurrently'); or - It uses the term 'concurrent' but fails to clearly explain its meaning, that both state and federal parliaments can legislate on these matters; or - It fails to specify that the Victorian law would only be invalid <i>to the extent of its inconsistency</i> (although other wording may be used); or - It provides a basic and accurate answer but gives no further information and argument on the impact then the basic fact of invalidity; or - It fails to make adequate use of the scenario; or - It contains at least one material error of fact, but not enough to undermine the answer as a whole.
2 marks	- An answer that paraphrases or recites verbatim the provisions of s109 and does little else; or - That fails to address all parts of the question <i>and</i> contains material errors of fact, but that draws out a couple of valid points; or - An answer that relies heavily on a case study such as McBain rather than answering the question. - An answer that fulfils all the requirements for a 4 mark answer, but that contains errors of fact that undermine part of the answer.
1 mark	An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example answer:

- ✓ *The courts could find that the Victorian taxation law was in conflict with a Commonwealth law, and a declaration of invalidity could be made that makes the state law unenforceable. Both parliaments have power under the Australia Constitution to make law in areas of concurrent power, such as taxation, and these taxation laws may be inconsistent with each other – this means that people are not able to follow both simultaneously, for instance, or perhaps the federal law shows an intention to cover the field. Section 109 will only have an impact if someone challenges the state taxation law in a federal court; if they do, the Victorian law overriding the tax cuts should be invalid to the extent of its inconsistency with the Commonwealth law. The Commonwealth law would therefore prevail, and people would disregard the inconsistent provisions of the Victorian legislation and not pay the tax.*

Problematic example:

- ✗ *Section 109 of the Australia Constitution is called the inconsistency rule. The inconsistency rule says that if a law of the state is inconsistent with a law of the Commonwealth, the former shall prevail and the latter shall, to the extent of the inconsistency, be invalid. The Victorian law regarding the taxes would therefore be invalid.*

This is problematic for a number of reasons. One reason is that it recites the s109 provision without really explaining it, elaborating, or connecting it properly with the scenario. A second reason is that it tries to copy the exact wording of the section, but in doing so it mixes up which law is the 'former' and which is the 'latter', and ends up accidentally saying that the state law overrides the federal law. A third reason is that it is internally inconsistent because of this – in the last sentence it says the state law would be the inconsistent one.

c. Compare the roles of the upper house of federal parliament and the lower house of federal parliament in the passing of this taxation law. (5 marks)

Advice: Note that the task word 'compare' requires at least one difference *and* at least one similarity.

In 2017 the Chief Assessor commented that the use of the hypothetical facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate."

MARK RANGE	QUALITIES OF ANSWER
5 marks	• A clear and comprehensive answer that provides at least one similarity between the roles of the houses and at least one difference; and • That covers two or more roles of each house, not necessarily in equal depth; and • That has elaboration appropriate to the number of points made; and • That makes meaningful use of the question scenario.

4 marks	An answer that fulfils the criteria for a 5 mark answer, but that displays one of the following weaknesses: • Something lacking in the quality of description and elaboration; or • Slightly superficial or lip-service use of the question scenario; or • An absence of either similarities or differences, even though the answer would otherwise be worth 5 marks; or • Only three roles/points total covered, even though the three covered are done well; or • An answer with the qualities of a 5 mark answer, but with errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole.
3 marks	• An answer with two of the problems identified in the 4 mark range; or • An answer with no use of the question scenario; or • An answer that focuses only on one house and leaves the comparison largely implied; or • An answer that elaborates well on the roles but leaves the comparison between them largely implied; or • An answer that covers only two roles/points, even though the two covered are done well; or • An answer that contains errors of understanding or content that begin to undermine sections of the answer.
2 marks	• An answer that identifies roles of each house but engages in no elaboration or comparison; or • An answer that only covers one or two roles/points; or • An answer with significant errors in understanding or content.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example point:

- ✓ *The lower house initiates most new bills, including the taxation bill, whereas the upper house tends to act as a house of review and receive those bills second. Because the Government holds the support of the majority of seats in the lower house, most new bills are introduced in the lower house, whereas the upper house has more debate – the Government usually does not hold a majority, so they can criticise provisions of the bill such as potential s109 conflict.*

Problematic examples:

- ✗ *The lower house controls government expenditure. All legislation that raises government revenue through taxation and spends government money through the budget must be introduced in the lower house, and s53 of the Australian Constitution prevents the Senate from originating or amending these bills – they can only debate, pass, or reject.*

This is problematic because it is the perfect comparison of roles to meaningfully relate to the question scenario, but it fails to mention the scenario entirely.

- × *The House of Representatives acts as the "people's house". This is because of the democratic, popular voting system it uses that elects one member per electorate. The Senate has the role of protecting state interests because it acts as the States House, with equal numbers of senators elected to represent each state.*

This is problematic because it fails to bring in any comparison between the roles. There is a potentially implied difference in the details of the voting systems, but this needs to be made explicit by the student.

Question 3

Criminal and civil procedures have many similarities, but also some differences.

- a. What impact does the presumption of innocence have on the operation of a criminal trial? (4 marks)**

Advice: 'The presumption of innocence' does not need a separate definition at the start. In 2018 the Chief Assessor wrote that "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "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."

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and comprehensive answer that shows an accurate understanding of the presumption of innocence – that every accused is considered entirely innocent until sufficient evidence has been shown of their guilt, and <i>not</i> that it protects people who are innocent from being found guilty; and • That provides at least one aspect of a criminal trial that is affected by the presumption of innocence, with a clear connection drawn between the two; and • That includes elaboration appropriate to the number of points made and that may or may not include case examples or hypotheticals.
3 marks	• An answer that contains some inaccurate elaboration on the presumption of innocence; or • An answer that focuses entirely on the impact of the presumption of innocence and fails to clearly show what the presumption of innocence means; or • An answer that has slightly too little content, in terms of number of points and/or elaboration; or • An answer that fails to make it consistently clear how and why the trial elements are a result of the presumption of innocence; or • An answer that contains errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole.

2 marks	• An answer that gives a thorough and accurate description of the presumption of innocence, but fails to link it clearly with elements of trial; or • An answer that gives a brief explanation of the presumption of innocence and a brief outline of one or two trial elements but fails to connect or elaborate on them; or • An answer that gives a thorough and accurate description of a range of relevant trial elements, but that fails to use the presumption of innocence in the answer; or • An answer that is around half as long as it should be, in terms of number of points and/or elaboration; or • An answer that focuses too significantly on a case study example and does not adequately answer the question in a theoretical sense; or • An answer that contains significant errors in understanding or content and is therefore partly undermined.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example point:

- ✓ *Because the presumption of innocence protects the rights of every accused by ensuring they are considered entirely innocent until a sufficient weight of evidence has been brought against them to show their guilt, trials always commence with the prosecution leading evidence. The defence never has to begin with their witnesses, because the prosecution has the burden of proof. The standard of proof is also high – beyond reasonable doubt – because the inculpatory evidence needs to be enough to overturn the presumption.*

b. Explain the burden of proof in a civil trial. (2 marks)

MARK RANGE	QUALITIES OF ANSWER
2 marks	• A clear and complete answer that defines the burden of proof as the responsibility to bring evidence to prove the claims made; and • That names the party with the burden – the plaintiff.
1 mark	• An answer that makes only one of these points; or • That makes both of the points but contains a significant error in one of them.

Problematic examples:

- ✗ *The burden of proof is the burden to prove the claims made in the civil claim. In a civil case the party with the burden of proof is the party bringing the action to court in the first place.*

This is problematic for two reasons: firstly, it defines the concept by using the words in the concept, and is therefore an inadequate expression of understanding; secondly, it fails to use the name of the party with the burden, and relies instead on a general description of which party. These two incomplete sections together might make the answer worth 1 mark overall.

Question 4

Section 76(i) of the Constitution gives the High Court of Australia the power to judge matters arising under the Australian Constitution or involving its interpretation, but only a referendum can change the wording.

- a. Describe one instance in which the Australian people used the referendum procedure to either protect the existing form of the Constitution or to change it. (3 marks)

Advice: The referendum procedure does not need a separate definition at the start. In 2018 the Chief Assessor wrote that "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "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."

Note that only material relating to the *first* example the student provides should be marked. In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
3 marks	- An answer that identifies an appropriate proposal; and - That provides enough of the factual basis of the proposal to give context to the answer; and - That correctly identifies the outcome of the referendum; and - That identifies how that outcome either protected or changed the Constitution.
2 marks	- An answer that is too focused on the facts of the proposal to link it adequately with either protecting or changing; or - An answer that lacks some depth in the description of the proposal or outcome; or - An answer that contains at least one material error of fact, but not enough to undermine the answer as a whole.
1 mark	An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example answers:

- ✓ *The 1967 Aboriginal Advancement referendum was used to change the existing form of the Constitution because it was able to capture the intellectual and emotional support of the vast majority of the people nationwide as well as in every single state. The people voted 'Yes' to remove the prohibition placed on the Commonwealth, preventing it from legislating on specifically Indigenous matters, and the rule that Indigenous people should not be counted when determining House of Representatives members and federal funding for state programmes.*

- ✓ *Australia has, on average, a high standard of living, and people are wary of the Commonwealth making "grabs for power." We want to be governed partly locally, to retain more control over our lives, and the public vote lets us decide that. The first social services referendum was rejected largely because the public were asked a 'bundled' question with a range of new powers grouped together. The public saw the referendum proposal to add a new legislative power relating to social services as a grab for power, and so protected the existing form of the Constitution from being amended by voting 'No'.*

b. Describe two effects of the High Court's statutory interpretation of the Constitution. (6 marks)

Advice: Note that only material relating to the *first two* identified effects should be marked. In 2017 the Chief Assessor reminded students that "If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

Note that students frequently confuse reasons for statutory interpretation with effects of statutory interpretation – for instance, in 2018 in a question on reasons for statutory interpretation. No marks should be awarded for answers on the wrong concept.

MARK RANGE	QUALITIES OF ANSWER
6 marks	- An answer that clearly identifies two different effects; and - That includes detail or elaboration for each effect that may or may not include examples or cases; and - That makes meaningful use of the question scenario, perhaps as a way to give that context or elaboration. Note that the chosen effects <i>must</i> be relevant to the High Court's interpretation of the Constitution – the effect that parliament may legislate to codify or abrogate the interpretation would therefore be inappropriate and would receive no marks, unless the students qualifies it by explaining the legislation as a referendum bill.
5 marks	An answer that fulfils the criteria for a 6 mark answer, but that displays one of the following weaknesses: - It fails to provide sufficient elaboration for one of the effects; or - It relies too heavily on a case example in one of the effects, to the detriment of the description; or - It contains at least one material error of fact, but not enough to undermine the answer as a whole.
4 marks	- An answer that contains one of the above weaknesses in each or both of the effects; or - An answer that contains multiple small errors; or - An answer that contains effects that in theory are appropriate to the High Court interpreting the Constitution, but where that connection is not drawn explicitly; or - An answer that only has one effect (or one appropriate effects), but where that single effect is answered superlatively.
3 marks	An answer that contains multiple of the above weaknesses; or

	• An answer that contains significant errors of fact that undermine parts of the answer; or • An answer that is significantly lacking in detail and description; or • An answer that only has one effect (or one appropriate effects), and where that single effect is answered satisfactorily.
2 marks	• An answer that identifies two effects but does nothing more that is worthy of marks; or • An answer that describes one effect adequately and omits a second effect (or includes a second effect that cannot be awarded marks); or • An answer that is riddled with errors or inaccurate explanations; or • An answer that essentially makes only two brief points.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example effect:

- ✓ *Words that were outdated by the time of the case may be given a more relevant and up-to-date meaning. This is a benefit to society because it enables people in society to better govern their behaviour and know when their constitutional rights have been infringed, and to know more accurately when the arms of government are acting within their powers. In the Tasmanian Dams Case, for instance, the meaning of "external affairs" in the Constitution was broadened to the point that the High Court commented it allowed for the "virtually limitless expansion" of the Commonwealth's powers – this has allowed the Constitution to evolve to stay relevant to the proliferation of treaties on new topics since the Second World War.*

Problematic example:

- ✗ *One effect may be to influence parliament to respond by legislating. This legislation could invalidate an interpretation with which parliament disagrees, or confirm the meaning given by the court if it agrees with it and wants to ensure that the new definition is followed by future courts. For example, after the Full Court of the Family Court in the Kevin and Jennifer Case decided that the definition of marriage was the union of one man and one woman – and not the union of two adults of either sex – the federal parliament amended the Marriage Act in 2004 to include that definition.*

This is problematic because it uses an effect that is not appropriate for the material given at the start of the question, to do with the High Court and the Constitution. It must therefore receive zero marks.

Question 5

Explain the way in which government power is distributed under the constitutional separation of powers. In your answer, evaluate the ability of the Constitution to adequately check the power of state and federal parliaments. (10 marks)

Advice: The task word 'evaluate' means to reflect on both sides of the argument *and* provide an opinion or conclusion. In 2017 the Chief Assessor said in response to an 'evaluate' question: "To gain full marks, students needed to explore the strengths and weaknesses [...], 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."

In 2018 the Chief Assessor said that, for clarity of structure, "Students are advised to use paragraphs in extended responses."

MARK RANGE	QUALITIES OF ANSWER
10 marks	- An answer that explains the separation of powers, including all three arms and the roles that each is required to perform (students may or may not name the relevant bodies or institutions performing each role); and - That provides a clear opinion in response to the second part of the question – this may be at the start of the answer, at the end of the answer, or woven throughout the answer; and - That demonstrates meaningful engagement with multiple arguments in relation to <i>more than one</i> method for checking the power of parliament; and - That has support provided for the arguments in the form of specific detail and/or examples; and - That relates these arguments to both state and federal parliaments at least once each across the answer; and - That covers both sides of the issue <i>to some extent</i> in these arguments – in other words, that considers both how the Constitution <i>is</i> and <i>is not</i> an effective check.
9 marks	An answer that otherwise meets the criteria for an 10-mark answer, but that demonstrates one the following weaknesses: - It makes one small error in its explanation of the separation of powers; or - It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification through the arguments; or - It lacks a small amount of scope or detail in its arguments, either covering slightly too few methods or a good number of methods in slightly too little depth; or - It contains a small number of minor errors in understanding or content that do not undermine the answer; or - It covers both sides of the issue, but lacks some engagement between the sides and sounds a little like separate arguments.
8 marks	An answer that otherwise meets the criteria for an 10-mark answer, but that demonstrates one the following weaknesses: - It has one of the above problems, demonstrated to a slightly greater extent; or - It fails to reach any conclusion for the second part of the question; or - It omits one branch of the separation of powers entirely; or - It omits reference entirely to either state or federal parliament, covering checks on only one of them; or

	• It lacks scope or detail in a number of its arguments, or is one good argument short of a full answer; or • It contains multiple small errors of understanding or fact; or • It lacks in covering both sides of the issue because one side is too little considered or there is too much of a gap between the sides and they are not weighed against each other.
7-6 marks	• An answer that has two of the above problems; or • An answer that provides a strong to excellent evaluation, but that fails entirely to explain the separation of powers (or accidentally explains the division of powers instead).
5 marks	Answers that demonstrate significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that explains the separation of powers and contains specific detail and content, but lacks meaningful engagement with any arguments and is factual rather than argumentative; or • An answer that explains the separation of powers and presents multiple methods but that fails to clearly link them with how parliament is 'checked' by them; or • An answer that contains errors of fact or understanding that are significant enough to undermine parts of the answer as a whole; or • An answer that explains the separation of powers but that covers significantly too few arguments in addition (such as perhaps two points only); or • An answer that omits the separation of powers and provides limited discussion of perhaps three arguments; or • An answer that provides little detail to support its arguments and relies instead on assertion without explanation and general statements.
4-3 marks	• An answer that demonstrates any of the above significant problems to a greater extent; or • An answer that has two or more of the above problems.
2 marks	• An answer that makes only two accurate and effective points, from either the evaluation or the separation of powers; or • An answer that makes one accurate and effective point about each of the sections.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example explanation:

- ✓ *The power to govern the country is split by the Constitution into three branches that should, in theory, remain separate and independent of each other – this is called the separation of powers, and it is replicated in the state constitutions, too. The power to make laws is called the legislative power, and it is exercised primarily by parliament; the power to administer and enforce the law is called the executive power, and it is exercised mainly by the Crown's representative on advice of the prime minister (or premier) and the executive council; finally, the power to interpret the law and resolve disputes arising under the law is called the judicial power, and this is exercised by the courts. The rationale for this is that, as Lord Acton said, power tends to corrupt, and absolute power corrupts absolutely; so, the Constitution prevents power from accumulating in any one arm.*

Example evaluation point:

- ✓ *The separation of powers is itself one of the ways in which the Constitution checks the power of parliament. By dividing the power to govern into three arms that should ideally remain separate and independent of each other, the separation of powers ensures that the Commonwealth Parliament doesn't hold all the power unilaterally, over the executive branch and the federal courts; this makes power harder to abuse. For instance, the independent Chapter III courts have the power to declare legislation invalid if it goes outside the jurisdiction of the legislature, as the High Court did in 2009 with the invalidation of the Australian Military Court. The Parliament also cannot create an executive body with the power to make laws without legislative oversight. These checks cannot be enforced without someone with standing being able and willing to mount a challenge to parliamentary acts in the courts, but once the invalidity has been declared the decision is fully enforceable and parliament cannot ignore it.*

State parliaments are similarly checked by the separation of powers because of the extent to which the High Court has decided that it also applies to them as a structural protection of the people – the separation is also present in each of the state constitutions, even though the state parliaments have the power to amend their own constitutions.

SECTION B

In 2018 the Chief Assessor made it clear the extent to which the source material *must* be used in each answer to Section B: "However, some students did not get full marks for responses to questions in Section B because they did not incorporate/apply the relevant stimulus material in all of their responses, despite an instruction on the examination to do so."

Question 1

a. Explain two purposes of the current method of conducting committal proceedings. (5 marks)

Advice: The procedure of a committal does not need a separate definition at the start. In 2018 the Chief Assessor wrote that "It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question." And, in 2017, "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."

Note that only material relating to the *first two* purposes the student identifies should be marked. In 2017 the Chief Assessor reminded students that, "If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for." Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
5 marks	- A clear and accurate answer that identifies two purposes of committal proceedings (either of the hearing specifically or of the proceedings in general); and - That supports these purposes with appropriate detail from the procedure for committals; and - That connects the purposes meaningfully with elements of the source material – note that both sources do not need to be used in each question. Note that, "To establish whether a <i>prima facie</i> case exists" cannot be accepted as a purpose and has not been accepted in past examinations. This is not the language of the legislation or of the Study Design.
4 marks	- An answer that lacks adequate procedure detail for 5 marks; or - An answer that lacks some length and comprehensiveness for 5 marks; or - An answer that includes one or two fairly superficial content errors; or - An answer that is slightly ambiguous at points about whether it is limiting itself to one purpose or whether it is moving into a second purpose.
3 marks	- An answer that demonstrates any of the problems from a 4 mark answer but to a greater degree; or - An answer that contains a fundamental content error or multiple smaller errors; or - An answer that covers only one appropriate purpose, but where that purpose is superlative in quality.
2 marks	An answer that gives a comprehensive account of committal proceedings but fails entirely to focus on the purposes; or

	• An answer that covers one appropriate purpose, but where that purpose is satisfactory only; or • An answer that addresses the question but is brief and superficial.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point. It may, for instance, give only one good point about committals, or it may identify a purpose but leave it general and vague.

Example purposes:

- ✓ *One purpose of committal proceedings is to establish whether the prosecution has evidence of sufficient weight to support a conviction of the accused before a properly-instructed jury. Committal proceedings do this by forcing the prosecution to collect, analyse and disclose its evidence early – committal hearings must generally be held six months after charges have been laid – so that the defence and the courts can assess the strength of this evidence. The Magistrates' Court plays a decisive role in this, as it is the job of the magistrate to decide whether the evidence meets this bar at a committal mention hearing; if it does not, the magistrate has the power to dismiss the charges.*
- ✓ *Committal proceedings allow the accused to properly prepare for trial and ensure that their evidence and legal arguments are ready to be presented to the court. The accused will have received the hand-up brief document at least 42 days before the committal hearing, and they have the opportunity to investigate and even challenge some of the evidence. The accused may even request a contested committal mention hearing to do this, where they orally examine some witnesses to discover the strong parts of their evidence and potentially what the gaps or weak points are.*

Problematic example:

- ✗ *One purpose of committals is for a magistrate to judge whether a prima facie case exists against the accused. 'Prima facie' means 'on the face of it' or 'on first glance', and this means that the magistrate will look superficially at the evidence collected by the prosecution to determine whether a case exists against the accused without that evidence being fully tested and examined in detail. If no prima facie case exists, the magistrate can then dismiss the case, allowing the prosecution to file charges again later if more evidence emerges. This then achieves the purpose of freeing up court time and saving time and stress for the accused, if there is not sufficient evidence for a jury to convict them anyway.*

This is problematic for a few reasons. Firstly, because it uses 'prima facie' and this is not an acceptable purpose. Secondly, because it bleeds into a second and potentially even a third purpose, without clear signposting or a clear line drawn between each purpose. This would make the answer very difficult to mark. Thirdly, because the middle part of it sounds a little like an explanation of committal proceedings without focusing on the purpose – just running through procedure content.

b. Discuss the justice system experience of victims of crime, and the extent to which the criminal justice system achieves justice in relation to them. (6 marks)

Advice: The task word 'discuss' means to engage with subjective arguments and not simply to list facts. Looking at 'both sides' is not always required, however, depending on the wording of the question; nor is arriving at a final opinion, or even having points that identify clearly as 'strengths' or 'weaknesses' – arguments can be about importance, impact or appropriateness. The task phrase 'the extent to which' requires a meaningful opinion on the extent in order to receive full marks. In 2017 the Chief Assessor said clearly: "To gain full marks, students needed to provide their opinion or view about the statement."

This question relates to material that is new on the current Study Design. In 2018 the Chief Assessor said students had trouble remembering the content points: "Some students confused the rights of the victims with the rights of the accused, providing rights such as the right to a fair trial and the right to legal representation. These students did not gain any marks."

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that provides a clear opinion in response to the second part of the question – this may be at the start of the answer, at the end of the answer, or woven throughout the answer; and • That makes one or more thoughtful and subjective points on the ways in which victims interact with the criminal justice system (which may include or go no further than the rights of victims); and • That connects these ways with whether or not they achieve justice – the principles of justice may be used here, but they do not need to be because the wording of the question is more open than that. Note that answers may rely heavily on vulnerable witness provisions and this is fine, but it is also not the only way in which victims interact with the system; answers may also address plea negotiations by the accused, or aspects of trial such as cross examination or delays, among other things.
5 marks	Something slightly less than a sophisticated, complete 6-mark answer. For instance, any of the following in an otherwise excellent answer: • Very little detail on specific aspects of the justice system and trials, rendering some parts of the answer slightly general; or • Slightly too much focus on one aspect of the system at the expense of a full and sophisticated discussion of other aspects mentioned; or • A slightly brief 'discussion' with too much focus on factual content; or • An answer that meets the criteria for a 6 mark answer, but that contains one or two factual errors that are more than just superficial; or • An answer that is slightly short.

4 marks	• An answer with two of the problems indicated in the 5 mark answer range; or • Any one of the above problems, but present to a larger extent; or • An answer that only covers one aspect of the experience, but does so in a great level of detail and discussion; or • An answer that fails to give an answer to the second part of the question, and expresses no opinion despite engaging in discussion; or • An answer that fails to adequately link its content and arguments to 'justice'; or • An answer that contains content errors significant enough to undermine small parts of the answer.
2-3 marks	• An answer that contains content detail but little to no subjective argument, and thus does not answer the question; or • An answer that makes only a couple of points; or • An answer that makes an attempt at engaging with the question and making subjective arguments, but that contains significant content errors.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example points:

- ✓ *Accommodating the special needs of victims such as children or those involved in an alleged sexual offence ensures that everyone has appropriate access to give evidence in court because vulnerable people are protected and supported by the system. Children, for instance, can engage less with the high-pressure trial system by giving pre-recorded evidence and having that be used instead of attending in person and being questioned. It would not be fair to require children to undergo this kind of on-the-spot examination, especially multiple potential times.*
- ✓ *Recently-implemented protections ensure victims of sexual and domestic violence are treated fairly by legal procedures such as cross-examination, because they cannot be asked unfair questions and cannot be cross-examined by the perpetrator or accused. In 2018 the law was broadened so that no witness can be asked improper or harassing questions, but reform was also put through specially for victims of sexual offences – the alleged perpetrator, when self-represented, cannot themselves perform the cross-examination. This has removed one of the most traumatic aspects of the criminal justice system, where victims were forced to interact with and sometimes be pressured and shamed by the very people they accused of assaulting them.*
- ✓ *Victims will be denied the same protections as the accused in the criminal justice system because of the presumption of innocence. Even though victims themselves are not bringing criminal actions against accused persons, the prosecution acting in their interests has the burden of proof and therefore the victim is not automatically 'believed' by the court – this means they feel the pressure to prove that they are telling the truth, and are then open to being attacked or discredited by the defence. They are not given the initial benefit of the doubt in the same way that a presumed innocent accused person is. This can discourage them from accessing the formal system, and can feel unfair because they were the injured party.*

c. Describe the role played by the Victorian Law Reform Commission or one other law reform body in contributing to law reform in the state. (3 marks)

Advice: In 2018 the Chief Assessor commented that many students failed to choose just *one* body, and that many did not adapt their answers to the source material given: "Many students attempted to explain the role of both. Other students did not make use of the stimulus material and provided a generic response about a parliamentary committee or a royal commission. These students did not get full marks."

Only material on the first reform body mentioned can be awarded marks.

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A clear answer that shows an understanding of how the body receives matters to investigate; and • That shows an understanding of how the body undertakes an investigation process; and • That shows an understanding of how the body prepares a report of recommendations <i>only</i> and cannot change the law; and • That uses the source material in a meaningful way. Note that this answer is very content-heavy and students may not include a lot of elaboration for 3 marks.
2 marks	An answer that fulfils the criteria for a 3 mark answer, but that displays one of the following weaknesses: • It fails to make one of the required content points; or • It contains a material error of fact; or • It fails to use the source material.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example:

- ✓ *The Victorian Law Reform Commission investigates matters in need of law reform in the state such as the committal process, with the goal of informing the Victorian government and parliament on public opinion, the current effectiveness of the law, and the pros and cons of options for change. Committals were referred to it by the attorney-general, and it will now investigate by doing things such as publishing a public consultation paper to inform the public and requesting submissions from interested parties, as in Source 1. The Commission will make its recommendations in a written report to the government, who will table it in parliament.*

d. To what extent is the public able to contribute meaningfully to the development of law in Victoria? Give reasons for your answer. (8 marks)

Advice: The task phrase 'the extent to which' requires a meaningful opinion on the extent in order to receive full marks. In 2017 the Chief Assessor said clearly: "To gain full marks, students needed to provide their opinion or view about the statement." Arguments do not need to cover 'both sides' depending on the nature of the opinion given, but more is required than a simple list of weaknesses or strengths with no reflection or engagement.

In 2017 the Chief Assessor commented that the use of the source facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate." In other words, how might the public contribute in a way relevant to *this* material?

In 2018 the Chief Assessor said that, for clarity of structure, "Students are advised to use paragraphs in extended responses."

MARK RANGE	QUALITIES OF ANSWER
8 marks	- An answer that provides a clear opinion in response to the question, at the start of the answer, at the end of the answer, or woven throughout the answer; and - That demonstrates meaningful engagement with multiple arguments in relation to how meaningful the public's contribution can be; and - That has support provided for the arguments in the form of specific detail and more than one example of ways the public makes that contribution; and - That makes meaningful use of the source material.
7 marks	An answer that otherwise meets the criteria for an 8 mark answer, but that demonstrates one of the following weaknesses: - It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification through the arguments; or - It lacks scope or detail in its arguments, either covering slightly too few or a good number in slightly too little depth; or - It has a slightly superficial use of the source material; or - It errs on the side of factual descriptions (eg of ways the public can influence law reform) and sounds slightly rote-learned rather than answering the question; or - It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole.
6 marks	- An answer that has one of the above problems, demonstrated to a slightly greater extent; or - An answer that fails to provide an overall conclusion or answer.
5 marks	- An answer that demonstrates two or more of the above problems, but still gives a satisfactory response to the question asked; or - An answer that fails entirely to use the source material, but that otherwise answers the question.

4 marks	Answers that demonstrate more significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that contains specific detail and content, but lacks meaningful engagement with any arguments and is entirely factual rather than responsive; or • An answer that gives general arguments about the public contributing to law reform, but fails to give any specific examples of how they might do that; or • An answer that contains errors of fact or understanding that are significant enough to undermine the answer as a whole; or • An answer that covers significantly too few arguments (such as perhaps two points or examples only); or • An answer that provides little detail to support its arguments and relies instead on assertion and general conjecture.
3-2 marks	• An answer that demonstrates any of the above significant problems to a slightly greater extent; or • An answer that has two or more of the above problems.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example points:

- ✓ *People can put pressure on their local member of parliament, or on the relevant minister, by using petitions to demonstrate public interest and let the parliament know that people are paying attention to what they are doing in an area of law. Petitions tabled correctly in one house of parliament, through a petitions committee, now often require a response from the relevant minister. If there are many signatures, indicating substantial support,, the minister may feel obliged to respond in an encouraging way, and may feel constrained from enacting laws the opposite of what were requested for fear of losing support. A petition will have limited influence by itself, because so many petitions are received by each house of parliament and many of them contain requests that are inconsistent with each other; but, if used as part of an overall campaign of influence that includes things such as calling an MPs office, they can put the political parties under scrutiny and can pressure them to give answers.*
- ✓ *Inquiries into the law conducted by formal bodies such as the Victorian Law Reform Commission or a parliamentary committee are often highly effective at influencing change, because these bodies are established and funded by government and their recommendations are supported by expert opinion. The people as a non-expert group are not directly part of these inquiry teams, but all bodies like this do give members of the public the opportunity to contribute an opinion. The source shows how the VLRC put out a call for public submissions regarding the committal process, and this is a standard part of any research process. It is questionable how much any single public submission will influence the final paper of recommendations, but the more people who submit a similar position to the body the more likely that influence will be.*

Problematic example:

- ✗ *A demonstration is a gathering of people in a public place in order to show popular support for a change in the law. This is usually outside parliament, the office of an MP, or in a public thoroughfare so that people notice the message. The size of the protest can be important in determining its likely impact, but it is not the only important factor. The profile and public reputation of the protesters will also be important, along with the nature of their demands: something that is simple to change, and that is already compatible with Government policy or with the wishes of major party donors and supporters will be far more likely to be taken up. There are many different types of protests or demonstrations, such as a rally, a march, a strike*

or a boycott – a recent example of a rally was the 2015 demonstration before the United Nations climate change conference in Paris, where famous supporters such as singer Paul Kelly attended along with politicians from The Greens and the Labor Party.

This is problematic because it limits itself largely to a description of one way the public could influence law, without using any of this content in an answer to the question – this is an example of a rote-learned answer. It is also problematic because it provides an example, but does not link that example to any answer or point.

Question 2

a. Provide one reason for the existence of a Victorian court hierarchy. (3 marks)

Advice: The court hierarchy does not need a separate definition at the start. In 2018 the Chief Assessor wrote that “It is not necessary to define key legal terms before answering a question, unless the question asks for a definition. It is also not necessary to give a description of methods, bodies or personnel before answering the question.” And, in 2017, “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.”

Note that only material relating to the *first* identified reason should be marked. In 2017 the Chief Assessor reminded students that “If the question asks for a certain number of reasons/points, etc [...], students should provide no more than the number that is asked for.” Only the *first* ones are marked – not the *best* ones. Markers should use their judgment as to when the student strays into multiple answers.

In 2017 the Chief Assessor commented that the use of the hypothetical facts needs to be meaningful and not merely lip-service: “The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate.”

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that gives a clear identification of one reason; and • That goes beyond the identification to provide detail or elaboration; and • That uses the source material in a meaningful way.
2 marks	An answer with one of the following faults: • It lacks detail in the description of the reason; or • It lacks meaningful use of the source material; or • It has one or more significant content errors; or • It is overall too brief.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example answer:

- ✓ *Arranging courts in a hierarchy or jurisdiction allows for decisions to be appealed to higher courts with the power to review the decisions made by courts inferior to them. Appeals can be on questions of fact (including, for instance, awards for damages) or on questions of law, and involve the higher court being asked to scrutinise the original decision-maker. The Kalibrate decision could be appealed on the basis of the costs award, and would be heard by the Court of Appeal, a 3-judge panel with the power to reverse the indemnity costs findings of Judge Cosgrave.*

b. Outline the trial responsibilities of the judge in the resolution of a civil dispute. (4 marks)

Advice: In 2017 the Chief Assessor commented that the use of the source facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate."

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that identifies more than one responsibility clearly – focusing on the responsibilities of the judge and not their 'role' or a definition of their position; and • That gives elaboration and detail appropriate to the number of responsibilities provided; and • That uses the source material in a meaningful way. Note that only responsibilities relevant at trial may be counted – pre-trial responsibilities such as case management are not relevant to this question.
3 marks	An answer that fulfils the criteria for a 4 mark answer, but that displays one of the following weaknesses: • It fails to provide sufficient detail or elaboration, but does identify a good number of responsibilities; or • It covers perhaps one too few responsibilities for 4 marks, but describes the ones it does include in appropriate detail; or • It uses the source material in a slightly superficial way; or • It contains one or more slight errors of fact, but not enough to undermine the answer.
2 marks	• An answer that describes only one relevant responsibility; or • An answer that identifies two responsibilities but gives no further detail or example; or • An answer that fails entirely to use the source material; or • An answer that contains significant errors of fact, enough to undermine parts of the answer.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example responsibilities:

- ✓ *The judge has the responsibility to remain impartial, and not side with either party to the dispute.*
- ✓ *The judge has the responsibility to ensure that the evidence in the case comes out clearly and according to the rules of evidence and procedure. These rules are contained in acts such as the Civil Procedure Act 2010 and the Evidence Act 2008, and the judge will be expected to be familiar with these rules to ensure that both parties follow them in the presentation of their cases.*
- ✓ *The judge's role of awarding remedies such as damages, and then making orders for costs on top of that, gives them the power to try to right a wrong that has happened in the community. In this case the plaintiff failed to meet its obligations under the Civil Procedure Act 2010; it was therefore the responsibility of the judge to calculate special indemnity damages to compensate the defendant for time wasted in trial.*

Problematic example:

- ✗ *The judge is an independent and impartial umpire to the dispute whose role is to preside over the case and ensure that the rules of evidence and procedure are followed equally by both parties.*

This is problematic because, even though the information is accurate, the focus of the answer is on what the judge is in a definition sense – not on what specific responsibilities she or he has. The wording and focus should be adjusted.

c. **Evaluate the extent to which the responsibilities placed on parties and legal representatives contribute to the effectiveness of the civil justice system.** **(8 marks)**

Advice: The task word 'evaluate' means to reflect on both sides of the argument *and* provide an opinion or conclusion. In 2017 the Chief Assessor said in response to an 'evaluate' question: "To gain full marks, students needed to explore the strengths and weaknesses [...], 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."

In 2017 the Chief Assessor commented that the use of the source facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate."

In 2018 the Chief Assessor said that, for clarity of structure, "Students are advised to use paragraphs in extended responses."

In 2018 the Chief Assessor observed that "Areas of the study that also need attention include the responsibilities of legal practitioners at trial, case management powers and enforcement issues (in civil proceedings)."

MARK RANGE	QUALITIES OF ANSWER
8 marks	• An answer that provides a clear opinion in response to the question, at the start of the answer, at the end of the answer, or woven throughout the answer; and • That demonstrates meaningful engagement with multiple arguments in relation to how effective the responsibilities are – both personnel must be covered, and it would be difficult to gain full marks without at least two responsibilities from each covered; and • That has support provided for the arguments in the form of specific detail and examples; and • That makes meaningful use of the source material. •
7 marks	An answer that otherwise meets the criteria for an 8 mark answer, but that demonstrates one of the following weaknesses: • It lacks a sophisticated opinion in response, and gives a more general “I agree to a certain extent” with insufficient clarification through the arguments; or • It lacks scope or detail in its arguments, either covering slightly too few or a good number in slightly too little depth; or • It has a slightly superficial use of the source material; or • It errs on the side of factual descriptions (eg specific responsibilities of the personnel) and sounds slightly rote-learned rather than answering the question; or • That favours one of the personnel slightly too much, even though the two do not need to be addressed for an equal length; or • It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole.
6 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent; or • An answer that fails to provide an overall conclusion or answer.
5 marks	• An answer that demonstrates two or more of the above problems, but still gives a satisfactory response to the question asked; or • An answer that fails entirely to use the source material, but that otherwise answers the question; or • An answer that only covers one of the personnel, but that does it superlatively.
4 marks	Answers that demonstrate more significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that contains specific detail and content, but lacks meaningful engagement with any arguments and is entirely factual rather than responsive; or • An answer that gives general arguments about how effective the personnel are, but fails to give any specific examples of how they might do that; or • An answer that contains errors of fact or understanding that are significant enough to undermine the answer as a whole; or • An answer that covers significantly too few arguments (such as only one or two points or examples for each personnel); or • An answer that only covers one of the personnel, but does not do it superlatively; or

	An answer that provides little detail to support its arguments and relies instead on assertion and general conjecture.
3-2 marks	- An answer that demonstrates any of the above significant problems to a slightly greater extent; or - An answer that has two or more of the above problems.
1 mark	An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example points:

- ✓ *Parties have the responsibility to choose the evidence for their case that will best represent their arguments and version of the facts. This contributes to access, as each party has options for how to present their case. Unlike the duty imposed on the criminal prosecutor to call all credible and relevant evidence, though, parties to a civil case are free to call only the evidence that supports their case. They are permitted to suppress evidence that is unfavourable to their side, which may reduce the fairness and truth value of the outcome. Having this responsibility can also work against the party, though, if they don't properly judge which evidence should be submitted – and Judge Cosgrave said in the Kalibrate case, where "the plaintiff's own evidence" was "unsatisfactory".*
- ✓ *The ten overarching obligations for parties introduced by the Civil Procedure Act 2010 put appropriate limits on the power of parties to prepare and control the conduct of their case. A balance is struck between the access of parties to making decisions about their interests, and the fairness and efficiency of the resolution process. If the parties do not follow these rules, as shown in the Kalibrate source, they may be penalised by orders such as having to pay higher indemnity costs.*
- ✓ *Party control may cause delays – through inexperience, failure to select only the best arguments, or by deliberately trying to delay and 'bleed' the opposition of their money, if those strategies are not curtailed by judicial case management. For example, in its January 2014 paper, 'Delivering high quality criminal trials: consultation and options paper', Victoria Legal Aid (VLA) reported that "judicial comment about the quality of counsel in trials continues to be critical," because poorly-prepared or inexperienced parties significantly slow down resolution.*
- ✓ *Even though they also have a duty to the court, the task for lawyers is to gain the best outcome possible for their client, and act on instruction from that client. This dual duty balances well the need to give access to parties with the need to serve justice and overall fairness in terms of the system. If legal representatives fail in this duty to the court, as Judge Cosgrave found the plaintiff's lawyers did when they "undoubtedly extended" the proper duration of the trial, they can be penalised by their client having to pay indemnity costs to the other side (as in the source), or by them being prevented from claiming costs.*
- ✓ *Lawyers can make the process even more adversarial in their quest for the win – they can discourage cooperation because it is not always in the lawyer's best interests to find a middle ground between parties, or they may believe they can win the case outright for their client. A 2013 study also found that law school culture contributed to an ethic of delay and procrastination among lawyers. The plaintiff's lawyers in the Kalibrate case seem to have reduced the effectiveness of the trial process by failing to advise their client that their evidence was likely to fail, and by making "repetitive and needlessly drawn out submissions."*

d. Describe the impact that costs can have on the decision of a plaintiff to initiate a civil claim. (3 marks)

Advice: In 2017 the Chief Assessor commented that the use of the source facts needs to be meaningful and not merely lip-service: "The reference to the case needed to be meaningful [...]. Many students did not achieve full marks because the reference to the case was inadequate."

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that gives a clear explanation of one or more impacts that costs might have; and • That makes meaningful links between costs and those ways the potential plaintiff might be affected; and • That goes beyond the identification to provide detail or elaboration; and • That uses the source material in a meaningful way.
2 marks	An answer with one of the following faults: • It lacks detail in the description of the impacts and is general, potentially with sweeping statements; or • It relies on factual examples of costs and fails to properly answer the question; or • It lacks meaningful use of the source material; or • It has one or more significant content errors; or • It is overall too brief.
1 mark	• An answer that gives more than nothing, but that is little more than one brief, accurate and responsive point.

Example:

- ✓ *Any potential plaintiff needs to feel that their outlay in achieving a judgment and damages will be worth what they are likely to receive in return, or else they will be unlikely to commit to legal action. There is no point paying for a senior barrister at perhaps \$10,000 per day (and the junior barristers assisting the senior counsel) if the complainant is looking at damages of anything less than \$100,000. In the Kalibrate case, the potential plaintiff would not have been aware that the judge would chastise them and award indemnity damages against them, but losing the claim and having to pay costs for the other party is always a risk.*

Problematic example:

- ✓ *A plaintiff is likely to incur the expense of consulting a solicitor about their claim. A solicitor will correspond with opposing parties, recommend and engage a barrister to present the case in court, prepare a brief of evidence to the barrister, and manage the plaintiff's documents in the case. Solicitors' fees are generally charged at an hourly rate, and may range anywhere from \$300 per hour upwards, depending on the level of expertise of the solicitor. The barrister may then charge upwards of \$3000-10,000 per day for appearance in court.*

This is problematic because it concentrates only on giving examples of costs, and fails to link them to the question about the potential plaintiff being influenced by them.