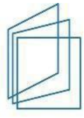

EXTRA

EXPERIENCED TEACHER RESOURCES & ASSESSMENTS

LEGAL STUDIES
UNITS 3&4
2021 Trial Examination

Reading time: 15 minutes

Writing time: 2 hours

SOLUTIONS

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EXTRA

EXPERIENCED TEACHER RESOURCES & ASSESSMENTS

2021 EXTRA Legal Studies Units 3&4 Trial Exam

SECTION A

Question 1 (3 marks)

a) Identify who holds the burden of proof in this case. 1 mark

Marking guide:
➔Students need to focus on the task word, identify, or point out explicitly who holds the burden of proof, that is, initiates legal proceedings in this civil case. **1 mark** for identifying the burden rests on Dr Dean (the plaintiff)

➔ **Note:** students need to use the plaintiff's name to game full marks as the question specifically states 'in this case'

Sample response:

The burden of proof is on the plaintiff, Dr Dean.

b) Distinguish between the standard of proof required in Dean v Puleio and a trial involving armed robbery. 2 marks

Marking guide:
➔Students need to focus on the task word, distinguish, that is, to show the difference, by using a linking word such as 'however', 'whereas' or 'in contrast' that can be used to illustrate the difference.

➔For two marks, **the standard of proof** requires the student to identify the extent, or **level of proof** or **evidence** that must be proven in **both** civil and criminal cases. If the student identifies the standard of proof in one type of trial, then only 1 mark can be awarded.

Sample response:

In a civil case like Dean v Puleio, the standard of proof required is on the balance of probabilities, or a greater likelihood of their case being true. In contrast, an armed robbery involves a criminal trial, where the prosecution must prove their case beyond reasonable doubt.

Question 2 (4 marks)

Using the data above, discuss the effectiveness of mediation.

Marking guide:
➔Students need to consider the instructional word, **discuss.** Therefore, to score 4/4 students must examine one strength **and** one weakness of mediation. Students must also use the data as evidence in support of an argument.

➔1-2 marks for at least one point explaining why mediation is effective in resolving civil disputes

➔1-2 marks for at least one point explaining why mediation is ineffective in resolving civil disputes

➔ 1 mark for substantial link/s to the data provided. These links could include

- 405 mediations have been completed out of 691 cases
- 236 of those 405 cases were resolved on the day of mediation
- 1,206 hearing days saved by using mediation
- only 236 cases out of 691 have been resolved on the day of the mediation (less than 50%)

➔Without explicitly linking strong analysis to the data, students can score a maximum of 3 / 4 marks.

➔If only one strength **or** one weakness is outlined, students can score a maximum of 2 / 4 marks.

Sample response:

Mediation is effective in resolving civil disputes as it is quicker and cheaper than using other methods of dispute resolution. This is because legal representation is not usually required, thus saving the parties money and meaning that parties will not be relying on strict rules of evidence and procedure. This can be seen in the above data as 236 cases out of a possible 405 completed mediations were resolved through mediation in the day of mediation.

However, mediation can also be argued to be ineffective as a method of resolving civil disputes as it may be inappropriate for some cases, specifically those which could be considered complicated and have a significant amount of evidence which needs to be presented. This could be the reason for why only 236 cases out of a total of 691 cases were ultimately resolved through mediation. This is less than 50%.

Question 3 (7 marks)

a) It has been argued that, "the Upper House is not allowed to initiate any bills, including the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021."

Is this statement correct? Justify your answer. 3 marks

Marking Guide:

➔For one mark, students need to identify that the statement is not totally correct, or partially correct, or partially incorrect.
➔ One mark is allocated for stating the Upper House cannot initiate or is except from introducing appropriation/money bills that deal with the budget.
➔One mark is allocated for stating that the Commonwealth Upper House can initiate **any other bills,** including the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

Sample response:
This statement is partially incorrect. This is because in the Commonwealth Parliament's Upper House (Senate) can initiated or introduce all bills like the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

However the Upper House is except from (cannot introduce) initiating appropriation/money bills that deal with the budget. These must be initiated in the Lower House (House of Representatives).

b) It has also been argued that, "Entering into international treaties like the ICCPR, will enhance the Commonwealth's ability to pass the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021".
To what extent do you agree? 4 marks

Marking guide:

➔ The instruction to students is "to what extent". Therefore, students need to establish whether they agree that entering into international treaties will enhance and/or limit the Commonwealth's ability to pass legislation, dependant on certain factors.
Therefore, 1 mark for making an extent statement e.g. 'to a large extent I agree with this statement'
➔ 2 marks for justifying reasons for agreeing or disagreeing. Possible points may include:

- Entering into treaties can create political pressure on Parliament to pass legislation
- If Australia enters into treaties the Commonwealth Parliament under the external affairs powers of the Constitution s51 (xxix), can legislate in relation to those treaty obligations regardless of the division of law-making power

➔ 1 mark for substantial links to the stimulus
➔ To score 4/4, students will need to show an understanding of the relationship between signing international treaties, external affairs powers under the Commonwealth Constitution, the impact of High Court interpretation, and the Commonwealth's willingness (or otherwise) to legislate in the area.

Sample response:

Entering into international treaties like the ICCPR, may enhance the Commonwealth's ability to pass the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021".

This is because the Commonwealth Parliament is able to use its external affairs power under s51 (xxix) of the Commonwealth Constitution. to enter in international treaties like the ICCPR. Therefore the Commonwealth could legislate in important areas like rights to equality, by passing the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021.

This is because the High Court's interpretation of s51 (xxix) external affairs power in cases like Franklin Dam 1983 has confirmed the Commonwealth's power to sign international treaties, and give effect to these treaties, by ratifying, that is, passing legislation in these areas of national and international importance, like equality.

However, even if international treaties, like the ICCPR are binding agreements under s61 of the Commonwealth Constitution, the Commonwealth has the power to remove itself from obligations under a treaty if it no longer serves Australia's interests.

Furthermore, entering into or signing international treaties does **not** guarantee legislation like the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 will become law because a bill still needs to pass through both houses of the Commonwealth parliament.

Question 4 (7 marks)

a) Distinguish between one method that could be used by Consumer Affairs Victoria (C.A.V.) and one method that could be used the VCAT to resolve similar disputes to the Donaldson v Dore case.

3 marks

Marking guide:

➔ To achieve 3 marks, students need to focus on the task word, **distinguish**, that is, to **show the difference** in how CAV and VCAT resolve similar disputes. Using a linking word such as 'however', 'whereas' or 'in contrast' can be used to illustrate the difference.

➔ 1 mark for a description of one method/s that can be used by Consumer Affair Victoria to resolve civil disputes.

- Conciliation: main method used by CAV

➔ 1 mark **for a** description of one method/s that can be used by Victorian Civil and Administrative Tribunal to resolve civil disputes.

VCAT uses 3 main types of dispute resolution methods:

- mediation
- compulsory conferences (conciliation)
- a final hearing before a tribunal member (arbitration)

➔ 1 mark for a significant link to the stimulus material

- Landlord and tenant relationship
- Threatening/violent disputes

Sample response:

The main method of dispute resolution used by Consumer Affairs Victoria (CAV) is conciliation, which is a cooperative and informal method of dispute resolution that involves an independent conciliator who will meet with the parties, listen to their evidence and arguments, explore the issues, before making a non-binding decision called an agreement.

In contrast, the Victoria Civil and Administrative Tribunal (VCAT) may use arbitration as a method of resolving disputes without the formal court process, utilising the skills of an independent 3rd party. The Member will arbitrate by presiding over the discussion and make a binding decision on the parties, called an award, that is enforceable by the courts. For example, VCAT's Member Crocker made a binding decision that dismissed the landlord's termination order.

b) Discuss one strength of VCAT as an effective dispute resolution body in the Donaldson v Dore case.

4 marks

Marking guide:

➔ Students need to consider the instructional word, **discuss**, therefore students must consider **both** one strength **and** one weakness.

➔ 1-2 marks for an explanation of one strength of using VCAT in this case. Points which could be raised include but are not limited to:

- Dispute is within VCAT's jurisdiction/lists
- Low cost methods available
- Quick/efficient methods available
- Uses multiple methods of dispute resolution if one does not work
- Can make legally binding decisions/orders
- Decisions can be appealed

➔ 1-2 marks for an explanation of one corresponding weakness of using VCAT in this case. Points which could be raised include but are not limited to:

- costs could increase if first method of resolution is unsuccessful
- There are still costs involved eg. changes to VCAT's fees mean that there are now fees for some hearings
- Long delays in some lists
- May be too informal for the dispute
- Limited right to appeal: decisions can only be appealed on a point of law, and to the Supreme Court, making it complex and expensive to appeal a case
- may be other or better ways to resolve the dispute (parties might prefer court)

➔ 1 mark for a significant link to this case

Sample response:
A strength of VCAT is that it's a less formal dispute resolution body when compared to our formal courts. Therefore cases like Donaldson and Dore could benefit from VCAT's **timely resolution** that includes electronic lodgement of claims and encouraging parties to reach agreement through processes like conciliation, mediation and compulsory conferences. Unlike the courts, VCAT does not rely on complex rules of evidence and procedure. For example, the Residential Tenancies Tribunal resolves some disputes like eviction issues in the Donaldson case with 6 weeks. This reflects timely resolution for the parties.

OR

A strength of VCAT in the Donaldson v Dore case reflects improved equality for the parties due to **access low cost resolution**. VCAT's nominal or non-existent fees coupled with the non-requirement for legal representatives in most hearings, makes it substantially cheaper than the courts. For example, the introduction of a three-tiered system was established for corporations, standard and Health Care Card users can pursue or defend their civil rights without excessive costs associated with going to court.

However, **one weakness** is that VCAT's appropriateness is reduced by a **limited right to appeal.** Even though Donaldson, is considering an appeal, that he believes will rectify an injustice, appeals from VCAT can only be heard on a point of law by the Supreme Court (Trial Division). Therefore rather than the process being financially accessible, appeals are also limited and therefore discourage parties who are unable to afford costly legal representation for an appeal. E.g. Macedon Rangers Council spent over $160,000 on legal fees on its Supreme Court appeal in 2009 to stop pokies. Therefore, access maybe reduced due to the high costs of legal representation, that contradicts the purposes for VCAT's establishment.

Question 5 (4 marks)

a) Using examples, compare the extent of Victoria's residual and concurrent law-making powers found in the Commonwealth Constitution.

Marking guide:
➔ This question asks for a comparison, that is **similarities and differences** in the constitutional law-making powers of the Victorian Parliament.
➔1-2 marks similarities between Victoria's ability to legislate in areas of residual and concurrent powers. Points which could be raised include but are not limited to:

- Both can be exercised by the states (Victorian Parliament)

➔1-2 marks differences between Victoria's ability to legislate in areas of residual and concurrent powers. Points which could be raised include but are not limited to:

- Concurrent power may restrict the Victorian Parliament from passing law due to s109

➔1 mark for examples (plural)

Sample response:
The Victorian Parliament has the ability to pass legislation in both the area of residual and concurrent powers as per the Constitution. This is because residual powers were left with the states at the time of Federation and thus may be exercised by them to make law. An example of a residual power includes education or criminal law. Similarly, concurrent powers can also be exercised by the states as states are not exclusively restricted by the Constitution from exercising these powers. For example, s51(ii) Taxation allows the Victorian Parliament to legislate in regard to taxes.

However, the Victorian Parliament may be restricted from passing legislation in the areas of concurrent power if such legislation is inconsistent with Commonwealth legislation. In such instances s109 may be activated by a successful challenge in the High Court of Australia which could invalidate the inconsistent sections of the Victorian legislation. Thus the Victorian Parliament may only legislate in areas of concurrent power if such legislation is consistent with already established Commonwealth/Federal law.

Question 6 (5 marks)
Discuss the significance of one High Court case that has had an impact on the division of constitutional law-making powers.

Marking guide:

➔ Students need to briefly consider the **facts, issue and decision.**
➔Then, the main component of the question is to consider and discuss (looking at strengths/ positive impacts AND weaknesses/negative impacts) the **legal and social significance / impact** of the case you have chosen.
➔ Students could consider the impact on individuals (e.g. Brislan), the state or states involves (e.g. the Uniform Tax Case), the Commonwealth, short and long-term impacts.
➔ This question is marked globally

***Sample response**:* using the *Brislan Case 1935*
One High Court case that had a significant impact on the division of powers is the Brislan Case 1935. Brislan challenged the validity of the Commonwealth Parliament's *Wireless Telegraphy Act 1905* where owners of wireless sets had to purchase a licence, otherwise they could have criminal charges laid against them and fined. Brislan argued that the law-making power on wireless sets was a state residual power, as the term wireless did not appear in the Constitution.

The High Court was required to interpret s.51(v). The Commonwealth Parliament had power to make laws with respect to 'postal, telegraphic, telephonic and other like services' and determine whether a wireless radio was "like service", that is, similar to other communication services like the post.

The High Court determined a **broad interpretation** of the phrase 'other like service'. The interpretation meant the Act covered laws relating to radio broadcasting. This is because new radio technology fulfilled a communication function that was a "like service" to those included in the Act, such as telephonic communication services.

Therefore, the significance of the case also substantially increased the Commonwealth's powers, by reducing the impact of the states' residual powers. In effect, the interpretation meant this became a concurrent power, and therefore the commonwealth would prevail if any inconsistency existed with state law.

The Brislan Case is also significant in a contemporary world, considering how the Commonwealth has already relied on the High Court's broad interpretation of s.51(v) to regulate parts of the internet through the *Interactive Gambling Act* 2001 (Cth), which regulates the operation of online casinos within Australia and advertising of online gambling. Therefore, the High Court's interpretation of "like services" means the Commonwealth automatically has law-making power over any new technology that serves as a form of communication – for example, televisions and the internet that didn't exist at the time of the Brislan Case.

Sample response: using Uniform Tax Case 1942
The significance of the First Uniform Tax Case 1942 between South Australia and the Commonwealth focused on who had dominance over concurrent powers, in this case, under s51 (ii) taxation. Prior to 1942, the Commonwealth and the States concurrently shared the power to make laws and raise/ levy taxation.

The issue before the High Court was to determine whether it was valid for the Commonwealth to make grants to the States and remove their financial power to raise income tax.

The High Court's significant decision determined the Commonwealth's proposal was valid. The decision significantly increased the Commonwealth's financial power due to the interpretation of s51 (ii) and s96.

The Commonwealth was in effect given exclusive powers to make laws and raise income tax and company tax that are uniform across Australia.

Conversely, the States' lost its concurrent power to levy income taxes. The States and now more reliant on Commonwealth grants of money to fund their programs like roads, schools, hospitals. Furthermore, The

Commonwealth's financial control has increased as they can dictate how these grants will be spent. The States have had to find other means like stamp duties on houses that can vary from state to state, to meet the financial shortfall.

Overall, the Commonwealth's financial and law-making powers have been increased by the High Court's interpretation in the First Uniform Tax Case 1942.

Question 7 (10 marks)

In June 2020, the Justice Legislation Amendment Act was passed by the Victorian Parliament, in response to VLRC's Access to Justice Report. The report called for improved regulation of representative proceedings, including litigation funding, lifting the ban on contingency fees and a greater case management role for the Victorian Supreme Court.

'The use of the VLRC (Victorian Law Reform Commission) and representative proceedings, will enhance the operation of our legal system'. Critically evaluate this statement.

Marking guide:

➔ The instruction to students is "critically evaluate". Therefore, students need to give a response that weighs up the contribution of both the VLRC (as a formal source of law reform for the Victorian Parliament and subsequent reform that have been introduced) and representative proceedings (to the improve the civil justice system's ability to resolve legal disputes).

➔Students can evaluate the operation of the legal system by using the principles of justice, or other criteria.

➔The answer will be marked globally, or teachers may allocate 5 marks for evaluating the VLRC and another 5 marks for evaluating representative proceedings.

➔ Students should consider how representative proceedings **assist** (strengths, advantages, benefits) and /or **hinder** (weaknesses, disadvantages, limits) access to all, or some or none of the components, for those using representative proceedings.

A full mark response will have the following features:

- Evaluation of how the VLRC enhances the operation of the legal system (strengths and weaknesses)
- Evaluation of how representative proceedings enhance the operation of our legal system (strengths and weaknesses)
- Significant links to the provided statement

Possible Points:

VLRC: strengths

- Encourages law reform as the Government through the Attorney-General refer the issue to be investigated to the VLRC (government has a vested interest)
- Allows the community to be involved in law reform
- Areas of law reform can be investigated comprehensively
- VLRC is an independent body

VLRC: weaknesses

- VLRC can only engage in an extensive investigation if the area of law is referred by the Attorney-General
- There is no obligation on parliament to adopt the VLRC's recommendations in part or whole
- The VLRC is constrained by its terms of reference

Representative Proceedings: strengths

- Lower litigation costs
- Opportunity for plaintiffs to seek relief for small amount of damages
- Greater judicial efficiency
- Litigation funding is possible

Representative Proceedings: weaknesses

- May not take into account the different or individual claims
- Process may be costly and time consuming
- Lack of decision-making control for most plaintiffs

Links to the Stimulus

- VLRC's report is put to parliament
- VLRC's recommendations were acted on
- litigation funding
- lifting the ban on contingency fees

Sample response:
The VLRC play a crucial role in providing an extensive law reform process that contributes to the Victorian government's ability to create effective laws. This was evident with ongoing improvements to the civil just system, and how the Supreme Courts can use representative proceedings, or class actions, to resolve disputes in a more timely and cost effective manner.

A key weakness is the Victorian Parliament does not have to accept any or all of the VLRCs recommendations for law reform, even though they have undertaken extensive research. Therefore, Parliament wastes resources and opportunities to reform problem areas of law that negatively affects society.

Even so, the VLRC's effectiveness was evident in June 2020, when the Justice Legislation Amendment Act was passed by the Victorian Parliament, in response to VLRC's Access to Justice Report and its recommendations for the improved regulation of representative proceedings, including litigation funding, and a greater case management role for the Victorian Supreme Court

Th extensive process that commenced in 2018, resulted in references from Attorney General, to determine problem areas that need to be researched. The VLRC consulted and received submissions from experts and the public, reflecting the democratic process and the opportunity to make Parliament aware of community values. The process ensured that effective laws can be created by utilising the expertise of those outside of Parliament since the VLRC will formulated a detailed report that includes the research, recommendations and even a draft bill, that was tabled in Parliament.

Therefore MPs were made aware of community views and provided with recommendations after an extensive process because representative proceedings, are a means to improve the operation of the civil justice system.

Reforms allow plaintiffs have access to personnel and institutions that provide them with an opportunity to protect their rights and pursue their case by seeking remedies like damages, that they would otherwise be unable to afford. This is because legal representation costs in excess of $8,500 per day for a barrister to present their case in the Supreme Court. Therefore, representative proceedings and the recommendations suggested by the VLRC could result in cost efficient resolution in the courts, as legal costs may be covered by litigation funders, insurers and the plaintiffs as a group who could share the financial cost.

However, the VLRC may be incorrect as representative proceedings can be inefficient. Injured plaintiffs who need to access damages and to be returned to their original position, rely on costly legal representatives and insurance funders. For example, insurance funders take the risk, but receive a sizable 20-40% of the damages payout that goes to their shareholders. This means plaintiffs will not automatically receive damages in a timely manner that cover their losses.

Even so, the VLRC is correct as representative proceedings improve the efficiency of the legal system. One representative proceeding, rather than many individual cases, could reduce the backlog of cases and the waste of resources for those who are similarly affected by the same or related facts, and require the identical legal issue to be decided by a court. For example, representative proceedings for the Black Saturday Bushfires, resulted in hearings and mediations, that provided access for 2,300 plaintiffs affected by personal injury claims and another 13,000 plaintiffs affected by property claims. This would reduce the number of sitting days, and subsequent delays in the Supreme Court.

Therefore, VLRC and its recommendations for improved representative proceedings resulted in law reform that is designed to improve access to timely and cost effective resolution.

Section B

Question 1 (19 marks)

a) Identify the two parties in this case. 2 marks

Marking guide:

➔ 1 mark identify Robert Michael Lees as the defendant

➔ 1 mark identify the state/DPP represented by as the prosecution

Sample response:

The two parties in this case are: the state/ the prosecutor/ Ms D Piekusis QC; and the defendant Robert Lees.

b) Explain how the purpose of denunciation is achieved in this case. 2 marks

Marking guide:

➔ 1 mark is for an explanation of denunciation as a purpose for sanctions -Court sending a message about society's disapproval of criminal behaviour.

➔1 mark for connection to Lees' case e.g. applying Judge Wraight's remarks

Sample response:

Denunciation is the showing of disapproval by the court and by extension society of the actions and behaviour of the defendant. Denunciation would be achieved in this case by the use of a significant term of imprisonment of a "maximum of 7 years and 9 months imprisonment, with a minimum sentence of years 5 years and 6 months" for the offence of seriously injuring two people.

c) Outline the impact of aggravating **or** mitigating factors in the sentencing of Lees. 3 marks

Marking guide:

➔1 mark outlining the impact of aggravating or mitigating factor/s

- Mitigating Factors: decrease the seriousness of the offence and the offender culpability
- Aggravating Factors: increase the seriousness of the offence and the offender culpability

➔ 2 marks link/s to this case. These may include but are not limited to the following points:

Possible Points:

Mitigating Factors

- guilty plea (lost 2 years from the sentence)
- dysfunctional upbringing
- rehabilitation
- remorse

Aggravating Factors

- victim impact statements
- fled the scene/ not assisting the police
- lack of regard for the law

Sample response:

The impact of mitigating factors like Lees' expression of remorse, accepting responsibility and pleading guilty at the earliest opportunity (which prevented the victim reliving their trauma in trial) decrease the seriousness of the offence and his culpability, and may therefore have encouraged Judge Wraight to reduce the length of Lees' sentence from a period greater than 7-9 years of imprisonment.

d) Describe one responsibility held by Judge Wraight in this case and discuss its ability to achieve the principle of fairness. 5 marks

Marking Guide:

➔ 1 mark description of one responsibility of Judge Wraight

➔ 2 marks discussion of how that responsibility achieves fairness

➔ 2 marks discussion of how that responsibility does not achieves fairness

Possible Responsibilitie:

- Manage the trial: act as an independent umpire
- Consider admissibility of evidence
- Attend to jury matters: giving directions, summing up the case
- Hand down the sentence

Sample Response:

One responsibility of Judge Wraight in this case is to manage the trial. This requires that Judge Wraight ensures the correct court procedures are followed so that both parties have an equal opportunity to present their case and are treated fairly. This ensures fairness as it ensures parties receive just treatment before the law, that court processes are fair, and that the hearing is unbiased without favouritism.

However, although Judge Wraight may manage the trial he is not an active participant in the trial and is unable to assist parties. His role is limited to be an independent umpire which may mean that a party with less experienced legal representation may be at a disadvantage and may be unfairly treated. This could lead to unfair outcomes based on the experience and skill of legal representation rather than legal argument and truth.

e) A social commentator wrote, "the criminal justice system favours the accused with extra rights and considerations, including plea negotiations and assistance by Victorian Legal Aid. The victims' rights are forgotten".
Evaluate this statement. 7 marks

Marking guide:

➔ The task word **'evaluate'** requires students to effectively structure their response by weighing up the **strengths** and **weaknesses** of the criminal justice system relating to the rights of victims and the defendants.

➔Students need to also establish a clear contention and or conclusion, that is reinforced by clear arguments and evidence.

➔ It is expected that a student's opinion in their contention statement should match the weighting of their response.

➔ This question should be marked globally.

A full mark response will have the following features:

- Evaluation of the rights of the accused (strengths and weaknesses)
- Evaluation of the rights of victims (strengths and weaknesses)
- Links to the statement: plea negotiations and Victorian Legal Aid
- Concluding statement

Possible Points:

<u>Rights of an Accused</u>

- Right to be tried without unreasonable delay
- Right to a fair hearing
- Right to trial by jury

<u>Rights of Victims</u>

- Entitled to information about the proceedings
- Entitled to give evidence as a vulnerable victim
- Entitled to be informed about the likely release date of the offender

Sample response:
Rights held by the accused, do not favour them, but reflect these processes are part of a fair criminal justice system.

This is evident with plea negotiations that result in the Prosecution offering the accused, Lees, an incentive, in the form of reduced charges to plead guilty. This is appropriate, as Lees would be guided by his VLA appointed legal counsel. The defence and prosecutors would make their fully informed decision after accessing and assessing relevant information such as the strength of the evidence, and therefore the likelihood of guaranteeing a conviction at a County Court trial.

However, the community may feel that a plea negotiation is inappropriate even though Lees pleaded guilty, as the serious charges were reduced. This could be inappropriate as Lees decided to plead guilty to the lesser charge, even though he was yet to fully disclose at trial all relevant evidence regarding his role in the victims' serious injuries.

However, the social commentator is wrong, because plea negotiations are a means for the criminal justice system to a**void the cost of funding an expensive and stressful criminal trial** and therefore improve the administrative efficiency of the criminal justice system. This is because court resources are freed up to resolve other matters, therefore reducing delays. Nearly 75% of Supreme Court and 85% County Court cases in 2018 were resolved through a guilty plea as a result of plea negotiations and sentence indications, thus avoiding costly, timely and stressful trials.

However, a plea negotiation may not fully explore all aspects of the **serious nature of the offence**. The community, the victim's extended family and the Prosecution may feel plea negotiations resulted in an offender's punishment being manifestly inadequate, even though Judge Wraight heard and weighed up mitigating and aggravating factors to determine his sentence. Therefore, allowing plea negotiations may be viewed as favourable for the defendant as the sentence may not have reflected the gravity of Lees' offences, although as Judge Wraight acknowledged, Lees did take full responsibility for his actions.

Furthermore, the rights of the accused increase **equality** for financially disadvantaged people, like Lees who could not afford expert to have VLA funding or appointment of a barrister to provide necessary legal representation to help prepare and present his plea of sentencing case to court. This is crucial, especially when the Prosecutor would be a skilled, trained and expert legal representative. The funding increase will assist the legal system to improve equality by creating an equal footing for 80% of people, like Lees, that rely on access to VLA grants, to improve the likelihood of a fair sentencing hearing, that may otherwise have to represent themselves, in a stressful and unfamiliar environment.

Question 2 (21 marks)

a) Outline one possible reason for law reform in Section 11 of The Surveillance Devices Act (NSW) 2007.
2 marks

Marking guide:
➔1 mark outline of one reason for law reform
➔1 mark link to s11 of the Act

Possible Reasons:

- Changes in beliefs, values and attitudes toward freedom of speech, information, expression
- Infringes upon Australia's system of representative and responsible government

Sample response:
One reason for changing Section 11 of The Surveillance Devices Act (NSW) is to reflect changing societal values that reject laws suppressing secretly recorded vision of animal cruelty. This is because the current legislation, in the form of ag gag laws are "not compatible with the system of representative government", as society values transparency and rejects punishing people for exposing harm, including to animals.

b) Define injunction and outline one of its purposes in ABC v Lenah Game Meats Pty 2001.

3 marks

Marking guide:

➔ 1 mark defining the term ‘injunction’

➔ 1 mark outline the purpose of an injunction in ABC v Lenah Game Meats Pty 2001.

➔ 1 mark link between the purpose and the case

Sample response:

An injunction is a court order (interlocutory or perpetual) which prohibits or compels an action. One purpose of injunctions is to prevent an action from continuing that would otherwise be viewed as infringing on a party’s rights. For example, Lenah Meats wanted a restrictive injunction to prevent the ABC from showing illegally obtained footage that exposed their cruel business practices.

c) Describe one reason that it will be necessary for the High Court to interpret the words “private activities” in the Surveillance Devices Act (NSW) 2007. 3 marks

Marking guide:

➔ 2 marks description of one reason (more than stating) for interpretation

➔ 1 mark for link to the stimulus

Possible Reasons:

- ‘private activities’ may be ambiguous
- A mistake/oversight may have occurred during the drafting of the Act
- Meaning of ‘private activities’ may have changed over time
- Parliament may have had difficulty in foreseeing possible applications of ‘private activities’

Sample Response:

One reason why it might be necessary for the High Court to interpret the words ‘private activities’ in the Surveillance Devices Act (NSW) 2007 is that these words might be ambiguous as they may have more than one meaning and cover many circumstances. In this case it will need to be determined in ‘private activities’ include the business activities in relation to the treatment of animals which occurs at Lenah Game Meats. These words will need to be given meaning in order for the High Court to apply this meaning to the case and resolve the dispute.

d) Explain one effect that the High Court’s statutory interpretation of “private activities” may have on the Victorian County Court when adjudicating similar cases.
Justify your answer**.** 3 marks

Marking guide:

➔2 marks explaining/justifying the effect (including linking to the Victorian County Court when adjudicating similar cases)

➔1 mark links to the stimulus material

Possible Effects:

- Precedents are set for future cases to follow (Best response as links to future similar cases)
- Words or phrases contained in disputed acts are given meaning
- The decision reached is binding on the parties
- The meaning of the legislation (law) can be restricted or expanded

Sample response:
The effect of the High Court's statutory interpretation of the words "private activities" may establish a precedent, especially if this is a novel case in Victoria where no legislation or common law exists, or Victoria's legislation uses similar language to NSW. Since the interpretation occurs in a superior court of record, the High Court, then the effect is to create a binding precedent that will be followed by lower courts, like the Victorian County Court, when resolving similar disputes in the future. This interpretation creates consistency as it helps parties in the future to understand the legal reasons for the decision and determine the likely outcome of their case, unless the parties can distinguish.

e) Discuss two factors that may affect the ability of Chris Delforce, to influence law reform of ag gag laws through the courts. 6 marks

Marking guide:
➔Students need to consider the instructional word, **discuss.** Therefore, to score 6/6, students must examine one strength **and** one weakness, for each of their two factors that can influence law reform of ag gag laws through the courts.
➔If only one factor is discussed, then students can only score a maximum of 3/6.
➔Without explicitly linking analysis to the stimulus students can score a maximum of 4 /6.
➔If only strengths **or** weaknesses are discussed, students can only score a maximum of 3/6.

This question should be marked globally. A full mark response will have the following features:
- Discussion of first factor (how the factor to enable/hinder law reform)
- Discussion of second factor (how the factor will enable/hinder law reform)
- Significant links to the stimulus (Chris Delforce and ag gag laws)

Possible Factors:
- Cost and time of pursuing a case through the courts
- Requirement for standing
- Judicial conservativism/ judicial activism

Sample response (3 different factors provided, although only two are needed):

One factor that may influence Delforce's ability to influence law reform of ag gag laws is whether the High Court is judicially active or conservative. Former High Court Justice Michael Kirby, supported judicial activism, arguing superior courts should adopt a law making role that ensures flexibility and brings about the development of legal precedents to meet the needs and values of a modern society. The possibility for the common law to be developed is possible, in a "landmark High Court" case, especially considering the ABC v Lenah Meats Case 2001 and the persuasive nature of the common law that supports "open debate" by exposing animal cruelty and not punishing those like Delforce.

However, a weakness is that even if Delforce's case is heard by the High Court, the justices' conservative approach maybe that they will interpret and apply section 11 of the legislation to the case and determine that it's the NSW Parliament's role to reform the law through legislative change.

A factor that may affect Delforce's ability to reform the ag gag laws through the courts is the costs and time in bringing a case to court. Despite parties, like Delforce, seeking to exercise their legal rights, the high cost of legal representation e.g. a barrister in a High Court Case results in fees in excess of $10,000 per day, and this is a significant barrier that could limit the courts' ability to make law. Excessive costs have resulted in increased number of self-representedparties, who may not be entitled to VLA funding for representation. Consequently, the ability for Delforce, to bring a case to court, let alone create common law, is compromised.

Even so, crowdfunding by the FTP and the possibility of legal firms providing pro bono (free) legal support in representing individuals like Delforce may arise as the push for reform is seen as being for the greater good of the community. Even so, the high cost and time taken to pursue the matter through the courts may reduce the possibility of

cases being heard and therefore hinder the development of the common law or reform of ag gag laws.

A factor that may affect Delforce's ability to reform ag gag laws through the courts, is whether he fulfils the requirement having a 'standing' (locus standi) in the case. The strength is that because Delforce has been genuinely affected by legislation that threatens to imprison him, he has a "special interest" to commence legal proceedings. Parties with a standing, can be influential if higher courts like the High Court hear their dispute, because they have a legally acceptable rather than a trivial reason, to bring a case to court, that has already established a precedent in ABC v Lenah Game Meats Pty Ltd 2001, that recognised the implied freedom of political communication extends to animal welfare issues. This process may expose unconstitutional or questionable law, infringement of rights and have a profound effect on changing the common law.

However, a superior court must wait for a case to come before it, by a party with a standing in the case. This is not an automatic right. Even if Delforce has a standing and funds to initiate a case, there is no guarantee the High Court will establish or develop the common law, because judges may take a conservative approach regarding judges and law-making, and that High Court precedents like the implied right in the ABC v Lenah Meats, is only persuasive on future High Court cases.

f) Analyse the ability of the media, including social media, to promote reform of ag gag laws.

4 marks

Marking guide:

➔ Students need to consider the instructional word, analyse, therefore students need to weigh up the strength (effectiveness) and weakness (ineffectiveness) of the media in promoting specific law reform.
➔ If the student only analysis the media, without explicitly linking to ag gag laws and the material, they can only be awarded a maximum of 2/4.
➔ Students need to ensure their analysis is linked to the stimulus.

➔1-2 marks explanation of how the media will encourage law reform

➔1-2 marks explanation of how the media will limit law reform

➔1 mark significant links to the stimulus and ag gag law

Possible Points:

How Media Encourages law reform

- They make politicians aware of community views and values
- Encourage petitions and demonstrations
- Quickly generate community interest in and awareness
- limited restrictions

Limit law reform

- Media can be used by powerful lobby groups to prevent necessary law-reform
- Media can be used by minority groups to prevent law-reform

Sample response:

The media, both traditional media (newspapers, TV, radio) and social media platforms (Get Up!, Facebook), play an important role in "parliamentary democracies". The media may influencing law reform by communication information, such as opposition to NSW's "ag gag" laws, and therefore pressure politicians through talk back, editorials, letters to the editor and even support and raise awareness of e-petitions in support of ag gag law reform. In doing so, politicians are made aware through "media attention" that communicates community views and values. In the words of former High Court Justice Michael Kirby, media debate and attention has been influential in leading to policy change and law reform in areas like "live sheep exports and in the condition of battery hens".

Media may be used to promote law reform of "ag gag laws" as pressure groups like the FTP and individuals like Chris Delforce can generate community interest in and awareness of desired legal change. They can communicate to

potentially millions instantaneously, through social media platforms, that bypass conservative media outlets. This is likely to attract political attention of those that can directly influence change, especially if politicians are fearful of an electoral backlash if they are resistant to law reform.

However, conservative media interests may communicate their opposition and pressure the Parliament to reject the push for reform. Powerful pressure groups like farmers and political parties like the Nationals, may use the media to communicate their opposition to law reform, even if the broader community's values or needs support ag gag law reform. Ultimately, the media is highly influential in indicating to Parliaments whether law reform should occur.