



LEGAL STUDIES

2019

Unit 3 Practice Examination

SUGGESTED RESPONSES AND ADVICE

SECTION A

Question 1 (11 marks)

Acclaimed pianist Breckin Speed sued tabloid magazine the *Weekly Crier* for defamation after it published a report accusing him of sexual harassment during a recent concert tour. One of his fellow musicians, a younger woman flute player named Eve Norbert, had spoken to management during the tour about her discomfort with Speed helping her polish and prepare her flute for performances; she said it was unnecessary and unasked-for, and that he made sexual gestures and rubbed against her while doing it. A member of the management team spoke to the *Weekly Crier* who published the story. Eve Norbert gave evidence at the trial. The court found in favour of Speed, and awarded him \$1.25m for lost wages plus \$750,000 in emotional distress.

a. Who was the plaintiff in the above case and who was the defendant? 2 marks

MARK RANGE	QUALITIES OF ANSWER
2 marks	An answer that clearly identifies Speed as the plaintiff and the <i>Weekly Crier</i> (or 'the magazine') as the defendant.
1 mark	- One of the above being identified correctly but not both; or - Both of the above being identified correctly, but one of them being contradicted or invalidated by incorrect additional answers being included.

b. Describe one remedy that can be given at the conclusion of a civil matter, and identify two of its potential purposes. 4 marks

Note that only material relating to the *first* identified remedy should be marked, and the first two purposes. Markers should use their judgment as to when the student strays into multiple answers.

MARK RANGE	QUALITIES OF ANSWER
4 marks	- An answer that gives a clear and comprehensive description of a civil remedy (such as damages or an injunction); and - That uses the scenario in the answer; and - That has two appropriate purposes identified – these do not need to be detailed, and do not need to use the scenario if the remedy description does.
3 marks	An otherwise 4-mark answer that has <i>one</i> of the following faults: - It lacks detail in the remedy description; or - It lacks use of the scenario; or - It fails to identify one purpose; or - It conflates the two purposes (such as combining restoration with compensation); or - It has a small but significant content error.
2 marks	An otherwise 4-mark answer that has <i>two</i> of the above faults <i>or</i> that demonstrates any of the following: - It fails to identify <i>any</i> correct purposes; or - It fails to describe <i>any</i> remedy; or - It contains multiple significant content errors.
1 mark	An answer that contains multiple problems identified in the 2 mark range but that provides something that is more than nothing.

Example:

Damages are sums of money awarded to a successful plaintiff in satisfaction of their claim, and paid by the defendant. In the Speed case, Speed was awarded a total of \$2m based on the harm he claimed to have suffered as a result of the defamatory statements, and this money would be paid to him directly by the Weekly Crier. Damages can aim to compensate, such as for Speed's emotional suffering; they can also aim to restore the plaintiff to the position they were in before the rights infringement occurred.

c. Discuss the purpose of one pre-trial procedure that may have been conducted prior to the resolution of the above case. 6 marks

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that clearly identifies one appropriate pre-trial procedure; and • That clearly identifies one or more appropriate purposes; and • That provides one or more thoughtful and subjective points on the benefits of this procedure <i>or</i> the way in which the procedure achieves its purpose(s); and • That illustrates these points with content detail; and • That uses the case scenario.
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 either the procedure or the purpose(s), rendering some parts of the answer slightly general; or • A slightly brief acknowledgement of the purpose(s), with too much focus on factual content; or • Inadequate use of the case scenario; 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 • An answer with any one of the above problems, but present to a larger extent; or • An answer that entirely omits the case scenario but is strong in every other respect.
3-2 marks	• An answer that entirely lacks either a clearly-identified procedure or any purposes of that procedure; or • An answer that contains content detail but little to no subjective argument and thus does not answer the question; or • An answer that makes an attempt at engaging with the question and making subjective arguments supported with content detail, but that has significant content errors.
1 mark	• An answer that provides more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Example: One purpose of pleadings is to narrow the range of issues in dispute. By filing the statement of claim and the statement of defence, for instance, the disputing parties can work out what claims they agree on and are willing to 'stipulate to' and which claims will be contested with evidence. Any claims made by the plaintiff that the defence agrees with will be stated in the statement of defence as agreed points – both parties then know that they will not have to contest those claims. This can have the effect of streamlining trial, but it will not necessarily save the parties from the time it takes to collect evidence. Before the defence is confident in agreeing to some claims, they will likely have to undertake research to know how strong their case is and to feel confident in their version of the facts.

Problematic examples:

- × *The purpose of pre-trial procedures is to speed up trial. Speeding up trial is good because it gives greater access to members of the community, and reduces the cost and time of dispute resolution.*

This answer is general, and fails to even identify a pre-trial procedure. It talks about "procedures" in general, and doesn't illustrate its point with any information about a specific procedure. It also sounds rote-learned and repetitive with its explanation of 'access', repeating 'speed' and 'time' but not giving any explanation as to how this achieves access.

- × *Discovery is a pre-trial procedure where the parties disclose all non-privileged evidence they may rely on in trial or have in their possession. First, discovery involves each party giving the other an affidavit of documents that lists all the evidence they have; next, production of documents involves each party giving the other access to copies of any non-privileged material that party requests; finally, parties may participate in interrogatories, which are direct written questions exploring in detail a selection of claims made by the other side.*

This answer shows good content knowledge of a pre-trial procedure, but it doesn't answer the question. Instead of giving subjective 'discussion' points, it merely recounts factual detail. Instead of focusing on the purpose of a pre-trial procedure, it focuses on the procedure itself.

Question 2

Outline the role of the Victorian Civil and Administrative Tribunal as an alternative to courts in the resolution of civil disputes. **3 marks**

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A clear and accurate answer that states that VCAT hears civil claims and hands down binding resolutions (including creating binding orders on an agreement reached by the parties); and • That supports this answer with appropriate detail; and • That makes a relational statement with courts, such as that VCAT hears claims with simpler evidence or legal claims. It would not be appropriate to say that VCAT only hears claims of low value.
2 marks	• An answer that omits any of the required material for a 3-mark answer; or • An answer that contains a content error that is more than merely superficial; or • An answer that addresses the required content but is brief and superficial.
1 mark	• An answer that is more than nothing accurate and responsive, but that is something less than the 2 mark range. It may, for instance, give only one good point about VCAT, or it may make a comparative statement with courts but leave it general and vague.

Problematic examples:

- × *VCAT channels the smaller and less complex civil claims away from the legal system to take the pressure off the courts, and ensure that cases can be heard more quickly, cheaply and with less formality. VCAT is divided into a number of specialised divisions, each with lists tailored to narrow areas of law to increase the specialisation of members.*

This answer provides a general introductory statement, but does not support any of the claims made with examples or detail. One additional sentence could have provided some of this. The second sentence is accurate, but could have been tailored to answer the question rather than sounding rote-learned. The answer also seems to suggest that VCAT is not part of the legal system.

- × *VCAT is an alternative dispute resolution venue designed to allow people to resolve civil claims in a cooperative way using methods such as mediation, conciliation and arbitration. Unlike courts, it cannot make binding decisions and so parties may still have to go to court later.*

This answer is almost entirely incorrect. VCAT has some opportunities for cooperative resolution – for instance, it can ratify private agreements, and has mediation programs running in some of its lists – but primarily it conducts hearings in which parties oppose each other. It also uses neither conciliation nor arbitration to resolve disputes: its hearings are run in a similar way to an arbitration, in that there are no formal rules of evidence and procedure, but they are called 'hearings'. VCAT also does make binding resolutions, and parties will only go to court if one appeals.

Question 3**Explain how committal proceedings achieve one of their purposes.****4 marks**

Note that only material relating to the *first* identified purpose should be marked. Markers should use their judgment as to when the student strays into a second purpose.

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and accurate answer that identifies one purpose of committal proceedings (either of the hearing specifically or of the proceedings in general) and that supports this purpose with appropriate detail from the procedure. • Note that a case example may be used to extend the answer to 4 marks, and this kind of detail will be appropriate if it is effectively linked back to the question. • Note also that "To establish whether a <i>prima facie</i> case exists" should not be accepted as a purpose. This is not the language of the legislation.
3 marks	• An answer that lacks adequate detail for 4 marks; or • An answer that lacks some length and comprehensiveness for 4 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.
2 marks	• An answer that demonstrates any of the problems from a 3-mark answer but to a greater degree; or • An answer that contains a fundamental content error or multiple smaller errors; or • An answer that gives a comprehensive account of committal proceedings but fails to focus on the achievement of one purpose; or

	• An answer that analyses the effectiveness of committal proceedings and covers some relevant material but goes beyond what the question is asking; or • An answer that addresses the question but is brief and superficial.
1 mark	• An answer that is more than nothing accurate and responsive, but that is something less than the 2 mark range. It may, for instance, give only one good point about committals, or it may identify a purpose but leave it general and vague.

Example: One purpose of committal proceeding 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. The accused will have received the documentary hand-up brief at least 42 days before this hearing, and they will help the magistrate determine this by investigating and potentially challenging some of the evidence. They may even request a contested committal mention hearing to do this, where they orally examine some witnesses to show the magistrate that there is insufficient grounds for trial.

Question 4

Distinguish between mediation and arbitration as methods used to resolve civil disputes.
3 marks

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A clear and accurate answer that provides one or more differences between mediation and arbitration; and • That provides a combination of number of points and depth of detail on those points (it would be difficult to gain full marks with only one difference, but theoretically possible with enough depth); and • That structures the sentences to meaningfully draw out the difference(s), and does not rely on the presentation of two separate definitions.
2 marks	• An answer with something lacking in the quality of clear difference identification and reading more like separate descriptions; or • An answer with something lacking in elaboration and detail; or • An answer with the qualities of a 3-mark answer, but with errors in understanding or content that do not undermine the answer as a whole.
1 mark	• An answer that is more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Example: Mediation is a more cooperative method of dispute resolution than arbitration. In mediation, the parties engage in a conversation, and take turns talking about their points of view and willingness to compromise. In arbitration the focus is not on discussion as much as it is on the parties putting forward their points of view to a third party, trying to convince the third party of the strength of their side. This leads to another difference, which is that the parties are in charge of the outcome in mediation, whereas in arbitration the third party makes that decision for them.

Question 5

To what extent do you believe the responsibilities of the jury contribute to fairness in the resolution of disputes? Give reasons for your answer. **8 marks**

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 more than one responsibility of juries (either criminal or civil juries); and - That has support provided for the arguments in the form of specific detail and/or examples; and - That draws meaningful connections between the arguments and fairness, and does more than merely repeat the word 'fair'. - Note that 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.
7 marks	An answer that otherwise meets the criteria for an 8-mark answer, but that demonstrates one 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 is slightly repetitive in its use of the concept of 'fairness'; 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.
5 marks	An answer that has two of the above problems.
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 factual rather than argumentative; or - An answer that meaningfully engages with multiple arguments but that fails to link them with 'fairness'; 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 or three points 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 problems to a slightly greater extent; or - An answer that has two or more of the above problems.
1 mark	An answer that is more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Example arguments:

- ✓ *Jurors may be unable to provide fairness due to biases they are not aware of in themselves; they will therefore fail to judge the accused on the basis of the evidence, according to natural justice, but will instead judge them on the basis of irrelevant or prejudicial material. For example, in 2014 Lateline on the ABC aired the results of a juror experiment in which the defendant was seated in three different places for each version of the trial: next to her or his lawyer, in the dock, or in a special glass-enclosed dock. 36% of jurors delivered a guilty verdict when the defendant was seated next to her or his lawyer; 47% did when she or he were in a dock; and 60% did when the dock was enclosed.*
- ✓ *In 2003 the Victorian Law Reform Commission published a jury empanelment paper in which they argued that juries provide fairness by ensuring that justice is administered in line with the general community's standards and values rather than merely the views of unrepresentative judges. This is especially important considering the findings of the biggest survey of judges and magistrates conducted in Australia found that most members of the judiciary are male, white, Christian, private-school educated and in heterosexual marriages or de facto relationships. This is a narrow sample group of the population.*

Problematic examples:

- ✗ *Juries may not deliver fairness because they will be biased towards the accused and will make decisions based on prejudices and a misunderstanding of the evidence. This is unlike judges, who are trained to be fair and objective and would therefore decide the verdict based only on the evidence. One example of this is the Lindy Chamberlain case.*

This answer is too definite in its arguments: it is not correct or fair to say that juries are definitely biased, and there is no evidence to support this as a blanket condemnation. It is also not correct to say that no judge will ever be influenced by bias. Some nuance or supporting detail is required. The example could be used effectively; however, in this case, it has only been named – not used as an illustration.

- ✗ *Juries can provide fairness by protecting the presumption of innocence with their verdicts. Unless a unanimous or majority verdict can be reached of 'guilty', the accused will be found 'not guilty' and will be allowed to go free. This is fair, and the accused is protected by the burden of proof and the high standard of proof.*

This answer is factually incorrect: the default outcome is not 'not guilty' – it is a hung jury. A 'not guilty' verdict also requires a unanimous or majority verdict. The answer also lacks an explanation of how fairness is achieved by this or what fairness might mean in the context; it also names the concepts of the burden and standard of proof, but fails to explain their relevance.

Question 6

The most recent numbers taken from the Annual Reports of the County and Supreme Courts show that 81% of indictable matters resolve in a guilty plea.

Explain the difference between indictable and summary offences, and evaluate whether the processes the criminal justice system has for resolving cases without a trial verdict contribute to the achievement of justice. **10 marks**

MARK RANGE	QUALITIES OF ANSWER
10 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 <i>more than one</i> process for out-of-court resolution; and - That has support provided for the arguments in the form of specific detail and/or examples; and - That draws meaningful connections between the arguments and the concept of 'justice', and does more than merely repeat the word 'justice'; and - That covers both sides of the issue <i>to some extent</i> in these arguments; and - That explains that indictable offences are more serious than summary offences, and provides at least one other content point to elaborate on this. Content points include that indictable offences are heard by a jury whereas summary offences are not; that indictable offences are heard in the County and Supreme Courts whereas summary offences are heard in the Magistrates' Court; or that indictable offences are punishable by (theoretically) unlimited fines or imprisonment, whereas summary offences are punishable by no more than Level 5 fines and/or imprisonment. - Note that 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. - Note also that the question does not specify 'the principles of justice'. A looser definition of justice may therefore be applied here, and students do not need to expressly use the stated principles the way they would if the question specified it. - Note that the answer is marked globally, but that the difference between summary and indictable offences ought not to be counted for more than 2-3 marks maximum.
9 marks	An answer that otherwise meets the criteria for an 10-mark answer, but that demonstrates one 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 pays insufficient attention to a second process, making a brief point on it but focusing on one process almost exclusively; or - It is slightly repetitive in its use of the concept of 'justice'; or - It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole; or - It identifies the basic difference between summary and indictable offences, but fails to elaborate on the difference; or - It covers both sides of the issue, but lacks some engagement between the sides and sounds a little like two separate arguments.

8 marks	An answer that has one of the above problems, demonstrated to a slightly greater extent.
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 difference between summary and indictable offences.
5 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 explains the difference between summary and indictable offences 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 difference between summary and indictable offences and that presents multiple arguments but that fails to link any of them with 'justice'; 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 or three points only); or - An answer that provides little detail to support its arguments and relies instead on assertion and general conjecture.
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; or - An answer that has an inadequate explanation of the difference between summary and indictable offences <i>and</i> that demonstrates one of the above significant problems.
2 marks	- An answer that makes only two accurate and effective points, from either the evaluation or the difference between summary and indictable offences or one from each; or - An answer that makes three brief points.
1 mark	An answer that is more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Example arguments:

- ✓ *Summary offences are less serious than indictable offences, and are heard in the Magistrates' Court rather than the County Court or Supreme Court, as indictable offences are. Summary offences are therefore not heard by a jury, and are punishable by no more than Level 5 imprisonment and/or fines, compared with indictable offences which are punishable by theoretically unlimited fines or imprisonment.*
- ✓ *Plea negotiations can result in an early guilty plea, sending the matter directly to sentencing and avoiding the need for a protracted trial with an uncertain outcome. These kinds of pleas should hopefully seem fair and appropriate to the community because the OPP's Policy on Resolution states that the prosecutor may only accept a plea from the accused if the plea is fair and just with regard to factors such as the strength of the evidence, the views of the victim and the informant, and the accused's criminal history. Prosecutors will always arrange a special meeting with the complainant (preferably in person) before accepting a plea from the accused. This ensures that views on justice from outside the office are taken into account.*

- ✓ *Sentence indications can enhance justice by encouraging the accused to enter an early plea of guilty and giving them as much information as is fair and reasonable in order to do this. If the judge or magistrate is able to give the accused some indication of where the severity of their offending sits in terms of whether it deserves a custodial sentence or not – including the effect of any discounts for an early plea – they achieve justice by giving the accused access to more informed decision-making. Access in terms of the cost and time of resolution may be diminished by the provision of indications, though, if the accused chooses not to plead guilty. The judge or magistrate will have to be replaced by another, and this causes potential delays and therefore increased cost of representation – possibly also extended time held in remand.*

Problematic example:

- ✗ *Plea negotiations may not achieve justice in the system because the sentence for the accused is decided privately, without a public trial. The accused has the ability to negotiate a sentence that she or he is happy with, and is likely to accept only those punishments that are lower than what is likely to be given in sentencing at the end of a full trial with a verdict of 'guilty'. Plea negotiations are also conducted in private and without prejudice, meaning any admissions the accused makes behind closed doors are not available to the public to judge the fairness of the sentence agreed upon.*

This answer makes the fundamental error of confusing charges with sentencing. Plea negotiations determine the charges the accused is pleading guilty to – they do not determine the sentence. This answer also refers to the sentence as a 'punishment', which is sloppy language: punishment is one of the purposes of sanctions, but is not a synonym for sentencing.

SECTION B

Question 1 (20 marks)

- a. **Explain one role of legal practitioners in the resolution of a legal matter through the courts.** **2 marks**

Note that only material relating to the *first* identified role should be marked. Markers should use their judgment as to when the student strays into a second role.

MARK RANGE	QUALITIES OF ANSWER
2 marks	• An answer that gives a clear and comprehensive explanation of one role; and • That uses the source material in a meaningful way.
1 marks	An otherwise 2-mark answer that has one of the following faults: • It lacks any detail in the description of the role; or • It lacks meaningful use of the scenario; or • It fails to identify one clear role and instead gives an overall function; or • It has a significant content error.

Examples:

- ✓ *One role of legal practitioners is to question witnesses during trial. If those witnesses are vulnerable witnesses covered by the intermediaries pilot, for instance, this will involve taking into account the recommendations from the intermediary about how best to communicate with the witness.*
- ✓ *One role is to find witnesses before trial and determine which witnesses to call and what questions to ask them. If one witness is a vulnerable witness included in the pilot intermediaries program, this selection and preparation will include attending the Ground Rules Hearing.*

b. Discuss the role played by the judge in the resolution of disputes. 5 marks

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that gives one or more descriptive statements about what the judge does and/or is responsible for; and • That uses this content as the basis for thoughtful and subjective points on the benefits, drawbacks, effectiveness and/or ineffectiveness of the judge; and • That uses the source material – although not every part of the answer needs to use the source material. • Note that the Study Design requires students to know specific “responsibilities” of the judge. A discussion of the ‘role’ will likely encompass a range of these, but the idea of the ‘role’ is not present in the wording of the Study Design, so has no mandatory requirements attached to it. It should be marked flexibly. • Note also that no final ‘conclusion’ needs to be reached for a ‘discuss’ question.
4 marks	Something slightly less than a sophisticated, complete 5-mark answer. For instance, any of the following in an otherwise excellent answer: • Very little detail on the content of the judge’s ‘role’, rendering some parts of the answer slightly general; or • A slightly brief acknowledgement of the subjective arguments with too much focus on factual content; or • Inadequate use of the source material; or • An answer that meets the criteria for a 5 mark answer, but that contains one or two factual errors that are more than just superficial; or • An answer that is slightly short.
3 marks	• An answer with two of the problems indicated in the 4 mark answer range; or • An answer with any one of the above problems, but present to a larger extent; or • An answer that entirely omits the source material but is strong in every other respect.
2 marks	• An answer that entirely lacks specific content on the ‘role’; or • An answer that contains content detail but little to no subjective argument and thus does not answer the question; or • An answer that makes an attempt at engaging with the question and making subjective arguments supported with content detail, but that has significant content errors.
1 mark	• An answer that provides more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Examples:

- ✓ *The judge ensures that the evidence in the case comes out clearly and according to the rules of evidence and procedure. The provisions allowed for vulnerable witnesses such as the intermediaries pilot are examples of how this is done in special cases. The judge in this programme will need to assess information provided by the intermediary about how questions will need to be asked of the witness to allow them to give the most reliable evidence possible. If the judge is not properly trained in this procedure, or they fail to take the advice of the*

intermediary into account during the Ground Rules Hearing, the witness's evidence may not come out clearly or they may feel intimidated or further traumatised by their involvement. Alternatively, questions could be allowed that grossly contravene the normal rules of evidence, and that wouldn't be fair to the parties.

- ✓ *The judge has the responsibility to ensure that both parties received natural justice, and so plays an important part in the fairness of the system. This involves giving each party a fair and equal opportunity to present their case, and ensuring that consistent rules and laws are applied to each party so the case will hopefully be decided on the basis of evidence and law. This will always be an ideal rather than a practical thing to achieve, though, because the judge has limited ability to equalise the resources and representation of the parties, or the knowledge of the legal system that each has. They have greater powers of case management than ever before, since the passing of the Civil Procedure Act 2010, but they still need to remain independent.*
- ✓ *The judge's role of awarding remedies such as damages and injunctions if the plaintiff is successful gives them the power to try to right a wrong that has happened in the community. Damages, for instance, often aim to restore the thing that was lost by the rights infringement, and the judge has the responsibility of trying to assess what that will require. The difficult part of this is that options for remedies are limited – even injunctions cannot order the defendant to do just anything – but money can be inadequate. If someone loses a limb or a loved one, even trying to 'compensate' it with money feels ineffective.*

c. Identify two alternative arrangements that may be put in place for witnesses classed as 'vulnerable'. 2 marks

MARK RANGE	QUALITIES OF ANSWER
2 marks	• An answer that clearly identifies two alternative arrangements; and • That uses the source material – this may be a fairly superficial reference, given the low marks, or one of the alternative arrangements may come from the source material itself.
1 mark	• An answer that provides more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly; or • An answer that identifies two alternative arrangements, but that makes no reference to the source material.

Example: *Some vulnerable witnesses can be appointed an intermediary to assist with communication during questioning. Vulnerable witnesses may also be shielded from the accused in court by a screen, if the accused chooses to give evidence in the courtroom.*

- d. Describe one recommended reform to the criminal justice system and comment on how it might enhance the ability of the system to achieve justice. 5 marks**

MARK RANGE	QUALITIES OF ANSWER
5 marks	- An answer that clearly identifies and provides some detail on one appropriate reform (note that a <i>recent</i> reform must receive zero marks); and - That provides one or more thoughtful and subjective points on the benefits of this reform, supported by content detail; and - That uses the source material. Note that benefits of the reform may also include criticisms of the current system and reasons why the reform is needed.
4 marks	Something slightly less than a sophisticated, complete 5-mark answer. For instance, any of the following in an otherwise excellent answer: - Very little detail on the reform, rendering some parts of the answer slightly general; or - A slightly brief acknowledgement of the subjective benefits, with too much focus on factual content on the change; or - Inadequate use of the source material; or - An answer that meets the criteria for a 5 mark answer, but that contains one or two factual errors that are more than just superficial; or - An answer that is slightly short.
3 marks	- An answer with two of the problems indicated in the 4 mark answer range; or - An answer with any one of the above problems, but present to a larger extent; or - An answer that is based on a reform that is too general and doesn't clearly say what specific change is recommended or by whom it is recommended (even in a general sense, as though the student plucked it out of their imagination), but that otherwise answers the requirements of the question; or - An answer that entirely omits the source material but is strong in every other respect.
2 marks	- An answer that entirely lacks any clearly-identified reform; or - An answer that contains content detail but little to no subjective argument on the benefits and thus does not answer the question; or - An answer that makes an attempt at engaging with the question and making subjective arguments supported with content detail, but that has significant factual errors.
1 mark	An answer that provides more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Problematic examples:

- × *One recommended reform is to provide more funding for legal aid. This would benefit the system because... [etc]*

This is an example of a reform that is too general. There is no clear change, no plan for implementation, no source, and no clear identification of what the funding is to be used for specifically.

- ✱ *In its January 2014 paper, 'Delivering high quality criminal trials: consultation and options paper', Victoria Legal Aid ('VLA') recommended that a statutory public defenders scheme be established. This would involve parliament passing legislation to create an office of dedicated, full-time criminal barristers, paid a fixed salary from public monies, who would have the task of representing criminal defendants who qualified for Legal Aid. Victoria could base a scheme on similar models operating in other jurisdictions. For instance, New South Wales has a statutory public defenders scheme. Barristers are appointed through legislation, and have salaries at the same level as crown prosecutors. The VLA reported: "As a result, it attracts very senior barristers who appear in many legally aided trials, particularly in the Supreme Court."*

This answer focuses too much on the factual content of the reform and fails to engage with the 'comment' part of the question.

- e. To what extent do the provisions made for vulnerable witnesses help the criminal justice system achieve the principles of justice? 6 marks**

MARK RANGE	QUALITIES OF ANSWER
6 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 <i>more than one</i> alternative arrangement provision; and • That uses detail and/or examples in the explanation of these subjective arguments; and • That draws meaningful connections between the arguments and at least two of the three principles of justice ('meaningful' meaning that it does more than merely repeat the names of the principles); and • That uses the source material in some parts of the answer. • Note that 'both sides' do not technically need to be covered in a 'to what extent' question, depending on the opinion that is given in answer.
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 vulnerable witness provisions, rendering some parts of the answer slightly general; or • Slightly too brief an acknowledgement of a second provision, relying too much on a single provision; or • A slightly brief acknowledgement of the benefits and/or drawbacks, with too much focus on factual content; or • A tendency towards superficial naming in the use of the principles of justice; 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 uses one principle of justice in a sophisticated way, but makes no mention of another.

3-2 marks	• An answer that entirely lacks a second provision; or • An answer that contains content detail but little to no subjective argument relating to the benefits, and thus does not answer the question; or • An answer that uses only one of the principles of justice, and not in a sophisticated way; or • An answer that makes only one or two arguments; or • An attempt at engaging with the question and making subjective arguments, but with significant content errors that work to undermine the quality of the answer as a whole.
1 mark	• More than nothing accurate and responsive, but essentially only one valuable point, made fairly briefly.

Example arguments:

- ✓ *Accommodating the special needs of witnesses 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. Even though witnesses and victims are not parties to a criminal matter, they are recognised as stakeholders and their interests and needs are taken into account and given avenues for recognition so they can participate effectively.*
- ✓ *Vulnerable witness 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. Until the court has found that a crime occurred the witness is not legally a 'victim', but as a complainant they are saying they have been harmed by the person on trial; it is therefore important in the interests of fairness for them to receive some protection from a person they are intimidated by because we as a society value feelings of safety and protection from trauma.*
- ✓ *The pilot programme for intermediaries tries to achieve an outcome-based equality for witnesses who have special vulnerabilities such as cognitive disabilities. Without providing a support person for communication, it is likely that particularly vulnerable witnesses including child witnesses would not have the same ability to give persuasive evidence and influence the outcome of the trial. The differentiated treatment and specialised communication plan do not treat each witness equally in a blunt procedural way, but this is foregone in favour of the more important achievement of having a more equal ability to engage in the trial and give evidence.*

Question 2 (20 marks)

- a. Explain two enforcement issues that might affect the decision of a potential plaintiff to launch civil proceedings. 4 marks**

Note that only material relating to the *first two* identified issues should be marked. Markers should use their judgment as to when the student strays into multiple issues – sometimes the line between elaboration and a new answer is unclear.

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that gives a clear and comprehensive explanation of two issues, identifying them and then providing detail or elaboration; and • That uses the source material in a meaningful way. • Note that the issues do not need to be described in equal depth. One may take up more of the answer than the other.
3 marks	An otherwise 4-mark answer that has one of the following faults: • It lacks detail in the description of one of the issues that is not made up for in quality of the other; or • It fails to describe a second issue entirely, but provides an exceptional explanation of the first issue; or • It lacks meaningful use of the source material; or • It fails to identify two clear issues and instead blends them together into an overall picture; or • It has a small but significant content error; or • It is overall a little short.
2 marks	• An answer that fails to give a second issue entirely, but that describes the first one well; or • An answer that identifies two issues but fails to give adequate elaboration on either; or • An answer that fails to use the source material entirely; or • An answer that has multiple content errors, or a fundamental error that undermines the answer as a whole, in a response that otherwise answers the requirements of the question.
1 mark	• An answer that contains multiple problems identified in the 2 mark range but that provides something that is more than nothing; or • An answer that merely names two issues and fails to provide even a sentence outline of either; or • An answer that gives only enforcement orders the courts can make, and fails to answer the question on enforcement <i>issues</i>.

Example arguments:

- ✓ *The defendant may not have the financial resources to satisfy the judgment against them if damages are awarded. In a class action, for instance, the damages can be significant because they are for an entire class of person and not just one individual; damages can add up to millions of dollars – in Camping Warehouse v Downer EDI, for instance, the legal fees being almost \$3m suggests a payout in the millions for the defendant.*
- ✓ *The plaintiff may not have the financial resources left to bring the matter back to court if the defendant fails to follow through on the award of damages. The courts have the power to make enforcement orders, but only if the plaintiff brings it to their attention that the defendant has*

failed to satisfy the judgment; this requires more money for filing fees, solicitor advice and casework, and lost interest on investments in the meantime.

- b. Jeri is considering launching a civil action. How might costs factor into the decision of any potential plaintiff to pursue justice for a civil wrong? 4 marks**

MARK RANGE	QUALITIES OF ANSWER
4 marks	• An answer that provides meaningful engagement with multiple arguments in relation to costs; and • That provides support for the arguments in the form of specific detail and/or examples; and • That draws meaningful connections between the arguments and reasons why that might influence a complainant's decision; and • That has meaningful use of the source material.
3 marks	• An answer that meets all the criteria for a 4-mark answer, but is inadequate in one aspect; or • An answer that meets all the criteria for a 4-mark answer, but that contains a few small errors of understanding or fact.
2 marks	• An answer that lacks meaningful engagement with any arguments (for instance, that merely states 'costs are high' and gives examples) but that contains some specific detail and uses the source material; or • An answer that meaningfully engages with multiple arguments, provides supporting detail and/or examples and draws connections to parameters of effectiveness, but that fails to use the source material entirely; or • An answer that really only gives one point, but that backs it up with some use of the source material and an example; or • An answer that meets all the criteria for a 4-mark answer, but that contains significant errors of understanding or fact.
1 mark	• More than nothing accurate and responsive, but essentially only one valuable point, made fairly briefly.

Example arguments:

- ✓ *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. Occasionally they will balance the costs of taking action against the potential moral victory – for instance, when asking for nominal damages; mostly, however, the costs will be weighed against the likely damages. 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 – the outlay is too risky, and is not worth it in the long run, even with the possibility of some money being recouped through costs orders.*
- ✓ *In a class action, in particular, the person considering being the named plaintiff needs to think about the costs burden they will be taking on on behalf of the group. As the source explains, the costs of losing are "solely borne by the representative plaintiff" – these are the costs of bringing the action, but also the costs of adverse costs orders if the claim fails. The named plaintiff may decide that these responsibilities and risks are too great to take on unless the action is funded by a litigation funder or a 'no win no fee' arrangement; if this happens, though, the final payout to class members is going to be significantly decreased because the funder, we are told by the VLRC, "will necessarily be rewarded from any settlement or judgment amounts for taking on this 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 answer concentrates only on giving examples of costs, and fails to link them to the question about the potential plaintiff being influenced by them.

- c. The Supreme Court of Victoria is the only state court with the power to hear representative proceedings. Identify and explain two reasons that justify the arrangement of courts into a hierarchy with some having more power than others. 6 marks**

Note that only material relating to the *first two* identified reasons should be marked. Markers should use their judgment as to when the student strays into multiple reasons – sometimes the line between elaboration and a new answer is unclear.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that gives a clear identification of two reasons; and • That goes beyond the identification to provide detail or elaboration on both; and • That links these reasons to the idea of some courts having more power than others; and • That uses the source material in a meaningful way. • Note that the reasons do not need to be described in equal depth. One may take up more of the answer than the other.
5 marks	An otherwise 6-mark answer that has one of the following faults: • It lacks detail in the description of one of the reasons that is not made up for in quality of the other; or • It fails to make the link between reasons for a court hierarchy and the power of courts in a meaningful way; or • It lacks meaningful use of the source material; or • It has a small but significant content error; or • It is overall a little short.
4 marks	An answer that is competent and responsive and that answers the requirements, except for having one of the following faults: • It fails to describe a second reason entirely (even if it names it), but provides an exceptional explanation of the first; or • It lacks some detail overall in both of the reasons; or • It fails to make the link between reasons for a court hierarchy and the power of courts; or • It lacks any use of the source material; or • It has more than one small but significant content errors, or one error that undermines one part of the answer.
3 marks	An answer that is basically competent and that answers the requirements, except for having one of the following faults:

	• It fails to identify two clear issues and instead blends them together into an overall picture; or • It fails to describe a second reason entirely (even if it names it), and has only a competent explanation of the first, but does use the source material; or • It has multiple content errors that are significant but do not undermine the entire answers.
2 marks	• An answer that gives a competent explanation of one reason but fails to address either a second reason or the source material; or • An answer that identifies two issues but fails to give elaboration on either or to use the source material; or • An answer that has at least one fundamental error that undermines the answer as a whole; or • An answer that provides some relevant points from the source material, but that fails to explain how they are relevant to the 'reasons' asked for in the question.
1 mark	• An answer that contains multiple problems identified in the 2 mark range but that provides something that is more than nothing; or

Example arguments:

- ✓ *The vertical hierarchy allows courts to specialise, meaning that personnel can gain expertise in the areas of law, evidence and procedure that suit the types of cases they hear. The Supreme Court, for instance, specialises in more complex matters such as representative proceedings. The County Court has the power to hear unlimited claims for damages, but class actions can be particularly complex and can involve a great deal of evidence because of the large number of group members that can be involved. The Supreme Court having special jurisdiction over class actions allows its personnel to develop this specialised knowledge through experience.*
- ✓ *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, findings of liability or awards for damages) or on questions of law, and involve the higher court being asked to scrutinise the original decision-maker. In the case of a class action, this would involve the three-justice Court of Appeal reviewing the decisions made by a Supreme Court single justice, as this is the court the proceeding would have been heard in originally.*

d. Discuss the ability of representative proceedings to enhance access to justice.
6 marks

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that provides one or more thoughtful and subjective points on the benefits of representative proceedings; and • That illustrates these arguments with content detail; and • That connects these points to the concept of 'access' in a meaningful way (for instance, that goes beyond repetition of the mere word 'access'); and • That uses the source material in a meaningful way. • Note that no final 'conclusion' needs to be reached for a 'discuss' question.
5 marks	Something slightly less than a sophisticated, complete 6-mark answer. For instance, any of the following in an otherwise excellent answer: • Slightly inadequate detail on representative proceedings, rendering some parts of the answer slightly general; or • A slightly brief acknowledgement of the benefits of representative proceedings, with too much focus on factual content; or • A slightly repetitive or superficial use of 'access'; or • Inadequate use of the source material; 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 • An answer with any one of the above problems, but present to a larger extent; or • An answer that entirely omits the source material but is strong in every other respect.
3 marks	• An answer with two or more of the above problems; or • An answer that fails to make any connection to the concept of 'access' but that has good detail on representative proceedings; or • An answer that fails to provide detail on representative proceedings and instead relies on general or vague statements; or • An answer with factual errors that are significant enough to undermine parts of the answer; or • An answer that limits itself to only one point, even though it executes that one point very well.
2 marks	• An answer that entirely lacks any detail on representative proceedings; or • An answer that contains content detail but little to no subjective argument and thus does not answer the question; or • An answer that makes an attempt at engaging with the question and making subjective arguments supported with content detail, but that has significant content errors.
1 mark	• An answer that provides more than nothing accurate and responsive, but that is essentially only one valuable point, made fairly briefly.

Example arguments:

- ✓ *The original purpose of implementing a representative proceedings regime in 1992 was to enhance access to justice by reducing the cost of court action to the individual plaintiff, in situations where multiple people had been harmed in similar fact scenarios. The purpose of the reform in the first place was to allow people to achieve redress, even in situations where they could not afford to initiate proceedings themselves and especially when the defendant was a powerful and wealthy organisation. These instructions were part of the ALRC's advice in 1988 and guided the provisions in the legislation.*
- ✓ *In 2013 Federal Court justice Bernard Murphy said in a speech, when Queensland was considering adopting the same regime as Victoria has, that representative proceedings should be introduced there because laws are "no more than an illusion" if they say they protect people but no-one can use them in practice; class actions were therefore "important in improving access to the protection of substantive laws," partly because the group members bear no risk in terms of the costs of losing, as outlined in the source material, and do not need the money to fund the legal advice and representation in the first place.*
- ✓ *Because the financial risks for the entire group are borne by the named plaintiff, it could sometimes be difficult finding a group member willing to take on those responsibilities on behalf of the rest of the group. Class actions are often launched with respect to matters of a public interest and where vulnerable complainants are concerned – for instance, with the recent proceedings on behalf of asylum seekers detained offshore. The most thorough research into the regime in Australia, by Prof Vincent Morabito, shows that the average named plaintiff is a middle-aged white professional male, and surmised that this was because the representative plaintiff needed to be comfortable taking that risk. Not all actions may find such a plaintiff to give the other group members access.*