VCE LEGAL STUDIES 3/4
2021

CPAP Practice Examination No 2

SUGGESTED RESPONSES, MARKING SCHEME AND ADVICE

SECTION A

Note that any question in Section A that follows on from stimulus should use that stimulus material; in some questions it will be appropriate for this use to be a very brief name-check reference, but it depends on the question.

Question 1
Explain one example of the Victorian Law Reform Commission recommending reform to improve the effective operation of law in Victoria. 3 marks

Advice: In 2020 the Examination Report warned students that reform bodies were often confused: "Some students confused parliamentary committees and royal commissions with the Victorian Law Reform Commission."

The VLRC does not need a separate definition at the start.

Note that only the *first* identified recommendation should be marked.

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that clearly identifies one specific example of a recommended reform; and • That uses specific detail to illustrate and expand, which may or may not include whether the Parliament acted on the recommendation; and • That connects the reform with at least one benefit, to indicate how it might contribute to 'effectiveness'.
2 marks	• An answer that meets all the criteria for a 3-mark answer but contains some errors of fact; or • An answer that addresses a VLRC report but is too general in its recommendation for reform; or • An answer that fails to clearly identify any intended benefits of the reform; or • An answer that addresses all the required content but is brief and superficial.
1 mark	• An answer that is more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range; or • An answer that focuses heavily on the role of the VLRC and fails to address the question; or • An answer that gives only a general outline of one VLRC inquiry.

Sample answer: *In 2016 the state attorney-general asked the VLRC to examine the way in which representative proceedings were funded, and in March 2018 the VLRC submitted its report into class actions and litigation funding, Access to Justice – Litigation Funding and Group Proceedings, with a key recommendation that the law be changed nationally to permit contingency fees, and that laws should be introduced to govern their operation to ensure that law firms did not use them unfairly. It argued that contingency fees could reduce the risk to litigants of taking civil action, and allow a wider range of injured parties to seek justice.*

Question 2

General compensatory damages over one million dollars have been claimed in addition to a fine in a defamation case over Facebook comments.

In April 2021 the claim was filed with the Magistrates' Court by Sam Zachariah, a property developer, against local councillor Cameron Hearst. Zachariah claims that a Facebook page administered by Hearst hosted a string of comments that suggested Zachariah was acting corruptly.

Zachariah is demanding that Hearst pay both damages and a fine in recognition of the reputation damage he caused, and has requested that the dispute be determined by a jury of their peers. Zachariah is asking the jury to weigh up the value of lost property development contracts in their assessment of damages to be paid by Hearst.

a. Identify two errors in the scenario above and, for each error, explain the correct process or procedure that should have occurred. 4 marks

Advice: Note that only the *first two* identified errors should be marked, and that marks can only be awarded for corrections that match these errors.

Note that some possible errors and corrections use material that is outside the Study Design – such as the precise civil jurisdiction of the Magistrates' Court. Material outside the Study Design is never required knowledge, and there will always be other possible answers that fall within the Study Design; however, students should still be awarded marks for knowledge outside the Study Design *if they are correct.*

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and accurate answer that unambiguously provides two errors; and • That matches each error with a way in which the error can be resolved.
3 marks	• *An answer that lacks one error or one correction; or* • *An answer that is on track, but slightly too vague about one error/correction pair; or* • *An answer that lacks a little detail in one part of its response; or* • *An answer that is correct except for one small factual error that doesn't undermine the response as a whole.*
2 marks	• An answer that lacks *two* errors and/or corrections; or • An answer that is indicative of two error/correction pairs, but that is too vague to be a complete response; or • An answer that so brief as to omit some necessary information; or • An answer that is undermined by incorrect content.
1 mark	• More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Intended error/correction pairs:

✓ *The plaintiff cannot request a fine in a civil case. A fine could be ordered in a criminal case, <u>or</u> the plaintiff could request a second type of damages.*

✓ *A claim of one million dollars would not be filed with the Magistrates' Court. The damages would need to be much lower (up to $100,000) for the matter to be heard in the Magistrates' Court, <u>or</u> damages of that amount would be heard in a higher court (such as the County Court).*

✓ *A civil matter resolved in the Magistrates' Court will not use a jury. If Zachariah wants to have the dispute heard by a jury, it will need to be heard in a higher court (such as the County Court).*

✓ *Juries do not determine damages in defamation cases. The magistrate or judge would determine damages in a defamation suit (depending on the court), or the jury would only deliver the verdict and would then be discharged.*

b. What does it mean to say that Zachariah must have 'standing' in this case? 3 marks

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that clearly defines the concept of standing, as the requirement that an injured party has rights, interests or duties that are directly affected by the law in order to bring a legal dispute; and • That uses specific detail and/or examples to elaborate; and • That makes meaningful use of the stimulus case. Note that some answers may elaborate on standing and *then* connect the content to the stimulus case, while others may *use* the stimulus case to elaborate.
2 marks	• An answer that is accurate and detailed in relation to standing, but that either omits the stimulus case or is inaccurate in terms of the relationship with the stimulus case; or • An answer that meets all the criteria for a 3-mark answer but contains some errors of fact; or • An answer that addresses the required content but is brief and superficial.
1 mark	• An answer that gives only a general definition of standing; or • An answer that is otherwise more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range.

Sample answer: *Only people whose rights, interests or duties are directly affected by the operation of a law are permitted to bring a dispute before the courts. This direct interest in the outcome is called 'standing' or locus standi. Zachariah has standing in the case because his right to a fair and accurate reputation is allegedly being affected by the defamatory comments.*

Problematic example:

× *Standing is the legal privilege to bring a matter to court for resolution, and it is granted to a person, organisation or state entity because their rights, interests or duties are directly affected by the operation of a law. Zachariah has standing in this case because he wants to bring a dispute against Hearst because Hearst did not remove comments from the Facebook group that he administered.*

× *This is problematic because it has an accurate definition of standing, and it accurately suggests that Zachariah is the plaintiff in this case, but it fails to connect the two: it does not explain what relationship Zachariah has with the law in the area that gives him standing.*

c. How might the judicial power of case management help to resolve this dispute effectively? 5 marks

MARK RANGE	QUALITIES OF ANSWER
5 marks	• A clear and comprehensive answer that expresses an accurate understanding of case management, even though a freestanding definition is not required; and • That contains meaningful engagement with multiple arguments in relation to the benefits of case management – benefits may go beyond the principles of justice, but they must be linked with 'effectiveness' of the civil justice system generally; and • That provides a level of elaboration and detail appropriate to the number of arguments covered; and • That demonstrates meaningful use of the stimulus in those arguments. Note that arguments do not need to cover 'both sides' for the task instruction 'how might […] help to resolve'. No definitive opinion needs to be given in conclusion, but the focus of the arguments is on *helping* the system.
4 marks	• An answer that meets all the criteria for a 5-mark answer, but is inadequate in one aspect; or • An answer that meets all the criteria for a 5-mark answer, but that contains a few small errors of understanding or fact.
3 marks	An answer that meets the criteria for a 5-mark answer and is otherwise strong, but that suffers from one of the following problems: • The stimulus material is not used in the discussion; or • The answer relies more on content facts about case management than on a meaningful engagement with effectiveness; or • There are material errors of understanding or fact; or • The answer is overall too general or brief; or • The answer reads like a 'shopping list' of dot points rather than an explanation of coherent arguments.
2 marks	• An answer that suffers two or more of the problems identified in the 3-mark range; or • An answer that omits arguments on effectiveness entirely in favour of memorised content facts on case management; or • An answer that is undermined by significant errors of understanding or fact, such as concentrating on the *trial* role of the judge rather than limiting itself to pre-trial case management; or • An answer that discusses the stimulus material but does not link it with arguments about the case management theory component of the question.
1 mark	• An answer that generally defines case management but does nothing more; or • Anything else that is more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range.

Sample arguments:

✓ *Judicial case management over evidence can reduce the ability of parties to overwhelm the court with immaterial or contradictory evidence. Evidence can be limited to only that which is strictly necessary to prove or disprove the key issues in dispute. The system could resolve Zachariah's claim more effectively because it could limit discovery to only those comments that Zachariah is complaining about, rather than possibly flooding discovery with thousands of irrelevant comments, too.*

✓ *Case management powers are directed towards facilitating the most effective, efficient and prompt resolution possible – for instance, by ordering that Zachariah and Hearst attempt mediation. Access is increased for Zachariah in particular if the resolution process is shorter, cheaper and more efficient, because he claims to have lost a lot of income as a result of the alleged defamation.*

Question 3
Discuss one difference between the role played by the lower house of parliament and the role played by the upper house of parliament. 4 marks

Advice: The roles do not need separate definitions at the start, before the task word is addressed.

Note that only the *first* identified difference should be marked. It may be ambiguous sometimes whether students are using additional roles as detail to elaborate on their chosen difference, or whether they are moving on to additional differences. Assessors will need to use judgment in these cases.

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A comprehensive answer that clearly identifies one difference between the roles; and • That presents a range of subjective arguments in relation to that difference; and • That provides a level of elaboration and detail appropriate to the number of arguments covered, which may include examples and cases. Note that arguments do not need to expressly argue 'both sides' for the task word 'discuss', but more is required than a simple list of weaknesses or strengths with no reflection or engagement. Subjective arguments could cover the strengths and weaknesses of each house's role; the extent to which the roles are performed in practice; or examples of the roles being executed well or poorly. Note also that no definitive opinion needs to be given in conclusion, because that is not required for 'discuss'.
3 marks	An answer that fulfils the criteria for a 4-mark answer, but that displays one of the following weaknesses: • Something lacking in the quality of description and elaboration; or • Slightly too much ambiguity in whether the answer is elaborating on one difference or moving onto additional differences; or • Slightly too much focus on individual explanations of roles, with the difference between drawn out only superficially or briefly; or • Slightly too much focus on factual content at the expense of subjective discussion; or • Superficial errors in understanding or content that do not undermine the answer as a whole.
2 marks	• An answer with two of the problems identified in the 3-mark range; or • An answer that focuses only on definitions and explanations, and leaves the difference implied; or • An answer that outlines an appropriate difference, but engages in no elaboration; or • An answer that fails to engage in the discussion of subjective arguments and only includes factual information on the difference; or • An answer that contains errors of understanding or content that undermine the answer.
1 mark	• More than *nothing* that is accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answer:

✓ *The lower house has a larger role to play in introducing bills to make new legislation or amend existing acts, compared with the upper house. The lower house initiates most new bills, including the taxation bill and budget, whereas the upper house tends to act as a house of review and receive those bills second. This creates a complementary relationship where bills can be introduced efficiently by the executive, but the upper house can focus on checking that poorly considered bills do not pass, or laws that are unfair to the citizens who did not vote for the Government party. Also, because the Government has the support of the majority of seats in the lower house and most government ministers sit there, most new bills are introduced in the lower house. In contrast, the upper house has more debate, which can make the passage of legislation in the upper house more time-consuming than the lower house.*

Note that the difference is identified clearly in the first sentence. The rest of the answer is a mix of factual content and subjective arguments, and all the points mentioned relate to the one difference identified at the start.

✓ *The lower house is the seat of government, whereas the upper house does not have the power to determine which party becomes the executive government. The lower house MPs have the responsibility of determining which party or coalition of parties will control the executive branch and determining the main policy direction for the state, which gives that house a lot of influence over the executive arm in the separation of powers. For example, the Labor Government in Victoria is responsible for developing the policy behind the State's Covid-19 response, because it has the confidence of the representative lower house. Arguably, the upper house better achieves the checks and balances of the separation of powers because it acts legislatively and has less power over the executive. The upper house only has power over the Government insofar as it can refuse to pass Government bills – even though this can slow down effective government of the state or country.*

Problematic difference:

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

This is problematic because it fails to bring in any comparison between the roles. There is a potentially implied difference in the details of the voting systems, but this needs to be made explicit by the student. Independent definitions are not sufficient for 'differences'.

Question 4

In *Gerner v Victoria* [2020] HCA 48 the High Court stated that: "Section 51(ix) of the Constitution confers on the Commonwealth Parliament an express power to make laws with respect to 'quarantine'. By virtue of s 106 of the Constitution the concurrent legislative power of the States with respect to the same subject matter was expressly preserved."

✓ *What does it mean to say that quarantine is a "concurrent legislative power"? 3 marks*

MARK RANGE	QUALITIES OF ANSWER
3 marks	• A clear answer that shows an understanding of the fact that concurrent powers are powers that are shared between Commonwealth and state parliaments; and • A meaningful application of the stimulus case to illustrate why we know that quarantine is concurrent.
2 marks	• An answer that fails to define 'concurrent powers'; or • An answer that is superficial in its application of the stimulus case, by simply saying for instance that the High Court calls quarantine 'concurrent' and going no further; or • An answer that contains minor errors in fact or application; or • An answer that addresses the required content but is brief and superficial.
1 mark	• More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answer: *A concurrent legislative power is one that is shared by the Commonwealth and state parliaments. Quarantine is a concurrent power because, as the High Court states in its judgment in Gerner's case, it is given to the Commonwealth in s51(ix), but it was also kept by the states as part of their protected powers from before federation – the High Court says it was "expressly preserved."*

✓ *Analyse the effect that section 109 of the Australian Constitution could have on any quarantine laws passed by the state parliaments. 4 marks*

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A clear and comprehensive explanation that clearly expresses an understanding of s109, even though a freestanding definition is *not* required – this understanding must include the fact that both state and Commonwealth parliaments can make law in concurrent areas, and that Commonwealth law will override any inconsistent state provisions; and • That makes at least one argument about the way in which the meaning of s109 relates to quarantine; and • That provides a level of elaboration and detail appropriate to the number of arguments covered; and • That makes meaningful use of the stimulus material. Note that arguments should cover 'both sides' for the task word 'analyse', because 'analyse' means to argue the different aspects, components or sides to something. More is required than a simple list of strengths or weaknesses with no reflection or engagement. No definitive opinion needs to be given in conclusion, however.
3 marks	Something slightly less than a sophisticated, complete 4-mark answer. For instance, any of the following in an otherwise complete answer: • An excellent explanation of s109, but only a superficial mention of the stimulus; or • An omission of part of the required information regarding s109; or • Too heavy a focus on factual content at the expense of subjective 'analysis' arguments; or • Superficial errors of fact or understanding; or • An answer that addresses the required content but is slightly brief.
2 marks	• An answer that is focused on an outside case study such as McBain; or • An answer that attempts to illustrate its points with examples, but uses inappropriate examples such as the ACT marriage equality legislation from 2016; or • An answer that clearly explains s109 but that fails to produce a range of arguments on its impact; or • An answer that fails entirely to mention the stimulus; or • An answer that is undermined by factual inaccuracies; or • An answer that covers the required content but is brief and superficial; or • An answer that makes only one argument about the impact of s109.
1 mark	• An answer that gives only a simple definition of s109; or • Anything else that is more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range.

Sample arguments:

✓ *If there is an inconsistency between a Commonwealth law and a state law, the Commonwealth law will prevail to the extent of the conflict. This is a fairly narrow effect in some instances, because a quarantine law could possibly cover a whole range of matters such as isolation, testing and border closures – the conflict might only be in relation to the exact length of isolation, for instance. It could, however, have a significant impact, if the entire law is fundamentally inconsistent. The entire state law could be overridden.*

Section 109 will only be applied if a party with standing takes a relevant question to the High Court (or Federal Court), like Gerner did in the stimulus case. If there is no party with standing willing to spend that time and money, both laws will continue unaltered even if they are in conflict with each other. For s109 to have an impact, the court will need to hear the case and decide that at least some part of the state law is inconsistent with the federal law. With quarantine laws, this could be, for example, a person affected by the testing rules or the border closures.

- ✓ *Explain two possible effects of the High Court interpreting the Constitution in the case of Gerner. 4 marks*

Advice: Note that only the *first two* identified effects should be marked.

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A comprehensive answer that clearly identifies two separate, accurate and relevant effects; and • That gives an explanation of them using detail and elaboration; and • That uses the stimulus case in a meaningful way.
3 marks	An otherwise 4-mark answer that has one of the following faults: • It lacks detail in the description of one effect; or • It lacks meaningful use of the source material; or • It has minor content errors; or • It contains one effect that is only ambiguously or tenuously connected to the stimulus case; or • The second effect is ambiguously related to the first, creating some overlap.
2 marks	• An answer that gives a clear and comprehensive explanation of only one effect; or • An answer that fails to identify two clear effects and instead gives an overall explanation of the effects of statutory interpretation; or • An answer that is undermined by content errors; or • An answer that gives an outline only of two separate effects and is too brief; or • An answer that entirely fails to use the stimulus case.
1 mark	• An answer that lacks any outline on either effect, and merely names both; or • An answer that gives an outline of only one effect; or • An answer that fails to identify any clear role and instead gives a generic definition of statutory interpretation; • An answer that gives only a description of the role of the High Court in interpreting the Constitution; or • More than *nothing* that is accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample effects:

- ✓ *A broad reading by the Court changes the meaning of the Constitution in a way that expands what is included within the meaning of the section. For instance, if the Court interprets the "quarantine" power broadly, it increases the scope of what state laws can potentially be declared invalid under the s109 inconsistency rule.*

- ✓ *Once the Constitution has been interpreted, it can be applied to the facts of the case. The Gerner case questioned one or more laws relating to quarantine, so the High Court's interpretation of ss51(ix) and s106 of the Constitution will be relevant to the facts of Gerner's case, and will allow it to be resolved.*

- ✓ *Precedent may be established regarding the meaning of the words in the Constitution. It is possible that the High Court could choose to reinterpret the scope of the quarantine power, or even the meaning of the s106 protection of residual powers. If they did, this new interpretation would set precedent that would be binding on all Australian courts.*

Question 5

In the recent case of *LibertyWorks Inc v Commonwealth of Australia* [2021] HCA 18, the joint judgment of Kiefel CJ, and Keane and Gleeson JJ commented on the freedom of political communication that the High Court has found through its interpretation of sections 7 and 24 of the Constitution:

"The freedom is recognised as necessarily implied because the great underlying principle of the Constitution is that citizens are to share equally in political power and because it is only by a freedom to communicate on these matters that citizens may exercise a free and informed choice as electors. It follows that a free flow of communication is necessary to the maintenance of the system of representative government for which the Constitution provides."

Discuss the role played by the High Court in interpreting the Australian Constitution, and the extent to which judgments of the High Court change the scope and meaning of the Constitution. 10 marks

MARK RANGE	QUALITIES OF ANSWER
10 marks	• A comprehensive answer that provides a clear opinion on the extent to which the High Court can change the meaning of the Constitution; and • That demonstrates meaningful engagement with one or more arguments in relation to this opinion; and • That demonstrates meaningful engagement with one or more arguments in relation to the role of the High Court, although a definitive opinion on this is not required; and • That provides a level of elaboration and detail appropriate to the number of arguments covered, which may include examples and cases; and • That makes meaningful use of the stimulus material. The role of the High Court is primarily to interpret the meaning of the wording of the Constitution, without changing the wording. Answers should communicate this basic idea. Note that arguments do not need to expressly argue 'both sides' for the task word 'discuss', but more is required than a simple list of weaknesses or strengths with no reflection or engagement. Note also that no definitive opinion needs to be given in conclusion, because that is not required for 'discuss'. A clear opinion or conclusion *does* need to be provided for the second part of the question, however. The balance of arguments on 'both sides' should be guided by that opinion. Note also that the stimulus case does *not* need to be woven all the way throughout the answer. This is a Part A question stimulus rather than a Part B key source, and only a very little amount of information is given in the question. Students must integrate it at some point, but they do not need to centre it.
9 marks	Something slightly less than a sophisticated, complete 10-mark answer. For instance, any of the following in an otherwise complete answer:

	• It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification; or • It lacks scope or detail in its arguments, either covering slightly too few, or a good number in slightly too little depth; or • It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole; or • It covers 'both sides', but lacks some engagement between arguments; or • It is slightly too brief on either the role of the High Court or the ability of the High Court to change the meaning of the Constitution; or • It focuses slightly too heavily on one or two case examples rather than using case examples to effectively illustrate arguments in response to the question; or • It has only a superficial reference to the stimulus.
8 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent; or • An answer that provides an excellent response, but that fails entirely to reference the stimulus case.
7-6 marks	• An answer that has two of the above problems; or • An answer that has one material failing from the above list, demonstrated to enough of a degree that 8 marks would be inappropriately high; or • An answer that is entirely missing one of the topics listed in the question.
5 marks	Answers that demonstrate more significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that contains errors of fact or understanding that are significant enough to undermine the answer as a whole; or • An answer that covers significantly too few arguments (such as perhaps two or three points only); or • An answer that provides too little detail to support its arguments and relies instead on assertion and general conjecture; or • An answer that reads like a 'shopping list' of dot points rather than a discussion; or • An answer that is focused on one or two case studies rather than arguments.
4-3 marks	• An answer that demonstrates any of the above significant problems to a greater extent; or • An answer that has two or more of the above problems; or • An answer that omits one of the topics in the question *and* that demonstrates at least one of the above significant problems.
2 marks	• An answer that makes only two accurate points; or • An answer that names three brief points or relevant cases; or • An answer that outlines the facts of one relevant case; or • An answer that provides information on tangentially relevant topics, such as explaining the difference between a referendum and High Court interpretation of the Constitution.
1 mark	• More than *nothing* that is accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample arguments:

- ✓ *The High Court has the power to interpret the Constitution, and the meanings the Court gives to the words form part of the law, even though they are not inserted into the wording of the Constitution. The meanings attached to the words of the Act form precedent, and are written down in law reports; these precedents are just as binding as the words of the Constitution themselves and change, in law, the way the Constitution applies in society. If in Gerner, for instance, the Court reinterpreted the nature of the s51(ix) quarantine power to be, like immigration, exclusive by its nature, this would invalidate all state law on quarantine.*

- ✓ *The ability to alter the meaning of the words in the Constitution allows the High Court to extend the relevance and lifespan of it, making sure it continues to be appropriate to contemporary circumstances. It would be impossible for parliament to draft a constitution in a way that related to every single fact situation that could ever arise. Giving the High Court the power to add to the meaning over time by elaborating on specifics allows flexibility and continued relevance. For instance, the framers could not legislate for radio and TV in the 1800s, but the High Court has used cases such as Brislan and Jones to expand the scope of the wording to include these.*

- ✓ *The High Court can use its powers of interpretation to quite radically change the application and meaning of the Constitution from what the framers intended. This is an example of an unelected judiciary overriding the will of an elected legislature. The implied right to freedom of political communication derived from the interpretation of ss7 and 24 has been criticised for this, because the framers chose deliberately not to protect a freedom of speech or political engagement. In LibertyWorks the Court justified it as being based on "the great underlying principle of the Constitution," but not everyone agrees or sees that in the wording.*

- ✓ *The High Court develops its interpretation of the Constitution over time, and in response to changing social circumstances. It also traditionally has been conservative in its jurisprudence, even when developing somewhat activist rights and doctrine. For instance, representative government provides fairly broad guarantees that the Commonwealth, the states, the territories and even local government will not abuse the democratic rights of Australians. It is flexible enough to change with changing circumstances, and can be interpreted by the courts on a case-by-case basis. The implied freedom has been developed to be very flexible and practical, and not extreme or overly literal.*

- ✓ *The High Court has the ability to find more implied rights and more structural protections connected to the interpretation of ss7 and 24 – for example, they could expand on the freedom of political participation and the right to vote. We do not need to change the wording of the Constitution for this, so it is a cheaper and much more flexible way of adapting rights and the Constitution to a changing society.*

- ✓ *Since 1920 and the Engineers Case, the Court has interpreted the Constitution in a way that unfairly increases the power of the Commonwealth and takes too much power away from the states. The specific powers of the Commonwealth should be interpreted with the goal of preserving a "federal balance," in line with the intentions of the framers and the goal of federation. Instead, they have been given mostly their literal scope, and have eroded the residual powers and state autonomy.*

Sample case illustration:

- ✓ *In the case of Burgess in 1936, the High Court was asked to decide whether the Paris Convention activated the external affairs power to allow the Commonwealth to legislate in a normally residual area: local aviation. Burgess established a precedent that the Commonwealth could sometimes legislate to implement the terms of an international agreement, even if the subject was usually a matter of residual power. This expanded the scope of external affairs outside the concurrent and exclusive powers that the framers intended for the Commonwealth.*

SECTION B

Advice: Since 2018 the Chief Assessor has consistently made it clear that the source material *must* be used in each answer to Section B: "Many students used the relevant stimulus material for Section A […], and for every question in Section B, as was required, although some students did not […] and therefore could not get full marks." (2020)

Question 1 (16 marks)

Source 1
The following is a media release published by the Parliament of Victoria on 25 June 2021 concerning a parliamentary committee hearing.

Health experts to address impact of COVID on tourism and events industries

Victoria's Chief Health Officer, Professor Brett Sutton, the Secretary of the Department of Health, and the Deputy Secretary of COVID-19 Strategy and Policy will appear at the final hearing of the Legislative Council's inquiry into the impact of the COVID-19 pandemic on tourism and events.

The hearing will be conducted on Monday June 28 via Zoom and broadcast live from 10:00am to 1:00pm on the Parliament's website.

The Legislative Council's Economy and Infrastructure Committee has heard from more than 50 witnesses from Victoria's tourism and events sectors since April.

The full schedule is available here.

The Committee will provide recommendations to the State Government on the best way to restore the tourism and events sectors to their critical role in the Victorian economy, including the thousands of jobs threatened by the ongoing effects of the global pandemic.

The inquiry's terms of reference, submissions and transcripts of earlier hearings are available from the Committee's website.

Issued: 25 June 2021

Parliament of Victoria News
news@parliament.vic.gov.au
(03) 8682 2814
parliament.vic.gov.au/about/news

Source 2
The following is an extract taken from the summary statement of the 2020 hotel quarantine class action, published by the Supreme Court of Victoria.

Hotel Quarantine Class Action
5 Boroughs NY Pty Ltd v State of Victoria & Ors
Case: S ECI 2020 03402
Filed on: 21/08/2020 at 06:21 PM

CLASS ACTION SUMMARY STATEMENT

The Hotel Quarantine Class Action seeks compensation for loss suffered by businesses alleged to have been caused by negligence in relation to the hotel quarantine program in Victoria.

Who is a group member in the Hotel Quarantine Class Action?

You are a group member if:

(a) as at 1 July 2020 you carried on a business involving the supply of goods or services to members of the general public from one or more premises physically located within Victoria;

(b) your ability to supply goods or services to members of the general public from those premises was adversely affected by one or more of the "stage 3" restrictions put in place in certain postcodes of Melbourne in July 2020; the "stage 4" restrictions put in place in Melbourne from 2 August 2020; and

(c) you have suffered economic loss by reason of one or more of the above-mentioned matters.

How is the Hotel Quarantine Class Action funded?

Quinn Emanuel Lawyers is acting on the basis that its fees will not be payable until and unless there is a successful resolution of the class action, by Court approved settlement or judgment. In the event that there is not a successful outcome in this class action, group members cannot be pursued for costs by the defendants as the Supreme Court Act prohibits orders for costs against group members.

a. **Discuss the ability of representative proceedings to achieve the principle of equality. 5 marks**

Advice: Representative proceedings do not need a separate definition at the start, before the task word is addressed.

MARK RANGE	QUALITIES OF ANSWER
5 marks	• An answer that shows an understanding of representative proceedings even though a freestanding definition is not required; and • That presents a range of subjective arguments in relation to representative proceedings; and • That links these arguments with the concept of equality; and • That provides a level of elaboration and detail appropriate to the number of arguments covered, which may include examples and cases; and • That makes meaningful use of the source material. Note that arguments do not need to expressly argue 'both sides' for the task word 'discuss', but more is required than a simple list of weaknesses or strengths with no reflection or engagement. Arguments must relate to equality: they do not need to repeat the word 'equality' to achieve this, and in fact should do more than simply repeat the word 'equality'.

	Note also that no definitive opinion needs to be given in conclusion, because that is not required for 'discuss'.
4 marks	Something slightly less than a sophisticated, complete 5-mark answer. For instance, any of the following in an otherwise excellent answer: • Slight errors in fact; or • Lacking something in elaboration and detail; or • Slightly too few different points and lacks in scope; or • Too much focus on factual content at the expense of subjective arguments relating to equality; or • A slightly excessive focus on one case example to the detriment of a broader answer to the question; or • Slightly superficial use of the source material; or • An answer that is slightly short.
3 marks	• An answer that demonstrates two of the above weaknesses; or • An answer that demonstrates one of the above weaknesses to a more significant degree; or • An answer that contains meaningful errors in fact, even though the underlying points are sound; or • An answer that elaborates on only one or two points; or • An answer that engages with arguments on representative proceedings, but that fails to link these arguments to equality; or • An answer that contains in-depth factual information on representative proceedings, but that fails to focus on subjective arguments; or • An answer that fails to use the source material.
2 marks	• An answer that gives a good description of representative proceedings but that does not answer the task word; or • An answer that provides a basic argument as to equality and representative proceedings, but that lacks entirely in elaboration and explanation; or • An answer that contains fundamental errors that undermine the answer; or • An answer that has only one point; or • An answer that runs through a short laundry list of dot points.
1 mark	• More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample arguments:

- ✓ *The original purpose of implementing a representative proceedings regime in 1992 was to enhance equality by reducing the cost of court action to the individual plaintiff. It was particularly designed for situations where they could not afford to initiate proceedings themselves and especially when the defendant was a powerful and wealthy organisation. For example, the recent hotel quarantine class action is being brought by people who claim their ability to earn a livelihood was damaged by the government. These two groups have vastly different power and financial resources, and grouping the injured parties together does only a little to address it.*

- ✓ *In 2013 Federal Court justice Bernard Murphy said that class actions are "important in improving access to the protection of substantive laws," because group members bear no risk in terms of the cost of losing, and do not need the money to fund the legal advice and representation in the first place. Group members can access the protection of laws, while also being protected from risk. The people who lost work as a result of lockdown can use the quarantine class action to challenge parliament's power, as is right in a democracy,*

without each having to individually foot the bill for the challenge. This gives them equality with other citizens and organisations who could afford it.

✓ *Representative proceedings provide equality across groups in society by providing alternative ways in which actions can be funded. A wealthy plaintiff may be able to pay for their own representation and court fees, but in class actions there is more likely to be a 'no win no fee' arrangement, and the group costs orders introduced in 2020 allow the court to order the plaintiff law firm to bear the costs of the action. Class actions also use litigation funders. This gives an equal opportunity to less wealthy complainants, even if they can't afford an action themselves.*

Problematic example:

× *Representative proceedings allow seven or more people all harmed by the same wrongdoing the ability to share the costs of the action. Legal representation is expensive, but if all group members share in those costs, they make bringing a civil case possible in situations where no group member could afford to pay for representation by themselves. This makes all the people involved in the class action equal.*

This is problematic because it makes the common mistake of saying that group members share the costs of the action. They do not. Often, they will receive a reduced amount in damages, if some costs are taken out of the final settlement or damages award before it is divided between members.

This is also superficial in its claim about equality. Named plaintiffs are not equal to group members, and the people bringing the class action will not necessarily be equal with the defendants. More detailed explanation as to how and why might have made the argument more accurate.

b. Describe costs as one factor that a plaintiff should consider when deciding whether to bring a civil claim. 3 marks

MARK RANGE	QUALITIES OF ANSWER
3 marks	• An answer that gives a clear identification of costs as a factor; and • That goes beyond the identification to provide detail or elaboration; and • That makes meaningful use of the source material.
2 marks	Something slightly less than a sophisticated, complete 3-mark answer. For instance, any of the following in an otherwise complete answer: • An answer that lacks detail in the description of costs; or • An answer that gives no indication of why costs might affect the choice to bring a civil claim; or • An answer that lacks meaningful use of the source material; or • An answer that has one or more significant content errors; or • An answer that is overall too brief.
1 mark	• More than *nothing* accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample answer: *A plaintiff must consider whether they can afford to pursue the dispute, because they may be forced to abandon the claim or settle for less if they run out of funds. For instance, the named plaintiffs in the hotel quarantine class action might enter into a 'no win no fee' arrangement, but they will still need to service all costs (including personal costs such as time off work) not covered, and then the fees deducted from a final remedy or settlement may leave them and group members with less than they need for compensation.*

c. Evaluate the ability of law reform bodies, including either a royal commission or a parliamentary committee, to influence a change in the law. 8 marks

Advice: In 2020 the Examination Report noted that students needed more work on royal commissions and parliamentary committees.

Law reform bodies do not need separate definitions at the start, before the task word is addressed.

MARK RANGE	QUALITIES OF ANSWER
8 marks	• An answer that provides a clear opinion on the impact of law reform bodies; and • That demonstrates meaningful engagement with multiple arguments both in favour of influence, and against the ability of bodies to influence; and • That has support provided for the arguments in the form of specific recommendations, detail and/or examples appropriate to the number of points made; and • That makes meaningful use of the source material. Note that arguments *do* need to cover 'both sides', regardless of the opinion given, because of the task word 'evaluate'. Arguments should also engage with each other and not be a list. Note that reforms and recommendations for reform will only be relevant if they are used to illustrate an arguments about how law reform bodies do or do not have a meaningful ability to influence change. Students who have not studied parliamentary committees will likely use less of Source 1. They should not be penalised for this, as long as some use of it is made.
7 marks	Something slightly less than a sophisticated, complete 8-mark answer. For instance, any of the following in an otherwise complete answer: • It lacks a sophisticated opinion in response, and gives a more general "I agree to a certain extent" with insufficient clarification; or • It lacks some cohesiveness in the arguments, where each is strong in itself but there is limited integration or weighing up between them; or • Some arguments are strengths and weaknesses of the bodies, but aren't connected effectively with how or why they give the bodies more or less influence over change in the law; or • It lacks scope or detail in its arguments, either covering slightly too few or a good number in slightly too little depth; or • It has a slightly superficial use of the source material; or • It errs on the side of factual descriptions (eg accounts of recent and/or recommended reforms, or factual descriptions of the law reform bodies themselves); or • It contains a small number of minor errors in understanding or content that do not undermine the answer as a whole.
6 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent; or • An answer that fails to provide any overall conclusion or answer; or • An answer that relies too heavily on factual descriptions and individual arguments, and sounds slightly rote-learned rather than being a cohesive evaluation; or • An answer that fails entirely to use the source material but is otherwise excellent.
5 marks	• An answer that demonstrates two or more of the above problems, but still gives a satisfactory response to the question asked; or

	• An answer that provides an excellent account of law reform bodies, their roles, and a range of their strengths and weaknesses, but that fails to use this material to answer the question of how much they can influence reform.
4 marks	Answers that demonstrate more significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: ✓ *Errors of fact or understanding that are significant enough to undermine the answer as a whole; or* ✓ *Significantly too few arguments covered (such as only two or three points); or* ✓ *Little detail provided to support its arguments and a reliance on assertion and general conjecture; or* ✓ *A heavy reliance on problems with the legal system and an inadequate discussion of the way bodies influence change to the law; or* ✓ *A 'shopping list' of dot points rather than an evaluation.*
3-2 marks	✓ *An answer that demonstrates any of the above significant problems to a slightly greater extent; or* ✓ *An answer that has multiple of the above problems; or* ✓ *An answer that is limited to a short list of brief points; or* ✓ *An answer that concentrates on one case study of a recommendation and possible reform; or* ✓ *An answer that fails to evaluate and provides only factual content.*
1 mark	✓ *More than nothing that is accurate and responsive, but limited to one point that is something less than the 2-mark range.*

Sample arguments:

✓ *A parliamentary committee is a group of parliamentarians who are appointed to conduct special research into an issue or area of legislation in addition to their time sitting on the 'floor' of parliament. Standing committees and select committees tend to undertake more comprehensive research and inquiry, which is why the issue of Covid-19 tourism impact was referred to the Legislative Council's Economy and Infrastructure Committee, because they can do things such as calling public meetings and questioning witnesses, like is advertised in Source 1. First-hand evidence can be obtained, and used to influence legislation and amendments.*

✓ *The research of parliamentary committees can be compromised by party politics. For example, Senate reference committees are chaired by non-Government members, but the paired legislation committee is always chaired by a Government member. Victorian Parliament committees are mostly composed of members from both houses, and usually are under government control. The Committee in Source 1 will luckily avoid some of this political control, though, because it is an upper house committee rather than a committee from both houses. This may enable it to better scrutinise executive government actions and make recommendations to improve it going forward, even if those recommendations are critical of the government.*

✓ *Committees are expected to cover too much ground to do proper research on everything in their field. For example, the Senate Standing Committee on Regulations and Ordinances deals with over 200 bills a year, plus 1570 federal regulations according to the Committee's 2018 Annual Report. Most issues do not receive the level of attention that the Covid-19 impact on tourism is receiving.*

✓ *The powers given to a royal commission go beyond the powers given to other bodies, as commissions can even request classified information, hold private hearings in camera, compel government officials to aid the investigation, and offer witnesses indemnity for giving evidence. Penalties for refusing the order of a commission include fines of $1,000 and six months imprisonment. The committee in Source 1 is holding a public hearing of a similar kind. The amount of evidence gained from these public hearings can be highly influential to parliament in law-making.*

- ✓ *Royal commissions can take broad, systemic approaches to issues, and look into matters of huge public importance. They are able to transcend party politics because they cannot be de-commissioned after they have been established; commissions in the past have given recommendations that even criticised the government of the day, such as the 1987 Fitzgerald Inquiry that criticised corruption in the Queensland police force. An issue such as Covid-19 is therefore likely to be given to a royal commission, but that leaves commissions without the ability to influence law in smaller areas – ones where a commission would seem overkill and an unnecessary allocation of money and resources.*

  - ✓ *The results of commissions are published in enormous, multi-volume reports. These are difficult to find online, and must often be purchased in hardback print copy. They are also frequently known by the surname of the chairperson of the inquiry, so can be confusing to locate. As a result, recommendations made by commissions can be publicised at the time of release, but then easily forgotten about. For instance, most of the 1300+ bushfires recommendations made since 2009 have been implemented, yet another commission was called after the 2019-20 fires.*

  - ✓ *The VLRC has access to law reform measures and outcomes from a range of other jurisdictions: it has direct access to law reform commissions in other states, and employs legal professionals who know how to research case law and statutory amendments. This means it can make informed recommendations based on what has worked in other states or countries, and provide evidence to substantiate them. The recommendations carry more weight than petitions and public lobbying requests that do not have the same expert weight behind them.*

  - ✓ *The Commission was created by the parliament and receives both funding and commissions from them. In other words, the Commission is paid by parliament to make (unbiased and independent) recommendations on issues about which the Government wants to hear. This means its advice will be likely to be taken seriously. Most of its commissions also last for no more than 24 months, which means that often the Government that requested the recommendations is still in power.*

  - ✓ *The Commission's investigative processes are much more time-consuming than the average protest, petition or media report. The average report takes between 6 and 24 months to complete – and it is not uncommon for them to take longer. Even the community law inquiry on funeral and burial instructions lasted for 18 months, from June 2015 until December 2016. If there has been a change of Government in this time, the new Government may prefer its own policy agenda and may sideline the non-binding recommendations to distance itself from the previous governing party.*

Question 2 (24 marks)
Source 1
The following is an extract taken from the judgment of the Supreme Court of Victoria (Court of Appeal) in the case of *Baker v The Queen* [2021] VSCA 158. Baker was found guilty of assault in the County Court in 2019, and appealed to the Court of Appeal on the grounds that his sentence was too severe.

Extract has been edited for length and clarity.

SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCR 2020 0005

JOHNIE BAKER (A PSEUDONYM) [1] — Applicant

v

THE QUEEN — Respondent

JUDGES:	McLEISH and OSBORN JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	26 May 2021
DATE OF JUDGMENT:	9 June 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 158
JUDGMENT APPEALED FROM:	[2019] VCC 2096 (Judge Carmody)

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr P J Smallwood	Tyler Tipping & Woods
For the Respondent	Mr J Dickie	Ms A Hogan, Solicitor for Public Prosecutions

1 The applicant pleaded guilty in the County Court to 14 charges arising out of violence inflicted by him on his former partner over a period of some 18 months. He seeks leave to appeal against the sentence imposed on two of those charges.

2 The applicant was sentenced on 12 December 2019 to be imprisoned for 5 years and 3 months, with a non-parole period of 3 years and 6 months.

3 At the time of the offending, the applicant was between 21 and 23 years old. The victim of the offending, Ella Anderson, was between the ages of 18 and 20.

4 The applicant accepted that the offending was serious and involved disgraceful conduct on his part. It was conceded that a significant term of imprisonment was warranted. However, the applicant submitted that the sentence imposed was manifestly excessive because it failed to give sufficient weight to a number of important mitigating factors.

5 It was submitted that the applicant had demonstrated real remorse.

6 Next, the applicant was youthful at the time of the offending and ill-equipped to handle a domestic relationship. He was a person who presented with a traumatic background, having been exposed to violence and neglect from caregivers at an early age. A report prepared by forensic psychologist Dr Aaron Cunningham concluded that the applicant's intellectual functioning was in the extremely low range. His overall thinking and reasoning skills were consistent with an intellectual disability.

7 At the time of the plea hearing, the applicant had spent 477 days in custody, housed in maximum security and for much of that time in solitary confinement. He had remained drug-free whilst in custody and had attended an anger management course and a drug and alcohol course. He had also taken up religion and engaged in daily prayer.

8 In our view, the argument that the sentence imposed was manifestly excessive cannot be sustained. This was an extremely grave case of recklessly causing injury.

9 Leave to appeal should be refused.

a. Compare the responsibilities of trial personnel in a criminal trial with the responsibilities of personnel in a civil trial. 6 marks

Advice: The various responsibilities do not need separate definitions at the start, before the task word is addressed.

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

When open-ended questions are asked like this on the examination, it is uncommon for *all* possible options to be required. Four categories of personnel are covered on the Study Design. For 6 marks, it would be unreasonable to expect answers to cover all four; generally, half plus one is a good measure. So, three of the four might be mentioned in the best answers.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• A clear and comprehensive answer that provides at least one similarity between the responsibilities of the personnel and at least one difference; and • That covers two or three categories of personnel, not necessarily in equal depth; and • That has elaboration appropriate to the number of points made; and • That makes meaningful use of the source material. Note that the connections must be express rather than implied. One answer on the roles of a civil jury followed by a separate answer on the roles of the criminal jury will not be eligible for full marks, even if a word such as 'whereas' is sandwiched between them – this is because the comparison is implied rather than express.
5 marks	An answer that fulfils the criteria for a 6-mark answer, but that displays one of the following weaknesses: • Something lacking in the quality of description and elaboration; or • An absence of *either* similarities or differences, even though the answer (relying only on one side) would otherwise be worth 6 marks in terms of scope and detail – at least one of each must be included; or • Minor errors in understanding or content that are something more than superficial but that do not undermine the answer as a whole; or • Something less than a sophisticated use of the source material.

4 marks	• An answer with one of the above identified problems, but present to a larger extent; or • An answer that covers only one personnel category, even though it is discussed well as a comparison, with both similarities and differences; or • An answer that fails to use the source material.
3 marks	• An answer with two of the problems identified in the 5-mark range; or • An answer that focuses on one of either criminal or civil and leaves the comparison with the other largely implied; or • An answer that elaborates on the responsibilities of each personnel category but leaves the comparison between them unstated or implied; or • An answer that contains errors of understanding or content that begin to undermine sections of the answer; or • An answer that is significantly short.
2 marks	• An answer that identifies responsibilities but engages in no elaboration or comparison; or • An answer that only covers one brief comparison point; or • An answer with significant errors in understanding or content.
1 mark	• An answer that names only one responsibility; or • Anything else that is more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range.

Sample comparisons:

✓ *The civil judge has the responsibility to deliver the verdict in all trial matters where a jury has not been requested, whereas the criminal judge will never deliver the verdict in a trial because all indictable offences are determined by jury. In Source 1, the appeal decision would be handed down by the judge in both criminal and civil, because no juries are used in appeals.*

✓ *Both criminal and civil legal practitioners have a paramount duty to the court and to justice – this is codified in the* Civil Procedure Act *for civil lawyers, however, and is more clearly legislated than the primary duty to the court of criminal lawyers. Smallwood and Dickie would both have borne this responsibility in Source 1, as would barristers in a civil trial.*

✓ *The legal practitioners in both criminal and civil matters have to balance their duties to the court with fighting for the best outcome possible for their client, and acting on instruction from that client. Legal practitioners must always take instruction from their client – as Smallwood and Tyler Tipping & Woods would have done when launching the appeal – but cannot do so if it would mislead the court or be unethical.*

✓ *Civil judges have the responsibility to use the case management powers given to them in the* Civil Procedure Act, *which enables them to exercise control over some evidence such as expert witnesses – they can even select a court-appointed expert for both parties to use. This is both similar to and different from the responsibilities of criminal judges. Criminal judges have much less extensive case management powers, and cannot control expert witnesses to the same extent. They can, however, set timelines and make orders regarding evidence allowed at trial.*

✓ *The judge in both criminal and civil resolution has the responsibility to remain impartial, and not side with either party. Even if they assist self-represented litigants or accused, they are meant to do it with impartiality and without unreasonably prejudicing one side. This is one of the reasons why the appeal justices in Source 1 outlines factors both against and in favour of the appellant – to demonstrate impartiality.*

✓ *Parties in a civil dispute have the responsibility to engage in negotiation and to attempt to resolve the matter out-of-court where possible, whereas the accused in a criminal matter does not. Johnie Baker in Source 1 would have been encouraged to enter into plea negotiations, but he had no legal obligation to do this. Civil parties do, in the* Civil Procedure Act.

✓ *The jury in Johnie Baker's original trial would have been responsible for delivering the verdict, but they would then have been discharged before sentencing. Baker is appealing the sentence handed down by Judge Carmody alone. This is different from the jury in a civil case, as it will usually also be responsible for determining the amount of damages to be paid if the defendant loses.*

Problematic example:

× *Baker's lawyers would have been responsible for representing their client to the best of their abilities, and ensuring that he could put his best case forward and received the protection of the presumption of innocence and the high standard of criminal proof. Civil parties also engage lawyers to represent their interests and give them the best chances of success with their claims and defences.*

This is problematic because it is too general and covers multiple points without clearly identifying what the similarities and differences are.

b. How has the criminal court hierarchy been relevant to the resolution of this case? 4 marks

MARK RANGE	QUALITIES OF ANSWER
4 marks	• A comprehensive answer that relies on content from at least one reason for a court hierarchy that relates to the source case; and • That provides detail and elaboration on the reason or reasons; and • That makes meaningful use of the source material. Note that the material in the answer will come generally from 'reasons for a court hierarchy', but that the wording may not be as clean as this because of the way the question has been worded. Students have not been directed to expressly identifying specific 'reasons' for a court hierarchy, so may not do this clearly. The content in their answers will rely on this kind of information, however.
3 marks	• An answer that is slightly too general or repetitive; or • An answer that relies on strong content regarding a court hierarchy, but that has only shallow links with the source case; or • An answer that meets all the criteria for a 4-mark answer, but is weaker in one aspect; or • An answer that meets all the criteria for a 4-mark answer, but that contains a few small errors of understanding or fact.
2 marks	• An answer that lacks meaningful engagement with any points, and instead covers basic factual information on the court hierarchy; or • An answer that covers civil aspects of the hierarchy and reasons; or • An answer that discusses the source case but fails to include theory on the court hierarchy or reasons for it; or • An answer that fails to use the source case; or • An answer that superficially meets the criteria for a 4-mark answer, but that is undermined by fundamental errors of understanding or fact; or • An answer that reads like a short 'shopping list' of two or three dot points rather than an explanation of relevant points.

1 mark	• One fact about the court hierarchy, but nothing more; or • An identification of one fact about the source case that illustrates the court hierarchy, but nothing more; or • Anything else that is more than *nothing* accurate and responsive, but that is limited to one point that is something less than the 2-mark range.

Sample answer:

✓ *The organisation of courts in a hierarchy allows for a verdict or judicial determination to be appealed to a higher court. Appeals can be made on questions of fact (including, for instance, sentencing, as in Source 1) or on questions of law, and involve the higher court being asked to scrutinise the original decision-maker. Baker appealed from a decision of the County Court to the higher Court of Appeal, where three justices reviewed the lower court's sentence. Allocating matters depending on the seriousness and complexity of the dispute also allows the courts to better allocate their resources and achieve efficient resolution – this is administrative convenience. For instance, the Court of Appeal in this extract would not have needed to empanel a jury or process witness statements because appeals are just legal arguments.*

Problematic answer:

× *Baker used the Court of Appeal's specialised appeal focus to gain greater administrative convenience. Individual courts hear disputes that relate to narrower areas than the whole field of criminal law, and the court personnel therefore develop detailed knowledge and procedures that relate to these areas. The Court of Appeal focuses specifically on appeals, for instance, and the justices have experience in this area – this leads to more efficient hearings. The three justices in Baker's case only hear appeals: they do not hear witnesses or give jury instructions, because witnesses and juries are not used in appeal cases. This makes appeals in the Court of Appeal more specialised and streamlined. The hierarchy was relevant in this case because Baker was bringing a criminal appeal up to the Court of Appeal.*

This is problematic because it combines elements of specialisation and administrative convenience. This is a common error. It is also problematic because it begins to become repetitive and general towards the end – this is also a common error as students run out of their first idea.

c. Discuss the ability of imprisonment to achieve two of the purposes of sanctions. 6 marks

Advice: In the 2020 Examination Report it was acknowledged that the purposes can overlap, and students were warned about excessive repetition: "Some repeated the points they made about each type of purpose – noting that if an offender was wealthy they would not be punished or deterred. While some points can be repeated, students are encouraged to make new points for each purpose."

Note that only the *first two* identified purposes should be marked.

MARK RANGE	QUALITIES OF ANSWER
6 marks	• An answer that gives a clear identification of two purposes taken from the *Sentencing Act 1991* (Vic); and • That shows an understanding of the meaning of these purposes through words in the answer such as synonyms – repetition of 'denounce' for 'denunciation', for instance, fails to show understanding; and • That illustrates these purposes with some content detail from imprisonment; and • That engages with at least two arguments for each purpose; and • That makes meaningful use of the source material. Note that the answer does not need to be split 50/50 across the two purposes.

	Note also that arguments do not need to expressly argue 'both sides' for the task word 'discuss', but more is required than a simple list of weaknesses or strengths with no reflection or engagement. Additionally, no definitive opinion needs to be given in conclusion, because that is not required for 'discuss'.
5 marks	Something slightly less than a sophisticated, complete 6-mark answer. For instance, any of the following in an otherwise excellent answer: • Very little detail on one of the purposes; or • Slightly too much focus on one purpose at the expense of a full and sophisticated discussion of the other; or • A slightly brief acknowledgement of subjective arguments, with too much focus on factual content; or • An answer that meets the criteria for a 6-mark answer, but that contains a small number of minor factual errors; or • An answer that is slightly short; or • A slightly superficial use of the source material.
4 marks	• An answer with two of the problems indicated in the 5-mark answer range; or • An answer with any one of the above problems, but present to a larger extent; or • An excellent answer on one purpose, but that fails to cover a second purpose; or • An answer that fails to use the source material.
2-3 marks	• An average answer that only addresses one purpose; or • An answer that contains content facts but little to no subjective argument, and thus does not answer the question; or • An answer that makes only a couple of points; or • An answer that has significant content errors.
1 mark	• More than *nothing* that is accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample purposes:

✓ *Imprisonment could specifically deter Baker from committing further criminal offences, because he will still be a fairly young adult when he is released, with many years left to make a life for himself, and he might not want to lose more of them to jail. Baker's offending was "disgraceful," but he was also young and showed remorse. This indicates that he might be receptive to future deterrence and making better choices. One concern is if a sentence isn't long enough, however. Evidence suggests that short prison sentences can send the opposite message, by telling an offender that they will only receive a slap on the wrist for their wrongdoing – they can be more likely to do it again. A sentence of three years before parole may be too short to provide sufficient specific deterrence.*

✓ *Imprisonment will likely punish Baker, because even a short sentence is highly punitive. Prisoners are cut off from family and their homes, and Baker has a history of poor mental health and his psychological report suggests an intellectual disability. This could make prison even more punitive for him, and could cause him more suffering than another prisoner in his same situation. Steps could be taken to reduce the punishment by housing him in a specialised facility and engaging him in educational programmes and therapy, but this level of isolation could have more of a negative impact on his mental and physical health.*

d. Analyse the role played by factors considered in sentencing in achieving a fair outcome in a criminal dispute. 8 marks

Advice: The factors do not need separate definitions at the start, before the task word is addressed.

In 2019 the final Part B question called for an analysis of fairness in relation to the source case. The Chief Assessor commented that answers often repeated the word 'fairness' in a simplistic way: "Many students spoke about the case being 'fair' or 'unfair' without explaining what that meant; it would have been better to use other terms."

In the 2019 Examination Report, sentencing indications were identified as an area in need of additional work. For instance: "Many students stated that a sentence indication was not appropriate because John had pleaded not guilty. This was not acceptable as an answer. Applications for sentence indications ordinarily occur after a plea of not guilty is entered."

MARK RANGE	QUALITIES OF ANSWER
8 marks	• A comprehensive answer that clearly identifies two or more factors considered in sentencing; and • That demonstrates meaningful engagement with multiple arguments in relation to these factors; and • That relates these arguments to a 'fair outcome' in a meaningful way; and • That provides a level of elaboration and detail appropriate to the number of arguments covered; and • That makes meaningful use of the source material. Note that arguments should cover 'both sides' for the task word 'analyse', because 'analyse' means to argue the different aspects, components or sides to something. More is required than a simple list of strengths or weaknesses with no reflection or engagement. No definitive opinion needs to be given in conclusion, however.
7 marks	Something slightly less than a sophisticated, complete 8-mark answer. For instance, any of the following in an otherwise complete answer: • A lack of scope or detail in the arguments, either covering slightly too few or a good number in slightly too little depth; or • A slightly superficial use of the source material; or • A slight reliance on factual descriptions of factors, rather than answering the question through subjective arguments; or • A small number of minor errors in understanding or content that do not undermine the answer as a whole.

6 marks	• An answer that has one of the above problems, demonstrated to a slightly greater extent.
5 marks	• An answer that demonstrates two or more of the above problems, but still gives a satisfactory response; or • An answer that is shallow and repetitive in its links with fairness; or • An answer that fails entirely to use the source material, but that otherwise answers the question; or • An answer that only discusses one factor.
4 marks	Answers that demonstrate more significant problems or omissions begin to place from this mark range down. Problems or omissions include the following: • An answer that contains specific detail and content, but lacks meaningful engagement with any arguments and is entirely factual rather than responsive; or • An answer that contains errors of fact or understanding that are significant enough to undermine parts of the answer; or • An answer that covers significantly too few arguments (such as two or three only); or • An answer that provides little detail to support its arguments and relies instead on assertion and general conjecture; or • An answer that reads more like a 'shopping list' of dot points than a cohesive analysis.
3-2 marks	• An answer that makes one clear argument about one sentencing factor; or • An answer that demonstrates any of the above significant problems to a slightly greater extent; or • An answer that has two or more of the above problems.
1 mark	• More than *nothing* that is accurate and responsive, but limited to one point that is something less than the 2-mark range.

Sample analyses:

✓ *One sentencing factor is the weighing up of mitigating factors and aggravating factors. It is appropriate that the individual circumstances of the offender be taken into account when the most appropriate sentence is determined, because sanctions are offender-focused rather than victim-focused. Here, the sanction is focused on Baker's behaviour rather than on what Anderson might need to recover from the abuse. Baker's history, the specific motivations he had when offending, the likelihood of him posing a threat to others in society and other relevant considerations should all influence the sentence that is given to him to make it more fair and appropriate. This is why, for instance, the appeal justices review factors such as his intellectual disability and the remorse he has shown.*

✓ *Offenders are rewarded for pleading guilty and taking responsibility for their actions and the ensuing trial, but they are not punished for insisting on their right to the presumption of innocence by pleading not guilty. Guilty pleas will be taken as mitigating factors regardless of whether there is remorse present, and the law takes into account the fact that early guilty pleas are more beneficial than late ones, because they save the witnesses and court time and stress. The law encourages judges and magistrates to reward early guilty pleas more meaningfully than late ones, as an incentive. Baker did not plead guilty, and insisted on his presumption of innocence. Because this would have affected the length of his sentence, he may feel that he is being punished for asking for his right to a fair trial, even though he has showed remorse.*

✓ *The sentencing court will take victim impact statements into account in sentencing, if anything in them tends to prove or disprove a relevant fact. This was designed to give fairness to a victim who wanted to be heard, and also to an accused in that a more complete picture of the offence is being put before the court. The*

judge or magistrate is given the power to declare any part of a victim impact statement inadmissible if it contravenes the rules of evidence, or if it may unfairly prejudice the sentencing against the offender. These restrictions are also in the interests of fairness. If Anderson submitted a statement, Baker would have been protected by these provisions. One of the unintended side-effects of victim impact statements, however, is that they suggest that a crime against a victim is worse, and deserving of harsher punishment, if that victim is eloquent, able to appeal to the emotions of the court, and has money or social standing that was threatened by the crime. This unintentionally devalues the impact of crime on people who can't express themselves well, or have little money or social standing to be impacted. Anderson is young and vulnerable, and may fall into this category.