INSIGHT

Trial Exam Paper

2010

LEGAL STUDIES

Written examination

Sample responses

This book presents:

- correct sample responses
- mark allocations
- tips and guidelines

Instructions
Answer **all** questions in the spaces provided. In Question 10 answer either part **a.** or part **b.** Indicate which part, **a.** or **b**., of Question 10 you have answered.

Question 1

Laws need to keep changing in order to be relevant to the society they serve.

a. Using an example to illustrate, explain **one** reason why laws need to change.

Sample response

If the views and values of society change, then the laws need to change so that they continue to reflect the values of society. This was shown in the example of changes to the law in the *Abortion Law Reform Act*, which allowed abortion in limited circumstances.

OR

Changes in technology can necessitate a change in the law if new technologies create new situations that need to be regulated. For example, laws were passed to regulate the use of embryos in stem cell research.

OR

If a new harm emerges, or becomes evident in society, then laws may need to change in order to protect the community from danger. For example, a number of anti-terrorism laws have recently been passed in order to protect the community from the threat and the effects of terrorist activities.

1 mark

Mark allocation

- 1 mark awarded for an explanation of any of the above reasons for the need for change in the law, with the inclusion of an example (can be briefly mentioned).

Tips

- *The Study Design stipulates that students need to be familiar with examples that illustrate the reasons laws may change.*
- *Students are required to know more than one reason why laws may need to change, as the Study Design stipulates reasons (i.e. plural).*

b. Suggest how an individual can try to influence a change in the law. Comment on the likelihood of success.

Sample response

An individual may start or sign a petition in an effort to influence the law. A petition is a collection of signatures from people who are in support of a particular change in the law or issue, stating a specific request for action by parliament. A petition will be presented to a Member of Parliament, with the aim of having it tabled in parliament. Petitions can be a means of alerting parliamentarians to the views of the public. The more signatories a petition receives, the more successful it is likely to be, because a large number of signatories indicates a high level of support for the suggested change.

OR

An individual can join a demonstration or rally, where a group of people gather together in a public place to voice their concerns and desire for change. To be effective, these demonstrations need to be brought to the attention of parliament. This could be achieved by holding the demonstration outside Parliament House, or by arranging for the demonstration to be covered in the media.

2 marks

Mark allocation

- 1 mark awarded for an appropriate explanation of one way in which an individual can influence a change in the law.
- 1 mark awarded for a relevant discussion of its likely success.

Note that these points could be discussed together.

Tips

- *Note that all methods used to influence change in the law can only be effective if they are brought to the attention of parliament. Therefore, all responses on this topic should be rounded off by discussing this point.*
- *Other methods used by individuals to influence a change in the law include: defiance of the law, submission to a formal law reform body, lobbying Members of Parliament, launching a test case in court.*
- *Examination Assessment Criterion number 5 states that students will be examined on the need for change in the law and/or ways in which change in the law can be influenced. Students should therefore expect a question on this topic, which could take the form of a question on either reasons why laws need to be changed and/or the means by which individuals and groups influence change in the law and/or the role of formal law reform bodies in assessing the need for change in the law.*

c. Once the decision has been made to change a law, and it is written up as a bill, this bill then needs to pass through a number of stages in parliament. Describe **one** of these stages and explain its purpose.

Sample response

The Second Reading Stage involves the Member of Parliament who is responsible for introducing the bill making a speech to parliament that describes the purpose and function of the bill. This discussion relates to the broad objectives of the bill, not specific sections of the bill, and is significant in determining parliament's intentions in regard to the bill. The Second Reading Speech is followed by the Second Reading Debate, where members speak in turn about the broad principles of the bill.

OR

Consideration in Detail, which occurs after the Second Reading Stage, is an informal discussion of the details of the bill. The Speaker of the House or the President of the Upper House leaves to be replaced by the Chairman of Committees, who convenes a session in which the bill is read clause by clause, clauses/sections are discussed, and amendments may occur. Consideration in Detail involves the most detailed discussion of the specifics of the bill, and often results in amendments or changes to the bill.

2 marks

Mark allocation

- 1 mark awarded for an explanation of an appropriate stage.
- 1 mark for explanation of its purpose. Note that these may be discussed together.

Tips

- *When given a choice of stage to explain for multiple marks, it is important to choose a substantial one. The stages that provide the most potential for detailed discussion include: Second Reading Stage, and the Consideration in Detail/Committee Stage. Other stages – such as the First Reading Stage and Royal Assent – are rather brief, and it could be more difficult to earn two marks from these.*
- *Other possible stages that students could choose to discuss include: the First Reading, the Third Reading, Royal Assent, or Proclamation.*

1 + 2 + 2 = 5 marks

End of Question 1

Question 2

Distinguish between binding and persuasive precedent.

Sample response

Binding precedent refers to statements of law that must be followed by all courts lower in the court hierarchy. It is the *ratio decidendi* (reason for the decision) that forms the binding part of the judgement. However, while persuasive precedent does not have to be followed by judges, it can still be highly influential. Statements of law made by courts in other hierarchies, statements of law from courts lower in the court hierarchy and *obiter dictum* comments (judges' comments made 'by the way') form persuasive precedent.

2 marks

Mark allocation

- 1 mark for correct explanation of binding precedent.
- 1 mark for correct explanation of persuasive precedent.
- Students must use a word that shows they are distinguishing between the terms.

Tips

- *Students must use a term such as 'however' or 'whereas' to signify that they are distinguishing between the two terms. Simply defining the terms will not secure full marks.*
- *Use of specific legal terminology is very important in all responses, but is particularly so in explanations of law-making through courts. In such responses students should be using the terms binding precedent, persuasive precedent,* ratio decidendi *and* obiter dictum.
- *Note that precedent refers only to statements of law made by judges. Decisions regarding sentencing do not constitute precedent.*

End of Question 2

Question 3

High Court interpretation of the Constitution can result in a change in the division of law-making powers between the Commonwealth and State Parliaments. Describe **one** example of such a change that occurred as a result of an Australian case.

Sample response

In the *Tasmanian Dams Case,* the High Court had to decide on whether the Commonwealth Parliament had the constitutional power to pass legislation that overruled Tasmanian legislation regarding the building of a dam in Tasmania. The High Court held that the 'external affairs' power in s.51(xxix) included the power to pass legislation that was necessary to uphold Australia's international treaty obligations. As the area in question in Tasmania was subject to a UNESCO agreement, the High Court held that the Commonwealth legislation was valid. This interpretation greatly extended the meaning and scope of the 'external affairs' power, thereby increasing the law-making power of the Commonwealth Parliament, which was able to pass legislation in an area previously regarded as a residual power.

OR

In *Brislan's Case,* Mrs Brislan was charged with holding a wireless without a license, contrary to the Commonwealth's *Wireless Telegraphy Act*. Mrs Brislan challenged the validity of the legislation, claiming that it was outside the Commonwealth's law-making powers. The High Court interpreted s.51(v) of the Constitution which gives the Commonwealth power to legislate on 'postal, telegraphic, telephonic and other like services'. They held that wirelesses were included in 'other like services', and so the legislation was valid. This interpretation extended the law-making power of the Commonwealth in this area.

2 marks

Mark allocation

Marks received will depend on the quality and depth of the explanation, with basic responses receiving only one mark, and a more detailed response earning two marks. Responses should include a discussion of the impact on the division of powers from the interpretation given by the High Court.

Tips

- *Students need give only a brief account of the facts of the case; the main focus of responses should be on the High Court's decision/interpretation and its impact.*
- *There are a number of possible cases that students could discuss for a question such as this. The most commonly discussed cases include: the* Tasmanian Dams Case, Brislan's Case*, and the* First Uniform Tax Case*. Other cases include* Jones v Commonwealth, Newcrest Mining Limited, Workplace Relations Case, Ha and anor v NSW*, and the* Roads Case.
- *Students are required to know at least two cases involving High Court interpretation of the Constitution, as the Study Design stipulates cases (i.e. plural).*

End of Question 3

Question 4

Jessica was involved in an incident in July 2009, which resulted in her being charged with 'causing serious injury recklessly'. This charge carries a maximum penalty of 15 years' imprisonment. Having gone through a number of pre-trial procedures, this matter is now listed to be heard in the County Court in December 2010, where Jessica will plead not guilty. In October 2010 Jessica was served with the following document from one of the men injured in the incident, who is claiming $825 000 in damages from her. She asks you for advice.

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

BETWEEN

Bradley Bennett **Plaintiff**

– and –

Jessica Hamilton **Defendant**

WRIT

Date of document: October 22, 2010

Filed on behalf of: The Plaintiff

Prepared by: Saxon and Associates Tel: (03) 994 6333; Fax: (03) 994 6222

Address: 121 High Street, Melbourne

TO THE DEFENDANT

TAKE NOTICE that this proceeding has been brought against you by the plaintiff for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiff which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearances stated below.

Extract of document received by Jessica

a. Explain the significance of the document that Jessica has received.

Sample response

This document is a writ. This is a standard form document that is prepared by the plaintiff (Bradley Bennett in this case) or their legal representation, and lodged with the court, with a copy being sent to the defendant or their legal representation. A writ informs the defendant of the case against them, and gives them a time period in which to reply; a writ also informs the court of a potential civil case.

1 mark

Mark allocation

- 1 mark for explanation of the document's significance/purpose.
- In their response, students should make some reference to the stimulus material.

Tips

- *The writ is one of the civil pre-trial procedures that are listed in the Study Design (along with letter of demand, pleadings, discovery and directions hearings), so students need to know about all of these procedures.*
- *Whenever stimulus material is included, students should refer to it in their responses if possible (as outlined on the front of the examination paper). In this instance, students need to read the stimulus material in order to correctly identify it as a writ – one of the documents required in civil pre-trial procedures.*

b. Describe **one** of the criminal pre-trial procedures that Jessica would have gone through in the lead-up to her trial, and the purpose of this procedure.

Sample response

Jessica may have been granted bail. Bail refers to when someone who has been charged with a criminal offence is released from custody while they await their court hearing or trial. There are often conditions attached to the granting of bail, such as regular attendance at a police station, surrendering of passport, or a surety. If bail is refused (e.g. the accused is considered too much of a risk to themselves or others, or is likely to abscond and not appear at their trial) then the accused person is held on remand in custody.

The purpose of bail is to uphold the presumption of innocence, as an accused person who has not yet been found guilty of a crime does not have to be held in custody. It also gives the accused person the opportunity to have time to prepare their defence while not in custody.

OR

As this is an indictable offence, Jessica would have faced a committal or preliminary hearing. These occur when a person has been charged with an indictable offence that is not being heard summarily. They involve a preliminary hearing in the Magistrates' Court where the prosecution's evidence is heard, in order to determine whether a *prima facie* case exists; i.e. whether there is sufficient prosecution evidence to support a conviction at a trial before a jury. If the Magistrate decides that there is sufficient prosecution evidence, then the accused will be ordered to stand trial in a higher court. If not, then the accused will be discharged.

The purpose of committal hearings is to save the time and expense of conducting trials in superior courts for cases that are weak on evidence, as those cases in which the prosecution fails to produce enough evidence in the committal hearing will usually be discharged. Committal hearings also give the accused the opportunity to hear the prosecution's evidence against them, helping to clarify the legal issues in question.

2 marks

Mark allocation

- 1 mark for explanation of a criminal pre-trial procedure.
- 1 mark for explanation of its purpose.

Tips

- *Students need to ensure that they can correctly identify cases and related procedures as either criminal or civil; unfortunately, some students confuse these when under the pressure of an examination setting. Look for key words such as prosecution, crime, accused, sanctions, punishment, guilty/not guilty in criminal cases; for civil cases, key words include sue, plaintiff, remedy, damages.*
- *Students are required to know all of the criminal pre-trial procedures listed in the Study Design, including: police powers and the rights of individuals, bail and remand, committal hearings, directions hearings. Note that all of these are relevant for an indictable offence, such as the one in this scenario.*
- *Scenarios are common ways in which to ask questions relating to criminal and civil procedures, as they test application skills.*
- *Take care to note the accuracy and completeness of explanations, particularly for terms that are in common usage such as bail; students need to show that they are Legal Studies students, rather than just people who are familiar with current affairs.*
- *It is advisable to incorporate the names of the parties in the case study into responses where possible or appropriate, to show that the stimulus material provided is being used appropriately.*

c. Explain to Jessica why her criminal case is taking place in the County Court, while her civil case will probably commence in the Supreme Court. Is there another court that could hear Jessica's civil case if it proceeds? Explain.

Sample response

The original criminal jurisdiction of the County Court is to hear indictable offences except murder and treason. As Jessica's charge falls into this category, her criminal trial will be held in this court.

Both the County and Supreme Courts have unlimited original civil jurisdiction, meaning that there is no limit on the types of civil cases they hear. Bradley has commenced his civil action in the Supreme Court (as evidenced on the writ), but he could have also decided to commence the case in the County Court.

2 marks

Mark allocation

- 1 mark for explaining the criminal jurisdiction of the County Court.
- 1 mark for explaining the civil jurisdiction of the County and Supreme Courts, and an appreciation that the civil case could take place in either court.

Tips

- *Students need to learn the jurisdictions of all courts listed in the Study Design – although only the County and Supreme Courts are relevant for this question.*
- *Students need to be able to apply their knowledge of court jurisdictions to cases or scenarios that could appear in questions.*
- *Students should also know the interrelationships between courts, e.g. to which courts appeals are heard, etc.*

d. Jessica asks you why Bradley is suing her. In your answer refer to the purpose of civil remedies, and contrast this to **one** purpose of criminal sanctions that could be fulfilled if she is sentenced to a term of imprisonment.

Sample response

The purpose of civil remedies such as damages is to restore the injured party to the position that they were in before the harm caused by the defendant occurred. If Bradley is successful in his claim, then the damages will help to cover the costs of specific measurable items such as medical expenses and loss of earnings; the damages may also provide Bradley with some compensation for pain and suffering and loss of enjoyment of life (general damages).

The criminal sanction of a term of imprisonment could serve the purpose of deterring Jessica, or other potential defendants, from engaging in conduct that can cause injury, as she allegedly has.

OR

By removing an allegedly dangerous person from the streets by imprisoning them, society is being protected from any further dangerous or reckless actions that Jessica may commit.

2 marks

Mark allocation

- 1 mark for explanation of the purpose of civil remedies.
- 1 mark for explanation of one purpose of the criminal sanction of imprisonment.

Tips

- *One error commonly made by students is to state that the purpose of civil remedies is to compensate the plaintiff. This definition is far too narrow and inaccurate, as the only remedy with the purpose of compensating the plaintiff is compensatory damages.*
- *Note also that compensation is not a type of remedy. The correct terminology – damages – must be used.*
- *Other acceptable purposes of criminal sanctions include: punishment, denunciation and rehabilitation.*

1 + 2 + 2 + 2 = 7 marks

End of Question 4

Question 5

The Anti-Discrimination List of VCAT hears between 200 and 300 complaints per year.

a. Describe the jurisdiction of this list.

Sample response

The Anti-Discrimination List of VCAT has the jurisdiction of hearing complaints of discrimination and sexual harassment as defined in the *Equal Opportunity Act*. Complainants must establish grounds or attributes of discrimination covered in the Act, such as impairment, race, gender, or status as a parent, and this discrimination must occur in a recognised area in the Act, such as education, employment or the provision of goods and services.

2 marks

Mark allocation

- 1 mark for describing grounds/attributes for discrimination.
- 1 mark for describing that discrimination is in a recognised area.

Tips

- *Detailed, up-to-date information about VCAT is available on its website at www.vcat.vic.gov.au.*
- *Note that the jurisdiction of the Anti-Discrimination List is unlimited, i.e. it can hear all claims, irrespective of the amount of damages claimed.*
- *While many students correctly describe grounds for discrimination, it is common for students to omit that discrimination must occur in a recognised area for a discrimination complaint to be lodged.*
- *Students need to have an understanding of the VCAT Civil Claims List and the Residential Tenancies List, in addition to the Anti-Discrimination List.*

b. Compare the dispute resolution practices of courts with those of tribunals such as VCAT.

Sample response

Conduct in courtrooms is subject to strict rules of evidence and procedure, meaning that there is a set order and way in which parties conduct their case, and strict rules as to what evidence is considered to be admissible and inadmissible in court. By contrast, VCAT is a less formal and less intimidating forum for dispute resolution, as there are more relaxed rules of evidence and procedure. This allows the parties involved to feel more at ease.

Due to the rules of evidence and procedure, there is a need for legal representation in courtrooms, so that trials/hearings are conducted by objective and professional representatives. This adds significant cost to a case resolved in court. However, legal representation is not required at VCAT, thereby making justice more accessible.

In addition, the application fees for courts are generally higher than those for tribunals, leading to a further cost for court trials.

Each list of VCAT operates as a specialised list, with the tribunal personnel becoming expert in their own jurisdiction or area, thereby improving the efficiency of dispute resolution. While there is some specialisation of types of cases in courts, they still hear a wide variety of cases.

Tribunals are limited to hearing only civil claims, and these are often smaller claims. Courts, however, can hear both criminal and civil claims and cover all areas of law.

The grounds for appeal from a VCAT decision are limited only to appeals on a question of law. Appeals from court decisions, however, also include appeals on conviction and severity of sanction/remedy, in addition to appeals on a point of law.

4 marks

Mark allocation

- Mark globally. Students generally earn one mark per feature that is compared between courts and VCAT.

Tips

- *This question assesses the key skill of comparing different dispute resolution practices.*
- *Students need to ensure that they explain points sufficiently to earn the full mark. Responses such as 'quicker', 'cheaper' and 'less formal' are not sufficient; each feature needs to be explained in a separate sentence with relevant detail.*

2 + 4 = 6 marks

Question 6

Explain **one** problem faced by individuals when using the legal system, and describe a change that has been made, or could be made, to overcome this problem and improve the effective operation of the legal system.

Sample response

One problem that causes difficulties to individuals when trying to access the legal system is that of delays. Delays can occur before the case commences due to potential parties not understanding their right to pursue a case, or to reluctance in commencing a case. While the numerous pre-trial procedures that are involved in both civil and criminal cases are designed to save time in court in the longer term, these pre-trial procedures can add to delays. Parties may then experience delays while waiting for their trial or hearing to be listed in the courts. Once a trial commences, it is heard as one continuous event. All of these factors can contribute to preventing a timely resolution of disputes. Delays can lead to the parties suffering further stress, financial hardship, increased social stigma, and loss of confidence in the legal system.

One change made has been the appointment of acting judges. In 2005 the Victorian Parliament passed the *Courts Legislation (Judicial Appointments and Other Amendments) Act*, which allowed for the appointment of acting judges on a full-time or part-time basis to the Supreme, County and Magistrates' Courts. These acting judges are appointed for up to five years to work in the courts in times of increased court workloads. This change was designed to increase the pool of available judges to reduce delays and improve efficiency in the hearing of cases, thereby assisting with a timely resolution of disputes, and increasing access to dispute resolution mechanisms.

[Suggested changes to overcome delays could include: the extension of current Magistrates' Court hours to include night courts and Saturday morning courts, reforms to support the early charging of people, reducing the length of committal hearings, reducing delay in guilty plea hearings in the County and Supreme Courts, and increased case management processes to try to identify pleas of guilty and pre-trial issues at an earlier stage.]

OR

The high cost of using the legal system represents a problem for many people, with high costs often barring them from effective access to mechanisms for the resolution of disputes. High costs can be due to court costs and fees in lodging a case, in addition to the need for legal representation. Solicitors need to be consulted for legal advice and pre-trial procedures, and barristers need to be engaged to represent parties in the trial or hearing. These fees can be very expensive. In addition, legal aid can be difficult to qualify for due to limited resources, as applicants have to pass the merits and means tests. While Victoria Legal Aid has some funds for representation for serious criminal cases, there are limits: this body is often unable to represent parties in civil cases.

One change that has assisted with increasing the resources of Victoria Legal Aid (VLA), and thereby increasing the provision of legal representation for clients, is the Pro Bono Secondment Scheme. This involves lawyers from private law firms being seconded to, or working for, Victoria Legal Aid for a set period of time, as agreed and permitted by their employers. This has allowed solicitors to provide free (pro bono) or low-cost legal services to VLA and therefore the community. It has increased the resources of VLA, and has also facilitated the exchange of information between the public and private sectors of the legal profession. More potential clients are thus now able to gain access to dispute resolution processes.

OR

There are some groups within society, such as Aborigines, who may experience problems accessing the legal system. Aboriginal people are overrepresented in the criminal justice system, with a higher proportion of the Aboriginal population involved in criminal cases, and also in custody, than the non-Aboriginal Australian population. Aboriginal people may experience communication difficulties when being questioned by police and in court due to their different language, customs and characteristics. For example, many Aboriginal people's reluctance to look others in the eye, due to the belief that this is disrespectful, can often be misinterpreted as untrustworthy in court. Social taboos such as speaking of personal issues and of the dead can work against them in court, and result in Aboriginal witnesses appearing to be uncooperative. Some Aboriginal people may not respond well to direct questioning. Also, misunderstanding the purposes of court procedures such as cross-examination may result in some Aboriginal witnesses giving different answers to questions when being cross-examined, compared to answers given under examination in chief, in an effort to please.

These problems have prevented some Aboriginal people from receiving a fair and unbiased hearing, as Aboriginal defendants may be treated differently compared to other parties. These cultural differences could also result in decreased access to mechanisms of dispute resolution, as Aboriginal people may not be familiar with, or may be reluctant to engage in, the legal system.

One change that has been introduced to overcome this problem for some cases is the Koori Court division of the Magistrates', County and Children's Courts. This is a sentencing court that hears cases within the jurisdictions of the courts in which it sits, with the exception of sexual offences and family violence cases. One feature of the Koori Court is the involvement of an Aboriginal elder or respected person, who advises the court on culturally relevant issues, which are considered when sentencing. These are informal proceedings, which are aimed at ensuring the understanding of the defendant, their family and the Aboriginal community. They also look at the offending behaviour, with the aim of reducing recidivism rates. The Koori Court is restricted to Aboriginal defendants who plead guilty. Its existence helps to ensure a fair and unbiased hearing for Aboriginal defendants, and helps them gain effective access to dispute resolution processes by providing them with access to a more culturally appropriate court.

4 marks

Mark allocation

- Mark globally, although responses should address all parts of the question for full marks.

Tips

- *This is a broad question that lends itself to a range of potential answers. There are many potential points for discussion here. Students are advised to learn the problems/difficulties they studied in class. These often fit broadly into the categories of: financial problems affecting access; structural problems and delays in the legal system; cultural and social differences that affect access. Each of these problems will result in at least one element of an effective legal system not being met.*
- *Students need to strive to be as specific and detailed as possible in their discussion of problems and changes. They need to demonstrate that they are Legal Studies students, not just people with a good general knowledge of current events.*
- *The changes discussed should relate to the problems identified in the response. Changes can be actual or suggested. Note, though, that students need to know both actual recent changes and suggested or recommended changes, as either could be stipulated.*
- *Whenever judging the effective operation of the legal system, the elements of an effective legal system should be referred to. Whenever a question refers to an effective legal system or the effective operation of the legal system, one or more of the four elements of an effective legal system should be included in the discussion, as these elements act as a checklist. The four elements to be used are those listed in the Study Design.*
- *Students should expect to have to refer to the elements of an effective legal system in an examination, as these must be assessed according to Examination Criterion 4. Such a question could take the form of a direct explanation of one or more elements, a question relating to processes and procedures that help the element(s) to be achieved, problems that affect the element(s) being achieved, or changes to help achieve the element(s). An elements/effectiveness question may be a stand-alone question, or it could be incorporated into any of the topics in Unit 4 Outcome 2 (i.e. criminal procedure, civil procedure, the adversary system, the jury system).*

End of Question 6

Question 7

A foreign student studying the Australian legal system comes to you confused about the concepts of the separation of powers and the division of powers.

a. Explain what is meant by the doctrine of the separation of powers, and discuss the extent to which this doctrine applies in Australia.

Sample response

The doctrine of the separation of powers refers to the notion that the three types of power held by the Commonwealth must be exercised by different bodies, so that powers are kept separate, no single body has absolute power, and no branch can interfere with or control the operation of another branch. The three powers of the Commonwealth are:

- Legislative power, which is the power to pass laws, is exercised by parliament
- Executive power, which is the power to govern the country, is exercised by government (held by the Governor-General)
- Judicial power, which is the power to settle legal disputes, is exercised by the courts.

In Australia there is some overlap between the Legislative and Executive powers, with the government being a member of parliament, and also exercising the Executive power. The Governor-General is also both a member of parliament, as well as the Executive.

The judiciary remains independent.

3 marks

Mark allocation

- 2 marks for correctly explaining the concept of the separation of powers.
- 1 mark for discussing the extent to which this concept applies in Australia.

Tips

- *The concepts of separation of powers and the division of powers are commonly confused with one another by students, although they relate to quite different aspects of Unit 3.*
- *When discussing separation of powers, students need to address the 'separation' part of the doctrine, rather than just explaining the three types of power held by the Commonwealth.*
- *Students are required to know all of the principles of the Australian Parliamentary system, as listed in the Study Design. These include representative government, responsible government, the separation of powers, the structure of State and Commonwealth Parliaments and the roles played by the Crown and the Houses of Parliament.*
- *Students need to learn key skills as well as key knowledge. For this question, the relevant key skill is to compare aspects of legal theory to current practices.*

b. Explain the notion of the division of powers and its impact on law-making in Australia.

Sample response

The Commonwealth Constitution sets out the way in which law-making powers are divided between the State and Commonwealth Parliaments – referred to as the division of powers. Section 51 of the Constitution lists or enumerates 40 heads of power that have been given to Federal Parliament in order to make laws for the peace, order and good government of Australia. These are known as specific powers, and include powers such as external affairs and trade and commerce. Some of these specific powers are made exclusive by other sections of the Constitution, meaning that only the Federal Parliament can make laws in these areas. Some sections remove the rights of State Parliaments to make laws in these areas, such as coining money and raising military forces; other sections state that powers are exclusive, such as customs and excise. Those specific powers that are not made exclusive are called concurrent powers, and are shared by both Federal and State Parliaments. Examples of concurrent powers include marriage and taxation. However, as both State and Federal Parliaments can make laws on the same area there is the potential for the laws to be conflicting. If this occurs, then s.109 – the inconsistency provision – applies. It states that the federal law shall prevail, and the state law is to be ruled invalid to the extent of the inconsistency. Those powers that are not listed in the Constitution (and are therefore not given to the Federal Parliament) remain with the states. These are called residual powers. Some of these powers were intentionally left out of the Constitution in order to give power to the states, while others have evolved over time. Examples of residual powers include criminal law and IVF.

Therefore, in Australia we have some areas of law that belong only to the Federal Parliament, some that belong only to State Parliaments, and others that are shared.

5 marks

Mark allocation

- 1 mark for explanation of specific powers.
- 1 mark for explanation of exclusive powers.
- 1 mark for explanation of concurrent powers.
- 1 mark for explanation of inconsistency provision.
- 1 mark for explanation of residual powers.

Tips

- *Students can use the terms Federal Parliament and Commonwealth Parliament interchangeably.*
- *Note that it is parliaments who have law-making abilities and parliaments that pass laws, not governments, which are only a subset of parliament.*
- *Students should be able to define all four types of lawmaking powers, including examples of each (as is required in the Study Design), and be able to explain how these powers relate to each other.*
- *Whenever discussing concurrent powers, you should also include a discussion of the inconsistency provision as outlined in s.109 of the Constitution. Remember that s.109 is one of the two sections of the Constitution that are mentioned in the Study Design (the other being s.128 – referendum procedure).*

3 + 5 = 8 marks

End of Question 7

Question 8

Australia remains one of the few developed countries in the world without a national Bill of Rights. Citizens of countries such as Canada, South Africa and the United States of America have Bills of Rights entrenched in their Constitutions, and citizens of the United Kingdom and New Zealand have statutory Bills of Rights. Australia stands apart from these nations in terms of its constitutional protection of rights.

Compare and contrast the way in which the Australian Constitution protects democratic and human rights with one of the countries mentioned above. In your response, comment on the effectiveness of the approaches discussed.

Country selected for comparison with Australia: _____

Sample response

Canada:

While Australia does not have a Bill of Rights, with only five express rights written into the Commonwealth Constitution, Canada does have a Bill of Rights, with the *Canadian Charter of Rights and Freedoms* forming part of the Canadian Constitution. The Canadian Charter protects an extensive number of rights, including fundamental freedoms, democratic rights, mobility rights, legal rights, equality rights and language rights. In contrast, the number of rights protected by the Australian Constitution is limited to only five, and some of these, such as the right to trial by jury for Commonwealth indictable offences, only offer limited protection. Thus, at first glance, it would appear that constitutional protection of rights in Canada is more effective than in Australia.

Both Australia's and Canada's protected rights are entrenched in their Constitutions, meaning that they can only be changed by a successful referendum. In both countries this is difficult to achieve, as the support of a majority of voters overall is required, as well as a majority of voters in a majority of states (Australia) or 7 out of 10 provinces (Canada). Thus, the words of the Constitution, including the protected rights, can only be changed with the overwhelming support of society.

The rights protection in the Canadian Charter extends to both the Federal and provincial parliaments, whereas in Australia most of our constitutional rights offer protection from the actions of the Federal Parliament only, not from the states.

One similarity between the countries is that both have pre-legislative scrutiny of bills, so that any law that could potentially infringe a protected right should be identified and rectified at the bill stage. In Canada the Minister for Justice, along with parliamentary committees in each house, must determine the compliance of any bills with the Charter. In Australia, bills regarding potential constitutional issues should be checked by the Senate Standing Committee on Legal and Constitutional Affairs.

One important difference between the two countries is that the Canadian Supreme Court can be called upon to give advisory opinions as to the validity of legislation before it is passed. Dialogue is encouraged between the superior court and parliament, which is an effective way of ensuring that legislation that is likely to infringe on protected rights is not passed. However, no such mechanism exists in Australia. Any infringement of rights will be brought to the attention of the High Court only after the legislation has been passed and the person's rights infringed. Thus, it would appear that the Canadian system could be more effective in this regard, as there is not the need to wait until a case proceeds before the court comments on the legislation, as is the case in Australia.

The superior courts in both countries have the task of interpreting words in the Constitution, and rights are fully enforceable by the superior courts – the High Court in Australia and the Supreme Court in Canada. This means that the court is able to declare legislation to be invalid if it infringes a protected right. However, in Canada it is really only democratic and mobility rights that are fully enforceable, as the parliament can override a declaration of invalidity relating to the other types of rights, and pass the offending legislation, as long as they state that they are breaching rights protection; such legislation is valid only for five years. While this does provide some flexibility for the Canadian Parliament, particularly in the area of conflicting rights, it could negate some of the effectiveness of its Charter. All protected rights in Australia are fully enforceable by the High Court.

While hearing applications for breaches of protected rights, Canadian courts can offer remedies to parties whose rights have been infringed, and can make other rulings, such as ruling evidence to be inadmissible if gained against the Charter. In Australia however, an affected person can only be offered remedies if they lodge a separate case before the High Court, which is an expensive and time-consuming process.

Overall, there are a number of similarities and also differences in the approaches used for the constitutional protection of rights in Australia and Canada. However, the Canadian people appear to enjoy more rights protection, due to having an extensive Bill of Rights, and the ability of their courts to engage in dialogue with parliament, and to award remedies.

South Africa:

While Australia does not have a Bill of Rights, with only five express rights written into the Commonwealth Constitution, South Africa does have a Bill of Rights, which forms chapter 2 of its Constitution. The South African Bill of Rights protects an extensive number of rights, including equality, freedom and security, privacy, trade, freedom from slavery, freedom of expression and freedom of religion. Of note is that the Bill of Rights also includes protection of economic, social and cultural rights. In contrast, the number of rights protected by the Australian Constitution is limited to five, and some of these, such as the right to trial by jury for Commonwealth indictable offences, offer limited protection only. Thus, at first glance, it would appear that constitutional protection of rights in South Africa is more effective than in Australia.

Both Australia's and South Africa's protected rights are entrenched in their Constitutions, meaning that they can only be changed by a successful referendum. This is difficult to achieve in both countries, due to requiring the support of a majority of the voters overall, as well as of a majority of voters in a majority of states (Australia) or provinces (South Africa). (In South Africa there must be support from a two-thirds majority of the National Assembly and at least 6 out of 9 provinces). Thus the words of the Constitution, including the protected rights, can only be changed with the overwhelming support of society.

The superior courts in both countries have the task of interpreting words in the Constitution, and rights are fully enforceable by the superior courts – the High Court in Australia and the Constitutional Court in South Africa. This means that the court is able to declare legislation to be invalid if it infringes a protected right.

When interpreting legislation in South Africa, the courts are required to interpret statutes in accordance with the Bill of Rights. When interpreting the Constitution, the court must promote the values of an open and democratic society and international and foreign law. As no such provisions exist in Australia, South African residents can be considered better protected.

The South African Bill of Rights contains a limitation clause, which allows rights to be limited where justified in a free and democratic society. This is therefore a way of dealing with conflicting protected rights. However, this is not available in Australia, where the Commonwealth Parliament cannot legislate to infringe any rights.

While hearing applications for breaches of protected rights, South African courts can offer remedies to parties whose rights have been infringed. However, in Australia, an affected person can only be offered remedies if they lodge a separate case before the High Court, which is an expensive and time-consuming process.

Overall, there are a number of similarities and differences in the approaches used for the constitutional protection of rights in Australia and South Africa. The South African people appear to enjoy more rights protection, however, due to having extensive rights that are protected by the courts.

United States of America

While Australia does not have a Bill of Rights, with only five express rights written into the Commonwealth Constitution, the USA does have a Bill of Rights, added as amendments to their Constitution. The Bill of Rights protects an extensive number of rights, including freedom of religion and speech, the right to trial by jury and the right to bear arms. In contrast, the number of rights protected by the Australian Constitution is limited to five, and some of these, such as the right to trial by jury for Commonwealth indictable offences, offer limited protection only. Thus, at first glance, it would appear that constitutional protection of rights in the USA is more effective than in Australia.

Both Australia's and the USA's protected rights are entrenched in their Constitutions, meaning that they can only be changed by a successful referendum. In both countries, this is difficult to achieve. In Australia a successful referendum requires the support of the majority of voters overall, as well as a majority of voters in a majority of states. The referendum process is even more complicated in the USA, as it involves separate referenda being held in each state. Thus, for both countries the words of the Constitution, including the protected rights, can only be changed with the overwhelming support of society.

Protected rights in both countries also include implied rights – rights that are not expressly written into the Constitution, but have been held by the superior courts to be protected. For example, citizens of Australia have the implied right to freedom of political communication; in the USA they have the right to privacy.

Another similarity is that the superior courts in both countries have the task of interpreting words in the Constitution, and rights are fully enforceable by the superior courts – the High Court in Australia and the Supreme Court and Federal courts in the USA. This means that the court is able to declare legislation to be invalid if it infringes a protected right.

Overall, there are a number of similarities in the approaches used for the constitutional protection of rights in Australia and the USA. However, the biggest difference is in the scope of protected rights. The American people appear to enjoy more rights protection, because their courts protect a more extensive range of rights.

New Zealand

While Australia does not have a Bill of Rights, New Zealand has a statutory Bill of Rights created under the *Bill of Rights Act* 1990 and later the *Human Rights Act* 1993.The New Zealand Bill of Rights protects an extensive number of rights, including life and security of the person, democratic and civil rights, the right to silence and the right to trial by jury; whereas the Australian Constitution protects only five express and one implied right,

including the right to trial by jury for Commonwealth indictable offences, freedom of religion and freedom of political communication. Thus, it would appear that the New Zealand Bill of Rights offers greater protection of rights than the Australian Constitution.

The express rights protected within the Australian Constitution are entrenched, meaning that they are part of the Constitution and as such, can only be changed by a successful referendum. As this is difficult to achieve, and must have the majority support of the Australian voters to make such a change, these rights are well protected against arbitrary changes. However, the New Zealand Bill of Rights is a statutory bill of rights, being passed by the New Zealand parliament. As such, the New Zealand parliament could pass subsequent legislation to amend the Bill of Rights Act. This is a significant difference between the ways in which the two countries' rights are protected.

One similarity between the countries is the pre-legislative scrutiny of bills, so that any law that could potentially infringe a protected right should be identified and rectified at the bill stage. In New Zealand, the Attorney-General must bring to the attention of parliament any bill or provision that seems to be inconsistent with any of the rights and freedoms protected in the Bill of Rights. In Australia, bills regarding potential constitutional issues should be checked by the Senate Standing Committee on Legal and Constitutional Affairs.

When interpreting legislation in New Zealand, the courts are required to interpret these in accordance with the Bill of Rights. No such provisions exist in Australia, thereby giving further protection to New Zealand citizens

The High Court of Australia performs an important role in the interpretation and enforcement of protected rights. The High Court can declare legislation to be invalid if it infringes a protected right, i.e. the rights are fully enforceable by the High Court. While the courts in New Zealand can declare legislation or its provisions to be inconsistent with the Bill of Rights, this does not mean that the legislation is invalid. It is returned to the parliament to be reconsidered or amended.

Overall, there are significant differences between the approach to rights protection in these two countries, mainly due to the difference between having entrenched rights in Australia and a statutory bill of rights in New Zealand. The role of the courts in relation to the interpretation and enforcement of rights also differs. While there are a greater number of rights protected in New Zealand, the Australian Constitution affords stronger protection of the limited number of rights that it contains.

United Kingdom

While Australia does not have a Bill of Rights, the United Kingdom has a statutory Bill of Rights created under the *Human Rights Act* 1998.The United Kingdom Human Rights Act protects an extensive number of rights, including the right to life, freedom from torture, slavery and inhuman punishment, the right to marry and the right to an education; whereas the Australian Constitution protects only five express and one implied right, including the right to trial by jury for Commonwealth indictable offences, freedom of religion and freedom of political communication. Thus, it would appear that the United Kingdom Human Rights Act offers greater protection of rights than the Australian Constitution.

The express rights protected within the Australian Constitution are entrenched, meaning that they are part of the Constitution and as such, can only be changed by a successful referendum. As this is difficult to achieve, and must have the majority support of the Australian voters to make such a change, these rights are well-protected against arbitrary changes. However, the United Kingdom Human Rights Act is a statutory bill of rights, being passed by the United Kingdom parliament. Indeed, the United Kingdom does not have a constitution in which rights could be entrenched. As such, the Parliament of the United Kingdom could pass

subsequent legislation to amend the Human Rights Act. This is a significant difference between the ways in which the two countries' rights are protected.

One similarity between the countries is that there is pre-legislative scrutiny of bills, so that any law that could potentially infringe a protected right should be identified and rectified at the bill stage. In the United Kingdom the minister introducing any bill to parliament must make a statement of compatibility before the Second Reading Speech. This statement of compatibility outlines the extent to which the bill complies with protected rights. However, even if it is stated that legislation does not comply with protected rights, the parliament can proceed with the bill. In Australia, bills regarding potential constitutional issues should be checked by the Senate Standing Committee on Legal and Constitutional Affairs.

When interpreting legislation in the United Kingdom, the courts are required to interpret these in a way so as to be compatible with protected rights. Further, as a member of the European Union, the United Kingdom's courts are required to take into account any judgement of the European Court of Human Rights. As no such provisions exist in Australia, residents of the United Kingdom can be considered to be better-protected.

The High Court of Australia performs an important role in the interpretation and enforcement of protected rights. The High Court can declare legislation to be invalid if it infringes a protected right, i.e. the rights are fully enforceable by the High Court. While the courts in the United Kingdom can declare legislation or its provisions to be incompatible with the Human Rights Act, this does not result in the legislation being declared invalid. It is returned to the parliament to be considered again or amended. Dialogue between the courts and parliament is encouraged to fix this incompatibility.

Overall, there are significant differences in the approach to rights protection in these two countries, mainly due to the difference between having entrenched rights in Australia and a statutory bill of rights in the United Kingdom. Also different is the role of the courts in relation to the interpretation and enforcement of rights. While there are a greater number of rights protected in the United Kingdom, the Australian Constitution affords stronger protection of the limited number of rights that it contains.

8 marks

Mark allocation

Mark globally, although students need to consider both the approach for rights protection in their selected country, as well as make some evaluative comments. Generally one mark is awarded for each point that is explained, although detailed explanation of a point could earn two marks.

Tips

- *While examples of the types of rights protected are useful as part of the comparison in terms of the scope of rights protection, the question does not ask for a comparison of the rights protected. Students should focus on the process used for the constitutional protection of rights, rather than on the rights themselves.*
- *The discussion of the way in which rights are protected needs further attention. It is not sufficient to simply state that the right is written into the Constitution: students also need to discuss how these rights are interpreted and enforced as part of their discussion of how rights are protected.*
- *Examination Assessment Criterion 6 necessitates that the exam contain a question that relates to an analysis of the effectiveness of constitutional protection of democratic and human rights. This may focus only on Australia, or could call for a comparison with another country.*

End of Question 8

TURN OVER

Question 9

'Juries serve no useful purpose in Victorian trials, and need to be reformed.'

Critically evaluate the operation of juries in our justice system, indicating the extent to which you agree with the above statement. In your answer, include a discussion of **one** suggested reform to the jury system.

Sample response

Juries have an important place in our legal system, and do serve an important purpose. While there are some weaknesses associated with jury trials, the strengths outweigh these weaknesses. Reforms may assist in overcoming some of these weaknesses.

A jury is intended to be an independent and impartial body which decides questions of fact in a case (e.g. guilty or not guilty in a criminal trial). They help to ensure that the parties to a case receive a fair and unbiased hearing, as potentially biased jurors are removed from cases, as are those who have any prior associations with a case. The jury selection process ensures that potential jurors who may be biased due to their previous or current criminal records are disqualified from serving on a jury. Similarly, potential jurors who are considered to be too closely involved with the legal system, such as lawyers and police, are ineligible to serve on a jury, removing another source of potential bias. Any juror who has an acquaintance with any person involved in the case (e.g. defendant, witness) is required to inform the court of this, and will then be excused from that trial. Also, any potential juror who legal counsel considers may be biased is likely to be challenged in the jury empanelment process. Thus, the jury selection and empanelment procedure has a number of processes designed to remove potentially biased jurors, thereby ensuring that the hearing is as fair and unbiased as possible.

However, despite these processes, some jurors may still possess preconceived biases towards different social or cultural groups, or may be influenced by the media or legal counsel.

Another strength of jury trials is that they are a trial by one's peers, where questions of fact are decided by a group that represents the views and values of the community. Defendants can then have faith that ordinary citizens are making decisions in their case, rather than legal authorities who are paid by the state. This may assist in parties feeling more confident and satisfied with decisions of fact made in court.

However, in reality, a jury may not necessarily be a true cross-section of society, due to the number of people who are ineligible, disqualified, excused or challenged in the jury selection and empanelment process. Further, certain sectors of the community, such as Aboriginal defendants, are unlikely to be tried by their peers. Other sections of the community may be overrepresented on juries.

It is a strength of the jury system that it facilitates the involvement of the community in the legal system, thereby serving to educate members of the community about the role and operation of juries. This should help to develop confidence and appreciation of the legal system. It also serves to ensure that procedures and evidence in the courtroom are conducted in intelligible, non-technical language, thereby helping to improve public understanding.

However, it is still possible that jurors may not understand or recall some of the evidence presented to them at trial, particularly if it is complex or technical. This is a weakness if it results in an uninformed verdict.

Decisions reached by juries are made by a group of people, so decision-making is spread across 6 people (civil case) or 12 people (criminal case), rather than just one judge. This increases the likelihood of the decision being correct, as more people have considered the

Question 9 – continued

evidence. It also means that any individual biases in members of the jury or the judge are likely to be counterbalanced by the rest of the jury.

However, juries are not required to give a reason for their decision, which means that the reasoning they applied and the evidence that they relied on to reach their verdict is not announced.

To amend this, a reform to the jury system could be made. If jurors were required to give a reason for their decision, there would need to be some justification for their verdict, and they would thus be more accountable to the legal system. It may also help the parties to understand the verdict in their case, and assist with their understanding of the outcome. However, it may not be possible for the jury to present a reason for its decision if different jurors have made their decisions for different reasons. Also, providing a reason may open up further grounds for appeal.

8 marks

Mark allocation

Mark globally, with the explanation of each point/concept earning a mark. Note that more detailed or in-depth explanations of a point can earn two marks. Students should have a balanced discussion of strengths and weaknesses.

Suggested mark allocation:

- 6 marks on critical evaluation of juries.
- 2 marks on suggested reform.

Students must indicate the extent to which they agree with the statement in order to earn full marks.

Tips

- *'Critically evaluate', along with 'critically examine' and 'evaluate' are among the task or direction words that are often misunderstood by students. These all require students to undertake a consideration of both strengths/advantages and weaknesses/ disadvantages of the concept/process under investigation.*
- *When evaluating, try to provide a balanced discussion of strengths and weaknesses, i.e. roughly the same number of strengths and weaknesses should be discussed.*
- *Better answers are generally those that discuss the strength/advantage, then the corresponding weakness/disadvantage, rather than listing all the strengths followed by all the weaknesses.*
- *Watch the quality of explanation of points in this question, as students sometimes resort to listing strengths and weaknesses without sufficient discussion, thereby limiting the marks that they can receive.*
- *Students tend to confuse reforms to the jury system with alternatives to the jury system. Note that reforms refer to situations where the existing jury system is retained, but with some changes, while alternatives refer to situations where the current jury system is abolished and replaced with a different means by which matters of fact are decided.*
- *Other possible reforms to the jury system include: appointment of a professional foreperson; creating a more representative jury by changing the categories of disqualified and ineligible jurors; introducing a not proven verdict.*
- *Students need to indicate the extent to which they agree with the statement regarding the usefulness of juries. This can be done at the beginning of the answer, throughout the response, or in the concluding comments.*

End of Question 9

Question 10

*Answer **either** part **a.** or part **b.** of this question.*

EITHER

a. 'Courts have an important role to play in law-making in our legal system, and should continue to do so. However, there also exist a number of relationships between courts and parliament in the law-making process.'

Discuss, indicating the extent to which you agree with the statement.

OR

b. 'The conduct of trials in Australian courts differs from the conduct of trials in countries that use the inquisitorial system of trial. The adversary system could be improved through the adoption of some of the features of the inquisitorial system.'

Discuss, indicating the extent to which you agree with the statement.

☐ Either **a.** or **b.**

Sample response for 10a

It is true that courts play an important role in making and developing laws. There are many strengths of having courts as law-makers, but there are also some disadvantages.

Courts are able to make laws quickly when presented with a situation or case in which adjudication is required. Judges are required to rule on the cases before them, and in doing so they may make a statement of law (precedent) that applies to the case, and is binding on courts lower in the court hierarchy and persuasive to other courts – creating consistency and predictability in the law.

However, judges must wait until an appropriate test case comes before them which contests a point of law on which they can rule. This is dependent upon there being parties willing to spend the money to contest a case. Also, judges can only create laws on the specific issue of law in the case before them, so law-making can be rather narrow.

One important strength of the courts in law-making is their ability to develop and clarify the law, and fill in the gaps left by parliament. Parliament often drafts legislation in general terms, so that it applies to a range of situations. Judges interpret and therefore clarify the meaning of words in legislation through statutory interpretation. Further, if a dispute comes before the court on which parliament has not legislated, then courts are able to create areas of law. This ensures justice for the parties involved in the case. The creation of the tort of negligence, and the recognition of native title are two examples of areas of law created by the courts in this way. However, this can take a long time to develop, especially if judges are conservative in their law-making. For example, the law of negligence took around 100 years to develop through the English courts.

Judges are independent from government and parliament. As they are unelected law-makers, they do not suffer from the same political pressure. They are appointed to office, and may therefore be able to be more objective about areas of law-making. However, this means that as unelected law-makers, judges' views may not be representative of the community. There are certain sections of the community that are underrepresented in the judiciary, such as Aboriginal people and immigrants.

Judges are experienced legal professionals, who are expert in applying the law to cases and settling disputes. They see the impact of laws first hand, so are likely to create effective and workable laws – another advantage of court-made law. However, courts do not have access to

external sources of information, relying on their own resources in developing new laws. This is in contrast to law-makers such as parliament, which can consult experts and the community before making laws.

While courts have an important role in law-making, they often work with parliament in developing the law, and the two bodies enjoy a number of interrelationships.

Parliament can determine the jurisdiction of courts, and passes legislation that determines the jurisdiction and operations of courts.

Courts play an important role in applying parliament-made law (legislation, statutes, acts) to cases before them, and in doing so, judges may need to interpret words or phrases within legislation and give meaning to them. This statutory interpretation clarifies the legislation, and is read together with the legislation to form the law.

Parliament can also codify laws made by courts. This means that parliament can pass legislation that incorporates common law principles, thereby strengthening the law. For example, the common law principles of the *Mabo* decision were codified in the *Native Title Act* and represent the law relating to native title.

Additionally, the primary and sovereign law-maker parliament can abrogate (i.e. change/override) any common law made by courts by passing legislation that overrules the common law, provided that it is within the parliament's legislative power. Thus, parliament is ultimately the supreme law-making body.

Courts therefore have an important role in law-making, whether creating new areas of law, or extending or developing existing areas of law. However, some weaknesses do exist in law-making by courts.

10 marks

Mark allocation

Mark globally. In general, one mark is earned for the discussion of one point, although a detailed discussion of one point can earn more marks. Students must address both parts of the question (i.e. evaluation of courts plus relationships, although the weighting is not stipulated) and indicate the extent to which they agree with the statement in order to earn full marks.

Tips

- *Students should take some time during reading time to carefully consider both options in the final question in order to make an informed choice about which to answer. Students are advised to read the question carefully and start planning the answer ahead of time, so that they are familiar with the requirements of both questions. The choice made should be the one that the individual student thinks that they can best answer, in terms of focus, content and structure.*
- *Whenever students are asked the extent to which they agree or disagree with a statement, this must be addressed in order to earn full marks for the response. Students may choose to fully agree, fully disagree, or partially agree/disagree. The last option often provides more scope for discussion, as students can include both advantages and disadvantages to back up this assertion. In this question, students would then have the scope to discuss both strengths and weaknesses of courts as law-makers.*
- *It is recommended that students begin and conclude this extended response answer with a clear statement of where they stand in relation to the assertion.*
- *Students do not need to explain the process by which courts make laws for this question. The emphasis is on the evaluation of courts as law-making bodies, and their relationships with parliament, not an explanation of the law-making process.*

Sample response for 10b

The adversary system of trial involves two disputing parties in a case opposing each other in court in an effort to win their case, with the assistance of their legal representation. The case is overseen by an impartial umpire who makes sure that the rules of evidence and procedure are upheld. This is the system of trial that operates in most Australian courts.

In the inquisitorial system of trial, which operates in some European and Asian nations, the trial takes the form of an inquiry, which takes place before a judge, with the aim being to determine the truth of the issue or dispute. The two systems of trial are therefore quite different. While each has its strengths, it could be argued that some of the weaknesses of the adversary system of trial could be overcome through adopting some of the features of the inquisitorial system.

One key feature of the adversary system of trial is that trials are conducted before an independent and impartial umpire in the form of a judge or magistrate. Their role is to ensure that the rules of evidence and procedure are being followed by both parties, and to rule on matters of law. Judges have no prior associations with either party, and do not get involved with the parties or the running of the case, thereby ensuring their impartiality. In the inquisitorial system, by contrast, the judge takes a far more active role in the case. They may be involved in pre-trial procedures, such as the gathering and examination of evidence. At trial, the judge who directs the case can also question the witnesses, raise further evidence, and determine the outcome of the case.

While the independence and impartiality of the judge in the adversary system of trial could be seen as a strength, ensuring fair treatment for both parties, it restricts the role of the most experienced legal person in the courtroom. Therefore, allowing judges in the adversary system to be more actively involved in the case could improve this system. If judges are able to call and question witnesses, and are more involved before trial, this could help all parties, particularly those who appear in court unrepresented. However, this could also potentially compromise the independence and impartiality of the judge, which would not serve justice.

Within the adversary system there are strict rules of evidence and procedure that govern the order of court proceedings and the types of evidence able to be used at trial. Evidence that is able to be used includes oral testimonies, objects and affidavits; while inadmissible evidence includes hearsay evidence, opinion, bad character and evidence that has been obtained illegally. These strict rules of evidence and procedure do not apply in the inquisitorial system. All evidence is able to be presented to the court, including evidence that would be inadmissible in the adversary system. All evidence is considered to be valid, and the judge determines what evidence will be relied on when deciding the case. New evidence can be admitted at any time. Witnesses are able to give evidence to the court in their own words, rather than only answering specific questions directed to them. There is a greater reliance on written evidence such as statements, compared with the reliance on oral evidence in the adversary system of trial.

The strict rules of evidence and procedure in the adversary system could be considered a strength, as they promote consistency and fairness for the parties and allow for only reliable and relevant evidence to be heard in court. However, if our courts relaxed some of the rules of evidence and procedure, and adopted some of the evidentiary practices of the inquisitorial system, this may result in more useful but currently inadmissible evidence being heard in court. It may also result in the truth being more likely to emerge in the case.

The adversary system places control of the case in the hands of the disputing parties, who are responsible for the preparation of their case, for determining the place and mode of trial (e.g. whether an indictable offence is heard summarily or at trial before a judge and jury), and for the conduct of the case at trial. The parties in an inquisitorial system do not have this level of

party control, as the case is controlled by the judge. This may reduce some inequities that currently exist between some parties in the adversary system.

Due to the role of the parties and the rules of evidence and procedure in the adversary system of trial, there is a need for legal representation. Lawyers are experts in conducting cases, possessing the skills and expertise needed to present evidence, as well as (ideally) being objective. The inquisitorial system is less reliant on legal representation, whose role is to assist the judge with the preparation and presentation of the case. Incorporating this feature of the inquisitorial system into the adversary system would necessitate giving greater control to the judge, but it could also help to remove some of the inequities that currently exist due to parties having representation of unequal quality.

The adversary system has a clearly stated burden and standard of proof. The burden of proof – i.e. the party who needs to prove the case – falls on whichever party initiated the case (the prosecution in criminal cases and the plaintiff in civil cases). The standard of proof – i.e. the extent to which the case needs to be proven – is beyond reasonable doubt in a criminal case, and on the balance of probabilities in a civil case. The emphasis then, is on proving the case to win. By contrast, in the inquisitorial system, the emphasis of the trial is on determining the truth, so formal burden and standard of proof do not apply.

The adversary and the inquisitorial systems of trial therefore operate in rather different ways. While there are many strengths of the adversary system, if some features of the inquisitorial system, such as a more active role for the judge and the relaxation of the rules of evidence and procedure, were incorporated into the Australian system, justice may be better served.

10 marks

Mark allocation

Mark globally, although students should refer to both the comparison of the adversary and inquisitorial systems of trial, as well as discussing how to improve the operation of the adversary system.

Tips

- *Students should take some time during reading time to carefully consider both options in the final question in order to make an informed choice about which to answer. Students are advised to read the question carefully and start planning the answer ahead of time, so that they understand the requirements of both questions. The choice made should be the one that the individual student thinks that they can best answer, in terms of focus, content and structure.*
- *Use the five major features of the adversary system of trial as a structure for extended response questions on this topic. The five major features are listed in the Study Design. Note that juries are NOT considered to be a major feature of the adversary system, as only around 2% of cases are resolved by juries.*
- *Students may choose to structure this response as a comparison of the adversary and inquisitorial systems followed by a discussion of improvements, or they may choose to discuss the improvements throughout their comparative discussion.*
- *Whenever students are asked the extent to which they agree or disagree with a statement, this must be addressed in order to earn full marks for the response. Students may choose to fully agree, fully disagree, or partially agree/disagree. The last option often provides more scope for discussion.*
- *It is recommended that students begin and conclude this extended response answer with a clear statement of where they stand in relation to the assertion.*

END OF SAMPLE RESPONSES BOOK