COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES ¾

2013

Practice examination No. 1

SUGGESTED RESPONSES / ADVICE

Question 1
John supports democracy, but thinks that the public are too uneducated to be trusted with the vote.

Outline the principle of representative government and identify why it is important for the functioning of the democratic parliamentary system. (2 marks)

The task word 'outline' requires more than simply one or two words, but in the 2012 Assessor's Report the Chief Assessor reminded students that they should be able to succinctly outline the key information in one or two sentences.

1 mark A definition of representative government.
1 mark A link between representative government and democracy.

Sample answer:

✓ *Representative government is a democratic system in which people elect representatives to debate and make laws on their behalf in parliament. Democracy is government by the people, so representative government is important because it allows the views of the majority of the people to be reflected in the laws that are made.*

Question 2
Rather than dividing one level of courts by area of law, Victoria has a vertical hierarchy.

a. Why could a system of appeals not operate effectively in a flat hierarchy of courts? Explain. (2 marks)

In the 2012 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. This is an example of a question that needs to have the wording of the answer tailored to respond to it.

1 mark An understanding of appeals as having a decision or part of a decision reviewed.

1 mark An understanding that higher courts perform this review on lower courts, and that without higher courts there would be no court with the authority to do it.

Sample answer:

✓ *A vertical hierarchy allows a system of appeals to exist. If one party is dissatisfied with a decision made by a lower court, they can ask a higher court to scrutinise the decision and hopefully correct any mistakes. In a flat hierarchy there is no court with more authority than another, therefore no court would be able to reverse the mistakes of any other.*

b. Outline the appellate jurisdiction of the Supreme Court (Court of Appeal). (3 marks)

The task word 'outline' does not require definitions of key terms or examples to be given when providing the jurisdiction.

1 mark Appeals on points of fact and law from the County Court.

1 mark Appeals on points of fact and law from the Supreme Court (Trial Division).

1 mark Appeals on points of law from the Victorian Civil and Administrative Tribunal, when the hearing was constituted by the President or one of the Vice Presidents.

Question 3
Differentiate between a committal hearing and discovery as two pre-trial procedures that occur in the Supreme Court. (4 marks)

The task word 'differentiate' means to point out differences. This means that the differences do not count if they are merely implied or suggested by two independent definitions. The connection must be made between them.

In 2012 a number of questions required comparisons, and students lost marks if they did not make the similarities and differences clear. The Chief Assessor has clarified that marks will not be awarded for definitions or descriptions that are not connected, and where the examiners have to work out the similarities and differences themselves.

1 mark An understanding that a committal is a criminal procedures and discovery is a civil procedure.

1 mark In a committal hearing only the prosecution discloses their evidence, while in discovery both parties must disclose their evidence.

1 mark The purpose of a committal is to see if there is enough evidence to support a conviction in a higher court.

1 mark The purpose of discovery is to encourage pre-trial settlement and reduce surprises at trial.

Note: *The marking is flexible in that students may draw out slightly different purposes for discovery, and may weight their detail differently. The essential content listed above, particularly the fact that one is criminal and the other civil, must be covered at some point, however.*

Points that could be used in answers include:

- ✓ *Committal hearings are held before indictable criminal offences, whereas discovery is held for civil lawsuits.*
- ✓ *Committal hearings are held in a courtroom in the Magistrate's Court, whereas discovery is mostly a documentary stage involving the exchange of evidence in paper and photograph etc form.*
- ✓ *If a committal hearing shows that the party bringing the action does not have sufficient evidence to support a successful trial the case will likely be dismissed; in discovery, the defendant may feel that the plaintiff's evidence is weak, but the case will not be dismissed because of it.*

Question 4
The adversary system leaves a great deal of control in the hands of the parties. Comment on the extent to which you believe this is a strength of the system. (3 marks)

The task phrase 'comment on the extent to which' is an evaluative direction. This means that an opinion must be given on how beneficial this feature is, and reasons for and against that opinion must be considered. There does not need to be an equal number of reasons for and reasons against, however.

1 mark An explanation of how party control is a strength.

1 mark An explanation of how party control can also be a weakness.

1 mark Further detail on one of the above points, or one or more additional points.

Strengths regarding the role of the parties may include:

- ✓ *Parties are more likely to feel satisfied with the outcome of the case.*
- ✓ *The parties know the facts of the case better than any outsider, so it is more sensible and efficient for them to have control over how it is explored and argued.*
- ✓ *Parties are paying for the trial so they have a vested interest in it being run quickly and efficiently.*
- ✓ *Parties do not feel at the mercy of an outside judge.*
- ✓ *Parties are able to decide which arguments and evidence will give them the best chance of success.*
- ✓ *Parties are able to control the scrutiny of opposing evidence and arguments, and rebut them in the way they believe will be most effective.*
- ✓ *Party involvement in proceedings builds confidence in the legal system and encourages acceptance of the outcome.*

Weaknesses regarding the role of the parties may include:

- ✓ *Not all evidence may be presented as it may not favour the party that uncovers the evidence. Parties have no incentive to objectively uncover all evidence to the court.*
- ✓ *Party control puts of a lot of responsibility and stress on individual parties, most of whom are not experienced in arguing at trial.*
- ✓ *Party control may cause delays – through inexperience, failure to select only the best arguments, or by deliberately trying to 'bleed' the opposition of their money.*

Question 5
It has been argued that introducing the Victorian Civil and Administrative Tribunal ('VCAT') increases confusion in society, in terms of which avenue an injured party should use when they have a complaint.

a. VCAT hearings can be conducted using either arbitration or judicial determination. Compare the two approaches as methods of dispute resolution. (3 marks)

The task word 'compare' means examining both similarities and differences; at least one of each must therefore be included. In 2012 a number of questions required comparisons, and students lost marks if they did not make the similarities and differences clear. The Chief Assessor has said that marks will not be awarded for definitions or descriptions that are not connected, and where the examiners have to work out the similarities and differences themselves.

1 mark One similarity between arbitration and judicial determination.

1 mark One difference between arbitration and judicial determination.

1 mark Further detail on one of the above points, or one or more similarities and/or *differences.*

Similarities between arbitration and judicial determination may include:

- ✓ *Both methods involve parties putting their arguments and versions of the facts to an independent third party.*
- ✓ *Both methods involve the third party making a decision on behalf of the parties that does not require agreement or compromise.*
- ✓ *Both methods are automatically binding and enforceable through the courts; parties will face consequences if they do not abide by the decision.*
- ✓ *Both methods have some right of appeal following their resolution. When conducted through VCAT, arbitration outcomes can be appealed on a point of law to the Supreme Court or Court of Appeal, and when conducted through either VCAT or courts judicial determination outcomes can also be appealed.*

Differences between them may include:

- ✓ *The third party arbitrator is usually a lawyer or an experienced professional in the field of the dispute, but they are not a legal expert in the same way judges are. They may therefore have less understanding of legal arguments.*
- ✓ *Arbitrators are employed by the executive, so do not have the independence of the judiciary that judicial officers performing judicial determination do.*
- ✓ *The right of appeal is more limited from arbitration than it is from judicial determination. Arbitration in the Magistrate's Court or the Supreme Court has no avenue of appeal following it, for example.*
- ✓ *Arbitration is an inquisitorial process, whereas judicial determination is an adversarial process. The arbitrator asks questions and manages the process, whereas the parties take charge in judicial determination.*

b. In addition to choice of venues, parties are sometimes given a choice of method for the resolution of their legal issue. For some matters, VCAT also offers mediation and conciliation as options, and occasionally will order parties to attempt them.

Explain three reasons why parties might prefer to resolve their dispute through an arbitration or judicial determination hearing instead of mediation and conciliation.
(6 marks)

1 mark	One strength of arbitration and/or judicial determination.
1 mark	Further detail on this strength, that also shows how mediation and conciliation are weaker on that point.
2 marks	Repeat for a second strength.
2 mark	Repeat for a third strength.

Note: *Not every point needs to relate equally to mediation and conciliation, or arbitration and judicial determination*.

Arguments may include:

- ✓ *Mediation and conciliation do not by default result in binding outcomes. This can be less efficient, as one party not complying with the decision can push the matter to judicial determination or arbitration anyway.*

- ✓ *The lack of appeals from mediation and conciliation outcomes can result in less efficiency, as the main option for parties afterwards who feel that an error was made is to simply ignore the resolution. The ability to appeal decisions from arbitration and judicial determination gives unhappy parties an option that isn't simply refusing to comply.*

- ✓ *Since the decision must be made by the parties in mediation and conciliation, they must reach an agreement and compromise in order to resolve the dispute. This is not always possible if parties have a damaged or non-existent relationship, or if there is little common ground between them. It may be far more realistic to have the decision made by an independent third party instead.*

- ✓ *Mediation and conciliation is not appropriate for every type of dispute: for example, criminal disputes, or where there is a history of parties breaking promises. This means they can never replace judicial determination.*

- ✓ *Judicial determination can suffer from a lack of speed due to the depth in which all the evidence is examined, but examining evidence in detail is desirable and mediation and conciliation do not do this. Arbitration is more relaxed than judicial determination, but its examination of evidence is still far more thorough than that in mediation and conciliation.*

- ✓ *The formal and strict set of rules in judicial determination makes it more difficult for a stronger party to manipulate the case in their favour than in mediation and conciliation. The rules are flexible in arbitration, but the control exercised by the third party neutralises some power imbalances.*

- ✓ *The strict rules of procedure in judicial determination ensure that each party is given exactly the same opportunity to present their case, and the active role of the arbitrator ensures that each side will be questioned and examined. Mediation and conciliation do not have these strict rules, and the extent to which one side is considered depends on how forceful that party is willing to be when presenting their point of view.*

- ✓ *Since the judge in judicial determination does not get involved they can ensure that both parties respect the rules, and that neither gains an unfair advantage. The mediator and conciliator both become more involved in the discussion of the case – they also are supposed to remain impartial and support both parties, but this may be difficult and they may appear on the surface to favour one side more than the other.*

- ✓ *The winner in judicial determination usually has their costs awarded to them, which means the losing party has to pay them. In arbitration, costs awards are at the discretion of the arbitrator. In mediation and conciliation the costs are lower, but they are generally not awarded to the winning party. They are significant for the average person, though – daily fees, excluding legal advice and filing fees to initiate the claim in court or VCAT, start at around $2,500 for the mediator or conciliator.*

Question 6
Discuss how the independence of the judiciary might be a drawback of courts in their role as law-makers? ***(4 marks)***

Recently some VCAA examinations have identified the feature that must be evaluated. For example, in 2008 the examination asked students to evaluate parliament's ability to reflect community values and its ability to make law whenever the need arose. Students must ensure they can link general evaluation points to specific features of institutions such as the courts, parliament and the jury, for example.

1 mark One weakness of the independence of the judiciary.

1 mark A second weakness of the independence of the judiciary.

2 marks Further detail on, or examples that illustrate, the above weaknesses; or one or more additional weaknesses.

Sample answers:

- ✓ *Courts make law free from political pressures because they are appointed rather than elected, and are therefore independent; they do not fear voter backlash as parliament does. Courts can therefore change the law on controversial issues objectively – issues that parliaments may avoid due to political pressure. For example, the High Court's recognition of native title in Mabo and the Victorian courts' development of Victoria's abortion laws before 2008. Both of these were controversial, and therefore less likely to be acted on quickly by parliament.*

  But, parliament is elected to make laws on behalf of the people, whereas courts are not. This may result in laws that are not consistent with society's values, and they may not be accepted or followed by the community. Consider, for example, the obiter dicta of Justice Dawson in Mabo regarding it being the place of the elected parliament to change and create law because MPs are the representatives of the people.

- ✓ *The courts value their independence and believe in the separation of powers. This protects the integrity of the courts by preventing them from becoming too political. They stay a neutral body, one with a focus on protecting the people against the power of the parliament and government and strengthening laws such as implied rights that parliament may not always respect.*

  However, courts therefore feel that it is parliament's role to make the law: not their role as courts. Sometimes this means they will not change the law, even when it is deemed necessary. For example, in Trigwell when Murphy J dissented, but the rest of the High Court upheld the existing, persuasive common law that farmers were not responsible for harm caused by their straying animals. This conservative view led to outdated and inappropriate law.

- ✓ *Because judges are unelected and have independence of the judiciary and security of tenure, this means that courts are free from the short-term prejudices of the majority. They can therefore make decisions in favour of minority interests, and protect vulnerable groups such as children, future generations, asylum seekers and the environment.*

  However, this security of tenure means judges are not easily accountable for their actions, and cannot be made directly responsible for them by the people if they make a decision not in line with community values. The only accountability process is a time-consuming and expensive appeals process. Parliament is elected, so therefore can be made accountable for its decisions at the next election. It is therefore more likely to listen to what the majority of people want.

- ✓ *The independence of the judiciary means judges are impartial to the two parties so are never stakeholders. Independence allows judges to balance many competing interests and, because*

they are independent of all of them, decide what is most fair and appropriate for all parties. Judges are not beholden to just one interest group, like political parties can be.

This independence results in some inaccessibility, however. Individuals and groups have little ability to become involved in the law-making of courts. Courts do not hear petitions from parties not involved with the case, and ordinary citizens cannot become judges without extensive qualifications and experience. Individuals and groups have more of an ability to be involved in law-making by parliament. They can lobby, petition and protest, send submissions to bodies like the VLRC, and ordinary citizens can run for parliamentary office.

Question 7
Australia protects a range of constitutional rights, in a number of different ways.

a. Compare express rights and implied rights as two approaches to the protection of rights adopted by the Australian Constitution. (3 marks)

The task word 'compare' means examining both similarities and differences; at least one of each must therefore be included. In 2012 a number of questions required comparisons, and students therefore lost marks if they did not make the similarities and differences clear. The Chief Assessor has made it clear that marks will not be awarded for definitions or descriptions that are not connected, but where the examiners have to work out the similarities and differences themselves.

1 mark Express rights are written explicitly in the wording of the Constitution, while implied rights are not.

1 mark One similarity between express rights and implied rights.

1 mark Further detail on, or examples that illustrate, the above points; or one or more additional similarities and/or differences.

Note: *definitions of the two do not need to be given, and may be wasting time better spent on similarities and differences. Content regarding their meaning should naturally come out in the comparison.*

Similarities that could be used include:

- ✓ *Express rights and implied rights are both individual rights. Structural protections, for example, are not – they are broad protections for the community as a whole.*

- ✓ *Express rights and implied rights are both entrenched in the wording of the Constitution. Implied rights are not express in the wording, but they are entrenched because parliament cannot legislate to remove implied rights: a referendum must still be passed to change the sections on which the implied right is based.*

- ✓ *Express rights and implied rights are both fully enforceable. If the courts decide that legislation infringes one of them, the legislation can be found invalid and parliament cannot ignore or override that decision.*

Additional differences that could be used include:

- ✓ *Express rights are primarily restrictions on the power of one or more parliaments, whereas the wording of the implied right is focused more on the freedom of the people. Express are therefore negative in wording, whereas the implied right is positive.*

- ✓ *Express rights can be 'read down' or limited by the interpretation of the High Court, but they cannot be removed entirely without the consent of the people. Implied rights can be.*

b. Evaluate the extent to which one right is effectively protected by the Australian Constitution. (3 marks)

In the 2012 Assessor's Report the Chief Assessor reminded students that the task word 'evaluate' means to provide an opinion, and examine reasons for and against that opinion: evaluating involves a "consideration of strengths and weaknesses, and coming to an overall judgment as to its worth."

Both strengths and weaknesses must therefore be addressed, however they do not need to have equal time spent on them. If students do not offer an opinion, however, they can only receive a maximum of 2 marks.

The question does not ask for a 'method of' or 'approach taken towards' the protection of rights: it asks for *one right*. Students therefore should focus their answer on one selected right. If more than one right is addressed, only the answer on the first one should be counted.

1 mark — One strength of one identified constitutional right, or one way in which it does offer protection.

1 mark — One weakness of that right, or one way in which it does not offer protection.

1 mark — Further detail on the above points, or one or more additional strengths and/or weaknesses.

Note: *Rights chosen may be express or implied, or structural protections.*

Sample answers:

- ✓ *The right to trial by jury in s80 prevents the Commonwealth from trying indictable offences without a jury and a unanimous verdict. This ensures the parties will be tried by their peers, and that the outcome will be one on which a panel of people agree.*

  However, s80 does not specify which crimes must be tried on indictment. Therefore, the Commonwealth can remove all juries by legislating that all federal crimes are summary offences. The right, therefore, is more symbolic than real protection.

- ✓ *The Constitution guarantees, through the structural protection of representative government, that the parliament will be democratically elected and requires that it be re-elected by the people at regular intervals. This should ensure the parliament respects the rights and freedoms valued by the majority of citizens. Law-makers who pass laws violating the rights of individuals in society may be voted out of office and replaced with new law-makers who promise to 'undo' the rights abuse.*

  A reliance on representative government may be insufficient to protect the rights of some unpopular minorities – indeed, some voters may actually support the violation of some individuals' rights, as is the issue at the moment with the rights of asylum seekers. Many voters may choose to re-elect law-makers who pass legislation that harms the rights of unpopular members of society.

- ✓ *The right to freedom of religion is worded in such a way that it prevents government control over religious belief, while at the same time legitimately allowing some measures to be taken for the protection of society if some religious practices threaten that. For example, s116 prevents the Commonwealth from banning the "free exercise" of a religion, but in the 1943 Jehovah's Witnesses Case where the Jehovah's Witnesses believed that the government was an "organ of*

Satan" and should therefore be overthrown, the Court said the government was allowed to "reconcile religious freedom with ordered government". This did not involve preventing people from being Jehovah's Witnesses or privately holding that belief, but it did involve sometimes regulating actions based on those beliefs.

The wording of the right is extremely limited, however. It does not protect people from state law controlling or enforcing religion, and the Commonwealth can control religion to some extent as long as it is not the primary purpose of the law and they have another 'legitimate' reason such as national security.

- ✓ *The implied right of freedom of political communication is a 'purposive' right. In other words, it exists in the Constitution in order to achieve the purpose of having a healthy democracy and a strong representative government. People cannot, therefore, use this right to protect themselves when their speech has no relevance to education, social issues, democracy or representation – as demonstrated in the Rabelais Case, where an instruction manual on shoplifting was not protected – which limits the potential for abuse of the right.*

  This, however, then limits the scope of the right. There are no clear boundaries because it is not written explicitly in the Constitution, and a lot of the protection is subjective – it depends on what the courts think 'political speech' should cover.

Question 8
Denis Napthine, the Victorian Premier, wants the Commonwealth Parliament to take control of legislation over public transport, but is unsure how this can be done without formal change to the Constitution. Outline to him how his ability to refer power may solve the problem, and explain the impact this would be likely to have on the balance of power between state and federal parliaments. (4 marks)

In 2011, the Chief Assessor again commented on the error of students explaining a concept by using the word of the concept itself. For example, explaining the term 'referring' by saying that 'referring power is when a state refers a power'. Synonyms must always be used instead.

1 mark	The states have the ability to refer residual powers to the Commonwealth Parliament, after which the Commonwealth has the ability to legislate on them as though they were concurrent.
1 mark	This affects the balance of power because the Commonwealth gains additional power in practice. This means they can override state laws in that area.
2 marks	Additional detail on the operation and/or impact of referring powers.

Sample points that could be made in addition include:

- ✓ *The Commonwealth has the power (in s51) to make laws regarding any matter referred – handed over to them – by the states, but their legislation only applies to the state or states that referred the power.*

- ✓ *States may include a sunset clause in the referral. This means that the referral expires on a set date, which limits the extent of Commonwealth control over the area.*

- ✓ *Example: The 1996 referral of the workplace relations power to the Commonwealth, done by the Victorian Parliament under the Kennett Government. This gave the Commonwealth the power to override inconsistent state law in Victoria in the area of workplace relations.*

- ✓ *Example: The referral of the power to make laws prohibiting terrorist acts. This referral was a specific text-based one: in their referral acts, the states wrote the exact wording of the legislation*

that the Commonwealth was allowed to pass, and said that any changes to it had to be agreed to by a majority of states. This severely curtailed the ability of the Commonwealth to gain power at the expense of the states.

Question 9
Weigh one strength of parliament against one weakness of it as the primary law-maker in society. (4 marks)

Because a task word such as 'evaluate' or 'analyse' is not used in this question, students do not need to reach an overall opinion or conclusion.

1 mark One strength of parliament.

1 mark One weakness that relates to, or lessens, this strength.

2 marks Further detail and discussion on one or more of the above points.

Notes:

- If more than one strength or more than one weakness is addressed, only the *first* of each should be marked.
- If students begin with the weakness instead of the strength, they should be limited to half marks.

Arguments that could be used might include:

✓ Law-makers in parliament are elected, therefore are accountable to the people for the law that they make; because of this accountability, however, parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term.

✓ Electing parliament means that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate; this can lead to tyranny of the majority, however, and can mean that laws pander to majority interests rather than protecting minority interests, children, the future or the environment.

✓ Parliament is more accessible to the public than courts, through lobbying, interest groups, campaign funding, and making submissions to law reform bodies; this means that it has little independence, however, and can make law to please the interest groups that gave the party in power the most money, which may not be in the best interests of the community.

✓ Parliament can delegate the power to make laws to subordinate authorities such as local councils, who have more expertise and time to make specific, detailed and relevant laws. Apart from local councils, many of these bodies are unelected, however, and parliament does not have the necessary time to review every regulation they make. This is undemocratic law-making.

✓ Important bills introduced to parliament are generally supported by the entire party, and so have a greater chance of success; a party system is also more efficient than dozens of individuals having to debate and compromise on every single bill. On the other hand, the views of the electorates are often not represented because MPs vote with their parties, and everyone who did not vote for the majority party is effectively not represented.

Question 10
Describe the impact that one successful referendum had on the division of legislative power in the Australian federal system, and explain one factor that may have contributed to, or jeopardised, its success. (5 marks)

Advice:

- The word 'impact' is frequently overlooked by students, who spend too much time on the facts of the case or the referendum instead. In 2011 the Chief Assessor reminded students that answers that focused only on definitions and examples could not receive full marks for impact.

- In the 2012 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. This is an example of a question that needs to have the wording of the answer tailored to respond to it – the factor chosen must be related back to the referendum.

1 mark The facts of one successful referendum: what wording was changed in the Constitution and how.

1 mark How this change gave the Commonwealth Parliament more power.

1 mark How this change reduced or limited the power of the state parliaments.

1 mark One factor that may have impacted on the outcome of the referendum.

1 mark Further detail on this factor.

Note: *the chosen factor must be linked to the successful referendum that is explained.*

Sample answer:

✓ *The 1967 Aboriginal Advancement referendum changed the division of power by giving the Commonwealth another specific power. The wording of the Constitution was changed by deleting the phrase "other than the Aboriginal race" in the s51 race power, which allowed the Commonwealth to legislate specifically regarding Aborigines. The original wording of the Constitution made Aboriginal people a restriction on the Commonwealth and thus a residual power. The referendum change made it a concurrent power instead, enabling the Commonwealth to pass laws specifically on the Aboriginal race and use s109 to challenge and override conflicting state laws. Even though the states did not lose a power, the change from residual to concurrent reduced their power in practice.*

Sample factors might include:

✓ *The timing of referenda. The referendum issue was closely tied to election campaigning, so many people were informed on the change to the Constitution simply because they had been following the election. This means they were in the best position to understand and feel confident voting on it, which led to a majority 'yes' vote and success.*

✓ *Bipartisan agreement. The two major parties agreed on the proposal and urged both their supporters to vote in favour of it. Many people vote along party lines, so this encouragement from both sides of politics increased the chance of a successful double majority being achieved.*

✓ *The states believed that a proposed increase of Commonwealth power was in the best interests of the country as a whole, so were willing to overlook their concerns regarding loss of power and*

endorse the proposal. The 1967 referendum was seen as an important step in ensuring equal rights for Aboriginal people, which the states had shown themselves reluctant to do.

- ✓ *The lack of complexity of the proposal. The proposal was not presented as complex or highly legal, so more people in the community were able to understand it and thus felt more confident voting in favour of it. If the proposal had been presented as complex or highly legal many people in the community would not have been able to fully understand it, and may thus have felt less confident voting in favour of it.*

Question 11
Around the dinner table one night you discover that much of the material put out for recycling is actually sent to landfill and decide that state parliament needs to take action on recycling standards in the different suburbs. Your mother asks how you plan to influence this change, suggesting you start a petition, organise a protest or alert the media.

Critically examine which method would be the best option for you to choose. (6 marks)

In the 2012 Assessor's Report the Chief Assessor reminded students that task phrases such as 'critically examine' mean to provide an opinion, and examine reasons for and against that opinion: it involves a "consideration of strengths and weaknesses, and coming to an overall judgment as to its worth."

Both strengths and weaknesses must therefore be addressed, however they do not need to have equal time spent on them. If students do not offer an opinion, however, they can only receive a maximum of 5 marks.

1 mark	One strength in favour of one method.
1 mark	One weakness of one or both of the other two methods.
4 marks	Two or more additional strengths and/or weaknesses, spread in a flexible way across the three methods depending on how the student has chosen to approach the question.

Strengths may include:

- ✓ *If a protest attracts well-known supporters or speakers it may have a good chance of persuading other members of the public that this is a cause they should consider. A celebrity may also simply influence other people to turn up.*

- ✓ *Protests have greater visual and audio impact than something like a petition. This means it is harder for parliament to ignore; or, at the very least, it has a better chance of being noticed.*

- ✓ *Demonstrations can show mass public support for an issue. This is effective because MPs are generally influenced by votes, and protests can show the sheer number of votes being swayed by the issue.*

- ✓ *Protests are free to join and do not require a significant time commitment. This makes it much easier for the 'average' person to get involved in the issue and have their say.*

- ✓ *A petition is relatively easy to organise, and the rules about how a petition must be written and submitted are published on the Victorian and Commonwealth Parliaments' websites.*

- ✓ *A petition with a very large number of signatures may put more pressure on parliament as it indicates widespread support for a change in the law, and parliament wants to ensure it makes laws that are representative of the community's beliefs and expectations.*

- ✓ *A petition provides direct contact between the individuals or groups seeking change in the law and those responsible for making the law.*

- ✓ *Petitions will be tabled in parliament by a member who has personally signed the petition as well, which gives the petition more weight than a protest might, that has not been endorsed by anyone involved in the parliamentary process. The petition to the Victorian Parliament requesting the decriminalisation for abortion, for example, was signed by two members of parliament.*

- ✓ *Media can inform and persuade a very large number of people about need to change the law, connecting with many thousands of people simultaneously - especially via social networking and talk-back radio. This can create enough support for change throughout the community for parliament to feel compelled to act.*

- ✓ *Using social media to inform and persuade others of the need to change the law, to organise protests and petitions and coordinate lobbying of members of parliament is relatively inexpensive and therefore accessible to individuals and non-profit organisations attempting to influence a change in the law.*

- ✓ *Individuals and groups can use the media to demonstrate to parliament existing support for a change in the law, such as launching websites and writing newspaper articles showing the responses to online surveys, or by funding advertisements on radio and television that show groups of people in support of a change.*

- ✓ *Even 'non-media' methods of influencing change in the law rely to an extent on the media for their success. For example, a protest is much more effective if covered by radio or TV news because it then reaches a larger group, and social media outlets such as Twitter and Facebook are often used to promote demonstrations and encourage individuals to lobby their local member of parliament.*

Weaknesses may include:

- ✓ *Even a very large protest is still unlikely to constitute the majority in any one electorate, so individual MPs may not feel like they need to listen.*

- ✓ *Demonstrations can disrupt the flow of traffic or public movement and so force people to take notice of the issues (such as the taxi drivers protesting in Flinders Street did). If there is too much disruption, however, the public may choose not to support the issue because they have been inconvenienced.*

- ✓ *Protests only show a narrow self-selected percentage of the population: they in no way represent 'average' or a cross-section of community opinion. Only the people who strongly agree will attend, so parliament cannot see the number of people who do not agree.*

- ✓ *A petition with very few signatures is unlikely to influence law-making. Parliament will not change the law if very few people support the change, as it tends to prefer to make laws reflecting the views of the majority.*

- ✓ *The Victorian and Commonwealth Parliaments receive many petitions, sometimes showing conflicting views on the same topic. For instance, between the 2006 and 2010 elections, the Legislative Assembly received over 1,100 petitions with a total of 611,000 signatures! Parliaments simply cannot respond to, or act upon, all petitions submitted.*

- ✓ *There is no guarantee that parliament will discuss or respond to a petition after it is presented. The appropriate minister may respond to a petition presented that is relevant to their portfolio, but they are not required to.*

- ✓ *Gathering signatures and submitting petitions is not very visible (unlike a protest or the use of the media). This process of preparing and submitting a petition is unlikely to generate further public support on the issue on a large scale. A person standing on the street asking passing individuals to sign a petition is unlikely to make the 6pm news!*

- ✓ *Traditional media may not publish the views of all groups, especially unpopular minority groups who want laws changed or calls for action in an area that is dry or fails to make entertaining coverage. Alternatively, the media can sometimes publish the views of groups that do not necessarily deserve equal coverage, thereby drowning out or confusing the majority viewpoint. For instance, in 2012 the ABC's 'Media Watch' accused many news outlets of giving inappropriate attention to 'climate sceptic' scientists whose views against climate change do not have respected support within the scientific community.*

- ✓ *Buying advertisements in the traditional media of television and radio is expensive and may therefore be dominated by well-resourced organisations such as large businesses and trade unions. Such organisations can use television and radio to very effectively inform and persuade a large proportion of society about a proposed change in the law, but small businesses, community groups and individuals may not be able to afford this effective method of communication.*

- ✓ *Media may show such a diversity of opinions on an issue that there is no clear direction for change to the law. Parliament often fears backlash from vocal minorities in society when law-making on controversial issues, so if the media show a wide range of conflicting views on a particular issue, the government may be less likely to act due to this fear. It is impossible for law-makers to please all groups, so the media holds a lot of sway when it gives publicity to disagree over what the law should be.*

- ✓ *The media can become so saturated by letters, opinionated phone calls to talk-back radio and sensationalist advertisements that viewers and readers become confused about the issues or facts, or disengaged from the issue altogether. This can result in no broad consensus in society about whether the law should change or not.*

Question 12
Explain how courts make law, and critically examine the extent to which the doctrine of precedent allows the courts to create and change legal rules. (8 marks)

In the 2012 Assessor's Report the Chief Assessor reminded students that task phrases such as 'critically examine' mean to provide an opinion, and examine reasons for and against that opinion: it involves a "consideration of strengths and weaknesses, and coming to an overall judgment as to its worth."

Both strengths and weaknesses must therefore be addressed, however they do not need to have equal time spent on them. If students do not offer an opinion, however, they can only receive a maximum of 7 marks.

In 2012 a question regarding the ability of the courts to make law was asked. The Chief Assessor noted that many responses lacked confidence and were "unfocused", as though students did not know how to answer the question. Many answers described one case in detail rather than analysing the ability of the courts to change the law, and many students made errors such as stating that precedent relates to sanctions or remedies. Another common mistake was defining each of reversing, overruling, distinguishing and disapproving, without actually answering the question or looking more broadly at precedent.

1 mark An explanation of how courts develop precedent through their ratio decidendi on cases that come before them.

1 mark An explanation of binding precedent, and when precedent will be binding.

1 mark One way in which courts are *able* to develop the law through precedent.

1 mark One way in which courts are *limited* in their ability to develop the law.

4 marks Additional content points and/or arguments. One more mark can be gained from an explanation of how courts make law, but no more than that because the task word 'explain' is worth less than 'critically examine'. The remaining marks must be gained through arguments for and against the ability of the courts to develop law.

Note: *answers must go beyond merely reversing, overruling, distinguishing and disapproving – the system of precedent is much broader than that. In response to a similar question in 2012 the Chief Assessor commented that many students seemed unsure how to answer it, and limited their responses to case examples or definitions of the above methods of departure.*

Sample arguments regarding how courts are limited include:

- ✓ *Lower courts will generally be bound by the precedent set by higher courts in the same hierarchy. Even if the precedent is conservative or outdated, lower courts do not have the power to ignore or overrule the common law contained in the precedent.*

- ✓ *Only superior courts of record have the power to set precedent, however they hear only around 5% of cases. This limits the ability of the courts to establish new common law in a practical sense.*

- ✓ *Setting a precedent with authority usually requires one or more appeals to be made, which means a person with standing in the dispute needs the time, money and patience to appeal.*

- ✓ *Courts can only rule based on the arguments made to them. If parties do not make the right arguments, the court cannot establish common law on an area not put to them in argument. The judge may note this in his or her obiter dicta and suggest more desirable arguments or possible grounds of appeal, but the ratio decidendi and decision in the case will need to be based on the specific legal submissions put by counsel.*

- ✓ *In order for courts to set precedent a case needs to come before them with the right material facts, which can take a long time. This makes judges impotent to change the law in a way that parliament is not, as parliament can introduce whatever reform they think is necessary in society without the matter being brought to them.*

- ✓ *Judges prefer to extend existing rules, rather than making an entirely new law from scratch. In Breen v Williams justices Gaudron and McHugh of the High Court said that the judges of Australia cannot "make it up" as they go along: they need to begin from a baseline of existing law and then modify or adapt it slightly. Therefore many judges will be reluctant to be too progressive in their law-making.*

- ✓ *The system of precedent used by judges is based on the principle of stare decisis, which means to stand by things decided. Judges, therefore, will frequently choose to follow existing precedent, even when it is persuasive only, because they feel themselves limited by that principle. For example, in the Rape in Marriage Case the judge chose to follow an existing persuasive precedent granting marital immunity for rape, even though it was not binding on the court.*

Sample arguments regarding how courts have considerable power include:

- ✓ *Higher courts can reverse or overrule an existing precedent if the case is taken to them on appeal or if a later case with similar material facts is heard before them. The new precedent will replace the old one, which gives higher courts considerable power to change the common law.*

- ✓ *All courts – even lower ones such as the County and Magistrate's Courts that cannot actually make precedent – can still distinguish the cases before them on the basis of different material facts. This does not have the effect of replacing the old precedent, but does create a new precedent relevant to a different set of facts if the distinguishing court is high enough. At the very least it gives courts the power of flexibility.*

- ✓ *If a novel case comes before a superior court of record, and the area is not covered by either legislation or existing precedent, the court does have the power to make a new common law rule, such as negligence in Donoghue v Stevenson or Native Title in Mabo.*

- ✓ *Courts can influence parliament to change the law by commenting on the need for change in their obiter dicta. This will only be persuasive precedent, but could push parliament or a higher court to adopt it.*

- ✓ *The power to interpret statutes and set precedent on the meaning of legislation gives the courts significant power to change and adapt the law. Parliament will often legislate in vague or ambiguous terms, or at the very least the law will not cover all future events or developments in technology. This means the courts must create common law on the meaning of the act and fill in any gaps; unless it is abrogated by parliament, this precedent is just as binding on society as the original legislation.*

Question 13

'The jury is one of the main problems with the legal system, preventing people from having proper access to a fair trial. Members of the public have no idea how to decide legal disputes. However, the jury is not the only criticised aspect of the legal system.'

Describe two reforms or alternatives to the current jury system that could be implemented to better give access to a fair hearing, and explain how they could improve the system.

Comment on other problems that exist within the system, apart from the jury, and discuss changes that could be made, or have been made recently, designed to improve its effective operation.

(10 marks)

The 2010 VCAA Assessor's Report reminded students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences. In 2011 almost 50% of the students across the state received zero for the question on a recent reform. This indicates that reforms need significant attention in preparation for the examination.

In addition to leaving the question blank, the following errors were made: using a reform that was too old; using a reform to one individual law rather than to the legal system as a whole; failing to show how the reform was able to improve the legal system; and knowing the name of the reform, but not understanding the detail involved.

1 mark One reform or alternative to the jury system.

1 mark Detail on how it could improve the system.

1 mark A second reform or alternative to the system.

1 mark Detail on how it could improve the system.

1 mark One other problem that exists within the legal system.

1 mark A second problem that exists within the legal system.

1 mark One recent or recommended change, outlining how it could improve the system.

1 mark A second recent or recommended change, outlining how it could improve the system.

2 marks Additional problems and/or changes.

Note: reforms that 'have been made recently' refers to reforms made in the last 5 years.

Changes to the current system of trial by jury may include:

- ✓ *Requiring that juries provide written reasons for their decisions. This could be a summary given by the foreperson, or a collection of individual reasons given by each member of the jury. If juries were required to provide written reasons for their decisions, parties would be able to get the satisfaction of knowing why they won or lost, and could also appeal to request a review of any errors made concerning evidence or law.*

- ✓ *Appointing a specialist foreperson who has experience in the area, when the jury is hearing complex cases such as medical negligence or tax fraud. A specialist foreperson could ensure that the jury understands complicated evidence that could be crucial to the outcome of the trial. If the jury did not understand this evidence they may become confused, and either 'tune out' or make a decision based on factors that were not as important, such as the appearance of the witness or accused.*

- ✓ *Removing trial by one's peers, and replacing the jury with a panel of professional lawyers and/or judges. Removing juries would increase the speed of trials on indictment, and would also cost parties and the government less money. People in the community would not be taken away from their jobs, and they would not be put through the stress of having to make such an important decision when they are not trained for it.*

- ✓ *Removing trial by jury altogether, considering that they are only used in 0.5% of cases in Australia as it is.*

- ✓ *Reducing the number of peremptory challenges allowed to both parties, so that the composition of the jury becomes truly more random/inclusive.*

- ✓ *Requiring that jurors complete a questionnaire, showing that they understood key evidence and law. This is similar to what is done in several states in America.*

Problems may include:

- ✓ *Wealthy people have a greater access because barristers regularly cost up to $5000 per day, expert witnesses can charge thousands of dollars for reports, and filing fees can run into the thousands.*

- ✓ *The complicated rules of evidence and complicated legal language of legislation and precedent make it almost impossible for people to make educated decisions about how to handle their case.*

- ✓ *A strict 'means' test as a requirement for Legal Aid means that people earning only a few hundred dollars a week are ineligible for assistance, even though a trial can cost tens of thousands of dollars.*

- ✓ *Free interpreters were removed from the County and Supreme Courts in the 1990s.*

- ✓ *Increasing media reporting on trials and in the courtroom can unfairly influence jurors, preventing the parties from receiving a fair trial based on the evidence they present in court.*

- ✓ *The Supreme Court and the Broadmeadows Magistrate's Court have recently introduced compulsory mediation before most trials, but the decision reached is not binding. If one party fails to follow the agreement, the time taken in mediation is added to the time in court.*

Matching problems with changes could be presented as following:

- ✓ *The strict rules of evidence and procedure can be a problem. The rules of evidence are complex and without appropriate legal representation some evidence may not be presented or not presented effectively, which may impact on the decision rendered by the judge or jury.*

  The 2008 VLRC Civil Justice Review: Report recommended that judges be able to proactively manage disputes by allowing them to order directions hearings by telephone or using other technology, and to call independent witnesses and order experts to try to reach agreement on one joint report for the court listing all the matters they agree upon and the reasons for any disagreements. This would try to overcome delays in resolution caused by parties taking an adversarial approach to pre-trial such as discovery, and the judicial involvement would assist parties who could not afford extensive legal advice and representation.

- ✓ *The National Alternative Dispute Resolution Council ('NADRAC') conducted an investigation into the use of non-judicial methods of dispute resolution in 2009 and found that non-judicial methods remain "significantly under-utilised" and that legal professionals, litigants and the general public all have a concerning lack of understanding and knowledge of non-judicial processes and availability.*

  The Supreme Court and a number of Magistrate's Courts across the state, including the Broadmeadows Court, have recently introduced compulsory mediation before most trials. This removes the need for lawyers to be familiar with the process and willing to recommend it to their clients. The program has been a success, regularly achieving over 80% success in resolution, so ought to be extended to the central Melbourne Magistrate's Court and County Court.

- ✓ *Free interpreters were removed from the County and Supreme Courts in the 1990s. This means many parties must choose between interpreters they cannot necessarily afford and not being able to understand what is happening in their own cases.*

  Free interpreters could be reintroduced in the County and Supreme Courts, as they were removed in the 1990s. A free interpreter recognises the right of all parties to understand their own legal proceedings, even if they do not have the money to engage one themselves. The 2008 VLRC Civil Justice Review: Report recommended that interpreter funding be provided for civil disputes. Free interpreters are not present in the County or Supreme Courts, which is where pre-trial procedures such as directions hearings take place. This would try to overcome the problem of limited understanding faced by parties with limited English and limited financial resources, as not understanding mediation or directions hearings would slow cooperative resolution and prejudice them in trial preparation.

- ✓ *Delaying proceedings can be used as a deliberate tactic. Justice Hayne of the High Court observed in 2008 that, in the vast majority of civil cases, it is in the best interests of one party to move proceedings along quickly, but it is in the interests of the other party to delay where possible. He commented that most lawyers are happy for their cases to be "over-managed" with more directions hearings and pre-trial procedures than are necessary – sometimes they do this*

because they can benefit from the increased lawyer fees, however other reasons include over-anxious preparation and delaying the trial.

The 2008 VLRC Civil Justice Review: Report recommended that the discovery stage be streamlined by allowing pre-trial oral examinations (rather than written interrogatories) and legislating that parties only need to discover (i.e. produce copies of) documents and evidence that are relevant to issues still in dispute. This would try to overcome delays caused by extensive discovery, and parties possibly requesting copies of documents they already have or that are unimportant – simply because they want to try to bleed the opposition of their funds before trial starts.

- ✓ *'Regular' members of the community forming the jury means that untrained and unqualified people are put in charge of making a very important and legally-difficult decision. For example, the Judy Moran jury needed to ask three times what the difference was between murder and manslaughter.*

  The lay-person jury could be replaced by a professional jury of people trained by the state to be jurors, or very complex cases could be heard by professionals in the field. E.g. Medical negligence cases heard by a panel of doctors.

- ✓ *Juries do not have to give reasons for their decisions, so it is almost impossible to appeal a bad jury verdict. Parties do not know if the verdict was based on an accurate and unbiased understanding of the law and evidence.*

  Juries could be made to provide written reasons for their decisions. This could be in the form of a summary of the majority rationale, given by the foreperson, or it could be a collection of individual reasons given by each member of the jury. Parties could get the satisfaction of knowing why they won or lost, and it would also enable appeal courts to more accurately review the decisions of jury trials.

- ✓ *Juries decide the damages to be awarded to a successful plaintiff, but remedies are not subject to precedent and there is no consistent formula applied for fairness.*

  A set of rules or calculation tables could be established for juries awarding damages, to attempt to reduce the disparity in awards.