LEGAL STUDIES TRIAL EXAMINATION 2010
Assessment guidelines

Question 1

- Lower House: is designed to uphold the interests of the community that elected them. This is because the party that is asked to form government after an election is the party(s) that has a majority of members in the lower house. The leader of the government (Prime Minister in the Commonwealth Parliament) is found in the lower house, where the government introduces bills to reflect their policy on key issues such as taxation, immigration and health.
- Upper House: with the exception of money bills relating to areas such as taxation (which can only be introduced in the lower house) the upper house has the right to introduce bills. However, its primary role is to review bills that have been passed by the lower house, and to make amendments where necessary. The upper house is designed to keep a check on the activities of government, and in the case of the Senate, it is also designed to represent the interests of the states. The Constitution provides that there must be an equal number of senators from each state (section 7); this is to ensure that the larger states cannot dominate the smaller states. There are at present 12 senators from each state and 2 from each territory.
- Crown: for the purposes of law-making, Australia maintains a link to the British monarch, who is represented in Australia by the Governor-General in the Commonwealth Parliament. The chief role of the Queen's representative is to give Royal Assent to legislation that has been passed by both Houses of Parliament, while also conducting meetings of the Executive Council. At the Federal level, the Crown can also prorogue parliament and call a double dissolution if the upper house fails to pass a bill twice.

Question 2

a) This case would be heard in the County Court. The original jurisdiction of the County Court is to hear all serious indictable offences with the exception of the most serious, such as murder.

b) If Danny pleads not guilty at trial, then a jury will be empanelled. Some of the strengths and weaknesses that could have been mentioned by students are as follows:

Strengths of the jury system

- The presence of juries allows the values and expectations of the ordinary person to be reflected in outcomes. This is vital in cases such as serious assault where judgments are made as to human behaviour.
- Juries are independent of the parties and the legal system, and safeguard the rights of the defendant against inappropriate use of power by the police or the State.
- The need to convince a jury ensures that the language and argument used by counsel at trial remains intelligible to the ordinary person

Weaknesses of the jury system

- Jurors may be unduly influenced by factors other than the evidence. This includes the skills of a barrister, or previous media reporting of people involved in the case.

- Jurors do not give reasons for their verdict, and parties (and the community) may be left uncertain as to the reasoning behind decisions. This may reduce confidence in the capacity of the legal system to deliver justice.
- Juries add to the costs and delays in trials. This occurs for the following reasons: illness of jurors; the time taken for judges to explain legal and factual issues to the jury and retrials where a hung jury occurs.

c) Danny may have a right to appeal against the conviction or severity of the sentence. An appeal would be heard in the Supreme Court of Appeal.

d) Students may mention any one of the five purposes of imposing a sanction which include: just punishment, deterrence, rehabilitation, denunciation of the offenders conduct an protection of the community.

Question 3

a) This is a civil case and so the plaintiff has the burden of proof. This means that the plaintiff is required to establish all elements of the claim that they are making against the defendant.

b) Any one of the following remedies might be mentioned: damages, injunction, order of specific performance, rescission, restitution.

c) If this case goes to trial a pre-trial procedure that will be used is the process of pleadings. The purpose of pleadings is to clarify the claims of both parties and hopefully lead to an out-of-court settlement (students might mention specific aspects of pleadings such as the writ of notice of originating motion, statement of claim, counter-claim). Another pre-trial procedure is discovery, the purpose of which is to reveal documents and additional information that are relevant to the case. Discovery may lead to the case running more smoothly and could even lead to an out-of-court settlement. Students might also mention interrogatories, directions hearings as another pre-trial procedure.

d) The role of the judge is to preside over the proceedings ensuring the rules of evidence and procedure are followed. The judge may also ask witnesses for further clarification. If a jury is not present the judge will decide whether the defendant is liable on the balance of probabilities and a remedy will be decided.

Question 4

The separation of powers doctrine states that the three arms of government in Australia (as defined under our Constitution) must remain separate. These three arms of government are as follows:

- The Legislature (Parliament) which has the responsibility of making laws within a defined jurisdiction (scope of authority)
- The Executive, which administers the business of government. In effect, power held by the Executive lies with the Prime Minister (Commonwealth) and Premier (State) who meet with their senior ministers in a group known as the Cabinet.
- The Judiciary, which at the Commonwealth level features the High Court as the institution entrusted with hearing disputes over law-making power of parliaments. It is also the final court of appeal in the Australian hierarchy.

Question 5

a) Restrictions on the Commonwealth Parliament include:

- Sections 106 and 107 guarantee the rights of the states to exercise residual powers without interference from the Commonwealth.
- Section 51 (xxxi): the Commonwealth can only acquire property 'on just terms'. This law protects the ordinary person, corporations, states and territories from the Commonwealth acquisition of property where appropriate compensation has not been paid.
- Section 92: trade between the states must be free, without the imposition of border taxes or restrictions on movement across state borders by the Commonwealth.
- Section 99: the Commonwealth cannot give preference to one state over the other states in laws that effect trade, commerce or revenue.
- Section 116: the Commonwealth cannot prohibit or enforce religious practice. This restriction on the Commonwealth means that it cannot enact laws that would have the effect of banning or enforcing legitimate religious practice.

b) Restrictions on the State Parliaments include:

- Exclusive powers: the states cannot make law in an area that is designated under the Constitution as being an exclusive power, belonging only to the Commonwealth. Examples of exclusive powers are as follows:
  - section 114: only the Commonwealth can make laws for the defence of the nation and the establishment of military forces (army, navy, air force). The Commonwealth was specifically given this authority under section 51 (vi)
  - section 115: only the Commonwealth can produce and control legal tender (currency). The authority for the Commonwealth to make such laws is found in section 51 (xii)
  - section 90: the states cannot impose customs and excise duties for goods being imported into Australia
- Section 109: if the states make a law, and those laws are inconsistent with a law of the Commonwealth, the state law shall be declared invalid to the degree of the inconsistency. Therefore when drafting legislation, the states must always be mindful of Commonwealth laws that may impact on the legislation

Question 6

A committal hearing is a criminal pre-trial procedure used to determine whether there is sufficient evidence for the Prosecution case to support a verdict of guilty if the case proceeded to a higher court (County or Supreme). Committal hearings make the legal system more efficient because they are designed to sift out the cases that would not justify the time and expense of a major trial. After a committal, some defendants may decide to change their plea to guilty when they see the weight of evidence that is against them if the matter proceeded to a contested trial.

One advantage of having a committal hearing is that it saves costs and delays of hearing trials in the County and Supreme courts where the Prosecution evidence is inadequate. This enhances the overall efficiency of the legal system.

One disadvantage of conducting a committal hearing is that where the case does proceed to a contested trial, the committal itself has added considerably to the costs and delays of

reaching an eventual outcome. This is particularly harsh on those people being held on remand who are later found not guilty at the trial.

Question 7

The question asks students to critically evaluate two strengths of parliament. This does not mean that students need to address both strengths and weaknesses in a general manner. What it does mean is that for each strength identified a judgement needs to be made about the relative strength – is there anything that detracts or lessens its effectiveness.

For example: Parliament's primary role is to enact legislation that meets the needs of society – explain – then identify any factors that detract from this strength. Here are some possible areas for analysis.

Strengths of the Parliament as a law-maker

- Parliament is a democratic form of law-making, where the interests of the community are reflected in the law (the principle of representative government)
- The primary role of parliament is to make law. To fulfil this purpose, parliament is a forum for debate, and we the public are invited to attend sittings. In a democracy such as ours, the principle of representative government is dependent on this interaction between politicians, with members of the public being involved in proceedings.
- Parliament can investigate an entire area in need of reform, and any resultant legislation can regulate that area in its entirety. For example, the *Abortion Law Reform Act 2008 (Vic)* operates as a comprehensive statement of the law in this area.
- In undertaking this research, parliament has the opportunity to request both expert and public assistance before the drafting of legislation. This may include receiving submissions from people such as medical authorities, traffic engineers and clinical psychologists. Also, the public can become involved in this process by contributing responses to a government inquiry or royal commission, or by simply visiting their local member of parliament in his/her electoral offices. The *Abortion Law Reform Act 2008 (Vic)* reflected the recommendations of the Victorian Law Reform Commission, which were drawn after an exhaustive investigation.
- Within its jurisdiction, parliament can act when necessary to amend law. The only limitation that applies is where the government does not have a majority in the upper house, as is the case in the Senate since 2007 and the Legislative Council in Victoria. In this case, the leader of the government must negotiate with opposition members to convince them to support the bill. Where the opposition controls the upper house, most legislation is a compromise.
- Parliament creates law for the future – in futuro – and in this way, all people affected by that law can become informed of their legal rights and responsibilities ahead of time.
- Laws made by parliament can also be retrospective (the date of introduction of the law being backdated) to overcome possible injustices.

Weaknesses of the Parliament as a law-maker

- Issues that are politically sensitive are occasionally not addressed by parliament through fear of losing voter support. For example, in 2004, the Victorian Government ignored the recommendations of its Street Prostitution Advisory Committee, which had supported the limited decriminalisation of street prostitution

in St Kilda. The government feared a backlash against the sitting member, John Thwaites, who was also the Deputy Premier.

- Where the government does not control the upper house, the opposition parties (and independent members of the parliament) can act to frustrate the legislative program of the government purely for political expediency. This was seen in 2009 and 2010 with the defeat of the ALP Government's Emissions Trading Scheme in the Senate, even though this had been ALP policy at the 2007 election.
- If the government needs to amend legislation in response to opposition demands in the upper house, the resultant act may not be as effective.
- If the government has a majority in the upper house, government bills may not be scrutinised fully before they are passed into law. This is known as the upper house acting as a 'rubber stamp'.
- The number of sitting days for parliaments are relatively few, and therefore law reform may be delayed until parliament resumes.
- When parliament is drafting and debating legislation relating to a highly technical area, the words contained in the bill may not be fully defined. This may lead to confusion in the community and lengthy court cases where the exact intention of parliament must be determined by a judge or magistrate.

Question 8

The VCAA Legal Studies Study Design lists the countries that can be included in a response to this question. The USA has been selected for the sample answer below.

Similarities between the Australian and United States approach to the protection of rights

Australia	**United States**
The structure of our political system protects rights through a system of checks and balances and the separation of power doctrine.	The Federal political structure provides for some protection of rights through a system of checks and balances on government power and separate arms of government.
Changing the Constitution is a complex process whereby the Australian people must decide via a referendum whether to change the Constitution.	Changing the Constitution is also a complex process with two thirds of congress agreeing to change and three quarters of all states agreeing to change.
The High Court interprets the Constitution and interpret what it believes are implied rights.	The Supreme Court interprets the Constitution and has also declared that some rights are implied. For example a right to privacy.
Rights such as freedom of religion and the right to trial by jury are expressly stated in the Constitution.	Freedom of religion and trial by jury are rights in the US Constitution although the right to trial by jury is much broader and covers all criminal prosecutions and not just commonwealth indictable offences.
Rights can be enforced through the courts who will determine whether legislation is unconstitutional.	Individuals and courts can also take legal action and bring a case before the Court to determine the constitutional validity of legislation.

Differences between the Australian and United States approach to the protection of rights

Australia	United States
There are very few rights expressly stated in our Constitution (only five rights are specifically stated).	The United States Constitution contains a Bill of Rights that expressly states an extensive number of rights.
The process used to change the Constitution is different in that a referendum must be held.	The process used to change the Constitution has generally resulted in the legislature voting on change rather than change being put to a people's vote.

Question 9

This question invites students to discuss the costs of justice in civil cases, and to explore the nature of VCAT as a means of enhancing access to dispute resolution processes. The response should begin with a focus on why the costs of accessing justice in civil cases (through the courts) are so high.

The costs of accessing justice through the adversary system (courts)
- Legal fees payable to barristers and solicitors
- The costs of expert witnesses such as medical professionals and engineers.
- Court filing fees for lodging documents and appeals.
- Legal costs in the event that the plaintiff loses their case.

Advantages of VCAT
- VCAT arbitrators are often experts in their field: in many instances, VCAT decision-makers are selected for the technical knowledge that they possess, and with ongoing experience in hearing cases, this expertise is enhanced.
- Proceedings are more informal than courts: this informality allows a greater number of people in the community to enforce their rights before VCAT without the feelings of intimidation that can often accompany litigation (court action). Strict rules of evidence and procedure do not apply, and this is a major advantage of VCAT processes when compared to the adversary system that is used in Australian courts.
- Individual responsibility for outcomes: mediation and conciliation involve expert support, hopefully leading to compromise between the parties. In comparison to an enforced decision from a judge, such outcomes are more likely to be agreeable all concerned.
- Certainty in decision-making: in arbitrated cases at VCAT, the outcomes attained are legally binding, promoting certainty that the matter has been finally resolved.
- Right of appeal: parties have the right to lodge an appeal on a point of law to the Supreme Court when it is believed that a VCAT arbitrator has misinterpreted the law to be applied in the case.
- Efficient processes: VCAT cases are processed within about 3 months of the application being lodged. This assists parties who are in urgent need of a resolution to their dispute. This efficiency also reduces the potential for ongoing conflict between the parties.

- Limited costs: the costs of lodging a claim are minimal (for example, the fee is around $50 in the Civil Claims List). With legal representation only allowed with consent of the parties and the VCAT decision-maker, the opportunity to outspend the other party is not an issue.

Disadvantages of VCAT

- The non-binding nature of mediation and conciliation: although parties may reach an amicable settlement at mediation and conciliation, the agreement remains vulnerable if the original dispute between the parties once again erupts. In this situation, further legal issues may arise where the rights of one party are further infringed.
- The lack of legal representation: although the absence of legal representation in some cases can be considered as a positive feature of ADR, some people are incapable of fully presenting their case before an independent adjudicator, and in this situation, their essential rights may suffer. For example, some individuals may be intimidated even by an informal legal process, while others may lack the necessary oral communication skills to 'sell their story' at a structured meeting.
- Lack of appeal rights on a question of fact: if a party to a VCAT hearing is dissatisfied with the outcome of the case, appeal rights only exist where a misinterpretation of the law allegedly occurred. If the arbitrator correctly applied the law but reached a decision that was not necessarily appropriate, there is no right of appeal as exists in the court hierarchy in a civil law dispute.
- The need for resolution of disputes to occur in a public forum: although there is benefit in having sensitive cases such as anti-discrimination and sexual harassment claims resolved in private, there still exists the need to have disputes heard in open court where the public can witness at first hand the exercise of just outcomes. Also, with an increasing number of matters being removed from the traditional court hierarchy, judges are not being given the fullest opportunity to rule on factual issues. In this respect, the common law (which includes binding precedents) is not necessarily being developed continually over time.
- Although most cases at VCAT are relatively straight forward, costs can be very high – it depends on the particular list to which the case is proceeding. For example, complex cases before the Anti-discrimination List may involve large financial outlays.

Question 10

Students should discuss between 3 and 4 of the strengths and weaknesses of the courts.
Strengths of courts as a law-maker

- Judges must deliver a ruling in every case that arises, no matter how controversial. In areas such as abortion, native title, discrimination and immigration, judges have been faced with issues that have given rise to often heated community debate. In these cases, judges must proceed to deliver judgments that often contribute to the development of law.
- In delivering rulings, judges are not subject to pressure from external groups that we see imposed on politicians, and in this way, they can act independently and objectively to develop the law in the interests of justice.
- Through statutory interpretation, courts give meaning to words in legislation, which adds to the operation and community understanding of law. The interpretation given

by judges can also add detail to that law, especially where parliamentary drafting of the legislation has been ambiguous. This was seen in the *Re Kevin* case (2001) and the 2011 off-shore asylum seeker case in the High Court.
- The doctrine of precedent allows for a degree of certainty and consistency in the treatment of cases over time. Parties involved in legal proceedings (including their legal representatives) can contest cases with an understanding of the relevant legal principles that will be applied.
- Overruling, distinguishing and reversing allow judges to develop common law so that it does not remain rigid. Appeals have proven effective in developing legal principles through analysis by judges, especially in the Court of Appeal and the High Court.

Weaknesses of courts as a law-maker
- Common law is made *ex poste facto,* and therefore a judge must wait for a suitable case to arise before he/she can act to develop and amend existing legal principles.
- An inappropriate ratio decidendi statement may remain as binding precedent for an extended period unless a higher court overrules the decision, or parliament passes a codifying act.
- The decisions made by judges only relate to the particular facts that are relevant to that case. In most instances, precedents do not involve broad-ranging statements of legal principles.
- Seeking law reform through courts can be expensive and time-consuming. For example, a person who wishes to challenge the validity of a piece of delegated legislation before the courts should be prepared for significant legal costs. This is inappropriate when it is considered that the individual concerned may be pursuing a ruling that will override *bad law* that should be declared ultra vires.
- Judges may occasionally be conservative in law-making, especially where they believe that it is not their place to be making law that affects public policy best handled by parliaments.
- The vast body of case law makes the actual location of relevant law very difficult for members of the public without legal expertise.

Question 11
The response should start with a brief description of the adversary system and when it is used.
- All criminal cases
- Civil disputes where the parties have not been able to settle matters out of court.

Students should then explain the ways in which fair and unbiased hearings are promoted in legal processes. A judgement should then be made as to whether in fact the adversary system provides for fair and unbiased hearings and whether trial outcomes would be fairer if aspects of the inquisitorial system were to be adopted. Some key points to draw upon in this response are outlined below.

The key elements of fair and unbiased hearings are:
- An independent and impartial adjudicator is not involved in the gathering or selection of evidence to be presented.

- The hearing or trial is conducted as a single, continuous event. This means that unnecessary delays in the presentation of evidence are avoided to ensure the smooth running of the hearing or trial.
- Party control: the adversary system allows parties to have considerable control over the preparation and presentation of their cases in terms of the following:
    - the nature and extent of the investigation to be undertaken of the facts of the case
    - the undertaking of forensic testing of materials
    - consultation with doctors and other specialists
    - whether to call witnesses (including expert witnesses)
    - the strategies for examination-in-chief and cross-examination of witnesses
    - the legal issues to be presented to the court when assessing questions of fact
    - whether to appeal to a higher court after the hearing/trial
- The availability of legal representation: in all matters to be heard before a court, parties have the right to employ legal representation to assist them in the gathering and presentation of evidence.
- The existence of strict rules of evidence and procedure: the adversary system employs rules for the conduct of cases that are strictly enforced by the judge. These relate to the types of evidence that is considers admissible and the actual conduct of the trial
- A burden of proof is imposed on the party making the allegation. In a civil dispute, this is the plaintiff, while in a criminal case, the prosecution is said to carry the burden of proof.
- A standard of proof is applied to consideration of factual issues, and is the measure by which evidence is assessed. In civil disputes, the standard of proof is 'on the balance of probabilities', while in a criminal case, the standard is 'beyond reasonable doubt'.

The final part of the answer requires that students address the inquisitorial system. Students would be expected to discuss points such as those outlined below:

- With a separate branch of the judiciary to examine cases, it is more likely that <u>all</u> evidence will be collected at pre-trial stages and presented later in court. Under the adversary system, reliance on party control leads to a <u>quest for</u> <u>victory</u> rather than a search for the truth. A pre-trial investigative judge may be more objective than parties in being willing to present material that parties may have rejected because it was not advantageous to their case.
- Party control has been proven over centuries to produce the bulk of evidence relevant to cases. This quest for victory means that parties investigate matters thoroughly in an effort to succeed at trial. This 'chasing down' of every piece of evidence may not occur with a judge. If the pre-trial judge was incompetent or corrupt, vital evidence may be overlooked. Also, party control places the cost burden of preparing cases on the parties rather than on the State.

November 2011