

# 2022 VCE Legal Studies external assessment report

## General comments

The 2022 Legal Studies written examination required students to demonstrate application, analysis and synthesis skills, with a particular emphasis on the application of legal principles to actual scenarios. Command words such as ‘analyse’, ‘discuss’ and ‘evaluate’ require higher-order thinking. Responses to the 2022 examination indicate that the following areas of the study require extra attention by teachers and students: the role of the High Court in interpreting, and acting as a guardian of, the Australian Constitution; the principles of justice; the ability of parliament to change the law; civil pre-trial procedures; and the Victorian Law Reform Commission (VLRC).

The following advice is provided for teachers and students when developing responses to questions with the command words ‘analyse’, ‘discuss’ and ‘evaluate’:

- An analysis requires students to examine facts, data or issues in detail. Students should consider whether their response examines an issue in more detail, or merely provides a comprehensive explanation of the question topic. Words such as ‘moreover’, ‘therefore’, ‘for example’, ‘this can be seen’, ‘this is significant’, ‘in contrast’, ‘in particular’ or ‘in this instance’ can be used to demonstrate an analysis.
- A question that asks students to ‘discuss’ is multi-faceted and may be approached in several ways. As part of their discussion, students may consider limitations, restrictions, weaknesses, circumstances and/or potential reforms, depending on the question. Words such as ‘however’, ‘a limitation’, ‘although’, ‘on the other hand’ and ‘despite this’ can be used to demonstrate a discussion.
- An evaluation requires students to make a judgment about something’s value or worth by considering strengths and weaknesses. An overall conclusion is essential for an evaluation, as are properly signposted points that address both strengths and weaknesses.

The following addresses general examination techniques:

- Students are encouraged to write in blue or black pen and should ensure their responses are legible.
- Students can write in the blank space below the answer lines, but not outside the black margins. If students continued their responses at the end of the booklet, they needed to state at the end of their response that it is continued (for example, by writing ‘PTO’) and label the response at the end of the booklet (for example, by writing ‘Section B, Question 1d. cont’d’). Students should not use asterisks or stars to label their responses. If students do not label, or improperly label, their responses, the part of the response that is continued at the back of the booklet may not be identified and therefore may not be marked.
- Paragraphing and signposting are important to ensure clarity and to allow points to be easily identified. For example, in response to Question 4a., which required students to explain two roles of the VLRC, students should use two paragraphs so that the two roles are easily identifiable. Each paragraph should also commence with a topic sentence that clearly identifies the role they are explaining.
- Time management is important. To prepare for the examination, students should ensure they have not only practised their responses to sample questions but also practised completing the examination within the allocated timeframe. As part of time management, students should also ensure they are not writing too much on a straightforward question (such as Section A, Question 1).

## Specific information

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

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

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

## Section A

### Question 1

Marks	0	1	2	3	Average
%	2	11	39	49	2.4

Many students were able to correctly outline two responsibilities in a civil trial. The most common responsibilities provided were to decide on the admissibility of evidence during trial and to decide on liability. Other responsibilities that could have been outlined included:

- The judge must make sure that correct court procedure is followed.
- During trial, the judge may need to give directions to a jury (if there is one).
- The judge has the responsibility to act in an impartial and unbiased manner.
- The judge has the responsibility to give effect to the overarching purpose, which is to ensure the just, efficient, timely and cost-effective resolution of the real issues in dispute.

Some students wrote about pre-trial responsibilities, such as the responsibility to set a timetable of steps to be undertaken or to order the parties to attend mediation before trial, and therefore could not receive marks. Other students confused civil trial responsibilities with criminal trial responsibilities, and wrote about responsibilities such as to decide whether an accused is guilty or to sanction an offender. Those responses were also not able to be awarded marks.

The following is an example of a high-scoring response. The student has given a brief summary of two responsibilities and made a connection to civil trials by referring to the balance of probabilities as the relevant standard of proof.

*The judge's responsibilities in a civil trial can include things such as directing the jury to ensure that they are best able to understand legal terminology and proceedings. This could include explaining the meaning of the 'balance of probabilities'. The judge will also ensure conformation/adherence to rules of evidence and procedure, such as declaring hearsay evidence inadmissible.*

### Question 2

Marks	0	1	2	3	Average
%	24	10	33	32	1.8

This question required students to explain one reason for using representative proceedings (class actions). To obtain full marks, students needed to demonstrate their understanding of how representative proceedings are beneficial to parties, the court, and/or the community by looking at one reason. That is, they needed to address the 'why'; why are representative proceedings beneficial for this reason?

The most common reason given was in relation to costs; that is, that the commencement of a claim against a defendant on behalf of seven or more people allows group members to avoid the costs of commencing a separate claim themselves, as the lead plaintiff bears the responsibility of costs (and costs can be shared if there is a successful settlement or judgment).

Other possible responses included:

- Class actions reduce costs for defendants as multiple claims are made in one proceeding rather than separate proceedings (thus avoiding multiple court cases and multiple proceedings, all of which will have to be defended).
- It allows the courts to adopt efficiencies in dealing with the claim (i.e. not managing multiple proceedings) and also allows better use of court resources.
- Group members are not subjected to the inconvenience of initiating a civil dispute (having to give instructions, attend hearings, approve pleadings, etc.).
- Representative proceedings allow access to justice by reducing the cost burden on group members and saving time (due to multiple claims being made in one proceeding).

Some students confused representative proceedings with proceedings commenced by a legal representative on behalf of a party, or with committal proceedings. Those responses were not able to be awarded marks. Other students did not provide sufficient detail required to receive full marks or focused more on the definition or explanation of representative proceedings rather than the reason itself.

The following is an example of a high-scoring response. The student has demonstrated the link between the use of representative proceedings and the saving of court time by having multiple claims heard in the same proceeding. The student has also effectively used a topic sentence to introduce their reason.

*One reason for using representative proceedings is to save the court time. Representative proceedings refers to when a group of 7 or more people have suffered loss as a result of the actions of the same defendant entity, deriving from similar or related circumstances and concerning the same point of law. The lead plaintiff assumes most of the responsibility for preparing the representative proceeding on the behalf of other group members. By hearing the claims of multiple groups at once instead of hearing them individually, time may be saved by the court as common arguments which would have been put forward by many parties can be resolved in a single case. While it may lengthen the duration of the representative proceeding itself, it would ultimately reduce the amount of time the court spends resolving related disputes.*

### Question 3

Marks	0	1	2	3	4	5	Average
%	18	17	21	26	15	4	2.2

This question required students to consider, in more detail, the role and ability of the High Court to act as a guardian of the Australian Constitution. The concept of 'guardianship' is incorporated in Unit 4, Area of Study 1, and involves a consideration of the role of the High Court in protecting and 'guarding' the Australian Constitution and the legal principles embedded in that document. To analyse that, students were required to make points such as what 'guardian' means, in what ways the High Court 'guards' the Australian Constitution, what impact this has on the legislature or on laws and/or how this role has occurred in practice.

More specifically, some of the points that could have been made are as follows:

- There are arguments that the High Court was established by the founders to be a constitutional court; one which was intended to be the final decision-maker on what the Constitution means and, above all things, an interpreter of the Constitution.
- In its role as guardian or protector of the Constitution, the High Court must decide what the Constitution means, particularly where there are questions raised about the meaning of words or phrases (e.g. the

scope of external affairs powers), and decide whether a parliament has infringed the principles of the Constitution.

- The guardianship role has been seen in cases such as the *Roach* case, the *Franklin Dam* case and the *Brislan* case, where the High Court has guarded the Constitution by determining what it means or whether the Commonwealth has passed a law beyond its power (where inconsistent laws exist and the High Court is called upon to make a decision on the division of law-making powers).
- In its role as the guardian, the High Court can act contrary to the legislature or the executive. Though this may be seen to be against the idea of administrative efficiency or not allowing the government to follow through with its plans and mandates, it is seen by many as an important part of the separation of powers.
- The guardianship role is not unilateral; it requires a party seeking guidance from a ruling of the High Court when initiating a claim (which requires standing).

Many students were able to explain the role of the High Court and provide an example of a High Court case but were unable to extend this to an analysis. While High Court cases were useful to develop the analysis, some students focused too much on describing the case as opposed to linking it to the idea of guardianship.

Some students discussed the referendum process, but this was beyond the scope of the question. Other students used the *McBain* case, but this was a Federal Court case, not a High Court case.

The following is an example of a high-scoring response. The student incorporated an understanding of guardianship into their response, used paragraphs to separate their points, and used words such as 'This illustrates' and 'However' to demonstrate an analysis.

*The High Court acts as a guardian of the Australian Constitution through its determining of disputes relating to the Constitution and its interpretation of its wording.*

*If a parliament creates a law that is outside of its constitutional law-making powers, the High Court can declare this legislation ultra vires. This illustrates how the High Court guards the Constitution, ensuring that laws that contradict it are deemed invalid and reversed. However, this role is not proactive as the High Court must wait for a case to arise concerning unconstitutional legislation, and must be initiated by a person with standing, as the High Court is unable to declare legislation invalid of its own accord.*

*If a case arises requiring the interpretation of the wording of the Australian Constitution, this is another way in which the High Court can defend it. When these cases arise, the High Court acts as a guardian of the Australian Constitution by interpreting the words in a way consistent with the intentions of the drafters of the Australian Constitution, defending its integrity by either broadening or narrowing the meaning of the words.*

## Question 4a.

Marks	0	1	2	3	4	Average
%	18	10	22	30	20	2.3

To obtain full marks, students needed to comprehensively explain two roles of the VLRC, with reference to the Inclusive Juries project.

Some of the roles that could have been explained are:

- The VLRC may make recommendations to the Attorney-General regarding reform to make juries more inclusive so as to include people who are deaf, hard of hearing, blind or have low vision. They will do this in a final report to be provided to the Attorney-General.
- The VLRC will ordinarily research and consult as part of its background work to help identify the most important issues that need to be considered.

- It can appoint an expert panel or committee, which provides input into the VLRC’s work and its recommendations.
- It may consult relevant stakeholders (experts, community, those affected) to shape recommendations to be made to the Attorney-General about how to make juries more inclusive.
- It may call for submissions from the community about what should be done and their experiences, such as in relation to whether they have been able to be on a jury panel.

This question was generally well handled, with many students able to explain two roles. Some students did not sufficiently explain both roles to be awarded full marks; other students did not refer to the Inclusive Juries project and could not get full marks. Some students suggested that the VLRC had coercive powers and could examine witnesses or hold public hearings. These are not VLRC powers, and no marks could be given for these types of points. Some students focused more on the role of juries, such as how to help people perform their role as a juror, but that was not what the question asked for.

It is important for students to structure their responses to such questions. For example, some students provided a general description of the VLRC, but it was difficult to mark such responses because the two roles were not identifiable. Students are encouraged to structure responses by using two paragraphs, with each paragraph dedicated to one role (which should be clearly identifiable in the first sentence).

The following is an example of a high-scoring response. The student properly used paragraphs and signposted their response by using topic sentences, and incorporated the use of stimulus material into the response.

*One role of the VLRC in this case is to conduct thorough investigation into the issue of access for deaf, blind or vision or hearing impaired people. The VLRC would likely receive public submissions relating to this area of law, as well as consulting with experts, such as judges or experts on juries. This investigation would inform the VLRC of the impact of the law should law reform allow more inclusive juries.*

*Another role of the VLRC would be to make recommendations to the Victorian Parliament following their investigation. These recommendations would include how the law would best be reformed in relation to ‘Inclusive Juries’ to increase access to jury trials for hearing or vision impaired people.*

## Question 4b.

Marks	0	1	2	3	4	5	6	7	Average
%	25	8	10	12	16	16	10	3	3.0

This question required students to make a judgment about the ability of the VLRC to influence a change in the law by looking at the strengths and weaknesses of the VLRC in being able to influence change.

Students needed to refer to one recent example of the VLRC recommending law reform as part of the evaluation. VLRC projects such as those in relation to committal proceedings, sexual offences, litigation funding and class actions, neighbourhood tree disputes and stalking were all accepted as recent examples. The critical factor was that the recent example needed to be part of the student’s evaluation, supporting a point the student made in that evaluation.

Some of the points that students could have made are as follows.

Strengths:

- The VLRC is independent of government, and therefore is able to make recommendations free from political pressures.
- The VLRC is able to consult widely, including with experts.
- The VLRC is able to research in-depth and appoint an expert panel to ensure its recommendations are based on evidence and data.

- The community is able to make submissions as part of the process, therefore community values and views can be considered as part of the recommendations.
- The VLRC is able to initiate community-based projects in certain circumstances (e.g. involving a minor issue that will not take up many resources), and therefore in these situations, it is not constrained by having to wait for terms of reference.
- The government may be more willing to accept recommendations from the VLRC as the authoritative Victorian law reform body and in circumstances where government has provided terms of reference.

Weaknesses:

- It relies on terms of reference from the Attorney-General to investigate an area of law reform (unless a community law reform project).
- It is confined to its terms of reference, therefore depending on the terms, the VLRC may not be able to investigate an area of law comprehensively.
- It can make recommendations to parliament, but there is no obligation for government/parliament to implement recommendations.
- It may be seen as a waste of time and resources for the VLRC to conduct an extensive inquiry.
- VLRC is limited in its ability to conduct community law reform inquiries as they are limited to minor areas of law reform where they will not expend too many resources.

Many students pointed to a strength or weakness of the VLRC by referring to the particular example they had chosen, but others started or ended their response with the recent example, and did not connect the recent example to the evaluation.

Some of the other common errors were as follows:

- Some responses were not comprehensive enough to receive full marks. For example, points were too briefly made, or an insufficient number of points was made as part of the evaluation.
- Some students did not provide a conclusion.
- In some responses, only an explanation of VLRC was provided, not an evaluation.
- Some students used a recent example of Royal Commissions or parliamentary committees, such as examples related to drug testing.
- Some students provided long descriptions of a recent VLRC project, without any attempt to evaluate or incorporate that description into an evaluation.
- In some instances, the VLRC project on medicinal cannabis was used. This is not considered to be a recent example.

The following is an example of a high-scoring response. The student has used paragraphs and signposted their response so that the strengths, weaknesses and conclusion are easily identifiable. The conclusion, while brief, is also supported by an opening statement.

*The VLRC has many strengths and weaknesses in its ability to influence a change in the law, as seen by the VLRC's investigation into the committals system.*

*One strength is that the VLRC holds consultations and receives submissions from the community during their investigations. As Parliament must represent the people, if the VLRC report suggests that the majority of the community believes there is a need for the reform, it is likely to implement changes such as a more inclusive jury that is representative of the community.*

*However, a weakness is that VLRC's recommendations do not need to be implemented by the Parliament. Parliament is under no obligation to implement law reform, and the ability of VLRC to change the law for jurors who are hard of hearing, deaf or blind may be limited. Though the VLRC had 51 recommendations to make committals more efficient and reduce trauma on victims and witnesses, the Parliament has not implemented law reform yet. The test for committals to be abolished and replaced with a discharge application, one of the recommendations, may not be implemented as a result.*

*Another strength of VLRC is that it receives a term of reference from the Attorney-General in order to begin its investigations. This is a strength as Parliament is likely to implement the change as they already believe there is a need for law reform.*

*However, this can also be seen as a weakness as the VLRC is reliant on Parliament in order to begin its investigations, though it is able to investigate small community based projects.*

*Overall, there are a number of strengths and weaknesses of the VLRC in its ability to influence a change in the law.*

## Question 5

Marks	0	1	2	3	4	5	6	7	8	Average
%	11	6	11	16	25	17	10	3	1	3.6

This question required students to analyse how the Australian people could impact this suggested change to the Australian Constitution as part of the referendum process.

To receive full marks, students were expected to undertake a comprehensive analysis and refer to the stimulus material in their response. Students were also expected to demonstrate an understanding of the double majority requirement, and more particularly an understanding that this change would only be affected if there was a successful referendum.

A broad interpretation of 'impact' meant that students could consider the following as part of their analysis:

- ways that the Australian people could influence parliament to propose the change or influence the way other people would vote in the referendum, such as through petitioning, demonstrating or lobbying
- the ability of the Australian people to exercise their right to vote in future elections if governments do not introduce the proposed change
- the influences on the way in which people vote or what may impact on how they vote (such as whether they understand the change; whether the change is clear; whether there is bipartisan support; the timing of the referendum and whether there is a strong 'no' case). In doing so, students could have drawn on what they knew about previous referendums to consider what factors may influence the Australian people's decision to vote yes or no.

More specifically, some of the points that students could have made are as follows, based on the material they were provided in the exam:

- The only way the words of the Australian Constitution can be changed is through a referendum. This is set out in section 128 of the Australian Constitution. This process acts as a restriction on the powers of parliament because they cannot change the Constitution without double majority support. This strict requirement ensures that the wording of the Constitution can be changed only with the agreement of voters.
- More particularly, a double majority provision must be satisfied, which includes a majority of voters in the whole of Australia, and a majority of voters in a majority of states.
- Australians could impact or influence the establishment of a First Nations Voice by directly lobbying or petitioning parliament to introduce the change. This is particularly important because, as part of the referendum process, the houses of parliament need to approve the proposed change first. This may require the Australian people to put pressure on parliament to introduce such a change.
- Given the parliament is expected to be representative of the people, parliament should listen to the views of the majority. If the majority agrees with establishing a First Nations Voice, then it should respond by putting the vote to the people.
- Moreover, and connected to this, the Australian people could exert this influence by making this a voting or election issue, particularly if the timing of the referendum is close to a federal election.

- History suggests that Australian people are swayed by factors such as bipartisan support, clarity in the proposed change, and whether there is a strong 'no' case. All of those factors can influence the ability of the Australian people to vote, and thus impact whether the people agree with the change.
- Given parliamentary representatives often vote along bipartisan party lines, there is a question as to how voters may be influenced. In particular, people tend to vote according to party lines, and there is no information in the material to suggest whether this will be a proposal supported by both major political parties.
- Voting patterns reflect a preference for the status quo, particularly where suggested change or reasons for change are not clearly understood. Therefore, the impact of the people to establish a Voice to Parliament may depend on their ability to understand the proposal and their willingness to read the material that is sent to households. It is not clear from the material what the nature of the proposal is and what sort of material will be sent; this could influence what impact the people have here.

Some of the common errors made are as follows:

- While many students understood the double majority requirement and described the referendum process, many were not able to extend this description to analysis. Generally, those students received around three to four marks.
- Many students were not able to provide enough points to receive full marks and limited their answer to a consideration of only one or two discrete topics.
- Some students referred to previous referenda, such as the 1967 or 1999 referendum, but did not connect what they knew about that referendum back to the question.
- Some students tried to extend their analysis by considering the High Court and its role in interpreting the Australian Constitution, but this was not relevant to the question.

The following is an example of a high-scoring response. The student has addressed a wide range of points relating to 'impact', and used words such as 'This means', 'Additionally,' 'However' and 'This was seen' to demonstrate an analysis.

*The Australian people could have a large impact on the establishment of a First Nations Voice to parliament to protect or change the Constitution as a result of the double majority requirement in a referendum and the means the Australian people can use to promote legislative change.*

*The Commonwealth parliament is elected by the Australian people through the system of preferential voting, which enshrines the principle of representative government. This means that MPs are incentivised to pass legislation which aligns with the interests and values of the people in their electorate in order to retain their seat at the following election. In this case, the Australian people would have a strong ability to influence this legislative change by voting in MPs to the House of Representatives - and also the Senate - who were supportive of a First Nations Voice to Parliament. This is because these MPs could then advance bills or Constitutional Alteration Bills regarding this issue on behalf of the people to change the Constitution.*

*Additionally, the requirement for a double majority in a referendum means that the Australian people could have a large impact on the introduction of a Voice to Parliament. The double majority provision is outlined in s128 of the Constitution and it requires that a referendum proposal be sent out to all eligible Australian voters, who vote 'yes' or 'no' on a proposal. For it to be satisfied, the first test of the double majority is that there must be a majority of voters overall (50%+) of 'yes' votes, and the second test is that there must be a majority of 'yes' votes in a majority (4/6+) of states, in order for a referendum to be successful and passed on to the Governor General for royal assent before becoming law.*

*The Australian public could vote in favour of the reform to advance the social issue of Indigenous Australian representation through the establishment of a First Nations Voice in the Constitution, in order to change the Constitution. With the high standard of support necessitated to change the Constitution, a successful referendum would result in a change to Constitution.*

*However, the Australian people could vote 'no' to protect the Constitution from this Constitutional change. This was seen in the 1999 republic referendum where no Australian state received a majority of 'yes' votes and there was a 40% and 46% 'yes' vote for the two proposals, as the Australian people protected the Constitution from this change.*

*Finally, the Australian people would have a strong ability to establish or prevent the creation of a First Nations voice through means of influencing law reform. Through petitions, demonstrations and use of social media, supporters and opposers of the referendum proposal to alter the Constitution to introduce this amendment could change public opinion to influence the outcome of the referendum and thus whether or not it would be successful, in turn protecting or changing the Constitution.*

## Question 6

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	13	7	9	12	13	13	14	10	6	2	0.5	4.1

This question was a multi-faceted question, which required students to have all of the following features in their response to receive full marks:

- a statement as to what extent the student agreed or disagreed
- points about when pre-trial procedures may or may not be necessary (given the word 'unnecessary' in the statement)
- a discussion of at least one factor, other than pre-trial procedures, that may impact the achievement of the principles of justice. Factors such as delays, accessibility, cultural differences, litigants in rural areas or the five factors to consider before initiating a civil claim could have been discussed
- a consideration of all three principles of justice in their discussion, though not necessarily addressed or discussed to the same degree
- a consideration of how one recommended reform may enhance justice. Recommended reforms such as increased use of Koori hearing rooms in the Victorian Civil and Administrative Tribunal (VCAT), increased access to and use of interpreters, increased legal aid funding for civil disputes, allowing contingency fee agreements, and increased use of case management powers were the types of reforms that were accepted, though there are a number of recommended reforms that could have been explained. Justice could have been considered broadly, or by reference to one or more of the principles of justice. That is, a broad approach to 'justice' could have been taken without reference to any of the principles of justice.

Some of the points that could have been made are as follows. Given the scope of the question, the below points are not exhaustive, and students could have addressed points in different ways or made other points.

Pre-trial procedures:

- In court proceedings, parties need to undergo a number of pre-trial procedures before a case is 'ready' for trial. These procedures can include discovery, directions hearings, pleadings, exchange of evidence, case management conferences and mediation.
- Often, these pre-trial procedures have been considered unnecessary and impacting on the achievement of justice because of their complexities and how expensive they can be. For example:
  - Procedures such as discovery can delay the readiness of a case for trial. A fair trial is one that is resolved efficiently and without delay, and so discovery impacts fairness.
  - Procedures such as exchange of evidence are difficult to understand without a lawyer. This can impact people who do not have the funds to pay for a lawyer and will therefore be at a disadvantage if they are against a party that is well-resourced, thus impacting equality.

- Pleadings are formal documents that are required to comply with court rules as to their format. This can often impede access for parties, particularly parties who cannot afford a lawyer, who may not initiate a claim because of the complexities involved.
- On the other hand, pre-trial procedures are necessary in some situations. For example, mediation is actively used as a pre-trial procedure and is often successful in resolving matters before trial, thus achieving a timely resolution and access to a dispute resolution process that is less formal. In addition, procedures such as exchange of evidence can allow a party to determine the strength of their case and ensure procedural fairness as there is full disclosure, thus achieving fairness.

Factors to consider:

- There are many factors a possible plaintiff will consider before commencing a claim in court. Those include the costs involved in commencing a claim and the delays often associated with court proceedings.
- If a potential plaintiff has limited resources, then negotiation may be seen as an option, and could help to achieve the resolution of a dispute without the need to incur the costs of bringing a proceeding.
- As to enforcement issues, if rights cannot be exercised, there may be a 'hollow' victory. This could impact on fairness in that a person is required to expend significant resources, only to receive nothing at the end.
- As to limitation of actions, although an application can be made to waive limitation periods, a possible plaintiff may not be able to exercise rights if they miss the time period, particularly where there is a shorter limitation period. While limitation periods aim to not have plaintiffs 'sit on their hands' they may also force a plaintiff incurring pre-trial costs to consider whether action is appropriate.
- Delays can also impact on the achievement of the principles of justice (students could explain this in different ways), but at the same time there are some measures that seek to reduce delays, including active management of cases, reducing the burden of discovery, encouraging parties to mediate and at times hearing appeals 'on the papers'.

The question was challenging because of its scope. Some issues with student responses were:

- Some students were not specific enough about the recommended reform they had chosen, used a recent reform instead of a recommended reform or did not make the connection to 'justice'.
- Some students did not address the word 'unnecessary' in their response, and therefore did not consider why pre-trial procedures may or may not be useful.
- Some students did not consider another factor in their discussion.
- Some students did not have enough depth to their response.

The following is the introduction to a high-scoring response.

*This statement is true to a moderate extent. Whilst factors such as costs may inhibit the principles of equality and access, pre-trial procedures are aimed to promote the principle of fairness, and reforms to the system may assist in achieving the principles of justice. Furthermore, alternative methods of dispute resolution offer means other than the courts which may improve these principles.*

*The costs that must be considered when initiating a civil claim are highly significant, and as such, may be viewed as inhibiting the principle of access. Whilst the courts offer a means by which parties may resolve disputes, plaintiffs are often dissuaded from pursuing their rights by the exorbitant costs of legal representation, filing fees and hearing fees, as well as potential jury or expert witness fees. This inhibits these parties' ability to access justice, and is exacerbated by the potential for an adverse costs order if their claim is unsuccessful.*

## Section B

### Question 1a.

Marks	0	1	2	3	Average
%	11	25	42	22	1.8

This question required a comprehensive explanation of one role of the Legislative Assembly (the Victorian lower house) in passing the *Spent Convictions Act 2021*. A reference to the particular Act was required to receive full marks.

Some of the roles that could have been explained are:

- The Legislative Assembly introduced the *Spent Conviction Act 2021* in 2020 for consideration by the members of the lower house.
- The lower house represents the people in considering whether the Act should be passed.
- The Legislative Assembly provides for responsible government through careful investigation and debate on the merits of the Act.
- It debates the merits of the legislation and proposed reform related to spent convictions as part of the legislative process.

This question was well handled. The most common error made by students was confusing the Victorian lower house with the Senate or the House of Representatives. Other students assumed that the lower house was the Legislative Council, and therefore referred to the 25 votes to 14 (which was relevant to the upper house).

The following is an example of a high-scoring response. The student has used a topic sentence to identify the role and has effectively used the stimulus material in their response.

*One role of the Victorian lower house, that is the Legislative Assembly, in making the Spent Convictions Act 2001 is to represent the needs, views, values and beliefs of their electorates when partaking in the (initiating), debating, reviewing and voting of the Bill. As democratically elected members of the Legislative Assembly, the legislative decisions of a member of lower house should reflect the views of the community to achieve the principle of representative government. This can be seen in the Spent Convictions Act 2021, where the Legislative Assembly initiated and passed the Bill onto the Legislative Council for review, meaning that the Bill is likely to be reflective of an abundance of community support.*

### Question 1b.

Marks	0	1	2	3	4	5	6	Average
%	12	9	16	24	22	13	5	3.0

Students were expected to provide an explanation of two reasons for the legislative changes in relation to spent convictions. Meaningful use of the stimulus material was required. Answer structure and signposting were also important to ensure the two reasons were readily identifiable.

Some of the reasons for law reform were as follows:

- Community values or views change over time such as the right to a second chance. In light of the petition and the second reading speech, it is likely that this change has been made to reflect changing community attitudes about historical convictions, and parliament needs to reflect these changes.

- Law should protect the community and protect individual rights. As can be seen from the second reading speech, the legislation is intended to remove barriers to gaining employment, training and housing, all of which can be seen to be fundamental human rights.
- The legislation is seeking to address outdated laws, and more particularly an outdated view that a criminal conviction should stay on a person's record 'forever'. As can be seen in Austin's case, when he committed a crime and was convicted he was 14. It would potentially be an outdated view that this conviction should remain with him for the rest of his life.
- The source material notes that often people have worked hard to turn their lives around, and that historical convictions might preclude an individual from accessing basic training and housing. This change was necessary to ensure 'fairness' because it was a law that discriminated against people like Austin – those who were convicted of crimes when they were young.
- The proposed change would bring Victoria in line with other jurisdictions such as New South Wales, and therefore would allow some consistency across reforms in different states.

While many students were able to identify and explain one reason, many found it difficult to explain a second reason or their two reasons overlapped. Other students found it difficult to link their reason to the stimulus material. Higher-scoring responses gave two specific and independent reasons, as well as referred to specific aspects of the stimulus material.

The following is an example of a high-scoring response. The student has explained two clear, independent reasons, used the stimulus material well, and properly signposted and paragraphed their response.

*One reason why laws concerning spent convictions required reform is that the community's views and values on this matter of law has changed, and therefore the law must be able to keep up with, and reflect the changing views of society in order to be good laws that is in line with the majority of people's values in Victoria. The Spent Convictions Bill is representative of how people in society have viewed that people with a criminal record but with an improved life should be given an opportunity to bid their history of offending goodbye. Therefore, the law has been dynamic to accommodate these changes.*

*Another reason why the laws required reform is to protect the community and its best interests. Individuals like Austin who have worked hard to turn their life around should be protected against discrimination at work, and have their barriers of seeking and gaining employment, accessing practical training or in their application for housing addressed by Parliament. Law reform should protect these individuals from experiencing further impartiality from others and a lack of equal opportunity and status in all areas of their life.*

## Question 1c.

Marks	0	1	2	3	4	Average
%	7	15	46	27	5	2.1

This question required students to consider fairness in the context of Austin, and others like him, and in particular how legislative reform would help to achieve a fair outcome for Austin.

To receive full marks, students needed to expand on what fairness meant in this particular situation, considering Austin and others like him, with some link to criminal law and the criminal justice system (such as the notion of rehabilitation, historical convictions or the possibility that a conviction could act as an aggravating factor in the future). As to 'others like him', students needed to consider who else may be impacted like Austin, such as those with historical convictions or those who had committed an offence when they were younger but had since been rehabilitated.

Many students found it difficult to describe what fairness meant in this situation. Many students also found it difficult to connect the material to the criminal justice system.

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

*Through the reformed Spent Convictions Act 2021, the Victorian Parliament has increased the ability of previously convicted individuals such as Austin to achieve fairness. As seen in the Act, those ‘under the age of 15 years’ at the time of conviction are now able to have their conviction immediately ‘spent’ after 5 years. This enhances fairness as the trauma and hardship suffered for ‘children or young offenders’ is dramatically reduced. By allowing young offenders the chance to redeem themselves for past offences, the Spent Convictions Act 2021 enhances fairness as trauma is reduced. Further, the Spent Convictions Act increases the chance of offenders rehabilitating themselves. The prospect of their conviction being ‘spent’ means offenders such as Austin are likely to rehabilitate and avoid reoffending in the future, thus enhancing fairness.*

## Question 1d.

Marks	0	1	2	3	4	5	6	7	Average
%	22	12	15	16	17	12	5	1	2.6

This question required an evaluation of the ability of the Victorian Parliament to respond to the need for legislative reform. Specific and accurate use of the stimulus material was required for full marks, as was a consideration of strengths, weaknesses and an overall assessment of the parliament’s ability.

Given this legislative reform had actually succeeded, students should have considered that in their response. That is, in this particular situation, the Victorian Parliament responded to the need for change because the *Spent Convictions Act* was passed. This lent itself to talking about the strengths of parliament in being able to respond.

Some of the points that could have been made are as follows.

Strengths:

- The Act was passed by both houses, with sufficient opportunity to review and propose amendments. The upper house was able to act as a house of review by checking on the purpose of the Bill and debating the need for legislative reform. The vote in the upper house was overwhelmingly in favour of the change.
- As the Victorian Parliament is elected by the people and is expected to represent the views of the people in law making, it can gauge the community’s views through a variety of methods such as social media, consulting with electorates and utilising its committee system, or even referring an issue to the VLRC.
- The Victorian Parliament can move quickly to pass laws when the need arises, especially if the government controls both houses. This Bill was initiated, passed and given royal assent within six months.
- Both houses would have been able to debate the legislative reform, so all members get the chance to say what they like and do not like about the proposed law.
- There can be in-depth investigation via a parliamentary committee to investigate the specific section related to the change, which provides for greater accountability.
- The Victorian Parliament is not constrained like the courts are with respect to factors such as standing, costs and time, and can change laws whenever it likes.

Weaknesses:

- Parliament can be seen to be slow to change in areas which are controversial. Parliament may also be subject to various pressures to change or not change the law.
- The legislative process can be complex and slow. Sometimes changes to the law can take many months or years to be implemented as legislation.

- When controlled by the Opposition and minor parties, the Legislative Council's behaviour, debates and discussions can frustrate the legislative agenda of the government. A bill such as this one may get caught up in party politics.

Some of the errors in the responses were as follows:

- Some students did not use enough of the stimulus material, writing more about the weaknesses of the Victorian Parliament, but ignoring the point that the parliament did in fact respond to the need to change the law.
- As an alternative, some students referred to the fact that the parliament had changed the law, but could not extend this to considering weaknesses.
- Some students provided a description of parliament or its law-making processes, rather than an evaluation.
- Many students evaluated the courts, but that was not within the scope of the question.

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

*The Victorian Parliament is able to very effectively respond to the need for change to spent convictions laws.*

*Firstly, the bicameral structure of parliament ensures all proposed laws are very well considered, given the bill must be passed by both houses in its final form, allowing ample time for scrutinization, debate, and amendments to ensure the spent convictions law is highly effective and appropriate.*

*However, the bicameral structure does mean there is a lengthy law making process, with the bill passing in the Legislative Council 'a few months later', and by the Governor 'six weeks later'. This is a fairly lengthy delay, that may have impacted offenders who were waiting in limbo for the bill to pass, before they could 'improve [their] life'. Additionally, if it was a more urgent bill, the bicameral structure may have been even more of a prominent barrier.*

*Secondly, the Victorian Parliament is responsible to their electors, ensuring that they act in the best interests of their community. In this case, the change in community values and community support for the Spent Convictions reform, as signalled by the petition that Austin signed, meant that law makers were more likely to respond to the need for change, given their electors supported it. This responsiveness allows the Victorian Parliament to make laws that are accepted and wanted, and the three-year election cycle allows the Victorian Community to vote out parliamentarians who are not effectively responding to the need for law reform, thus ensuring necessary changes, such as the Spent Convictions bill, are passed.*

*However, this pressure from constituents may also be a limitation, as the frequent elections means law makers may pass short term legislation that panders to their constituents, instead of important long term reform that may not be as topical for constituents. In this case, the Victorian Parliament still demonstrated an ability to overcome that challenge, given the Spent Convictions Act was passed, although that may not be possible for all cases.*

*Thus overall, the Victorian Parliament responded very effectively to the need to change spent Convictions laws, despite the few limitations they faced.*

## Question 2a.

Marks	0	1	2	3	Average
%	5	15	48	31	2.1

This question required a comprehensive explanation of the role of Victoria Legal Aid (VLA) and community legal centres (CLCs) in relation to the toll road debt recovery system. To achieve full marks, students needed to explain one or both of the following roles:

- VLA and CLCs provided legal assistance to people who have been given fines as a result of failing to pay tolls for the use of roads. This legal assistance may have been in the form of the provision of free legal information or giving them advice about whether they should dispute paying the fine. In some instances they may have offered duty lawyers services or ongoing representation, particularly in cases which were more serious.
- VLA and CLCs were seeking to influence change through issuing a 'briefing paper'. In particular, they called for law reform on behalf of the people in their communities who have been disproportionately affected by the toll debt system.

In some instances, students mentioned that the VLA and CLCs will provide legal assistance but did not explain what type of legal assistance that may be. Other students mentioned that the VLA and CLCs require people to satisfy the means and merits test to be able to receive legal assistance, but this is not correct, as some types of legal assistance are available to everyone.

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

*The role of VLA and Victorian CLCs is to provide free legal information and advice. VLA provides free legal information and advice and can assist those facing charges for not paying their toll fines over the phone, on their website or in person and assist individuals by providing information on the procedures and steps required.*

*CLCs also provide free legal information over the phone, in one of their centres or through their published works, such as the Fitzroy Legal handbook, which can inform those facing charges in the Magistrates' Court on the steps and procedures of court.*

## Question 2b.

Marks	0	1	2	3	4	5	6	Average
%	10	8	17	25	25	12	4	3.0

This question required a consideration of how the existing toll debt system may not achieve equality and/or fairness. Both reasons could have been in relation to fairness, or equality, or one in relation to fairness and one in relation to equality. Students were required to consider what equality and fairness meant in the context of the question and what they knew about the toll debt system.

Many students found it difficult to connect equality and fairness to the toll debt system. Other students repeated the same reason or paraphrased the information that they were provided.

Some of the points that could have been made based on the material provided are as follows:

- The collection of toll road debts through the court systems is allegedly putting pressure on over-stretched courts, and is taking up magistrates' 'precious' time. This can impact on people who have their cases in the criminal justice system, as there are unnecessary delays caused. Delays impact on equality (as often more vulnerable people, including those in jail waiting for their case to be heard, can be disproportionately impacted by delays) and fairness (as delays are contrary to a fair trial).
- The tolls fine system has been criticised for delivering 'harsh and unequal outcomes for people, especially those in Melbourne's outer suburbs'.
- New South Wales has already changed their approach to bring it into line with other civil law debt recovery approaches. Victoria could also take this step towards fairer and more consistent legal processes.
- The imposition of fines and imprisoning people does not take into consideration the individual characteristics of people, including discerning between those who 'can't pay' and those who 'won't pay'.
- There is a question as to whether a person should be imprisoned because they are unable to pay the fine, as mentioned in the stimulus material.

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

*One reason why the toll road debt recovery system may not achieve fairness is because it may introduce delays in the wider courts system. By hearing lots of minor claims with individuals charged with not paying road tolls in the Magistrates' Court, this prevents the Magistrates' Court from hearing more pressing criminal claims. It takes up a great deal of time, which limits fairness by preventing accused persons from having access to the right to trial without unreasonable delay. This is a right enshrined in the Charter of Human Rights and Responsibilities Act. This limitation is particularly salient given there is a proposed change to alter road tolls to become a civil matter, enabling individuals to resolve their matter directly with Citylink or Eastlink rather than through the courts, which may allow for fairer outcomes and free up court resources and time.*

*One reason why the toll road debt system may be limited in achieving equality is because the current system disproportionately affects those living in the outer suburbs. Because individuals living in the outer suburbs are more likely to need to use the tollways on a daily basis to travel long distances to get to work, they are disproportionately punished by the current toll road debt system. By recording criminal convictions and potentially sentencing offenders to jail time for failing to pay these road debts, their disadvantage can be perpetuated. As expressed by the VLRC and CLCs, a change to this system could prevent the unequal outcomes for people that is a challenge with the current regime by penalising individuals who are already disadvantaged by their physical location, allowing for equality. This is because these groups are more likely to be financially unable to pay their debts, rather than simply choosing not to.*

## Question 2c.

Marks	0	1	2	3	4	5	6	Average
%	11	8	17	26	25	10	2	2.9

This question required students to consider whether fines and imprisonment are less appropriate than damages. For the purposes of this question, students were not expected to know the difference between a 'debt' and 'damages', and responses which assumed that a debt is damages were accepted. As noted in the general comments, a discussion is more than explanation, and in this question students could engage in a discussion by writing about why fines and imprisonment are less appropriate, and on the other hand why damages may be more appropriate (or vice versa).

Students could discuss this in a variety of ways, such as through the purposes of fines, imprisonment and damages, or through the nature of what a toll road debt is. Students were expected to specifically address each of fines, imprisonment and damages, rather than sanctions and remedies more broadly.

Many students found it difficult to expand their points to get full marks. While many were able to write about the fact that imprisonment is not appropriate for non-payment of toll road debt, they were not able to extend this into a fulsome discussion. Higher-scoring responses drew on some of the following points:

- The VLA and CLCs noted that 'People do not go to prison for failing to pay other private debts, and they should not be jailed for non-payment of road tolls'. Where a loss suffered is purely financial, such as toll debt, the payment of the debt to the private operator is arguably the most appropriate way to compensate a person.
- The non-payment of a toll debt is arguably not a threat to society requiring the public to be protected from it.
- The New South Wales case could be seen to demonstrate that toll debts to privately owned companies can be enforced in the same way as other civil law debts.
- Fines are commonly imposed for other driving offences (e.g. speeding, red light cameras), which maintains consistency in penalties for road users who do the wrong thing.

- Imprisonment is reserved for more serious road offences, such as culpable driving, repeat drink driving and sometimes where there is consistent non-payment of fines. Imprisonment may be more appropriate where there is a refusal to pay a debt legitimately owed and for recidivist offenders.
- Imprisonment and fines do not achieve the purposes of compensation or restoration as they are not paid to the private toll operator; therefore, damages could help to compensate the private toll operator.

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

*Damages are more appropriate in the recovery of road toll debt than fines are, and certainly more appropriate than imprisonment.*

*Firstly, as the debt collector is a privately owned company, it is more appropriate that they utilise the civil system- as other privately owned companies must, and therefore receive damages, rather than the penalty of a fine being imposed. Damages still allow the debt to be recovered, and thus ensures tolls are being paid.*

*However, in the civil system, if the defendant cannot afford damages, it is difficult for the debt collector to enforce them, and thus may limit the ability of the road toll company to recover the debt. Additionally, if the defendant is overseas or unreachable, the damages also may not be paid. Therefore, this may limit the appropriateness of damages, and mean another option- such as a fine, where a long-term payment plan could be installed, and the payment is more enforceable, may be more appropriate.*

*Imprisonment may be effective at deterring others from not paying, and deterring the offender from avoiding tolls again, thus minimising the need for the company to avoid debt, it is not as appropriate as damages. This is because imprisonment is the 'sanction of last resort', and used to punish the offender for serious crimes. Given this is against a privately owned company, and there is no damage to property or person, it is not an extremely serious crime, therefore meaning imprisonment is less appropriate than damages.*

*Thus overall, damages are the most appropriate method of road toll debt recovery given this should be a civil issue, because it involves a privately owned company, although there are some limitations to damages enforceability.*

## Question 2d.

Marks	0	1	2	3	4	5	Average
%	20	9	21	31	16	3	2.3

This question required students to draw on the stimulus material to analyse the impact of the toll road debt recovery system on the courts. Given this was an analysis question, students were expected to consider in more detail the extent to which and how the debt recovery system alone is impacting the courts, and whether the recommended reforms in the stimulus material could shift the burden away from the courts.

While many students were able to explain the impact of the toll debt recovery system on the courts, very few were able to extend this to an analysis. The following points could have been made:

- Time is a factor that can limit access to justice for various reasons. Delays can impact more vulnerable people, such as those who are elderly, in remand or who suffer mental or physical health issues, and can impact people's memories and evidence.
- According to Source 1, the toll debt recovery system 'places a heavy burden on courts' and '[places] unsustainable pressure on already overstretched courts'. In particular, the Magistrates' Court is likely to be largely impacted by the system. The Magistrates' Court hears the vast majority of criminal cases in Victoria, yet the court is burdened to deal with these issues that could be dealt with through other means.

- This can impact other cases, and thus impact access to justice, particularly for victims who are seeking an outcome of a criminal case that has affected them. It can also impact the right to be tried without unreasonable delay.
- Rather, the recommended reforms could help alleviate these issues. It could remove these debt recovery matters from the Magistrates' Court and the court may only need to deal with them when they become serious or where there are persistent failures to pay the debts.

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

*The current toll road debt recovery system has a negative impact on the already overburdened criminal system, thus reducing access.*

*Currently, the criminal justice system is overburdened, causing delays in hearings and trials. Cases may be delayed by anywhere from a few weeks, to many months. These delays impact negatively on the accused, given they must retain legal representation for an extended period of time, and there is a long period of limbo for both the accused and the victim where they are unaware of the outcome of the case. This severely reduces access to a timely trial, and may mean an accused cannot afford legal representation. Moreover, delays decrease the reliability of evidence, and first hand witness accounts, which can subsequently reduce access to a fair trial. The current road toll debt recovery system substantially contributes to this issue given the fines matters are heard in courts, even though they 'do not involve risks to public safety', and instead just '[fill] up the courts'. Therefore, the current system reduces access by increasing delays.*

*However, there are a number of other issues also contributing to delays and the overburdening of courts, such as lengthy committal proceedings which many experts believe to be unnecessary, meaning that toll road debt recovery is not the only factor that contributes to time in the courts.*

*The reforms by some CLC's and VLA's recommended only using the criminal justice system for the specific purpose of 'punishing ... and deterring the most serious offenders', which would significantly reduce the burden of cases on the criminal justice system. Subsequently, this would increase access by reducing the delays in cases being heard, allowing more access to a timely trial and allowing for greater access to being able to afford legal representation.*

*Thus, the reform proposed would increase access by reducing the burden on the courts system.*