COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES ¾

2013

Practice examination No. 2

SUGGESTED RESPONSES / ADVICE

Question 1
Jane argues with you that separating power is not an efficient way to govern.

Explain the principle of the separation of powers and outline for Jane the purpose behind it. (3 marks)

1 mark That government power is split into three separate arms or branches: the legislature, the executive and the judiciary.

1 mark That the legislative arm makes law, and is controlled by parliament; that the executive arm administers law, and is controlled in practice by the Prime Minister and Cabinet (although in theory by the Governor-General); and that the judicial arm enforces the law and resolves disputes, and is controlled by the courts.

1 mark The purpose is to prevent the abuse of power and corruption; also to act as a check and balance on the different functions of government and maintain the stability of government.

Notes:

- A link to efficiency does not need to be made, as the question does not ask for it.
- Three pieces of information must be given for each arm: its name, its function and the body that controls it. If students name all three arms but do not identify all the required information they can receive one out of two marks; if they identify all required information but only for one or two arms, they also receive one out of two marks.
- Only one purpose needs to be given, but it needs to be stated fully enough to receive a mark for it alone.

Question 2
Outline two constitutional restrictions on the power of the state parliaments. (2 marks)

Advice: 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 An outline of one restriction, either express or implied.

1 mark An outline of a second restriction, either express or implied.

Note: section numbers do not need to be included. They can, however, supplement the detail in very short responses.

Possible restrictions that could be used include:

- ✓ *Section 114 of the Constitution prevents states from raising an army or defence force.*
- ✓ *Section 115 prevents the states from creating their own currency.*
- ✓ *Section 92 prevents the states from taxing interstate trade – saying that "intercourse among the states…shall be absolutely free".*

- ✓ *The operation of s109 places a restriction in practice with respect to the concurrent powers. Whilst states can theoretically pass laws on concurrent topics such as marriage, trade, taxation and welfare payments, any state law that is inconsistent with Commonwealth law may be invalid.*

Question 3
Using examples to illustrate your answer, explain one reason why judges may sometimes need to use their powers of statutory interpretation, and one effect that this interpretation might have. (4 marks)

1 mark An outline of one reason for statutory interpretation.

1 mark An example that is clearly linked to the reason given.

1 mark An outline of one effect of statutory interpretation.

1 mark An example that is clearly linked to the reason given.

Note: the examples used should be different from each other, because of the plural "examples" in the question. However, they can by hypothetical rather than real examples.

Sample answers for reasons might include:

- ✓ *Technological advances may not have been foreseen by the drafters of the act, so the judge may need to decide whether they ought to be included within the meaning and application of the law. For example, in Brislan's Case the High Court needed to decide whether the phrase "telegraphic, telephonic and other like services" should in practice include radio.*

- ✓ *A mistake may have been made during the drafting of the act, and a literal interpretation may be impractical or ridiculous. The judge must decide what the most sensible meaning or application would be of the phrase. For example, legislation that stated allegations of sex offences being committed on someone with intellectual disabilities needed to be corroborated by an independent witness was impractical, as these offences were usually committed in private.*

- ✓ *A word or phrase may have not been defined within the act, so the judge may need to decide which definition in common use in society is most appropriate. For example, the word 'marriage' was not originally defined in the Marriage Act of 1961, so in the case of Kevin and Jennifer the Family Court needed to decide whether marriage was a union of two adults regardless of gender, or whether it was a union of one man and one woman.*

- ✓ *The wording of the act may be vague or general and may need to be given a more specific meaning to apply to the circumstances. For example, the word 'weapon' was too general in the Studded Belt Case, as it could have included anything that could be used as a weapon. The judge in the Supreme Court needed to decide specifically what the term 'weapon' included.*

- ✓ *The wording of the act may be ambiguous, with more than one possible meaning, and the judge may need to decide which meaning is the most appropriate one. For example, 'boots must be worn' could equally mean that boots must be worn on the feet, or that boots must be weathered and old.*

Sample answers for effects of statutory interpretation may include:

- ✓ *A more specific meaning may be given to words in the act so that they can be more easily applied to cases in the future. For example, in the Studded Belt Case the word 'weapon' was given the more specific meaning of only things that had a primary use as a weapon and no*

primary use as anything else. This made it easier in the future to see that innocent items that were simply capable of causing harm were not meant to be included.

- ✓ *Ambiguity or lack of clarity may be cleared up for the public, so the community can feel more confident about what the law is. For example, in the Kevin and Jennifer Case it was clarified that marriage had to be between one man and one woman, but that gender was determined at the time of marriage based on a range of indicators. This cleared up confusion for the transgender community.*

- ✓ *Ambiguity or lack of clarity is cleared up for the public, so the community can feel more confident about what the law is. For example, the Wills Act 1997 said only that any "disc, tape, sound track or other device" could record a legitimate will. Once the court decided that a computer hard drive was included in "other device", people knew they could put their wills on their computers with confidence.*

- ✓ *An interpretation that is too creative or conservative may influence parliament to pass amendments to the legislation, clarifying and possibly changing the meaning of the words. For example, following the Kevin and Jennifer Case the federal Government believed that the definition of gender being determined at the time of marriage, for the purposes of the definition of marriage, was too creative. They drafted legislation to abrogate that part of the definition, but it did not pass.*

- ✓ *An interpretation that is too creative or conservative may influence parliament to pass amendments to the legislation, clarifying and possibly changing the meaning of the words. For example, the court determined that letting your car roll by failing to put the handbrake on was not within the meaning of "driving" as used by the Motor Car Act 1958. Parliament subsequently amended the Act to include these situations.*

- ✓ *Precedent may be set on the meaning of the words, which all courts lower in the same hierarchy must follow any time they judge a case with similar material facts. For example, in Davies v Waldron the Supreme Court found that the phrase "start to drive" included sitting in the driver's seat of the car with the engine running. The County and Magistrate's Courts could not after that decide that the defendant needed to put the car in motion in order to "start to drive" it.*

- ✓ *Giving a more specific meaning to the words allows them to be applied to the facts of the case. This allows a verdict to be reached, as the actions can be seen as falling either inside or outside the meaning of the law. For example, in the 2010 Ciabatta Case the Federal Court defined "cracker" to include mini-ciabatta and the word "bread" not to include it, therefore it could be seen that GST was payable on the mini-ciabatta in a way that would not have been the case had it been classed as bread.*

Question 4
Outline two factors throughout panel selection and empanelment that could impact on the final composition of a jury in the County Court. (2 marks)

Advice:

- 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 An outline of one factor from any stage in the jury process that could result in someone not being on the final jury. Extensive detail is not required, but the factor must be more than merely named.

1 mark Repeat, for a second factor.

Note: 'Factors influencing the composition of the jury' was new on the Study Design in 2011 and, although it was asked in the 2011 Sample Exam, it has not been formally examined since its inception.

Sample answers on factors include, but are not limited to:

- ✓ *Parties may exclude potential jurors by making a peremptory challenge against them. They do not need to give their reasons, and the challenge must be accepted by the judge. Parties can each make three peremptory challenges.*

- ✓ *Parties may ask to exclude potential jurors by making a challenge for cause. A legitimate reason for exclusion must be given to the judge, who may decide whether or not to accept it. Parties can make unlimited challenges for cause.*

- ✓ *Potential jurors may ask the judge to be excused from sitting on that trial only. A reason might be that the length of the trial would cause undue hardship, or that they know a key witness and so would be unable to hear their evidence impartially.*

- ✓ *Potential jurors could be disqualified from service entirely if they met criteria such as being an undischarged bankrupt or having a criminal record.*

- ✓ *Potential jurors could be ineligible for service if they met criteria such as having a job too closely connected with the justice system, or not having a strong enough grasp of the English language.*

- ✓ *Potential jurors could ask the Juries Commissioner to be excused from service if they could show that service would cause severe hardship; for example, missing Year 12 examinations.*

Question 5
Compare the purposes of civil remedies with the purposes of criminal sanctions, using examples of remedies and sanctions to illustrate your answer. (5 marks)

Advice:

- 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 stated 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.

  If students do not make explicit connections between the purposes, they can receive a maximum of 3 marks if the content and illustrations are strong.

- In 2012, regarding a question on criminal sanctions, the Chief Assessor noted that many students were unable to – or failed – explain the purpose of the sanction. A question was also asked on the purposes of civil remedies, which encountered much the same problem. This question homes directly in on the purposes, and then asks students to link them to sanctions in the second part of their answer.

1 mark An outline of one similarity between their purposes.

1 mark An outline of one difference between their purposes.

1 mark Use of one civil remedy in illustration.

1 mark Use of one criminal sanction in illustration.

1 mark Further detail, comparisons, and/or illustrations.

Notes:

- The aims of sanctions given in the *Sentencing Act 1991* (Vic) are:
  - Punishment.
  - Rehabilitation.
  - Denunciation.
  - Deterrence (both specific and general).
  - Protection.
- Definitions of sanctions do not need to be given, as they are being used as illustrations. This means their content needs to be linked with and made relevant to the comparisons.

Sample arguments could include:

✓ *The main aim of remedies is to return the plaintiff to the position they were in before their rights were infringed, whereas the main aims of criminal sanctions are not to protect or restore the rights of the victim – instead, they are focused on punishing the offender and protecting society from further criminal harm.*

For example, compensatory damages aim to replace any lost money the plaintiff has suffered as a result of missed work or medical expenses. This is focused on the person who suffered harm. Imprisonment, on the other hand, largely ignores the suffering of the victim and instead concentrates on punishing the offender by taking their freedom away.

✓ *The main aim of remedies is to compensate the plaintiff for the infringement of their rights, however some remedies also aim to prevent the harm (such as injunctions) or punish the defendant (such as punitive damages). In this respect the aims of some remedies are similar to the aims of some sanctions. Some sanctions aim to prevent further harm, and others aim to punish the defendant.*

For example, punitive damages are sums of money paid by the defendant as a punishment from the courts; in this respect they are similar to fines being imposed for criminal behaviour.

Question 6
'One of parliament's most pressing concerns is trying to keep up with the changing needs for law in society.'

a. Explain the role played by the Victorian Law Reform Commission, and how it assists the Parliament with law reform in the state. (3 marks)

1 mark Ways in which the VLRC will investigate an issue and gauge the views of the public must be included. Examples are conducting opinion polls and receiving submissions from members of the public.

1 mark That the VLRC reports back to the government, who can table the recommendations in parliament, must also be included. Answers must reflect this feature of recommendations being made to parliament: the VLRC cannot change the law itself.

1 mark An example of an issue the VLRC has investigated or is currently investigating; OR, information on the roles of the VLRC to engage in public education on the law, or monitor informal law reform activities across the state.

Additional detail and examples may include:

- ✓ *That the VLRC receives referrals from the Attorney-General, has the ability to recommend to the Attorney-General that a matter be referred to them, or can self-refer minor issues.*
- ✓ *Information on the structure and/or personnel of the VLRC.*
- ✓ *An example such as: The Commission looked into the issue of abortion, and provided a range of options for how abortion could be decriminalised.*
- ✓ *An example such as: The Commission looked into the issue of defences to homicide, and recommended that the defence of provocation be abolished. It was.*
- ✓ *An example such as: The Commission looked into the issue of bail, and recommended that victims of crimes against the person should be notified of the outcome of the accused's bail hearing.*
- ✓ *An example such as: The Commission looked into the issue of evidence, and recommended that judges not be allowed to warn the jury that evidence from a child is potentially unreliable simply because the witness is a child.*

b. Using an example to illustrate your answer, define 'petitions' as one method an individual or group might use to inform parliament of the need for change.
(2 marks)

1 mark That petitions involve people from the community signing a document in support of a request for parliament to make a specific change to the law.

1 mark That petitions can be tabled in parliament (if they fulfill the standing rules) by a member of parliament.

Question 7
'The adversary system is preferred in Australia because it is believed that it delivers more effective justice.'

a. Outline the elements of an effective legal system. (3 marks)

1 mark An outline of 'the entitlement to a fair and unbiased hearing' that includes one or more synonyms or explanations of what 'fair and unbiased' means.

1 mark Repeat for 'access to dispute resolution', including synonyms.

1 mark Repeat for 'timely resolution of disputes', including synonyms.

Sample answers:

- ✓ *A fair and unbiased hearing requires that all parties who come before the court system are treated equally, that each party has the opportunity to present their side of the dispute, and that the outcome will be reached according to fair and consistent rules and procedures.*
- ✓ *Parties must have physical access to places to resolve their disputes; they must have enough knowledge of the legal system, their rights and the appropriate mechanisms for resolution in order to make decisions regarding their dispute; and they must be able to afford the process.*

✓ *Timely resolution means parties should not be rushed into resolution without adequate time to prepare and examine the arguments and evidence, but both have a right to efficient resolution without unnecessary delays so they can move on with their lives. Justice delayed is justice denied.*

b. Critically examine the extent to which the adversary system contributes to a more effective legal system, compared with the inquisitorial system. (6 marks)

Advice:

- 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: a critical examination 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.

- In 2012 students were asked for advantages of VCAT as opposed to court, and the Chief Assessor stated that courts needed to be used in each advantage, to show how that advantage of VCAT represented a weakness of courts. The same holds true in this question: the inquisitorial system must be used in each argument, as a point of difference to the adversary system.

1 mark — One strength of the adversary system compared with the inquisitorial system; the strength must be linked with a weakness of the inquisitorial system, however this does not need to be done in detail.

1 mark — One weakness of the adversary system compared with the inquisitorial system; the weakness must be linked with a strength of the inquisitorial system, however this does not need to be done in detail.

4 marks — Further arguments for and/or against, combined with elaboration and detail. The exact mix of arguments and detail should be judged globally – overall – on an answer-by-answer basis depending on the opinion advanced by the student and the quality of their argument.

Notes:

- The inquisitorial system was mentioned explicitly on the Study Design for the first time in 2011. It has not yet, however, appeared on the November examination.

- The balance of strengths and weaknesses will depend on the opinion the student advances.

- Full definitions of the features of trial are not required in this question, as an evaluative task phrase is used rather than one such as 'explain'. Content regarding the features should naturally come out in the strengths and weaknesses.

Sample arguments could include:

✓ *Adversary parties take an active role in trial, and are responsible for organising and presenting their evidence and legal submissions. This can be very stressful, and too difficult for many parties*

to do effectively. The inquisitorial system gives a less active role to parties, which reduces the stress, time and expense of trial for them. Parties mainly assist the investigating and trial judges.

- ✓ *The adversary judge takes a passive role in trial, as they do not collect evidence, decide legal submissions or question witnesses. This means that their expertise is largely wasted, and they cannot assist unrepresented parties. In the inquisitorial system the judge takes a far more active role, which utilises their knowledge. The investigating judge is in charge of collecting evidence, and the trial judge will lead questioning and direct the parties as to the arguments they want to hear more regarding in court.*

- ✓ *The adversary rules of evidence and procedure are very strict and complicated; witnesses must be examined orally and in person, and much evidence such as prior convictions is inadmissible. This means that witnesses can feel intimidated, and a complete picture of the facts may not emerge. In the inquisitorial system the flexible rules of evidence and procedure ensure that a complete picture emerges, but some evidence may be unfairly prejudicial to the defendant. However, the judge is expected to weigh the relevance and reliability of the evidence presented.*

- ✓ *The adversary burden of proof is on the party bringing the action: the plaintiff or prosecution. They have a heavy burden to prove their case, as well: the prosecution must prove the claim beyond reasonable doubt, while the plaintiff must prove it on the balance of probabilities. This means that weak cases should not succeed. The inquisitorial system also has a standard of proof in that the defendant is deemed innocent until significant evidence proves their guilt, but there is no formal burden of proof so they defendant may not feel as much benefit from the presumption of innocence.*

- ✓ *The adversary judge's impartiality and lack of bias protects the public perception of the court, and the respect they have for its decisions. The judge is not personally involved, so the verdict will be based on the strength of evidence and arguments rather than on personal prejudice. The inquisitorial judge, on the other hand, loses some of their impartiality by becoming involved in the investigation and contest; or, at the very least, they may appear to be less impartial.*

- ✓ *Strict rules of evidence in the adversary system ensure that all evidence presented in court is relevant, reliable and legally obtained. Also, that each party has a fair and equal opportunity to present their case. This is natural justice, and one element of an effective legal system is the entitlement to a fair and unbiased hearing. The flexible inquisitorial rules mean that documentary evidence can give a one-sided and misleading picture of events, however, because the author cannot always be asked to explain statements or consider areas in which they might be mistaken. All relevant evidence can be taken into account, to get a fuller picture of events, because the rules on admissibility are not as strict.*

- ✓ *The adversary burden of proof protects the presumption of innocence by not forcing the defendant to prove their innocence before evidence has been presented against them. In the inquisitorial system, however, the accused does not have as many rights during trial because there is less focus on being innocent until proved guilty. The defence's evidence and arguments will be examined before it has even been established that they did something wrong.*

- ✓ *In the adversary system parties give instructions to their lawyers, and so can feel like they are exercising control over their own case. Parties are also able to choose the lawyer they feel will best represent their interests. A qualified and experienced professional can put your case as efficiently and persuasively as possible. In the inquisitorial system, however, lawyers can only make requests of the judge and suggest avenues of exploration. They cannot exercise the same level of control in favour of their clients.*

Question 8
'The method of protecting constitutional rights in Australia is simply not as effective as the method adopted in many other jurisdictions.'

Explain two approaches to the protection of constitutional rights that Australia could adopt from one other jurisdiction, and comment on how they could make its protection more effective.

The jurisdictions that may be chosen are: Canada, New Zealand, South Africa and the United States of America. (6 marks)

Advice: 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. Students must not simply define differences; they must argue in terms of Australia adopting that approach instead.

1 mark An outline of one difference between Australia and the chosen jurisdiction.

1 mark An explanation of how this approach is more effective than Australia's current approach, or how it would improve Australia's current approach. Essentially, this will be drawing on weaknesses of Australia and strengths of the other jurisdiction.

1 mark A global mark, awarded for excellent detail on the difference, Australia's current weakness, and/or the strength of the change.

3 marks Repeat for a second difference.

Notes:

- If more than two differences are explained, only the first two should be marked.
- Any answers focusing on individual rights rather than broad approaches should not receive marks.

Arguments that could be used include:

✓ *The Supreme Court of Canada can issue an 'advisory opinion' on whether a particular law or action would infringe the Charter of Rights. An example is the bill to legalise gay marriage. The Australia High Court does not give advisory opinions; the action must be taken, and then the matter must be challenged by a party with standing. Advisory opinions would improve Australia's approach because they could avoid the harm being suffered by individuals in the first place, and could avoid much of the time and expense of a rights claim being made.*

✓ *The Canadian Constitution includes a Charter of Rights and Freedoms – this, like a 'bill of rights', is a part of the Constitution devoted to the protection of human rights and where they are all listed together. There is no such charter in the Australian Constitution – the rights are scattered throughout the document. Having a formal bill of rights would improve Australia's approach because it would be easier for the average citizen to locate their rights and understand them; it could also serve as a symbolic and inspiring document in a way that scattered rights do not.*

✓ *Courts in Canada can award damages for rights abuses; no such compensation is available from the High Court for the breach of constitutional rights in Australia. Allowing the High Court to award damages for rights infringements would improve Australia's approach because it would save injured parties the time, stress and expense of taking a second legal action to a second court.*

- ✓ *The Canadian Parliament can validly pass laws that breach express rights (even after a court has declared that the law breaches the Charter) because there is a constitutional clause allowing this; the Australian Parliament, on the other hand, cannot ever enact legislation that breaches constitutional rights. Allowing the parliament to override some declarations of invalidity would improve Australia's approach because it would reinforce the supremacy of the elected parliament, and put the rights more in the hands of the people.*

- ✓ *Because the New Zealand Bill of Rights Act ('BORA') is a normal statute rather than a constitutional bill, rights in the New Zealand Bill of Rights can be amended by an act of Parliament at any time. This does not occur in the Australian system because the rights are in the Constitution. Allowing the parliament to amend the rights document more easily by itself would improve Australia's approach because it would create more flexible rights that could be more easily updated and added to over time.*

- ✓ *In New Zealand, remedies can be sought if a party believes their BORA rights have been infringed. In Australia, remedies do not accompany a High Court declaration that a law is invalid. Allowing the High Court to award damages for rights infringements would improve Australia's approach because it would save injured parties the time, stress and expense of taking a second legal action to a second court.*

- ✓ *Acts of parliament in New Zealand are scrutinised by the Attorney-General to ensure they don't contradict rights in the BORA, however parliament will still be able to pass conflicting legislation. The Attorney-General plays no such formal role in the Australian Parliament, and the Australian Parliament cannot choose to infringe constitutional rights. Allowing the parliament to override some declarations of invalidity would improve Australia's approach because it would reinforce the supremacy of the elected parliament, and put the rights more in the hands of the people.*

- ✓ *New Zealand has a statutory bill of rights; Australia has five express rights entrenched in its constitution. This means that Australia's rights cannot be changed or removed by the parliament acting alone (a referendum is required), whereas New Zealand's can. Allowing the parliament to amend the rights document more easily by itself would improve Australia's approach because it would create more flexible rights that could be more easily updated and added to over time.*

- ✓ *New Zealand's rights are not fully enforceable, and courts cannot invalidate legislation that infringes them; Australia's rights are fully enforceable by the High Court, and the High Court can invalidate any legislation that infringes them. Allowing the parliament to override some declarations of invalidity would improve Australia's approach because it would reinforce the supremacy of the elected parliament, and put the rights more in the hands of the people.*

- ✓ *Some rights in South Africa are able to be limited by an act of parliament, either in a state of emergency or where parliament can show the infringement is necessary for some greater purpose. This is not possible in the Australian system, as we have no 'limitations clause'. Including some limitations clauses would improve Australia's approach because it would be more transparent than the system we currently have, where the High Court simply redefines a right to make its scope smaller. At the moment rights cannot be limited in Australia, but their definitions and scope can be altered subtly to achieve a very similar result.*

- ✓ *The South African Constitutional Court can award a remedy to the injured party in addition to declaring legislation invalid because it contravenes a constitutional right. The Australian High Court does not award damages when it invalidates legislation. Allowing the High Court to award damages for rights infringements would improve Australia's approach because it would save injured parties the time, stress and expense of taking a second legal action to a second court.*

- ✓ *In South Africa the rights give both vertical and horizontal protection. In other words, they protect people from the power of government as well as from other citizens. In Australia we have vertical protection only: protection from the power of government. Allowing horizontal*

protection for the rights that are appropriate to it would improve Australia's protection because it would recognise the practical reality than employers, large corporations and even schools and families can limit things such as political and religious freedom.

- ✓ *The United States of America has an entrenched bill of rights in its constitution, which takes the form of ten amendments added; Australia has five express rights entrenched in its constitution, but they are not organised into a bill of rights. Instead, they are scattered throughout the constitution. Having a formal bill of rights would improve Australia's approach because it would be easier for the average citizen to locate their rights and understand them; it could also serve as a symbolic and inspiring document in a way that scattered rights do not.*

- ✓ *In the United States the vote for changing the wording of the Constitution does not need to be held around the country on the same day; different states can hold it at a time that suits them. In Australia this is different, because the referendum votes in each state do need to be held on the same day. Allowing states to choose their own time for voting could improve Australia's approach because it would allow different states to investigate the change, educate the public or debate the impact of the proposal to a timeline that suited them and their population. If this resulted in people feeling more informed and in control, it might raise the number of proposals receiving a yes vote.*

Question 9
Parties in civil disputes are given a wide range of choices regarding where and how they want their dispute resolved.

a. Explain the role played by the Victorian Civil and Administrative Tribunal ('VCAT') in the legal system, as it exists in addition to courts. (3 marks)

Advice:

- In the 2011 examination many students struggled with the question involving VCAT, and the average mark was just over 50%.

- The Chief Assessor commented on a number of recurring problems: many students believe that VCAT is the same as mediation and conciliation; many students believe that parties make their own agreement in all matters before VCAT; and many students also believe that VCAT decisions are not binding. All of these are incorrect. In 2012 it was observed that many students believed VCAT hearings were private. This is also incorrect.

1 mark An outline of VCAT's role in hearing generally smaller and less complex civil disputes.

2 marks One mark for each of two further statements about VCAT's role or operation.

Additional information that could be used includes:

- ✓ *VCAT hearings use arbitration as a method when the hearings are conducted by the senior or ordinary members, and they use judicial determination when the hearings are conducted by the president or one of the vice-presidents.*

- ✓ *VCAT hearings mainly use arbitration, so the tribunal member takes a more active, inquisitorial role than judicial officers in court hearings do. They ask questions of parties and witnesses, and the rules of evidence and procedure are very flexible.*

- ✓ *VCAT decisions are binding, in that they can be enforced by the Magistrate's Court.*

- ✓ *VCAT's structure includes a president, who is a Supreme Court justice; vice-presidents, who are County Court judges; and senior and ordinary members, who are generally specialists in their field rather than lawyers.*

- ✓ *VCAT can hear some reviews to its own decisions internally, however appeals generally go to the Supreme Court or Court of Appeal on points of law only.*

- ✓ *VCAT usually does not provide extensive written reasons for its decisions, as giving oral reasons on the day speeds up resolution.*

- ✓ *The two most popular lists are the Civil Claims (Small Claims) List, which hears disputes between consumers and traders; and the Residential Tenancies List, which hears disputes between landlords and tenants.*

b. Describe two of the methods available to parties when going to either court or VCAT. (4 marks)

Advice: in 2012 the Chief Assessor commented that students were still confusing avenues and methods. Many students believed that VCAT was the 'same' as mediation and conciliation, while courts were the same as arbitration and/or judicial determination. Basic mistakes like these cost valuable marks in the examination.

1 mark A basic definition that outlines the roles of the parties and the third party.

1 mark More detail on the definition that includes how the outcome is reached.

Note: courts and VCAT each use all four of the methods listed on the Study Design, therefore any of them may be chosen for this question.

Sample answers:

- ✓ ***Mediation*** *is a cooperative method of dispute resolution in which a third party mediator, who is usually a counselor or very good at working with people, supports both parties equally and helps them problem-solve. Possible solutions will be drawn from the parties, and they are free to reach their own agreement – although it will not be binding unless ratified by courts or VCAT.*

- ✓ ***Conciliation*** *is a cooperative method of dispute resolution in which a third party conciliator, who usually has experience in the area of the dispute, leads discussion and suggests ways in which the dispute could be resolved. Parties are then free to reach their own agreement – although it will not be binding unless ratified by courts or VCAT.*

- ✓ ***Arbitration*** *is an inquisitorial method of dispute resolution in which a third party arbitrator, who usually has experience in the area of the dispute or qualifications in law, listens to both sides of the dispute, asks questions and examines evidence. They will then make a binding order or award on behalf of the parties, that can be enforced through the courts.*

- ✓ ***Judicial determination*** *is an adversarial method of dispute resolution in which a third party judicial officer, who is a legally-trained member of the independent judiciary, listens to legal arguments and evidence submitted by each party and enforces the rules of evidence and procedure. They will then make a binding order or award on behalf of the parties, that can be enforced through the courts.*

c. Anna and Stephen have worked together for ten years, with Anna purchasing goods from Stephen to sell in her store. Recently they discovered they have been keeping secrets from each other.

Anna has been trying to sell the business, even though she owes Stephen a lot of money for items she bought on credit because he trusts her; while Stephen has been selling Anna faulty items.

The mess is too big for Stephen and Anna to negotiate together and they have asked for your help. Advise them on what you think the best avenue and method of resolution would be for them, giving reasons for your answer. (7 marks)

Advice:

- In 2011 many students made the mistake of equating mediation with VCAT, and judicial determination with courts. This is incorrect. VCAT and courts both utilise mediation (courts even more than VCAT, actually), and VCAT and the courts both utilise judicial determination. In other words, students confused *avenues* of dispute resolution with *methods* of dispute resolution. This question therefore tests the ability of students to differentiate them as well as evaluate them.

- In 2012 on a question regarding an evaluation of mediation, the Chief Assessor noted some common misconceptions. These included that mediation was not used by courts, and that mediation was only used for small matters.

3 marks Discussion of reasons in support of the student's chosen avenue.

3 marks Discussion of reasons in support of the student's chosen method.

1 mark Further material on either the avenue or the method.

Notes:

- 'Avenues' for dispute resolution are courts and VCAT; 'methods' for dispute resolution are mediation, conciliation, arbitration and judicial determination. Each of the four methods is used in both of the two venues.

- Students can choose to argue in favour of their opinion by focusing on the strengths of their choices, or by balancing them against weaknesses of the others. Students may also outline weaknesses of their choices without contradicting their opinion, particularly if they are expressed as concessions.

- This question should be marked 'globally': meaning, in an overall way where the number of arguments is balanced against the quality of arguments. It would be difficult to achieve full marks without at least five different arguments, however.

Strength and weakness pairs regarding courts could include:

✓ *Courts require the parties to attend hearings. In a criminal dispute a defendant is summonsed to court or has been held on remand. If one party fails to attend a court judgment will automatically be entered against them and the party who attended will win. Attendance is also required at court-ordered mediation, conciliation and arbitration, but mediation and conciliation at court do not require the parties to come to an agreement while they are there, though – so their attendance may simply waste time.*

- ✓ *Legal representatives are used in the vast majority of cases at court, and they are able to present the case in the best manner possible and increase the chances of the most successful outcome possible for their party. Although not compulsory, it is highly recommended that both parties hire legal representation because otherwise, however, they are not able to present their cases effectively. This is a cost, and can be seen as a weakness of the system – especially since not having a lawyer will put a party at a serious disadvantage.*

- ✓ *Strict rules of evidence and procedure apply in court and during the pre-trial stages of a dispute. These allow both parties to be treated equally and to prepare for trial, and also ensure that all evidence presented is relevant, reliable and legally obtained. Strict rules of procedure mean that each party will always have an equal opportunity to present their arguments, and an equal opportunity to test the arguments of the other side. The presiding member cannot manipulate the hearing to favour one side over the other. The procedure is more focused on treating parties equally and fairly rather than determining the truth. This can be a weakness, as the party truly in the right may not win.*

- ✓ *Trial by peers is seen as a strength of our legal system as we are judged by a cross-section of our equals. Court trials in the County and Supreme Courts use juries, unlike VCAT and other venues. Juries are only used in the County and Supreme Courts, however, even though the vast majority of cases are heard in the Magistrate's Court – and then, in civil cases, only if one party requests a jury and is prepared to pay for it.*

- ✓ *Pre-trial court processes such as discovery and directions hearings reduce actual court time by narrowing the scope of issues in dispute, and can encourage out-of-court settlements or guilty pleas. These processes can, however, add to the time taken to resolve a dispute and increase the complexity of the process and increase the reliance on legal representation. They may therefore be seen to be a weakness.*

- ✓ *All elements of trial and hearing decisions in courts are subject to appeal. This gives an opportunity for any errors to be fixed and justice to be achieved. The ability to appeal, however, can add to the time and cost associated with resolving a dispute. Appeals are virtually unlimited from court hearings, as all elements of trial are subject to appeal and multiple appeals can be held up to the High Court. This can prolong the dispute and significantly increase the cost.*

- ✓ *Court hearings are presided over by highly experienced legal personnel: judges and magistrate work for years in the legal profession before they are able to be promoted. Their knowledge is a strength. A criticism of judicial officers, however, is that many judges come from a similar background and tend to be more conservative than many groups in the community, especially younger citizens.*

- ✓ *All judges have security of tenure: this means they are not elected, and cannot be dismissed for handing down decisions the government does not agree with. This independence is a strength. The great independence of judicial officers, however, means it is hard to hold judges accountable for poor decisions, and they are not intended to be representatives of the public.*

Strength and weakness pairs regarding VCAT could include:

- ✓ *VCAT members are mostly neither lawyers nor judges: instead, they are experts in the relevant field. This gives them more practical expertise. Since VCAT members are mostly not judicial officers, however, they may not be experts at interpreting or applying difficult point of law.*

- ✓ *The lack of security of tenure that most VCAT members have means it is easier to hold members accountable for poor decisions. However, the fact that most VCAT members are on contract means they do not have security of tenure, and their contracts may not be renewed by the Government. This lack of independence is a weakness, especially as the Government is a party to many VCAT disputes.*

- ✓ *VCAT is more suitable for smaller, less serious matters or matters where an ongoing relationship is desired. However, VCAT does not hear any criminal disputes or serious appeals. It is therefore suitable for a much smaller range of legal matters.*

- ✓ *The limits placed on appeals from VCAT decisions can be considered a strength, as the cost of appeals is quite high and not allowing appeals reduces the overall cost of resolution. It also gives finality to the dispute sooner. The limited grounds of appeal from VCAT decisions, however, dictating that appeals must go to the Supreme Court or Court of Appeal, and can only be on a point of law, is a weakness as it reduces access to justice.*

- ✓ *VCAT aims to resolve disputes within ten weeks, with an average length of time being 14 weeks. This is generally quicker than courts, which is a strength of VCAT. Combined with the lack of rules of evidence and procedure, however, it could be argued that this quick resolution means that not all evidence is tested appropriately – therefore this is also a weakness of VCAT.*

- ✓ *Even VCAT hearings are a relatively informal process. There are no rules of evidence and the rules of procedure are flexible. Parties participate much more in joint decision-making than they do in court. Parties have more of an ability to tell their story, because of the flexible rules of evidence in VCAT hearings. Evidence can be given in written form or as a statement rather than through examination. Some stronger parties may be able to dominate proceedings because of the more flexible rules, however, and could intimidate the other party.*

Strengths and weakness pairs regarding methods of dispute resolution could include:

- ✓ *Mediation is generally more cost effective than judicial determination. Mediation at the Dispute Settlement Centre of Victoria is free, for example, however even paid mediation costs approximately $2,500 per day and does not involve the same court fees and legal representation. However, mediation may still result in a court trial or VCAT hearing if it fails. The time and money spent will therefore not have achieved anything, and more costs may simply be added.*

- ✓ *Mediation will result in resolution in a shorter space of time than a court or VCAT hearing, if the parties are able to compromise. Generally mediation conferences last from a few hours to a few days. However, a decision made in mediation is not binding unless the parties sign a contract or ask VCAT or a court to ratify the agreement. This may prolong the dispute if parties do not abide by it.*

- ✓ *Mediation has no rules of evidence and the rules of procedure are supportive rather than intimidating; parties are encouraged to 'tell their story', and the procedures are in place to ensure each party receives a fair and equal opportunity to speak their point of view.*

- ✓ *Mediation maintains any ongoing relationship between the parties because they are encouraged to work together and are discouraged from laying blame. However, mediation is not compulsory to attend unless court- or VCAT-ordered. One party may refuse to attempt mediation and, even if ordered to by court or VCAT, it is not compulsory to reach an agreement. It relies on good faith to succeed.*

- ✓ *Conciliation is generally more cost effective than judicial determination. Conciliation at the Equal Opportunity and Human Rights Commission is free, for example, however even paid conciliation costs approximately $2,500 per day and does not involve the same court fees and legal representation. However, conciliation may still result in a court trial or VCAT hearing if it fails. The time and money spent will therefore not have achieved anything, and more costs may simply be added.*

- ✓ *Conciliation will result in resolution in a shorter space of time than a court or VCAT hearing, if the parties are able to work together. Generally conciliation conferences last from a few hours to a few days. However, a decision made in conciliation is not binding unless the parties sign a contract or ask VCAT or a court to ratify the agreement. This may prolong the dispute if parties do not abide by it.*

- ✓ *Conciliation conferences are less formal than hearings. There are no rules of evidence, and the procedure is not as intimidating for parties because the conciliator will lead the discussion, ask questions and give advice. However, one party may be better able to control proceedings and achieve a more favourable outcome, as lawyers are generally not used and the focus is on achieving agreement rather than having correct legal arguments.*

- ✓ *Conciliation has an improved chance of success and satisfaction, as parties contribute to the outcome by only making a decision they are happy with, and the outcome is more likely to be 'legally fair' as the conciliation will give their opinion on appropriate outcomes. However, conciliation is not compulsory to attend unless court- or VCAT-ordered. One party may refuse to attempt conciliation and, even if ordered to by court or VCAT, it is not compulsory to reach an agreement. The parties may choose not to follow the conciliator's advice.*

- ✓ *The award handed down by the arbitrator is automatically legally binding and enforceable. Parties therefore have closure and a more timely resolution. However, the arbitrator's decision and award cannot often be appealed if one party believes an error has been made. The only arbitration appeal available is on a point of law if the arbitration is conducted by VCAT, and there is no appeal from court arbitrations.*

- ✓ *During the arbitration parties are encouraged to resolve the dispute themselves. The arbitrator will allow them to discuss the issues, and will be guided by whatever they agree between themselves. However, arbitration is not suitable for complex legal disputes because the evidence is not scrutinised in detail and parties are not able to make detailed legal submissions.*

- ✓ *The third party will make a decision if the parties can't agree, which means a result is not reliant on compromise between two disputing parties. However, this efficiency of resolution may come at a cost. Many arbitration sessions are not open to the public and proceedings are not publicly recorded – so it cannot be used to set precedent, decisions do not have to follow precedent, and proceedings are not open to public scrutiny for fairness.*

- ✓ *Rules of evidence are quite flexible, and most evidence will be admissible. Rules of procedure are also fairly flexible, as the arbitrator runs proceedings and discussions: parties do not have to make submissions unassisted. However, evidence is relied upon, but because there is no formal cross-examination or rules of admissibility it might be misleading or unfairly prejudicial to one party.*

- ✓ *The decision handed down by the judicial officer is binding. Parties therefore receive closure and certainty, however this may be at the cost of their relationship. Judicial determination does not help to preserve the relationship between parties, as it is the most adversarial of the methods.*

- ✓ *Lawyers are frequently used (almost always in court and occasionally in VCAT), which means parties have a great deal of support and an experienced professional who can advise them as to the best decisions, make persuasive arguments and give them the best chance of success. However, once that binding order is made, parties may have limited options. Judicial determination through VCAT hearings gives a binding outcome, but it cannot be appealed on a question of fact: only on a question of law. If one party disagrees with the order made (for example, the compensation ordered) they cannot appeal. If appeals are possible, it is at the expense of many months and great cost.*

- ✓ *It is the only method that can be used for criminal matters, and disputes involving large amounts of money and complex law or evidence. It is also the only opportunity to have a trial by jury. However, judicial determination is more expensive than other resolution methods if used at court, as there are ongoing filing fees of hundreds of dollars on top of lawyer, expert witness and evidence costs. An average County Court dispute can easily cost $20,000 in pre-trial.*

- ✓ *Detailed reasons are given by a judicial professional – particularly when used through court – and courtroom judicial determination is the only method where the outcome is bound by precedent and can set precedent. However, judicial determination uses the strictest rules of evidence and procedure, particularly when used in a court hearing. This can be intimidating for the parties, and can mean some inadmissible evidence cannot be used.*

Question 10
The most recent proposal for changing the Constitution concerns including official recognition of local government in the wording of the act.

a. Outline the process that any proposal for constitutional change needs to go through according to s128, and advise the Prime Minister of two reasons why this might be a more desirable way of changing the division of legislative power than through High Court interpretation or the referral of powers. (7 marks)

Advice: the section number, s128, for the referendum process is one of the few listed in the Study Design that students must recognise and remember. In 2012 it was used as the basis of a question without any explanatory content that linked it to referenda.

1 mark A referendum bill must pass through both houses of federal parliament. Better students will note that if it passes through one house twice, and is rejected by the other house twice, it can be put to the people anyway.

1 mark It is voted on by all people enrolled to vote for the House of Representatives, and must receive a 'double majority': a majority of votes Australia-wide, plus a majority of votes in a majority of states (4/6). Better students will note that any state directly affected by the proposal must be one of the ones in favour.

1 mark After these two stages have been successfully passed, the Governor-General will give Royal Assent, and sign the bill for it to become law. The wording of the Constitution will be changed.

1 mark An outline of one benefit of referenda.

1 mark Further detail on this benefit, that shows how High Court interpretation and/or the referral of power do not have the same advantage.

2 marks Repeat for a second benefit.

Note: the phrase 'double majority' must be both used and explained.

Arguments may include:

- ✓ *A referendum is the main example of direct democracy in the country, because it gets most people involved and voting on how our legal system should be set up. The governance of the country is not simply left to elected representatives. The referral of powers uses our elected representatives, but the people do not get a direct say in the change themselves.*

- ✓ *A referendum forces people in the country to find out about certain fundamental legal issues, instead of simply letting parliament decide for us. This contributes to public education and hopefully encourages the community to care more about important legal issues, such as Aboriginal rights and the protection of political freedom such as communist beliefs. High Court interpretation involves almost no members of the public – even fewer than are involved in parliament. People do not lobby the Court, send in petitions or stand for the position of judge themselves.*

- ✓ *The double majority requirement means that the change must not only be acceptable to the majority of voters, but it must also not unfairly advantage larger states at the expense of smaller ones. High Court interpretation, on the other hand, very clearly ignores the policy implications of changes. Before they handed down their decision on the Tasmanian Dams Case, for example, the High Court reminded the parties that their role was to make a legal decision, regardless of the impact it had on state powers.*

- ✓ *Referenda are the only way in which the wording of the Constitution can be changed. This is the clearest way to change the division of power because the new power or restriction on power is physically and unambiguously written into the Constitution for anyone to read. High Court interpretation must work within the borders of the wording at all times, so there is limited scope for flexibility.*

b. A s128 proposal can also be used to alter the division of legislative powers in the Constitution, but it isn't the only way. Outline one instance of the High Court changing the balance of power through its interpretation of the Constitution, and describe the impact this case had on the powers of state and federal parliaments.
(3 marks)

Advice: in 2011, regarding a question on the impact of one method of changing the division of legislative power, the Chief Assessor noted that the discriminating factor in marks was the quality of this analysis. Students should keep this in mind in the event that a similar question appears on the 2013 exam.

1 mark The facts of the case.

1 mark The legal issue before the Court and the outcome of their interpretation.

1 mark The impact that this interpretation had on the division of power.

Material that could be used in answers includes:

- ✓ *The High Court can change the division of power by interpreting the scope and meaning of specific powers or restrictions when cases come before it. A narrow interpretation of specific powers leaves more power over for the states, while a broad interpretation gives more power to the Commonwealth. The scope given to the restriction will affect the division of power based on the parliament affected by the restriction.*

- ✓ *For example, in the Tasmanian Dams Case the High Court found that the federal "external affairs" power allowed the Commonwealth to legislate to implement the terms of any treaty, even if that treaty covered areas of residual power. The Commonwealth gained power at the expense of the states because any residual power could be used, as long as implementing a treaty was the basis of the legislation. This changed the division of power significantly from what was written in the Constitution at federation because the Commonwealth gained the ability to use virtually any residual power as long as it could be shown that the issue was one of 'international concern'.*

- ✓ *For example, in the Roads Case the High Court found that the Commonwealth tied grants power in s96 could be used to compel the states to legislate in residual areas by tying the legislation to grants of money as compulsory conditions. The Commonwealth gained power at the expense of the states because they could indirectly affect the way in which residual powers were used. This changed the division of power from what was originally written because it was not envisaged that the Commonwealth would tell the states how to legislate using their residual powers.*

- ✓ *In Brislan's Case the High Court held that the specific power of "telegraphic, telephonic and other like services" included the power to legislate regarding radios. The Commonwealth gained power at the expense of the states because new communications technologies not mentioned in the Constitution could be controlled by the Commonwealth as they were invented. This changed the division of power from what was originally written because the nature of residual powers should mean that new areas fall by default under state power.*

Question 11
'Parliament may be the supreme law-maker, but the courts still have an important role to play.'

Describe the relationship between the courts and parliament as law-makers, and indicate the extent to which you agree with the above statement. Give reasons for your answer. (10 marks)

Advice:

- When a question is introduced with a statement of opinion like this, the use of the task phrase 'the extent to which you agree' indicates that the question is a similar one to 'evaluate' or 'critically examine'. Students are being asked for their opinion on the relative strengths and weaknesses of something – in this case, the strengths/weaknesses (or benefits/costs) of the parliament as a law-maker when compared to the courts.

  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 6 marks from the seven allocated below.

- 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.

- The 2010 VCAA Assessor's Report reminded students that 'parliament' and 'precedent' are legal words that are often misspelled.

3 marks Features of the relationship between the courts and parliament as law-makers. Fewer than three features would be very thin for the 10-marker, however more than five would probably be unnecessary.

7 marks Strengths and weaknesses of the courts and parliament as law-makers. The exact balance in the answer can be determined by the student.

Note: this question should be marked 'globally': meaning, in an overall way where the number of arguments is balanced against the quality of arguments. It would be difficult to achieve full marks for the evaluation section without addressing approximately six or more different arguments, however.

Aspects of the relationship between courts and parliament may include:

- ✓ *Parliament can legislate to confirm the common law. For example, the precedent set in the Kevin and Jennifer Case regarding marriage being between one man and one woman was mostly incorporated into the Marriage Act the year after the judgment, in 2002.*

- ✓ *Parliament can legislate to abrogate the common law if they disagree with it. For example, the common law allowing rape within marriage was overridden by parliament ten days after the decision was handed down.*

- ✓ *The courts cannot change the wording of legislation, but they can have a significant impact on the way it applies to real life by using statutory interpretation to give it meaning.*

- ✓ *By giving the words in legislation a conservative interpretation the courts can drastically limit the scope of what is covered by parliament's law.*

- ✓ *By giving the words in legislation a creative and broad interpretation the courts can drastically increase the scope of what is covered by parliament's law – sometimes making it more comprehensive than parliament intended.*

- ✓ *Parliament passes acts to establish courts and give them jurisdiction. Without jurisdiction, the courts would not have the power to hear cases and make law in their own right.*

- ✓ *New common law rules, such as Native Title or negligence, that are created in areas where legislation does not exist can help keep the legal system up-to-date and can influence parliament to create their own law in the area.*

- ✓ *The High Court can declare any legislation invalid if it infringes rights contained in the Constitution, or if the parliament making it has acted outside its powers under the division of powers.*

Arguments that compare the strengths and weaknesses of courts with the strengths and weaknesses of parliament may include:

- ✓ *Parliament can legislate to confirm or abrogate the common law. For example, the precedent set in the Kevin and Jennifer Case was largely incorporated into the Marriage Act the year after, but the parliament did discuss overriding part of it. The courts can make precedent that best suits the circumstances of the case before them, but it is up to parliament whether that precedent will remain law.*

- ✓ *Courts can only set precedent when a case comes before them. This means that the law they make will always be relevant to real life situations. Parliament, on the other hand, makes law in future. It must therefore be broad and vague enough to hopefully cover a range of future circumstances, but have enough foresight not to leave too many gaps.*

- ✓ *Having to wait for an appropriate case to come before a court high enough to make or change precedent can take a long time, and the holes in the law may be exploited in the meantime. Parliament does not have to wait for a complaint to come before it, however; it can legislate to stop an emerging threat before it becomes a problem.*

- ✓ *The role of the judiciary is not to make law, so courts are often reluctant to make significant changes. This keeps the law consistent and predictable for the public. Parliament does not feel reluctant to change the law, however, which can mean great changes in legal expectations over a short period of time – especially when the party in power changes after an election.*

- ✓ *Parliament can be unwilling to make unpopular law, no matter how necessary it is. This is because the members of parliament want to keep the majority vote. Judges are not elected, however, so are free to displease the majority if it is for the greater or long term good of the people.*

- ✓ *Because members of parliament are elected, they are more likely to listen to what the people want, and can be held accountable at election-time for bad law. Judges have security of tenure, however, so cannot be held accountable as easily. They are also supposed to set precedent based solely on the case before them, and do not generally have recourse to things like opinion polls.*

- ✓ *Courts make law through hearing cases, so the law they make is specific to real-life situations. Parliament's on the other hand, can be vague and have gaps left in it.*

- ✓ *Courts can use their powers of statutory interpretation to make parliament's statutes more relevant and up-to-date: this creates a cooperative relationship between them, because courts stop legislation from needing constant amendment.*

- ✓ *Judges are unelected and hold security of their position, so they are not accountable for the law that they make. This means there is no way the people can make the courts respond to changes that are wanted by the majority. Parliament, on the other hand, is held accountable through regular elections.*

- ✓ *Courts can only make or change the law when a case comes before them; it must come before a superior court of record, or be an entirely novel case. This can take a long time. Parliament, meanwhile, can make law on any area within its jurisdiction whenever it feels that change is required.*