

# 2023 VCE Legal Studies external assessment report

## General comments

The 2023 VCE Legal Studies examination was appropriately challenging, with students generally performing well in response. Students demonstrated a strong understanding of [command terms](#) such as ‘explain’, ‘analyse’ and ‘discuss’, as well as effective time management, indicated through few students leaving questions unanswered.

Many students appeared to have read, and heeded, advice from previous Legal Studies assessment reports. Notably, many students were able to use paragraphs where appropriate, as well as key words to signpost responses. For example, in responding to ‘analyse’ questions, students used words such as ‘moreover’, ‘this can be seen’, and ‘notwithstanding that’ to seek to demonstrate an analysis rather than an explanation.

Overall, students demonstrated a good understanding of summary offences and indictable offences, statutory interpretation, the Victorian court hierarchy, social media and influences on law reform, representative proceedings, and sanctions. Areas of the course requiring more attention by teachers and students include the separation of powers, the division of law-making powers, the doctrine of precedent, legal practitioners, and the principles of justice.

Notable areas of potential improvement apparent from the 2023 examination:

- Students must carefully read each question and ensure they note and understand both scope and limitations. For example, for Section A, Question 8, students were required to consider the impact the High Court **has had** on the division of law-making powers, as opposed to the impact the High Court **could have**, or the **current** limitations on the High Court in changing the division of law-making powers.
- Students must ensure they accurately address the specific command word within each question. For example, for Section B, Question 1d., many students compared responsibilities of legal practitioners, rather than distinguished between them as required in the question. A ‘compare’ question requires a consideration of similarities and differences, whereas a ‘distinguish’ question requires only a consideration of differences. As another example, for Section B, Question 1e., many students discussed the appropriateness of their sanction, instead of justifying it.
- Students do not have to define key words or phrases before answering the question unless the question specifies that this is required. Instead, students are encouraged to incorporate definitions where necessary in responses. For example, for Section A, Question 2, many students defined summary offences and indictable offences first, but that definition was not incorporated into their explanation of the difference, resulting in students not receiving full marks.
- Students are encouraged to use the stimulus material beyond the names or subject matter in the material. Further, while this may not be necessary to receive full marks for each question attached to source material (i.e. Section B, Question 2), students are encouraged to identify and make connections between the sources, and then use those multiple sources to answer a question where the question allows it.
- Students should only give the specified number of reasons, differences or features asked for in the question. For example, for Section A, Question 3, only the first effect was marked. There is no benefit in providing more than one. In addition, students should ensure their choice is clear in their first sentence.

- Comprehensive and detailed responses are important. At times, student responses were too brief. Students are therefore encouraged to ensure they have a detailed, well-developed understanding of the relevant topics in the course to be able to provide detail where necessary.
- One way that students can be assisted in providing more detail, where required, is to use cases, evidence or data they have studied throughout the year to substantiate or expand on points, particularly in response to questions in Section A. While excessive use of examples or cases is discouraged (as it may result in the response becoming a recitation of examples or cases), examples or evidence are sometimes useful to expand on or support a point made. Some of the questions in this examination that lent themselves to the use of examples or evidence included Section A, Questions 2 (examples of offences), 3 (statutory interpretation case), 6 (a case in which the judiciary has acted as a check on the legislature), 7 (precedent cases) and 8 (a division of law-making powers case).

Students are reminded that good examination technique includes, in particular:

- the use of blue or black pen for clarity
- clear and legible handwriting
- responses that are correctly and clearly labelled. The Legal Studies examination was scanned and marked electronically; it was therefore important that students wrote 'PTO' at the end of a response completed in the extra space at the end of the booklet. Students should also state the full section and question at the end of the booklet before they start their response (for example, 'Sn A, Qn 1d').
- paragraphs, signposting, and good structure to ensure clarity of responses. These techniques also assist students when checking they have answered all the elements of a question and whether they have appropriately addressed the task word. For example, when distinguishing between responsibilities of legal practitioners, each set of differences should be in separate paragraphs, with words used to make clear which responsibility, practitioner and case the student is writing about.

## 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 of more or less than 100 per cent.

## Section A

### Question 1

Marks	0	1	2	3	Average
%	2	11	52	34	2.2

This question required students to provide a brief summary or overview of one reason for a court hierarchy in relation to criminal cases. To be awarded full marks, students were required to address why the courts need to be ranked for this reason. For example, if students wrote about appeals, they could have noted that appeals allow wrongful convictions or inadequate sentences to be corrected by higher courts on appeal.

The most popular reasons given were appeals and specialisation, although administrative convenience and the doctrine of precedent were also acceptable reasons.

To obtain full marks, students needed to refer to the ranking of courts; that is, they needed to refer to the existence of more superior courts and less superior courts. Some students did not do this. Another reason students may not have received full marks was because they used the same word (appeal, specialisation) to outline their reason. Students are encouraged to use alternate words to explain their reason, such as review (in relation to appeals) and expertise (in relation to specialisation). A small number of students referred to civil law principles such as damages, and therefore scored no or low marks.

The following is an example of a high-scoring response, demonstrating an understanding of why a ranking of courts is necessary for the doctrine of precedent to operate.

*The court hierarchy is necessary in determining criminal cases to enable the operation of the doctrine of precedent. The doctrine of precedent is the common law principle by which the reasons for the decisions of higher courts (ration decidendi) is binding on courts ranked lower in the same court hierarchy where the material facts are similar (stare decisis). The formation of precedent is necessary in the role of courts in law making (common law) and is applied in determining criminal cases. Without the existence of the court hierarchy – courts ranked from low severity to high severity – the doctrine of precedent would not be operational; thus, it is necessary in determining criminal cases.*

## Question 2

Marks	0	1	2	3	Average
%	2	6	43	50	2.4

This question was handled well. For full marks, students were expected to comprehensively explain (i.e. provide details of) one difference between a summary offence and an indictable offence. Many students were able to do this, demonstrating a good understanding of the difference between the two offences. A brief explanation would have received two marks; an identification only of a difference would have received one mark.

Some of the acceptable differences included:

- the nature of the offence (i.e. summary offences are minor crimes dealt with summarily in the Magistrates' Court, such as drink driving, whereas indictable offences are serious crimes dealt with in the higher courts, and are more serious in nature, such as serious assaults).
- the processes involved (such as the use of a jury, the use of committal proceedings, and the courts which hear the offences).
- the penalties imposed (noting that indictable offences will generally attract higher penalties such as a long term in prison or life imprisonment, whereas summary offences can result in less serious sanctions such as a small fine or an adjournment).

Some students provided a definition of both offences before explaining a difference but did not sufficiently explain the difference. Students are encouraged to incorporate their definition of the offences into their explanation. Some students did not have sufficient depth for full marks, only briefly stating that one offence is serious, whereas the other offence is minor in nature. That on its own was insufficient to receive three marks.

Some students suggested a fine and a community correction order were sanctions for summary offences, whereas imprisonment is for indictable offences. This is a misconception that should be corrected, noting that summary offending can result in imprisonment (though there is a maximum term the Magistrates' Court can impose), and serious offending can result in a fine or a community correction order.

The following is an example of a high-scoring response. The response directly answers the question, without providing a definition first, and expands on the minor and serious nature of the offences by reference to examples, their impact, and the courts which hear them.

*One difference between an indictable offence and a summary offence is the severity of the offending. Indictable offences are considered to be severe offences, causing a significant impact. These involve murder, rape, homicide or commercial drug offences, and are contained in the Crimes Act and heard in higher courts. Whereas summary offences are relatively minor in comparison, and have a far less detrimental impact than indictable offences. Summary offences include theft or minor assault; these are contained in the Summary Offences Act and heard in lower courts. As such, the severity and detrimental impact indictable offences have, in comparison to the less severe impact of summary offences is a key difference.*

### Question 3

Marks	0	1	2	3	Average
%	16	23	40	21	1.7

This question required students to comprehensively explain (provide details of) one effect of statutory interpretation. For full marks, students were required to state what the effect is on legislation (generally, or on the specific statute that was interpreted).

Some possible responses were:

- The interpretation can result in broadening (or narrowing) the meaning of the words in the statute.
- The courts can clarify the meaning and application of the statute through their interpretation.
- Statutory interpretation can lead to the creation of precedent through the interpretive decisions by judges as to the legislation's meaning. These decisions must be followed by lower courts in future cases to ensure consistency in interpretation of statutes (and could also result in words or phrases in other legislation being interpreted the same way).
- As parliament is sovereign, the court's interpretation may result in parliament further amending the legislation to provide clarity, or to abolish or abrogate the interpretation.

The most popular response given was in relation to broadening or narrowing the meaning of legislation (both or one of broadening or narrowing could have been explained). Many students provided examples of cases, the most popular of which was the *Studded Belt* case. A small number of students explained reasons for statutory interpretation rather than effects, and therefore received low or no marks.

The following is an example of a high-scoring response, in which a case was effectively used to support the explanation.

*One effect of statutory interpretation is the narrowing of the meaning of words. This means that via interpreting the meaning of legislation, the courts can narrow the meaning of a word, thus narrowing its application in the future for all courts lower than the court in which it was interpreted. This was demonstrated in *Deing v Tarola*, in which the courts interpreted the word 'weapon' to mean anything used to harm others or with the intent to harm others, meaning the studded belt, previously considered a weapon, was no longer a weapon as it was not worn with that intent, demonstrating how statutory interpretation can narrow the application of the law.*

## Question 4

Marks	0	1	2	3	4	Average
%	17	16	31	26	9	2.0

This question required students to provide a circumstance or situation in which a sentence indication would be appropriate, with a justification of that circumstance. A justification requires reasoning, evidence or data to support the response. Students were not expected to define what sentence indications are, but students should have referred to features of sentence indications in their response (in particular, that they involve the judge giving an indication about the sentence if the accused immediately pleads guilty).

To achieve full marks students needed to state with precision what the 'circumstance' was. Notably, a 'circumstance' is a situation, condition or state of affairs. For example, a clear circumstance is when an accused is considering or wishes to plead guilty, but fears doing so. Other circumstances include the following:

- Costs – the accused may not have money to defend the charges, or may not have sufficient legal representation, and so may be more inclined to seek an early resolution. In this case, it would be beneficial for the accused as they may avoid the costs of a hearing or trial.
- The accused is considering pleading guilty – the accused may be considering pleading guilty, or is willing to do so, but only wants to do so if they are certain they will not receive a term of imprisonment. In this case, the accused may benefit from the indication, as would the victims and the court, as a trial or hearing would be avoided.
- Information about the offending and the victim – if the court has sufficient information about the offending and the impact on victims, it would be a circumstance in which a sentence indication would be appropriate.
- Views of the prosecution – when the prosecution does not oppose the application, a sentence indication may be appropriate. For example, the prosecution may not oppose the application if the circumstances of the victims are such that a trial is not ideal.

As to the benefits or justification, this depended on the circumstance chosen, but many students were able to consider benefits such as saving of costs, time and resources, the benefit to the accused of a guilty plea in terms of a potential reduction in sentence, and avoiding the impact of a hearing or trial on victims and the criminal justice system and society more generally.

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

*One circumstance in which sentencing indication would be appropriate in determining a criminal case is in the instance that the accused individual is willing to consider a guilty plea. By handing down a sentence indication, the judge would be able to provide a level of certainty and security in terms of informing the accused as to the likely outcome (in terms of the type and length) of a sanction that they would receive. As part of this, if the accused were to then plead guilty following the indication, the judge would not be able to dramatically exceed the severity of the sanction that was promised (for instance, they would not be able to hand down a sentence of imprisonment if that was not a part of the indication).*

*Hence, by providing this certainty of a sentencing indication, it is likely that the accused would actually plead guilty, saving the court and any potential victims the time and stress associated with a formal trial/hearing. If that accused had already not been receptive to the idea of a guilty plea, the sentencing indication would likely have less of an impact in swaying the accused to solidify that plea.*

## Question 5

Marks	0	1	2	3	4	Average
%	13	14	30	32	10	2.1

This question required students to analyse the data in the table and explain at least two factors that affect the ability of parliament to make law. In relation to the data, it was important for students to identify that the Australian Labor Party, which formed government, did not have a majority in the Senate, nor did any other party. It was also important for students to identify that for government bills to pass, the Australian Labor Party required the support of the Australian Greens and the votes of two other senators, or the support of the opposition (the Liberal-National Coalition).

Stronger responses provided comprehensive detail of two specific factors, with use of the data and specific elaboration to support their explanation. The more common factors given were:

- Given the Australian Labor Party has majority in the lower house, government bills will pass the lower house with ease since members of parliament generally vote along party lines.
- If the Australian Labor Party has the support of the Opposition, laws will be more easily made, as the Opposition will support government bills in the upper house. However, without that support, the government will need to negotiate with senators on the crossbench to secure their votes.
- Therefore, for government bills to pass the Senate, the Australian Labor Party will require the support of the Australian Greens and two votes from independent senators or senators from minor parties, because it does not have the majority of seats in the upper house.
- The policies of each political party may be relevant to whether there is support for government bills; for example, the Australian Greens may be more willing to support the Australian Labor Party's policies given, historically, the stances taken by each party on key issues.
- The views and policies of the independent senators and senators from minor parties may mean that bills are amended, or there may be negotiations with those senators about other policies or legislation to enable bills to pass.

Some students provided a good explanation of factors impacting the ability of parliament to make law, but these were generic or appeared rote-learned as there was limited or no reference to the table. These responses generally received no more than two marks.

There were otherwise a number of errors made and incorrect analysis of the information provided:

- Many students suggested the Liberal-National Coalition had the 'majority' of seats in the Senate. Teachers are encouraged to assist students in understanding what 'majority' means in the context of votes in the houses of parliament, in that it should be a reference to a majority of the total number of seats (39 out of 76 in the Senate), as opposed to a reference to which party has the 'most' seats out of the other parties.
- Some students suggested this was a 'rubber stamp' Senate, though the data clearly showed the party in government (the Australian Labor Party) did not have a majority in the Senate.
- Many did not identify the information provided before the table that the Australian Labor Party was the party in government.
- Some students suggested that for bills to pass, both major political parties had to agree on the bill, without identifying that non-opposition senators could vote in favour of a government bill for it to achieve 39 votes.

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

*The bicameral structure of the Commonwealth Parliament (CP), protected by section one of the Australian Constitution (AC), impacts the ability of parliament to make law. As the 'Australian Labor Party',*

*the party in power (in government), has a 'majority of seats' in the House of Representatives, this may decrease the ability of the Commonwealth Parliament to make effective law. This is because a majority may prevent adequate debate in the lower house, with the government not having to negotiate bills with independent or minor members of parliament/parties to gather support to pass a bill. However, this makes for a more efficient law-making process in the lower house as the government does not have to water down its bills to have them pass, as sometimes independents and minor parties can make requests that are not in Australia's interests.*

*Furthermore, as the government does not have a majority in the Senate, with only '26' seats, this prevents the Senate from becoming a 'rubber stamp' which blindly approves legislation passed by the lower house. This encourages the scrutinising of legislation in the upper house, making for more efficient laws. However, this may result in a 'hostile Senate' which does not pass any bills, which means that laws that benefit Australians may not be passed.*

## Question 6

Marks	0	1	2	3	4	5	6	Average
%	25	12	14	21	18	9	2	2.3

This question required students to consider the extent to which the separation of powers, a principle established by the Australian Constitution, acts as a check on the Commonwealth Parliament in law-making. A 'discussion' is a multifaceted response which requires students to consider strengths, limitations, restrictions, weaknesses and circumstances that may limit or enhance the ability of the separation of powers to act as a check. Words such as 'however', 'on the other hand', 'despite this', 'another view' and 'while' are useful to show the move from an explanation to a discussion.

The focus of this question was on how the separation acts as a check on the legislature. Students could have considered one or both of the judiciary and the executive acting as a check. Most students focused on how the courts (the judiciary) act as a check on law-making by the legislature.

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

- In Australia, judicial power is vested in the High Court and other courts, which have the power to rule on the validity of Commonwealth legislation and can interpret the Constitution.
- The judiciary is strictly separate to the parliament, allowing the courts to independently determine whether the Commonwealth Parliament has legislated beyond its power. Judges are appointed, not elected. However, the judiciary is appointed by the executive; therefore, some may argue the Commonwealth is able to exercise influence over who makes up the judiciary.
- If an unconstitutional law is created by parliament, the judiciary can invalidate that law. Parliament cannot abrogate these decisions. However, there are limits on the ability to act as a check. These include costs, time, standing, and judicial conservatism (students could have elaborated on these points; in doing so, it is useful for students to explain, within their elaboration, what concepts such as standing or judicial conservatism mean).
- Executive power is vested in the Crown and exercised by the Governor-General. The executive introduces bills into parliament, and administers the laws created by parliament.
- If parliament had the power to make laws and administer them, it could abuse this power by creating laws that serve its needs alone. Therefore, this administrative power is held by the executive, which technically has the power to refuse to approve and implement the laws made by parliament.
- In practice, however, power is exercised by the Prime Minister and Cabinet ministers – who are also members of parliament. By convention the Governor-General acts on the advice of the Prime Minister. That is, there is a 'fused' executive and legislature, such that there is not a complete or strict separation of powers as in other jurisdictions.

Students who understood the principle of the separation of powers and understood the requirements of the command word ‘discuss’ performed well. Some students spent too much time describing the separation of powers and justifying its existence without discussing it as required by the question. Some students confused the separation of powers with the division of law-making powers and, therefore, received low or no marks. Some students were able to make one or two points briefly but did not have enough depth to get full marks.

The following is an example of a high-scoring response, which refers to all branches of power.

*The separation of powers acts as a check on the Cth Parliament to a moderate extent.*

*A benefit of the separation of powers is that the judiciary are independent from the legislative and executive arms of parliament. This independence ensures that laws passed by Parliament could be declared ‘ultra vires’ if challenged by a party with standing. Further, this separation ensures that no one body holds absolute power, where they cannot make law, administer it and rule on its legality simultaneously. Another advantage of the separation of powers is that the executive can be held accountable by the legislative during question time – via rigorous debate and scrutiny. Ergo, diffusing any potential concentration or abuse of power.*

*However, a limitation of the separation of powers is that there is a cross-over between the legislative and the executive. As members of the executive are drawn from the legislative, this can compromise the effectiveness and authenticity of this separation of powers, where some members who administer the law (the executive) can also vote to make it. Another curious feature of the separation of powers is that the judges in the judiciary are appointed by the executive. Thus, the judges could potentially be prone to harbour subtle biases – restricting this separation of powers.*

## Question 7

Marks	0	1	2	3	4	5	6	7	Average
%	18	9	16	22	20	11	4	1	2.7

This question was challenging, as it required students to undertake an analysis in relation to the doctrine of precedent. That is, the question not only required students to demonstrate their understanding of the doctrine of precedent, but also explore the relationship between the doctrine and how it affects the law-making powers of the court. Language that showed analytical thinking, such as ‘this means’, ‘this leads to’, ‘as such’, ‘moreover’, ‘therefore’, ‘this can be seen’ and ‘more particularly’, would have assisted students to move from an explanation to an analysis.

Some of the points that could have been made, while not exhaustive, are as follows:

- The courts do not have the same powers as parliament to make and amend laws. However, part of their function is to interpret and apply the law when a case is brought before them. This leads to the creation of common law, also known as ‘case’ or ‘judge-made’ law, which evolves as cases are brought before the courts.
- Judges are not free to make law as they wish, particularly those in lower courts. Superior courts’ decisions are followed by future cases in lower courts in similar fact situations. This is the principle of *stare decisis*, which means to stand by what has been decided. The *ratio decidendi*, the judge’s reasons for their decisions (or analysis of reasons by judges in a majority decision), are what becomes binding precedent on lower courts.
- The courts highest in court hierarchies, such as appellate courts at the state level (e.g. the Victorian Court of Appeal), and the High Court of Australia, have the greatest capacity to make new precedents as they are not bound by the doctrine of precedent to the same degree as judges in lower courts. Yet they are still limited to certain circumstances (e.g. in novel cases – where no past cases exist, or where they have to expand on existing precedent).

- The High Court can depart from precedent. It is not bound by its previous decisions and may depart from them if the circumstances of the case mean that is necessary. In the interests of consistency, however, it will usually follow its decisions in cases where there are similar fact situations. It can, though, overrule its own decisions when the need arises, such as where there is a risk of serious injustice through too rigid an adherence to precedent. In such a case the *ratio decidendi* of the original decision is no longer binding as a precedent.
- Other courts do not have the same scope for creating new precedents. This does not mean it cannot be done. There are circumstances in which courts can create new precedents:
  - Reversing: a case is appealed from to a higher court, and the higher court overturns the decision of the lower court, reversing the decision created in the lower court and replacing it with a new precedent and *ratio decidendi*.
  - Overruling: a case in a higher court hears case involving a similar fact situation to a decision made previously in a lower court. The higher court is not bound by the lower court's earlier decision; the new decision made in the higher court overrules the precedent created in the lower court in the earlier case.
  - Distinguishing: the two cases are substantially different and thus an earlier precedent is not applicable, thus allowing the court to avoid following the precedent.
  - Disapproving: lower courts are bound to follow earlier decisions, but can express disapproval of them as part of *obiter*. Higher courts are not bound to follow earlier decisions. This allows them to disapprove of an earlier decision by creating a new precedent. However, this may result in confusion unless a higher court creates a new binding precedent, or parliament abrogates one or both of the precedents.

While many students were able to explain elements of the doctrine of precedent and how it affects the ability of courts to make law, they were not able to undertake a comprehensive, in-depth analysis. Some students went beyond the scope of the question and considered other factors that affect the ability of courts to make law, such as time, costs and standing, but did not connect them back to the doctrine of precedent.

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

*The doctrine of precedent is a judicial process whereby the ratio decidendi behind decisions in courts of superior record must be following in lower courts in the same court hierarchy in cases with similar material facts. This implies that binding precedent can be somewhat restrictive in the ability of lower courts to adopt a broad or new interpretation of the law, in cases of similar material facts to existing decisions made in higher courts. However, judges can distinguish between the material facts of a case, as was done in Davies v Waldron which enables them to depart from existing reasoning and create new precedent. Thus, this ability of lower courts to distinguish between the material facts of cases where binding precedent has already been created in higher courts, indicates that lower courts can make law to some extent.*

## Question 8

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	16	7	9	14	16	15	12	7	3	1	0	3.6

This was the most challenging question in the examination. To receive full marks, students needed to:

- include a statement addressing the extent to which the High Court has had an impact on the division of law-making powers
- comprehensively discuss the impact the High Court **has had** (not could have, or may have) on the division of law-making powers. Key words or phrases were important to demonstrate a discussion

- explain the way power is distributed between the state and the Commonwealth parliaments. All three powers identified in the VCE Legal Studies Study Design (residual, exclusive, concurrent) were required for full marks.

Some of the points that could have been made in the discussion include:

- At the time of federation, and following the establishment of the Commonwealth, areas of law-making power were divided between the states and the Commonwealth.
- In the past, there have been disputes about whether the state or the Commonwealth has power in relation to a particular area. The High Court has jurisdiction to resolve these disputes or disagreements about their law-making powers. For example, a state government may claim the Commonwealth has made laws beyond its powers, encroaching on an area of residual law-making power.
- The High Court can act, and has acted, as an independent decision-maker between the states and the Commonwealth in these circumstances.
- Examples of the High Court impacting on the state and Commonwealth parliaments are numerous. (Students could have provided an example here and considered the extent of the impact the decision had on the division of law-making powers).
- Some might argue that the High Court has had a greater impact on the division of law-making powers than referendums, given how difficult it is for referendums to succeed. On the other hand, in the past, the High Court is likely to have been limited in its ability to change the division of powers given issues associated with costs, standing and judicial conservatism.
- One area in which the High Court has had a significant impact has been in relation to the external affairs power. The interpretation of that power has been such that the Commonwealth's powers have substantially increased in circumstances where they legislate to give effect to international treaties. This has enabled the Commonwealth to exercise its external affairs power in areas that may be residual areas of power.
- While the High Court's interpretation of the external affairs power is significant, in that some have argued it has given the Commonwealth 'unfettered' power, its impact is still constrained. For example, treaties must be *bona fide*, and legislation cannot go beyond what is necessary to implement the treaty.

While there was no requirement for students to use a case to illustrate their points, many students used a division of law-making powers such as the *Tasmanian Dam* case or the *Brislan* case. This assisted students in developing their response.

Some of the issues or errors in the responses were as follows:

- Many students did not have sufficient depth in their responses to receive full marks. For example, some students limited their discussion to a case only, whereas the question was broader, requiring students to consider the impact of the High Court generally.
- Some students focused solely on section 109 of the Australian Constitution. However, Section 109 is about resolving inconsistencies between laws / deciding whether laws can operate alongside each other. Not all section 109 cases involve a change in the division of law-making powers.
- Many students did not address the 'has had' part of the question, and instead wrote about issues that **may** impact the ability of the High Court to change the division of law-making powers (such as time, costs and standing).
- Some students used cases that did not involve the division of law-making powers, were not High Court cases, or were not relevant at all to the question (such as the *McBain* case, the *Roach* case, the *Mabo* case, and the *Studded Belt* case).
- Many students, in relation to the *Tasmanian Dam* case, suggested that the Tasmanian government's residual power 'became' a concurrent power. This was not the case; rather, the decision was such that it was held that both parliaments were able to legislate in a residual area of power, but that does not make that residual power a concurrent power.

The following is an example of the beginning of a high-scoring response. The balance of the response explored the decision in the *Tasmanian Dam* case, and the limitations of that decision.

*The High Court has had an impact on the division of law making powers to a reasonably high extent through the interpretation of the Australian Constitution.*

*Through the interpretation of section 51(xxix) of the Australian Constitution, the High Court has shifted the division of law-making powers in favour of the Commonwealth Parliament. Section 51(xxix) or the 'external affairs' power has been interpreted as giving power to the Commonwealth parliament to enact obligations set out in international agreements into Commonwealth law, potentially extending their powers beyond areas entrenched into the Constitution. Thus, extending Commonwealth powers into areas of residual power.*

*The Commonwealth parliament has the power to legislate in areas of exclusive and concurrent powers. Exclusive powers are powers outlined in the Australian Constitution as being exercised solely by the Commonwealth parliament, such as currency. Concurrent powers are powers outlined in the Constitution belonging to both state and Commonwealth parliaments, such as marriage. Residual powers are powers not outlined within the Australian Constitution thus exercised solely by the states parliaments, such as areas of environmental law.*

## Section B

### Question 1a.

Marks	0	1	2	3	Average
%	18	4	27	51	2.1

This question, requiring an explanation of representative proceedings (class actions), and why it was not appropriate for the plaintiff (shop owner) in this case, was generally well handled. Many students were able to explain that a representative proceeding is commenced by a person on behalf of a group of seven or more persons who have claims against the same person, and which relate to the same or similar circumstances. Many were also able to use the stimulus material, stating that because there was only one person who suffered damage because of Terri's conduct (i.e. the shop owner), it was not an appropriate mechanism by which to seek damages.

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

*A representative proceeding is when seven or more individuals with similar or related claims against a singular defendant initiate a single case against them under a lead or nominal plaintiff rather than having the court hear each claim separately. This is not appropriate for the shop owner as Terri, the defendant, has only engaged in one civil wrong impacting his shop only. This means that no other parties could participate in a class action due to the absence of similar or related claims. Hence he must bring an individual case.*

## Question 1b.

Marks	0	1	2	3	Average
%	27	19	33	21	1.5

For full marks, students were required to explain how the judge's management of the civil dispute could assist in its resolution, while effectively and accurately making use of the stimulus material.

Appropriate responses included the following:

- Judges can exercise case management powers before trial and during trial. The judge may make orders at the upcoming directions hearing setting out a timetable of steps for pre-trial procedures such as the exchange of evidence, discovery and mediation. This may include all documents held by the shop owner evidencing loss and damage. This would ensure efficiency as the parties would know certain facts in advance of the trial and would avoid delays.
- At the upcoming directions hearing, the judge may consider the documents submitted by the parties and determine whether the matter is appropriate to go to mediation now, or at a later time. Mediation is an effective way to resolve disputes and avoids the costs and time of trial. Given the shop owner has already suffered significant loss, this may help them achieve a resolution without having to incur trial costs.

Stronger responses used specific examples of the exercise of case management powers, such as giving directions, limiting discovery, or ordering the parties to attend mediation. Those responses also used more than just the names (Terri and the shop owner), and instead also used information in the scenario such as the giving of directions at the upcoming directions hearing, or how a judge could order the parties to attend mediation, which could help the shop owner avoid further loss through incurring legal costs. Some students did not receive full marks because their answer lacked meaningful use of stimulus material, with some merely referring to 'this case' or 'Terri'.

The following is an example of a high-scoring response that demonstrates an understanding of case management powers and the effective and appropriate use of stimulus material.

*Judicial case management could assist in resolving the shop owner's case by reducing the time taken by, and streamlining, the trial. This is because the judge can give directions such as 'requiring documents [to be filed] in time for a directions hearing' that ensures that steps in a proceeding such as pretrial procedures are undertaken promptly. The judge can also order Terri and the shop owner to attend mediation before or during the trial to try to reach an out of court settlement, saving the time associated with a full trial.*

## Question 1c.

Marks	0	1	2	3	Average
%	23	16	41	20	1.6

This question required students to explain the **purpose** of one civil pre-trial procedure, such as discovery, the exchange of evidence, pleadings or mediation. Effective and meaningful use of stimulus material was required.

Examples of the purposes of pre-trial procedures that could have been given were:

- Pleadings – the purpose of pleadings is to ensure the shop owner clarifies the nature of the claim, defines the issues and identifies the remedy sought.

- Mediation – the parties may voluntarily attend mediation, or they may be ordered to do so. The purpose of mediation is to encourage the parties to settle the whole or part of the proceedings without having to go to trial.
- Directions hearings – as in this case, the judge can require the parties to attend a directions hearing for the purposes of making orders about the conduct of the pre-trial stages and trial itself. The purpose of directions hearings is to ensure the dispute is managed and conducted efficiently and in a timely manner.
- Discovery – the purpose of the discovery process is to ensure transparency over and access to the documents relevant to the issues in dispute.
- Exchange of evidence – the purpose of this process is to ensure both parties understand the evidence that will be put against them with a view to avoiding ambush or surprise at trial. The court may order the parties to exchange witness statements, or alternatively witness outlines, which will be provided to the other side.

Some issues in the responses were:

- Some students explained the pre-trial procedure but did not explain its purpose.
- Some students did not use the stimulus material, or did not use it effectively (and only referred to the names of the parties). References could have also been made to the shop owner's loss, Terri's circumstances, the nature of the claim, or the remedy sought.
- There was some confusion between discovery and evidence. Discovery includes the exchange of documents relevant to the issues in dispute, but not all discovered documents will ultimately be used as evidence. On the other hand, the exchange of evidence is the process by which parties exchange witness statements or witness outlines, which is the evidence of the witness, or the evidence they propose to give at trial. Those witness statements or outlines may refer to documents but may also include evidence beyond written evidence (such as what a person saw, or conversations between two or more people).

The following is an example of a high-scoring response, demonstrating a clear purpose of pleadings with use of stimulus material.

*One purpose of pleadings, another civil pre-trial procedure, is to set limits to the dispute. In requiring Terri and the shop owner to set out their claims in writing, pleadings solidifies the scope of the matter. As no claim or issue that is not indicated in the pleadings process can be brought up without consent in court, it ensures that what is presented remains relevant and allows for a fair resolution of the case. For example, the shop owner cannot claim damages to other parts of his shop that aren't set out in pleadings. Through the serving of a claim to Terri and the potential filing of a defence, pleadings thus sets limits to the dispute.*

## Question 1d.

Marks	0	1	2	3	4	5	6	Average
%	14	16	25	24	15	5	1	2.3

This question required students to describe differences between the responsibilities of legal representatives in each case. Two approaches were accepted. The first approach was to distinguish between the responsibilities of the prosecution's legal representatives and those of the accused's legal representatives, and then distinguish between the responsibilities of the plaintiff's legal representatives and those of the defendant's legal representatives. The second approach was to distinguish between the responsibilities of the legal practitioners in the criminal case and those in the civil case. While either approach was accepted, at least two responsibilities should have been distinguished, and there was a need for effective and accurate use of the stimulus material.

Some of the responsibilities that could have been distinguished across the two cases are as follows:

- Standard of proof – in Terri’s criminal case, the DPP will have the burden of proof and will need to satisfy the jury beyond reasonable doubt that Terri committed the offences of destroying or damaging property. This is different to what the shop owner will need to prove in the civil case, where the legal representatives for the shop owner must help prove the case at a much lower standard of proof: on the balance of probabilities.
- Overarching obligations – in the shop owner’s case, the legal representatives must adhere to various overarching obligations, which include advising their client to disclose critical documents during the pre-trial stages in the case. While there are obligations on the legal practitioners in the criminal case, they are different given the nature of criminal matters; for example, this obligation would not extend to Terri’s legal representatives in the criminal case because Terri, due to the right to silence, does not automatically need to produce any evidence or disclose documents.
- Out of court resolution – in the shop owner’s civil case, the legal representatives may be required to advise their clients about an appropriate remedy to accept or agree to out of court. In a criminal case, the legal representatives’ advice may be about whether to accept a plea deal, or possible sentences that may be imposed.
- Jury matters – in the criminal case, the practitioners are responsible for attending to jury matters such as empanelment, considering when it may be appropriate to seek the discharge of a certain juror, and assisting in relation to directions that should be given to jurors. Jurors are rarely used in civil cases, therefore in the civil case, the practitioners are unlikely to be responsible for these matters.

Some of the responsibilities that could have been distinguished within each case could have been in relation to the burden of proof, disclosure and the nature of advice given to the legal representatives’ clients.

Students generally found this question challenging:

- Many students tried to distinguish entirely different responsibilities. The responsibilities needed to be connected, such as distinguishing between the obligations on the parties to disclose documents.
- Many responses lacked structure, such that it was unclear which case, and which legal practitioners they were writing about. Terminology, paragraph structure and proper signposting are important to avoid inadvertent errors because of lack of clarity.
- Many students compared the responsibilities and therefore provided similarities and differences, but this is not what the question was asking for. This often resulted in a lack of marks simply because there was not enough material to receive full marks for a distinction.
- Some students did not make sufficient use of the stimulus material.

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

*In Terri’s criminal case the legal representative for the prosecution i.e. the DPP (the party bringing the case against Terri) will need to prove that Terri is guilty beyond a reasonable doubt for ‘destroying or damaging property’. While in the civil case against Terri, the plaintiff i.e. shop owner (the party bringing the case against Terri’s) legal representative will need to prove that Terri is liable for any damage caused on the balance of probabilities.*

## Question 1e.

Marks	0	1	2	3	4	5	Average
%	4	10	25	35	21	5	2.8

This question required students to justify the appropriateness of one of either a fine or a community correction order (CCO). A justification requires students to provide reasoning, evidence or facts in support of their choice. It is not a discussion; that is, a justification is about providing material to support the choice, whereas a discussion is multifaceted and often involves points that argue against the choice. Some students

discussed one of the sanctions, therefore resulting in insufficient justification to receive full marks (as often they sought to argue against the use of the sanction, thus diluting their justification).

A summary of the points that could have been made are as follows:

#### Fine

- The aim of fines is to deter the offender from committing a crime again, as they do not want to be financially burdened in the future. It may be appropriate in this case as Terri is likely to spend a considerable amount of money defending her criminal case, and therefore may be appropriately burdened by a fine.
- A fine may also be appropriate in this case because there was no death or serious injury involved, only damage to property. In a case where a person may only be injured by the accused's actions through property loss, the judge may deem it appropriate to show their disapproval with a large enough fine – particularly given the number of incidents in the area. This may also be the case for Terri given the mitigating factors which may lessen the seriousness of the offence.
- A fine may also be appropriate, as this was Terri's first offence.
- A fine is likely to significantly burden and punish Terri given her age. As she is 24, she is less likely to have significant wealth such that a fine may be effective in punishing her.

#### Community correction order (CCO)

- One aim of a CCO is to rehabilitate the offender in a bid to address the underlying problems associated with their offending. This might be appropriate where the judge orders Terri to attend a relevant course as part of the CCO that addresses the reason why they offended (e.g. anger, drugs or alcohol). This may stop Terri from committing acts of property damage in the future.
- The judge may also deem it appropriate to restrict Terri from normal activity to make her think twice about destroying shops. If Terri does not serve some sort of punishment, then she may be inclined to cause damage to property again.
- Because this was Terri's first offence, something as serious as prison would not be appropriate. A CCO would, therefore, be the next best sanction, still showing the community that the actions are not taken lightly. This is also important in this case, where the community is upset about the recent spate of similar offences.

While the purposes of sanctions did not need to be referred to in the response, many students did refer to one or more purposes to justify the sanction.

Effective and accurate use of the stimulus material was important. For example, students could have referred to Terri's age, that this is her first offence, the nature of the offending, and the need for general deterrence. Some students did not make sufficient use of the stimulus material, and made a number of assertions (such as that a CCO will punish Terri) without supporting those assertions.

A small number of students sought to justify both sanctions, but the reference to (and bolding of) the words 'either' and 'or' meant that students only needed to justify one.

The following is an example of a high-scoring response that effectively incorporates the stimulus material, and justifies the appropriateness by reference to the purposes of sanctions.

*A fine will likely be the most appropriate sanction in the case against Terri given it will adequately act as a specific and general deterrent and appropriately punish her.*

*Fines are a monetary amount which the offender is ordered to pay to the state if found guilty of a criminal offence. They are expressed in penalty units which cost \$192.31 per unit and stack up to 3000 penalty units (~500 000 dollars). As this is a first time offence, harsh sanctions such as imprisonment are likely too excessive in punishing Terri. However, a significant fine may be appropriate given it will grant the community a sense of retribution for Terri's offending. Furthermore, a significant fine will act as an*

*effective deterrent for Terri given she will be incentivised to not commit further crimes in the future and may also act as a general deterrent for others to assuage community concerns given others would likely stay away from similar crimes to avoid the significant fine. Thus, a fine will be an appropriate sanction for Terri.*

## Question 1f.

Marks	0	1	2	3	4	5	Average
%	7	10	28	31	19	5	2.6

This question required students to discuss a method, such as mediation, conciliation or arbitration, in resolving the shop owner's civil dispute. This required a consideration of strengths or positives, as well as limitations, restrictions, issues or factors to consider, or weaknesses. Signposting was important to show a discussion.

Given the nature of the civil dispute, and the damages sought, mediation and conciliation were the more appropriate and more popular responses given, though arbitration could have also been discussed. Some of the points that could have been made in relation to mediation, as an example, were:

- Mediation is a dispute resolution method that encourages parties to discuss the case in an informal environment to try and reach a settlement themselves. The use of mediation would therefore be useful in this case as the shop owner is not seeking a large financial sum and may have some luck in mediation working this out with Terri. However, Terri may not be willing to engage in mediation, particularly if she doesn't believe she is liable, or if she doesn't want to jeopardise her criminal case.
- The mediator seeks to encourage the parties to discuss a resolution and to assist them to resolve the dispute between themselves. The mediator cannot make a resolution for them. In this instance the mediator cannot force a settlement (if Terri does not want one) and the dispute may be left unresolved.
- Although an agreement between the parties is not binding, a deed of settlement or contract can be signed which can formalise the agreement and make it binding. This would suit the shop owner who would be able to move on from the matter. However, unless the deed is enforced in a court, Terri could still ignore the deed. This could cause further costs to the shop owner to enforce the terms.
- There may be no need for legal representation in this mediation process. This makes the process cheaper. This would benefit both parties. However, this informal nature could mean that parties could dominate proceedings if they view themselves as more powerful, and stall the process altogether.

Meaningful use of the stimulus material was required. Many students only briefly referred to the scenario; some did not refer to it at all. Some students did not have enough depth to their response to receive full marks.

Some students discussed dispute resolution bodies (Consumer Affairs Victoria or the Victorian Civil and Administrative Tribunal) instead of methods (mediation, arbitration, conciliation, and a hearing or trial). Students are encouraged to distinguish between institutions and methods.

The following is the beginning of a high-scoring response demonstrating a good understanding of mediation, and drawing on the stimulus material. The remainder of the response explains the potential limitations of mediation.

*One method that could be used to resolve the civil dispute between the shopkeeper and Terri is mediation. A benefit of mediation is that both parties have agency in the outcome. Unlike arbitration, where an arbitration award is imposed upon the parties, the round table discussions in mediation could contribute to a term of settlement (deed) that reflects both the interests of Terri and the shop owner. This could involve the shop owner making allowances or concessions, whereby they may forgive Terri partially for the loss of income/damage to the property. Another strength of mediation is that a mediator can*

*facilitate communication/discussions in a private and confidential environment behind closed doors. This could be particularly advantageous for Terri as she may not want the publicity of a civil trial after a potential criminal trial, meaning she may be more willing to cooperate and negotiate with the shop owner.*

## Question 2a.

Marks	0	1	2	3	Average
%	12	22	39	27	1.8

This question required details of one reason for law reform in relation to victims' rights, with the use of source material. The most apparent reasons based on the source material were:

- Changing views and values in the community – contemporary society is more aware of and sensitive to the need to treat people with respect, and to avoid creating unnecessary trauma. Victims' experiences of criminal prosecutions leave some victims feeling dissatisfied and dismayed with how poorly they were treated in the process, not acknowledged or respected, and in some cases, retraumatised.
- Access to the criminal justice system – one reason for law reform is to provide victims with greater access to the criminal justice system. This may include ensuring they are properly acknowledged and respected and are able to actively participate in the criminal justice system, such as through restorative justice conferencing.
- Protection of victims or their rights – changes may be required to protect victims by ensuring they are not traumatised by their experiences. For example, if victims are poorly treated in the trial process (Source 2), the laws may need to change to ensure this is avoided.

This question was generally well handled, with many students providing a valid reason for law reform. Some responses were repetitive, with the identification of the reason restated in the explanation. Some students did not receive full marks because they did not use the stimulus material. Students are encouraged to incorporate the material into their response and, where possible, draw on multiple sources, as demonstrated in the following high-scoring response:

*A reason why law reform has been sought in relation to victims' rights is because of the need to better protect the welfare and rights of the community. Currently, victims in criminal trials are 'demeaned' and 're-traumatised', as the Victorian Law Reform Commission's report in Source 2 notes. Thus, people are pushing for restorative justice that would focus on helping victims heal, instead of further harming them.*

## Question 2b.

Marks	0	1	2	3	Average
%	25	22	38	16	1.5

To respond to this question, students were required to draw on their understanding of one of the limitations on the Victorian Law Reform Commission (VLRC) in being able to influence law reform in relation to victims' rights. Comprehensive details and an understanding of that limitation (factor), as well as effective use of the stimulus material, were required for full marks.

Some of the factors that could have been explained were:

- Non-binding – while the VLRC's report was tabled in parliament, recommending the Victorian Government should establish a statutory scheme for restorative justice conferencing for indictable offences in specific contexts, government is under no obligation to introduce a bill that implements the recommendations, and parliament is under no obligation to agree to pass the bill.

- Composition of parliament – although the Victorian Government may have referred the matter to VLRC for inquiry, and may support their recommendations, it does not mean parliament will pass the bill incorporating the recommendations (including that in relation to restorative justice). For example, if the government does not have majority in the upper house and does not have the support of the opposition, they would need to seek support for their bill through the votes of minor parties and independents on the crossbench.
- Whether it was a referral from the Attorney-General – if VLRC’s inquiry was in response to a referral from the Attorney-General, the government may be more prepared to accept the recommendations (as it may be an area of law reform that government is already considering). (Sources 2 and 3 did not provide detail about whether this was a reference from the Attorney-General or not.)

It was clear many students were familiar with and understood the role of the VLRC and the extent to which they were able to influence law reform. The most popular response given by students was that the VLRC’s recommendations are not binding, and therefore while Recommendation 32 may be supported by the public and may be an important change, government does not have to agree to implement it by introducing legislation.

Some students did not use the stimulus material. Instead, they repeated the statement given at the start of the question that while the VLRC’s recommendation was tabled, it was not implemented. That was not sufficient to earn full marks. Some students repeated words or statements such as noting that recommendations are non-binding, without elaborating what that means. Some students referred to the Commonwealth houses of parliament or the Governor-General, and thus could not receive full marks.

The following is an example of a high-scoring response as it effectively uses information from the source material.

*One factor that might have limited the ability of the VLRC to influence law reform in relation to victims rights is due to the fact that parliament has no obligation to introduce VLRC’s recommendations. While VLRC is a highly influential body in law reform they do not possess any law making powers meaning they are unable to introduce the ‘statutory scheme for restorative justice conferencing’ (source 3) on their own, and rely on parliament to introduce such recommendations. However, as parliament has no obligation to introduce the recommendations of the VLRC this significantly limits their ability to lead to changes in the law such as seen with these victims rights recommendations which were tabled but not implemented.*

## Question 2c.

Marks	0	1	2	3	4	Average
%	4	15	45	31	5	2.2

To respond to this question, students were required to consider social media and how it could influence law reform. Given it was an ‘analyse’ question, students were expected to break down components and consider the relationship between social media and law reform, and more particularly how social media can influence legislative change in relation to victims. Signposted words were important to show analytical thinking.

Some points that could have been made were:

- One of the most common ways individuals attempt to influence law reform is through increasing interest in, and awareness of, a problem or issue through social media. The most effective ways to influence law reform are those attracting widespread attention. Individuals, such as the social media influencer, can use social media and hashtags such as #reformisoverdue to generate interest, awareness and support for an issue to bring about change in the law.
- Social media can quickly communicate information to wider audiences, generating interest, awareness and support for an issue that is more likely to gain the attention of members of parliament than other

means that are less capable of capturing attention. The social media post enabled the influencer to publicly share and give voice to their experiences as a victim, as well as their hopes for reform. Often, hashtags can go ‘viral’, with others catching on and talking about their own experiences.

- Although the VLRC has already tabled recommendations from its inquiry into victims’ rights, the social media post brings the issue to public attention in a way that the VLRC may not have available to them, unless the media themselves chose to cover those recommendations. This added interest and attention from the public could result in further pressure on parliament from voters to bring about change.
- Notwithstanding the influence of social media, its influence could be impacted or diluted by misinformation, alternative viewpoints, or the messaging getting lost, particularly if more viral issues become talked about, or people use social media to bring an alternative viewpoint.

Some students provided an explanation only, and thus received no more than two marks. Some students did not use the source material, or did not use the critical parts of the material (particularly that in Source 1, which referred to a social media influencer, millions of social media users, and hashtags). Stronger responses critically considered issues such as hashtags, influencers, and millions of social media users. For example, some students considered the risk of misinformation amongst millions of social media users, or the possible dilution of valid reasons for law reform by views put forward by other influencers, or the use of opposing hashtags.

The following is an example of a high-scoring response. The response uses the stimulus material as well as exploring the relationship between social media and parliament implementing law reform.

*Social media can influence law reform by shedding light on prevalent issues for the community and parliament, thus garnering greater support, prompting legislative change. Social media enables connection between large groups of people with ease, which in turn, enables greater support to be generated for an issue, as the community is made aware of it. This is exemplified in Source 1, as the post including ‘#Restorativejustice’, and shedding light on how the ‘justice system does not meet victims’ needs’ was viewed by millions of people. This then allows for the fostering of support for such law reform concerning victims’ rights. In turn, through its ability to connect, social media allows for parliament to monitor the levels of community support, such as seeing the millions of comments regarding support for the reform of victims’ rights. This generation and exemplification ultimately enhances the ability of social media to influence law reform, as parliament is only likely to enact such reform concerning victims’ rights if the weight of public support for a change is immense, as they hold a responsibility to remain representative.*

## Question 2d.

Marks	0	1	2	3	4	5	Average
%	17	15	25	27	13	2	2.1

This question required an understanding of one of the principles of justice, and the extent to which existing victims’ rights achieve one of those principles. Those rights include the right to be informed of proceedings, give evidence as a vulnerable witness, and be informed of the likely release date of the offender.

For full marks, a comprehensive discussion with sufficient understanding of victims’ rights and the relevant principle of justice, and effective use of the stimulus material were required. A statement about the extent to which those rights do or do not achieve the principle was also required.

In relation to the discussion, students could have taken various approaches. For example, they could have considered how one right does achieve the principle of justice, and the way in which another right does not achieve it. Another approach was for students to consider how victims’ rights do not achieve the principle of justice, but then consider how the VLRC’s recommendation could achieve that principle.

Some of the points that could have been made in relation to each of the principles are as follows:

#### Equality

- Not all victims have the same rights in the criminal justice system. For example, not all victims have the right to give evidence as a vulnerable witness (as that right is limited to witnesses in certain types of cases), and not all victims have the right to be informed about the likely release date of the offender (as it is limited to offences involving criminal acts of violence and those on the Victims Register). This may arguably constitute 'different treatment' but without recognition that it may be inadvertently discriminating against certain victims.
- Reforms to the criminal trial process allowing victims to participate through restorative justice may increase their capacity to be treated more equally before the law by giving them the opportunity to heal and recognise their vulnerability in criminal cases.

#### Fairness

- Fairness includes the ability for people to participate, but victims do not always have the right to do so. For example, their views are not determinative in plea negotiations, and the right to use alternative arrangements when giving evidence is limited to certain types of cases.
- Reform to the criminal trial process allowing victims to participate through restorative justice increases their capacity to be treated fairly by giving them the opportunity to be heard on their terms. This is opposed to them telling their story through trial processes which are primarily focused on determining questions such as whether a crime has been committed, whether an accused is guilty, and if so, what sentence is appropriate.

#### Access

- The existing criminal trial process is set up to determine whether a person is guilty of committing a crime and may not recognise victim rights, such as their right to be acknowledged and respected. This could act as a deterrent for victims seeking justice (for example, it may impact on victims' willingness to give evidence or even report a crime).
- Reforms allowing victims to participate through restorative justice mean the victim has increased their ability to use the criminal justice system, as the purpose moves from a narrow focus on determining guilt/sentencing, towards bringing all parties together, including the victim, to resolve and repair harm collectively. This may increase a victim's willingness to report a crime, give evidence and provide a victim impact statement as part of the sentencing process.

Stronger responses engaged in a multifaceted consideration of the extent to which rights achieve fairness, equality or access, and drew on criticisms in the stimulus material to extend that discussion.

Some students found it difficult to make use of the stimulus material, and either did not use it at all or limited its use to referring to victims' rights. Some of the other errors or issues in student responses were:

- Some students repeated the words 'fair', 'equal' and 'access' without explaining what the principles mean.
- In some responses, assertions were made about whether victims' rights achieve the principle of justice without that assertion being supported by an explanation.
- A discussion was lacking at times, with some students only giving an explanation about how victims' rights do not achieve the principle.

The following is an example of a high-scoring response. The response addresses two rights of victims, incorporates the stimulus material into the response, and engages in a discussion, which is made clearer by paragraphs, topic sentences, and signposted words such as 'however'.

*While to a large extent victims' rights achieve access, there are some components that can result in the other participants not making use of the justice system.*

*The right to give evidence as a vulnerable witness can restrict the accused's access to the criminal justice system. This is because the right found in the Criminal Procedure Act can allow the victim to receive many arrangements such as screens being put in place to shield them from the accused or the courtroom being cleared while they give evidence. This can add delays to a trial and thus make it more costly for the accused, thus limiting their ability to make use of the justice system.*

*However, the right of the victim to give evidence as a vulnerable witness conversely enhances the victims access to the criminal justice system. This is because mechanisms such as giving evidence at an offsite location can help to reduce the 'secondary trauma', conveyed in Source 2. This can conversely mean they do not face undue stress and trauma and thus are better able to testify and make use of the justice system by expressing their experiences.*

*In addition to this the victims right to be informed about proceedings helps to enhance access. Given under section 7, 8, 9 of the victim's charter, this right says that investigatory, victims servicing and prosecuting agencies must inform the victim of their rights to access support services and possible compensation. This can consequently help to rectify the lack of 'needs' being met for victims by the justice system as expressed in source 1. This consequently enhances a victims ability to make use of the justice system by providing them with information to access support.*