2019 VCE Legal Studies examination report

General comments

The 2019 Legal Studies examination required students to demonstrate synthesis, application and analysis skills in both Sections A and B, and to integrate and apply source material and stimulus material in answer to many of the questions.

The questions students found most challenging were Section A: Questions 1a., 4 and 6, and Section B: Questions 2c., 2d. and 2e. Areas of the study design that require particular attention by teachers include sentencing indications, the external affairs power and international declarations and treaties, the principles of justice, the relationship between courts and parliament, and the doctrine of precedent. Key skills that students need to focus on are application, synthesis, analysis, discussion and understanding key legal terminology.

Advice for students

- Students are advised to write in paragraphs in extended responses.
- Students should not use previously prepared answers. Very few, if any, questions in the examination can be successfully answered using rote-learned responses.
- Students should practise synthesis, application and analysis skills as much as possible, by undertaking a variety of scenario-based and source-based tasks.
- It is not necessary to define key legal terms or explain what an institution or method is before answering a question, unless the question specifically asks for it.
- All Section B responses **must** make use of the relevant stimulus material. For Section A responses, this is necessary for questions that specifically require reference to or use of them.
- Students can use abbreviations in their answers, but they should define them at first mention and then use the abbreviation. For example, in response to Question 2a. of Section B, students could have written 'Mr D'Orta-Ekenaike (Mr D)' and then used 'Mr D' for the rest of their response.
- Students should adopt techniques to effectively use their reading time, particularly where there is a significant amount of reading, and practise these techniques throughout the year.
- Students who need to use extra writing space at the end of the question and answer book should mark their answer with 'PTO'.

Specific information

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

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

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

Section A

Question 1a.

Marks	0	1	2	3	Average
%	26	32	27	15	**1.3**

To achieve full marks, a comprehensive explanation of one reason specific to John's case was required. Acceptable reasons included that the judge in John's case may have insufficient information about the impact of crime on the victims, or that the prosecution has not consented to the sentence indication. Some students stated that sentence indications generally are not appropriate, including in John's case, as they can encourage an otherwise innocent person to plead guilty. This reason was accepted. Other acceptable reasons included that the charges were of a nature or severity that a sentence indication was not appropriate (e.g. murder or sexual offence charges), or that the evidence was strong and therefore the prosecution may not consent.

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. The plea can be changed after the indication has been given.

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

> *One reason that a sentence indication may not be appropriate is that it may pressure John into pleading guilty when he isn't. If john really did not commit the indictable offence, and the judge gives him a non-custodial sentence indication (assuming the judge and prosecution consent) John may feel compelled to plead guilty to a crime he didn't commit for fear of going to prison if the trial continues and he is found guilty. If John was to plead guilty when he didn't do it for this reason, it would be unjust.*

Question 1b.

Marks	0	1	2	3	Average
%	6	17	42	35	**2.1**

This question was generally handled well. Many students explained how a guilty plea may act as a mitigating factor and therefore reduce the sentence that John may receive. Other students explained how a guilty plea would mean that the victims and witnesses are saved the trauma and inconvenience of having to give evidence at trial. Other acceptable impacts included, for example, that no trial was necessary or that no jury would need to be used. The differentiating factor was the ability of students to demonstrate the cause and effect of the guilty plea.

The following is an example of a high-scoring response. The response went on to describe a second impact, but as only one impact was required, only the first impact was marked.

> *In John's case, a guilty plea may be considered a mitigating factor, meaning it may reduce his culpability and therefore influence the trial judge to give him a more lenient sentence. This is because by pleading guilty, John demonstrates that he recognises his conduct was wrong and therefore it may be considered a sign of John's remorse, inclining the judge to give a more lenient sentence.*

Question 2

Marks	0	1	2	3	4	Average
%	9	12	42	29	8	**2.2**

This question contained visual material which students were expected to use in their answer. They needed to refer to the data on both age and gender to argue whether the current composition of the Commonwealth Parliament impacted its ability to be representative in law-making. To achieve full marks, students needed to express their view and justify it. Use of the first person is acceptable in this type of response.

Students could have argued that the composition of the Commonwealth Parliament did, or did not, influence its ability to represent the people. The differentiating factor was the strength of the justification, and whether students went beyond arguing that a House of Representatives consisting predominantly of older males may not be able to represent the interests of younger people and/or females. Examples were a good way to justify the view taken and could have related to same-sex marriage, laws on tampon tax, climate change, or other relevant examples.

Students could have considered the following points:

- other factors beside the Parliament's composition can affect its ability to make law, such as political pressures and voting along party lines
- there is nothing in the table to suggest that the composition of Parliament impacts on its ability to make good law; for example, how does gender or age factor into Parliament's ability to represent the people?
- the Senate is fairly balanced in terms of gender, so whether the Senate is representative or not is unlikely to be based on this factor
- a lack of representation can impact Parliament's ability to be responsive to the needs and will of the people
- there have been instances of parliamentarians deciding how they vote or influence law-making according to their own views and attitudes, and their age or gender could have an impact on those views and attitudes (e.g. on same-sex marriage).

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

> *I believe the composition of the Commonwealth Parliament affects its ability to be representative in law-making to a moderate extent. A representative parliament refers to one which considers the views and values of the people in its law-making. As per the table above, it is clear that the Parliament is compromised predominantly of males, and largely of those aged 45+; this is especially true for the House of Representatives. However, in reality, the ratio of Australian males to females is not 105:46; it is closer to 50:50. Thus, the composition of Parliament may mean that the laws it makes primarily revolves around the interests of males and those over 45, and if the interests of all Australia people are not taken into account, this may mean Parliament is not representative in its law-making. However, just because the composition is skewed primarily towards males and the 45+ age group, this does not necessarily mean Parliament will not be representative. That is, just because a member of parliament is male, this does not in itself mean that he will not take into account the interests of females. After all, members of parliament are elected to consider the views and values of those in their electorate, and are likely to do so in order to preserve their changes of re-election.*

Question 3

Marks	0	1	2	3	4	5	Average
%	10	15	26	28	17	5	**2.5**

Students were expected to discuss the appropriateness of VCAT in resolving Zena's dispute, by reference to the key points made in the stimulus material, including the following:

- the claim for $300 was of relatively low cost and so was suited to VCAT which hears claims of low value
- Zena is a Year 12 student so is unlikely to have the finances and resources to issue a claim in court
- VCAT has jurisdiction and can make a binding decision on No Guarantees
- No Guarantees, however, doesn't seem to be responding to Zena's calls or emails, so there may be difficulties serving it with the claim – though this issue will arise whether Zena uses the courts or VCAT. There may also be difficulties with enforcing any damages amount received if No Guarantees isn't responding (it may well be out of business)
- a class action may be issued, in which case a court is the only appropriate institution, but given the low value of the claim, Zena may wish to utilise VCAT instead of the courts.

The differentiating factor was the discussion of VCAT's appropriateness and the use of two or more of the above points, and other relevant points. Some students discussed Consumer Affairs Victoria (CAV) or the courts, without any reference to VCAT. This was not what the question asked, and these responses did not gain full marks.

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

> *VCAT is somewhat appropriate for Zena as firstly, minor civil disputes are within their accrued jurisdiction. In addition, VCAT can offer binding decisions, which could be helpful for Zena as No Guarantees seems to be unwilling to negotiate, indicating mediation & conciliation may be inappropriate. However, whilst VCAT has lower fees than the courts, they still do have fees, and even if Zena was a health care card holder and her filing fees were capped at $150 that is still half the price of the dress; as such Zena should consider if the cost of filing a claim with VCAT for a relatively minor loss is worthwhile. Furthermore, Zena has 12 others affected in the same, similar or related circumstance meaning she could file for a representative proceedings which VCAT does not do; however again the cost of such a proceeding with the courts would probably outweigh the benefit. CAV is a no-cost option for Zena but they cannot offer binding decisions and as No Guarantees appears unwilling to negotiate VCAT is probably her best bet.*

Question 4

Marks	0	1	2	3	4	5	Average
%	25	16	18	21	15	5	**2**

This question required students to explain what then Chief Justice Gibbs said in the *Koowarta* case. His statement was to the effect that the external affairs power could allow the Commonwealth Parliament to make any laws it wanted to, so long as the laws were legitimately giving effect to international agreements such as treaties. The question required no knowledge of the *Koowarta* case, but rather knowledge about what the statement meant by reference to the High Court, the external affairs power, and international treaties and declarations. Examples of where the Commonwealth Parliament was given more power by reason of giving effect to international treaties, such as in the *Tasmanian Dam* case, were a useful way to support the explanation given.

Some students did not attempt the question. Some explanations repeated the statement given or were too brief to get full marks.

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

The above statement refers to the ability of courts to make law in relation to external affairs, including turning international declarations and treaties into Australian law. This is done using external affairs power.

The statement concerns the ability of Parliament to bypass their restrictions of law making power and jurisdiction so long as it relates to an international agreement. This means that Parliament could create laws in areas of residual powers if they are doing so in respect to an international agreement. Such was what happened in the Franklin Dam case which allowed Parliament to use external affairs power to make laws in relation to the Tasmanian environment, which is a residual power. The High Courts concern that the Commonwealth could have 'unlimited legislative power' is because the Commonwealth could feesably legislate on any matter despite jurisdiction and restriction using external affairs power, as long as it were to relate to an international agreement.

Question 5a.

Marks	0	1	2	3	Average
%	10	35	31	24	**1.7**

To obtain full marks, the response needed to demonstrate one reason for a court hierarchy by reference to committal proceedings. Reasons for a court hierarchy include administrative convenience, specialisation and appeals.

The best reason to give in response to this question was specialisation or expertise. Students who used this reason were able to explain how the Magistrates' Court specialises in committal processes. Another good reason was administrative convenience.

Students who used appeals as a reason found it difficult to refer this to committal proceedings, given committal proceedings are not final determinations and appeals aren't made against a magistrate's decision to commit an accused to stand trial.

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

One reason for the Victorian court hierarchy is specialisation. By having a ranking of the courts, lower courts are able to become experts in hearing minor matters, for example, the Magistrates Court is the only court that hears committal proceedings. This allows Magistrates to deal with these matters quickly because they are so knowledgeable about them, and also saves time for higher courts because Magistrates can become experts in determining if a prima facie case exists, thus weeding out weaker cases. If there was no ranking then all courts would have to hear committals which would mean no judges would be able to build up expertise in them.

Question 5b.

Marks	0	1	2	3	4	5	6	7	Average
%	16	10	11	15	19	15	10	4	**3.2**

This question required students to evaluate the Victorian Law Reform Commission in terms of its ability to influence change. As part of the evaluation, students were required to refer to a recent example from the past four years of the VLRC recommending law reform.

Many students did not achieve full marks because they focussed on a recent example rather than the evaluation. Other students did not achieve full marks because they had no conclusion to their evaluation. Other students referred to a recent example, but it was not part of their evaluation. Better responses used the recent example to support a point they made as to the strengths or weaknesses of the VLRC. Stronger responses continued to refer to the recent example as part of their evaluation.

The most common example used by students was the recommendations made by the VLRC in the reform of laws with respect to medicinal cannabis. Fewer students used the VLRC's report on victims of crime in the criminal trial process.

Some points that could have been made are as follows.

Strengths

- VLRC is independent of government. It has no political affiliations and can make recommendations in an objective manner.
- A comprehensive investigation can take place. VLRC can seek expert opinions, invite submissions from individuals and bodies, and hold consultations to obtain the views of the public.
- Given that it is the government that asks the VLRC to report, the government is more likely to adopt the recommendations, and history shows that VLRC can be quite influential.

Weaknesses

- The VLRC doesn't have infinite resources and the investigations may take a long time and incur significant costs.
- The VLRC is only able to make recommendations where the government has given it terms of reference (or there is otherwise a minor community legal issue that the VLRC takes on).
- The VLRC is constrained by the terms of reference it is given.

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

> *The VLRC has the ability to effectively influences changes to the criminal justice system, but have some limitations in doing so. The VLRC's recommendations on the committal system will be more likely to be accepted by the Victorian Parliament as not only do they have the jurisdiction to do so (as criminal law is a residual power), but its reference from the Attorney-General shows that they already have a vested interest in the issue. 70 percent of recommendations from the VLRC have been implemented in the past. The body also has the ability to gauge the community's views and concerns on the issue from the general public or those who have a vested interest, ensuring recommendations made to Parliament on committals are representative of the people.*

Question 6

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	8	8	11	13	14	13	13	9	6	3	1	**4.2**

This question was marked globally. To receive full marks, students were required to comprehensively discuss and address the **extent** to which the Australian people can prevent the Commonwealth Parliament from making any laws on religion. The key word in the question was 'any', requiring consideration of whether Section 116 absolutely prevents the Commonwealth Parliament from making laws on religion.

Some students limited their answer to two main points: the referendum process acting as a way to prevent the Commonwealth Parliament from expanding its powers, and the ability of the people to

take a matter to the High Court if the Commonwealth Parliament makes laws on religion beyond its powers to do so. Responses of this type were limited, and were generally awarded five or six marks. Points that could have been made, other than the referendum and High Court points, were as follows:

Statutory interpretation/scope of s116

- Section 116 is limiting. It does not say the Commonwealth cannot make laws on religion, just that it can't make laws on the areas that section 116 proscribes.
- It doesn't act as a complete restriction, and in fact there are many laws about religion.
- If the law is not covered by section 116, then the Australian people need to use other means to prevent the Parliament from making it.

People influencing Commonwealth

- The Australian people can talk to their members of parliament, demonstrate, petition Parliament, for example, and such actions may prevent the Parliament from making laws.
- There are often issues where the Parliament makes laws notwithstanding the views of the people.
- The Commonwealth Parliament also often acts at the instigation of people other than the Australian people – such as influential bodies, whether domestic, national or international. Students could have discussed political pressures.
- If the Australian people are not listened to, then the people may influence the Commonwealth by voting at election time, thus causing a change in government and perhaps a change in the law.

Students who made points about the High Court could have raised factors such as the need for standing, the costs and time associated with bringing a matter to the High Court, and judicial conservatism and activism.

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

> *The Australian people have the power to protect their constitutional right to freedom of religion, if they are able to overcome barriers such as standing, cost and time.*
>
> *Firstly, the people cannot really prevent parliament from making the law in the first place, but they can lobby to have it declared ultra vires by the High Court. But to do this a person must have standing, that is be directly affected by a law the Cth makes that breaches their right to religion. This would likely involve being charged under the legislation. Once a person has standing they then must be willing to pay the costs & time associated with a High Court case; between the cost of legal representation, filing fees and hearing fees, it could cost tens of thousands of dollars, so it may take years to find a person who a) has standing and b) has the money to challenge such a law in the High Court.*

Section B

Question 1a.

Marks	0	1	2	Average
%	26	17	57	**1.3**

This question was handled well. One mark was awarded for stating that this was a residual power, and one mark was awarded for the justification. The justification needed to refer to the stimulus material. Many students referred to the fact that the *Defamation Act 2005* (Vic) is a Victorian

legislation. Other students referred to the fact that Source 2 referred to separate systems of defamation laws (state laws).

Question 1b.

Marks	0	1	2	3	Average
%	13	21	41	26	**1.8**

Students responded well to this question. To obtain full marks, a comprehensive explanation, with use of the relevant stimulus material, was required. The most common reasons given were as follows:

- technology – Source 2 referred to the need to change the law amid rapid changes in online publishing
- complex/outdated/difficult to understand – current defamation laws are seen to be unworkable and out of date
- inconsistency of laws across the country and the need for uniformity (this could have been linked to laws not being understood).

A small number of students stated that the reason was that the limitation of actions period for defamation laws was too short and needed to be extended. They did not get full marks as there was nothing in the stimulus material to support that answer.

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

> *One reason for the need for law reform in relation to defamation laws is that they are 'outdated.' In order to remain relevant and uphold social cohesion in the community, laws must remain relevant in the face of changing views and values of the public, and in light of rapid technological changes. 'Rapid changes in online publishing' which were not around when defamation laws were originally legislated mean that current laws do not cater to this technological change and thus they must change in order to do so, and in order to continue to protect people's right, to not be defamed.*

Question 1c.

Marks	0	1	2	3	Average
%	18	20	42	21	**1.7**

This question assessed knowledge of the meaning of sections 7 and 24 of the Australian Constitution. To achieve full marks, students needed to explain that those sections do not provide any entitlement to anybody to be elected to any parliament; rather, those sections provide an entitlement to voters to choose the members of the Houses of Parliament (specifically, the Commonwealth Parliament).

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

> *Bradley is wrong as section 7 and 24 refer specifically to parliamentarians being 'directly chosen by the people'. This does not refer to individuals being entitled to elect themselves into parliament but rather individuals being voted into parliament by a majority of Australians. Instead, Bradley is entitled to be able to be voted for by Australian voters and thus be 'directly chosen by the people'. This definition does not, however, extend to an entitlement to effectively vote oneself into parliament despite what Bradley believes.*

Question 1d.

Marks	0	1	2	3	4	Average
%	11	14	27	30	18	**2.3**

To gain full marks for this question, responses had to describe the link/relationship between section 22 of the *Defamation Act*, the responsibilities of the judge, and the responsibilities of the jury if the case goes to trial. Section 22 explains that the jury will decide liability, and if the jury finds in favour of the plaintiff (that is, the jury is satisfied that the defendants, Stefani and her employer, published defamatory material, and they did not establish a defence), then the judge will determine the amount of damages. Better, more comprehensive responses were able to draw out what the jury would need to decide on beyond being the decider of facts; that is, finding that the defendants did in fact defame Bradley and had no defence in doing so.

Some students provided a general explanation of the responsibilities of the judge and jury at trial, without any reference to section 22 of the *Defamation Act*. Other students confused the section and stated that the jury will decide on damages.

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

> *The relationship is that section 22 is what gives the judge and jury their respective responsibilities if Bradley's case goes to trial. If Bradley's case did go to trial, the jury's responsibility as per S22 would be to deliberate on whether the defendant was liable and had defamed Bradley, and to determine whether any defence made by the defendant was valid/successful. The jury would do so after listening to all the facts, arguments and evidence presented and come to an objective decision based on this. By contrast, it would be the judge's responsibility, as per S22, to determine the amount of damages that Bradley was entitled to, if the jury deemed the defendant to be liable. It would be the responsibility of the judge to take into account points of law and fact in determining the amount of damages, if any. This responsibility is likely left to the judge, due to his/her expertise in doing so. Therefore, the relationship is that S22 is what sets out the responsibilities.*

Question 1e.

Marks	0	1	2	3	4	5	Average
%	11	9	19	34	22	5	**2.7**

This question was globally marked and required students to provide a comprehensive discussion which addressed the relevant stimulus material. The key word in this question was 'alone' – could an injunction by itself achieve what Bradley wanted? In particular, the key issue in this case was that the defamatory material was published online and republished. How much could an injunction stop the material from spreading and prevent Bradley's reputation being damaged?

Many students were able to pick up on this point, but some did not. Many students referred to the fact that an injunction combined with damages may be a better remedy; others stated that no remedy would be able to restore Bradley to the position he was in before the comments were published. Some students stated that Bradley's reputation as an actor was no longer relevant given that he was now seeking election to Parliament. All of these points were good points, as they drew on relevant stimulus material to address the question. There was no minimum number of points required to obtain full marks (though one or two points is unlikely to be enough for a comprehensive discussion) – the key factor was the depth of discussion and the extent to which each point was addressed, not the number of points made.

The following is the beginning of a high-scoring response (noting that the injunction is best characterised as a mandatory injunction rather than a restrictive injunction).

A restrictive injunction ordering Stefani's comments to be removed from both toe social media website and for her article to be removed could only achieve the purpose of rectifying Bradley to his original position before the wrong occurred to a certain extent. It could mean that no further citizens could access the negative information about Bradley, which may be favourable to him. However, as the information has already been published and widely shared, his reputation may have already suffered substantially which is something that is irreversible.

Question 1f.

Marks	0	1	2	3	4	5	6	Average
%	5	10	20	29	22	10	3	**3**

This question required students to decide whether this case was better determined at trial by a jury or through mediation. Students who made no selection could not get full marks. The differentiating factor was the reasons that were given by reference to the stimulus material.

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

- mediation is cheaper than a trial, with much less informality and much greater opportunities for the parties to have their say
- parties are not restricted to what is in the statement of claim as to what remedy they may agree on in mediation
- at a mediation, parties get an opportunity to present their arguments, test the other side's case, and discuss the weaknesses of their case, with an objective, unbiased mediator
- mediation usually happens in private; perhaps this is a high profile enough case for Bradley to want this heard in open court so that it serves as a lesson for the media
- will Bradley be able to match the power of the media in terms of their lawyers' likely experience in this space, in a mediation?
- a jury trial does allow for finality for the parties, as a binding decision can be made (though this can also be achieved through a mediation process if the parties sign binding terms).

The following is the beginning of a high-scoring response. The response stated a view at the start, and then justified that view.

In my view this matter should be determined through mediation. Whilst money is probably not an object for celebrity Bradley or Stefani's newspaper company, Bradley is mostly retired from movies and if Stefani is sued separately she may struggle to fund a civil defence, so mediation is the more financial-savvy option. Mediation is also a more time effective option and Bradley probably wants the comments & article down as quickly as possible, and a lengthy court case that will probably get publicity due to Bradley's ex-celebrity status will only cause more damage to his reputation.

Question 2a.

Marks	0	1	2	Average
%	22	13	65	**1.5**

Many students were able to correctly state that this case was a civil case, as it involved Mr D'Orta-Ekenaike suing Victoria Legal Aid for negligence. Incorrect responses suggesting that this was a criminal case were not awarded any marks.

Question 2b.

Marks	0	1	2	Average
%	7	49	44	**1.4**

It was clear that students are familiar with the role of VLA in assisting accused people in criminal cases. Most students stated that the role of VLA in this case was to represent Mr D'Orta-Ekenaike in his criminal case. Others stated that the role of VLA was to provide legal advice to him. Both answers were acceptable. A few responses stated that the role of VLA was to provide Mr D'Orta-Ekenaike with brochures or information on its website. These did not gain marks as they did not identify from the stimulus material that the VLA had a more active role to play in this case.

Some responses were unnecessarily long for two marks. An 'outline' requires only a brief response – more than an identification of a role, but less than a description.

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

> *VLA is responsible for offering free legal advice to accused persons such as Mr D'Orta-Ekenaike, which in this case could've included things like what a rape charge means or what his best option would be in regards to a plea.*

Question 2c.

Marks	0	1	2	3	Average
%	51	17	17	16	**1.0**

It was evident from the responses that this was the most challenging question on the examination, with many students not attempting the question or not receiving any marks. The question did not require any knowledge of what the principle of 'advocates' immunity' was (though an explanation was provided in the first paragraph of the accompanying article). Rather, the question required an understanding of the fact that the immunity was established by the High Court, and that the Parliament could, if it decided to, either abrogate or codify that immunity.

Some students explained the process of how Parliament could do that by reference to the law-making process, which was an acceptable response.

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

> *The parliament, as the supreme law-making body, could either codify the principle of advocates immunity, or abrogate the principle. Codifying the principle would entail the Commonwealth Parliament (CP) passing an Act to confirm the decision of the High Court in that lawyers can't be sued for negligence in their work, implying that it agrees with the High Court and its reasoning. By contrast, if the parliament abrogated the principle, it may pass a law allowing people to sue their lawyers for negligence, if they did not agree with the High Court's position on this issue.*

Question 2d.

Marks	0	1	2	3	4	Average
%	28	20	26	20	6	**1.6**

For students to gain full marks, they needed to recognise that the High Court has made a binding decision in the case of *D'Orta-Ekenaike*, and that it is the only court that can change that decision because it is the highest court in Australia, and the decision in *D'Orta* is a High Court decision.

Students could have referred to the *Atwells* case, noting that the Court of Appeal could not have reversed the decision of the High Court that a party cannot sue their lawyer for negligence, whereas the High Court can. Very few students referred to the *Atwells* case but this was not required to gain full marks.

High-scoring responses comprehensively explained how the precedent operated by reference to the concepts of binding precedent, persuasive precedent and *stare decisis.*

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

> *The relationship is that the doctrine of precedent, whereby lower courts in the same hierarchy must follow the reasoning for the decision of a superior court if material facts are similar, is what makes the rulings in High Court cases such as D'Orta-Ekenaike v VLA so important. It is the doctrine of precedent which means that if a case arises in the Supreme Court for example, where a plaintiff claims he is entitled to damages due to poor advice form his lawyer, the justices will most likely have to follow the ratio decidendi of the D'Orta-Ekenaike v VLA case and therefore deny the right of the plaintiff to claim damages. However, the doctrine of precedent also means that this decision does not always have to be followed in future. For example, if in such a Supreme Court case above the justice is able to differentiate the material facts of that particular case to the ones of the High Court case, it will not be bound by that precedent.*

Question 2e.

Marks	0	1	2	3	4	5	6	Average
%	11	15	26	23	16	7	2	**2.5**

Students had to choose one of the principles of justice – fairness, equality or access – and discuss them in relation to Mr D'Orta-Ekenaike's criminal case. Most students chose fairness; the second most popular principle was access.

Some of the points that could have been made in relation to each principle include:

Fairness

- Mr D'Orta-Ekenaike had legal representation, though its quality could be discussed.
- He was presumed innocent until proven guilty.
- Was he given a fair trial in light of the advice he was given, and the fact that his withdrawn guilty plea was used against him?
- He was able to use the court system to appeal.
- He was allowed to change his plea.

Equality

- Mr D'Orta-Ekenaike is clearly not a wealthy man, given he had VLA represent him in the original trial. So were the parties on equal footing?
- Did Mr D'Orta-Ekenaike have the resources to be able to match the legal representation of the prosecution?
- The use of a random jury in the original trial, and impartial judges in appeal hearings, who need to make a decision based on the facts rather than any unconscious or conscious biases, can uphold equality (and fairness).

Access

- Mr D'Orta-Ekenaike had access to VLA which would have allowed him to know his rights and understand court processes.
- Mr D'Orta-Ekenaike had a right to appeal. This allows people access to the higher courts to review the lower courts' decisions.

- Were there any delays in hearing the case?
- How did Mr D'Orta-Ekenaike cope with the formalities and the processes? Was he disadvantaged?

The differentiating factor was the use of the stimulus material with respect to the relevant principle of justice. Many students spoke about the case being 'fair' or 'unfair' without explaining what that meant; it would have been better to use other terms.

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

> *Access refers to the ability for one to understand his/her legal rights and purse the case. In this criminal case, although Mr D'Orta-Ekenaike likely came from a low socioeconomic status, which would typically compromise his access to the criminal justice system, due to inability to afford legal representation and thus adequately defend himself or understand what was happening in the case, he was able to qualify for legal aid and receive legal representation from VLA. This therefore increased Mr D'Orta-Ekenaike's ability to participate in the trial and understanding his legal rights, compared to the position he was in prior to receiving this aid. Therefore, his access and ability to participate was arguably enhanced in this aspect.*