Solution Pathway

Question 1

a. *The bill is currently at the second reading stage.*

1 mark

b. *The first reason is that the Attorney General is presenting to the Parliament. The Attorney General is essentially the "Minister for Law". The second is that when a bill is presented to Parliament detailed reasons are provided to the parliament explaining its introduction. The reason provided in this speech is because criminal bikie organisations are being used for serious criminal activity.*

2 marks

c. *The next stage of the bill is the Consideration in Detail or Committee stage where members debate on and vote on each clause of the bill. This stage can be used for the Opposition to debate the clauses in detail and make amendments if necessary. The Consideration in Detail stage can be skipped if both sides of the house agree.*

2 marks

Question 2

Terms of reference is the formal process that the Attorney General follows to formally refer a matter to the VLRC. In the Terms of Reference there are specific instructions to the VLRC. These instructions make it clear that the VLRC needs to consider how the matter being referred interacts with other Acts of Parliament and whether those Acts require amendment as a result of the VLRC's recommendations. For example, with the VLRC enquiry into abortion, the terms of reference outlined a number of options for the VLRC to consider and then required it to make one of the options a recommendation to the Parliament. The terms of reference seek to provide direction to the commission and the VLRC cannot commence major enquiries without them. Also when reporting back to the Attorney General and the Parliament the response to the terms of reference provides specific answers to the questions that were asked. When the Attorney General receives the report they will table it in Parliament. A response back from the VLRC does not guarantee that the Parliament will change the law but provides advice on the best way to do it.

Teachers should consider the split of marks: 2 for the explanation and 3 marks for a solid discussion.

5 marks

Question 3

Petitions are lists of signatures collected to present to Parliament to convey sentiment about an action or inaction in the community. Petitions can cover a broad range of topics. Their effectiveness however is questionable. (Defining petitions and explaining their purpose – 1 mark)

Since petitions are lists of signatures there is no opportunity for discussion on the topic being raised. This means that a person's motive for signing the petition to determine if there is real support for the issue is difficult to gauge. People who sign petitions must live in Victoria and put their name and address on the petition. However, their true stance in relation to the issue can never be fully conveyed via a petition.

Discussion covering both sides of effectiveness – 2 marks.

Petitions with large numbers of signatures that are presented to Parliament can convey widespread public support for or against a particular issue. Parliamentarians may take notice of this. In this way petitions can assist to raise the profile of an issue and bring it to the attention of the broader community. In this sense petitions can be effective if they are supported by large numbers of people and this support is publicised through the media in some form. However, it is rare for the petition itself to be highly effective as this depends on the utilisation of other means to influence change.

Discussion covering both sides of effectiveness: 2 marks.

5 marks

Question 4

A referendum that changed the division of powers was the 1967 referendum question to determine if two sections of the Constitution that discriminated against Aboriginal people should be removed. These sections were s.51 (xxvi) and S.127. (1 mark for identifying the year of the referendum or providing a description of it also for the correct description of the referendum. (Section numbers are not necessary but do enhance the "look" of the response.)

When the Constitution was written the Commonwealth Parliament was not given any power to EITHER legislate in relation to them or to count them in the census. In effect matters pertaining to Aboriginals were considered residual powers. That meant that each state was responsible for the Aboriginal people. (1 mark for the reason this was an important referendum)

The referendum was passed and it recorded the highest ever vote for change with 90.77% of voters voting YES. It changed the balance of power. (1 mark for this part of the response).

The implications of passing this referendum, was that the Commonwealth could now make laws with respect to Aboriginal people. This meant that responsibility passed from the states to the Commonwealth who could now provide social security, housing and education for this section of the community. (2 marks for the implication, as this is the most important part of the question and the most difficult for students to articulate.)

5 marks

Question 5

A referendum is a vote to determine whether the wording of the Commonwealth Constitution should be changed. Essentially proposals are framed as a YES or NO proposal. Each proposal starts as a bill through Parliament and needs to pass both houses within 3 months or be passed by one house twice at least 3 months between votes. Once passed it is put to the people.

To pass the proposal the support of the overall majority of the electorate and at least 4 out of 6 states needs to be gained. (Note to marker some students state 4/6 state parliaments, this is incorrect). This process is called the Double Majority requirement.

Once the Double Majority is satisfied the bill gains Royal Assent and the wording of the Constitution is changed (wording is added, amended or some words are perhaps struck out).

3 marks

Question 6

Australia protects its citizens rights in three main ways. The first is via expressed rights. There are 5 of them in the Commonwealth Constitution and they deal with matters such as right to trial by jury. However each of these 5 rights are limited in some way. Some might also argue that they are somewhat outdated. For example, the Commonwealth being forbidden to discriminate against citizens according to their state of residence which may have been relevant when the Constitution was originally enacted but is much less relevant to contemporary Australian society. (1 mark)

The second way is through implied rights. In fact there is only one and it is the freedom of political communication. This was as a result of the Australian Capital Television v Commonwealth (1992*) (ACTTV case). Due to the fact that there is only one implied right this protection is obviously limited.* (1 mark)

The third way that Australians rights are protected is through structural protection. This is the most pragmatic type of Constitutional protection of rights. Structural protection allows for the establishment of the separation of powers, responsible and representative government, bicameral parliament and the High Court. These structures allow for laws to be made to represent the community with adequate provision for review of bills through the upper house, the review of law through cases via the high court and to avoid absolute control of any arm of government through the separation of powers. (2 marks as this is the most important feature of Australian Constitutional rights.)

In contrast, South Africa has a very different approach to rights.

For example South Africa has an express Bill of Rights. This contains 39 specific rights which cover a range of issues such as education, language, cultural, economic, democratic and human rights. It is a broad document which clearly articulates to all citizens their rights. In this respect it is a much clearer and accessible document to citizens than the Australian Constitution. (1 mark)

South Africa also has enforceable rights. This means that the spirit of the Bill of Rights must be reflected in the court system at all levels and any divergence from this means that compensation can be paid to the person who had their rights infringed.

However in the South African context rights can be limited. In Australia this is not the case.

In South Africa the infringement of rights means that remedies such as declaring a law invalid, highlighting the need for change or the provision of damages can be awarded. In Australia this is not the case. (1 mark)

Finally in South Africa rights can be changed via the National assembly passing a two thirds majority vote and on approval from 6 out of 9 provinces. In Australia the Double majority provision exists. (1 mark)

In conclusion, whilst structural protection does protect Australian rights to a large extent, the provision of a Bill of Rights in South Africa protects the citizens rights more comprehensively. (Students always need to link their responses back to the question for 1 mark)

8 marks

Question 7

Parliament and the Courts do have an inter-dependent relationship as neither institution could completely operate without the other.

Parliament's main role is to make law and it has access to significant range and scope of resources to be able to do this. An example of this is the Victorian Law Reform Commission. The Commission has a range of law reform experts to manage and direct law reform investigations as directed by the Attorney General in terms of reference. In contrast to this, the courts main role is to resolve disputes with a secondary role to make law. Some judges are reluctant to make law believing it to the exclusive role of Parliament. This was demonstrated in comments made during the judgment in the Trigwell case. (2 marks)

Through passing legislation Parliament creates the courts. As an example, the Victorian Parliament passed the Magistrates Court Act (1989) (Vic). Even though Parliament creates the Courts, the Courts are independent of Parliament. This is necessary to ensure the independence of decisions made by the courts. (2 marks)

Courts can make comments in judgments that may cause Parliament to change the law. Alternatively courts may make decisions in cases that cause such public outcry that Parliament steps in to change the law. Again an example of this is in the Trigwell Case (1979) where the judge stated that he disapproved of the precedent but applied it regardless. This caused the Parliament to pass a law, the Wrongs Act (Vic) (1984). (2 marks)

Parliament makes laws and courts interpret them to give them meaning. This means that after Parliament passes an Act that the court interprets that act when an appropriate case comes before it. Examples of this happening were in the "Studded Belt Case" when the word "weapon" was interpreted and in the "Kevin and Jennifer Case" where the term "man" was interpreted. The ongoing interpretation of the law over time means that the law will evolve. This means that after a long period of time that Parliament may need to codify the past decisions into legislation. This means to incorporate all of the court decisions over time into a statute. (2 marks)

Overall Parliament and Courts rely on each other to ensure the ongoing development of law.

(Although no marks are allocated for the conclusion this is a necessary part of the response to remind students to always link their response back to the question.)

8 marks

Question 8

It is possible that Kyle could resolve this dispute either through the courts or through VCAT. In either case it is likely that the use of ADR's would be the best form of dispute resolution for Kyle.

Whilst the Magistrates' Court could hear the dispute, this would not be the best option. Civil cases can take a significant time to be heard in the Magistrates' Court and the delay is unlikely to assist Kyle. In addition it is likely that Kyle may require legal representation in court and this can be an expensive cost. It is for these reasons that Kyle should avoid the court system for his present dispute. (2 marks for this discussion.)

A much better option would be for Kyle to attend VCAT and look for a resolution via mediation or conciliation. VCAT is specifically structured to resolve civil disputes and to take a significant load off the court system. Using VCAT reduces costs, as filing fees are low. It is more easily accessible because it sits in 43 locations throughout Victoria and resolves disputes in a timely fashion compared to courts. For example in the Residential Tenancies Tribunal it takes 2 weeks from the filing date to the hearing date. (2 marks for this discussion)

Mediation or conciliation would be best for Kyle. This is because his dispute is with a neighbour and because they are likely to keep living next door to each other it is in the interests of both parties to maintain a peaceful relationship. Although the results of mediation or conciliation are not legally binding often the parties come to an agreement about the action to take so parties are more likely to abide by the final agreement. (1 mark for the conclusion.)

For the reasons of reducing delays and cost, maintaining the relationship with his neighbour and increasing accessibility to have his case heard, Kyle should pursue his dispute at VCAT using mediation or conciliation. (Linking response back to the question)

5 marks

Question 9

Teachers are reminded that students should follow a strength, weakness, evaluation formula when writing this response. Students frequently find the evaluation part difficult to articulate because it cannot be rote learned and students must think about how they structure their argument to provide a balanced judgment on their response.

To write to this formula students need to follow the following structure.

State the advantage of the idea, then explain it using an example. Then counter this advantage with a disadvantage, stating this and explaining why it is a disadvantage. Finally this paragraph should contain a judgment about which is stronger and why. Depending on the quality of the writing this paragraph could be worth 2 or three marks.

A model response could be as follows:

Pre-trial procedures in the civil and criminal jurisdictions play a vital role in encouraging the parties to reveal the significant underlying issues that can only be resolved by courts in the case of civil pre-trial procedures. They also prevent flimsy cases arising that can cause unnecessary delays in criminal matters.

Firstly civil jurisdiction. Civil pre-trial procedures comprise three main parts: pleadings, discovery and directions hearings. Each part can take significant time but this is often offset by the distilling of key issues, meaning that there is less time spent at trial.

Pleadings is in the initial stage. This is where a matter is initiated. There are strict timelines to be observed in this stage with parties having to respond to each others claims. However there may be a benefit to this stage as the plaintiff may outline what is needed to rectify the claim. This gives the defendant the opportunity to settle the claim at the earliest opportunity thus averting the need for the matter to go to court. The parties should be given this opportunity early on in the case. As such it is important to have this stage to outline the matters but also to give an opportunity for resolution. On this basis it should not be abolished.

The Discovery process is where the parties conduct a search for evidence, testimony and documents that will support their case. Again if this cannot be located then the case should not proceed. This is the longest stage of pre-trial proceedings but it has a purpose. Potentially this stage can support an out of court settlement because matters have been investigated and documents exchanged to give each party a clear idea of the strength of the case. Discovery plays an important role in civil pre-trial and as such should not be abolished.

Criminal pre-trial procedures have different aims. Their objective is to disclose the case against the accused so that the accused can understand the case against them and decide whether to plead or to contest the case. Criminal pre-trial procedures include bail, remand and committal hearings.

Bail and remand are essentially two sides of the same coin. Bail is where the accused gives an undertaking to the court to appear on a certain date. Bail may be granted with or without conditions. Bail allows the accused to live in the community prior to their court date. Remand occurs when bail is refused. This will occur because the accused is considered too much of a threat to the community or is a flight risk. Remand locks up the accused until the trial date. It is important to have both bail and remand. The underlying philosophy of innocent until proven guilty is upheld by this process until it is decided that there is too much danger to the community.

Committal hearings occur in serious indictable matters to determine if there is enough evidence for a properly instructed jury to convict at trial. This does mean that the jury will convict, but only if there is sufficient evidence. Committal hearings ensure that "flimsy" cases do not go to trial and subsequently clog up the courts with cases that have an unrealistic chance at conviction. This is an important stage of filtering weak cases.

Directions hearings occur in both jurisdictions. They provide parties with the opportunity to inform the court about the likely length of the trial, the number of witnesses to be called and the need for any interpreters or other court appointed personnel and any other questions of law to be resolved. This helps the court direct the trial and reduces delays when it gets underway.

In both jurisdictions there are sound reasons that pre-trial procedures are not a waste of time. In fact they assist the parties to reduce delays and as such they should not be abolished.

NOTE: This is a long response for 8 marks. Students may not cover all points contained in this response but their evaluation should cover two civil pre-trial and two criminal pre-trial procedures as a minimum to satisfy the marks for this question.

8 marks

Question 10

There are a number of reforms that could be used in this response and teachers will have to consider the merits of the answers they receive.

Questions that use the command term "To what extent" are becoming more frequent in past VCAA exams. Students may find it a difficult command term to execute because it requires a response as to "how far" reforms would make the legal system far more effective. For full marks for this question it is suggested that the merits of three reforms are considered for 2 marks each and then a final considered and measured response to the question as a conclusion be worth 2 marks.

The following is an example of a model answer;

There are a number of reforms that have been recently introduced to make aspects of the civil and criminal jurisdictions more effective.

The introduction of Koori Courts at Magistrates' Court level in 2003 and the recent expansion to the County Court level in the Latrobe Valley in 2009, has contributed to a more effective legal system. Effectiveness revolves around three main elements, fair and unbiased hearing, timely resolution of disputes and access to mechanisms of dispute resolution. In the case of the Koori Court, defendants plead guilty and strive for mutual understanding and reconciliation with the community through the input and wisdom of their elders. It has had outstanding success in the Magistrates Court cutting re-offending rates by half. In the County Court so far only 1 out of 57 has re-offended. The Koori Court in both jurisdictions provides for a culturally fair and unbiased hearing, although this is tempered with the fact that defendants do have to plead guilty. It also contributes to timely resolution of disputes, because through pleading guilty defendants appear before the court more quickly than if the matter was contested. In my opinion, there is no doubt that this reform has made the legal system more effective for Koori Victorians.

Another reform is the Neighbourhood Justice Centre (NJC) located in Collingwood. Established in 2007 it provides a range of dispute resolution opportunities for those living in the City of Yarra or those with a strong affiliation with the area in the case of indigenous people. It sits as a criminal Magistrates Court, with the same Magistrate which provides continuity when hearing cases. It also allows the Magistrates to get to know the area and the offenders and victims within it. It also hears sessions of VCAT and VOCAT (Victims Of Crime Assistance Tribunal)as well as the Children's Court. The NJC has been evaluated and the pilot has been extended, indicating effectiveness. It also upholds the element of access to mechanisms of dispute resolution. Because it is located within the community it serves, because there is continuity of Magistrate, as well as sitting in a range of formats it allows the community to access dispute resolution much more easily than if the NJC did not exist.

The introduction of more judge led mediation in the Supreme Court and the Magistrates' Court has contributed to a more effective legal system. For example there are a number of Magistrates' Courts in Victoria, located at Broadmeadows, Werribee, Sunshine, Latrobe Valley and Ballarat. Commencing in 2007 and most recently extended in 2011 it aims at resolving civil cases to the value of $40000. In addition the Supreme Court in the Civil jurisdiction is increasingly using mediation to resolve disputes. This makes the legal system more effective because it encourages the parties to come to a suitable settlement of the matter themselves, whilst being overseen by the court. This enhances all three elements of the legal system, timely resolution of disputes, access to mechanisms of dispute resolution as well as fair and unbiased hearing. These developments are embracing the philosophy of party led dispute resolution rather than imposing a solution upon the parties where there is likely to be a clear winner and a clear loser.

As a result of reforms they have made the legal system is far more effective by emphasising that the parties themselves have the most to gain from enhancing mutually understanding and seeking to find a solution. Or in the case of the Koori Court being punished but reconciling with the community in the process. The reforms ultimately support matters being heard within a reasonable time therefore satisfying the element of timely resolution of disputes and hearing disputes locally. The continuity of a presiding magistrate or elders satisfies the element of access to mechanisms of dispute resolution by people who supervise the process in an impartial and unbiased manner. This aspect satisfies the element of fair and unbiased hearing. Therefore I agree that these reforms have made our legal system far more effective.

8 marks

Question 11

NOTE: There are 3 main parts to this question. It is suggested that the analysis be allocated approximately 5 marks, reform or alternative approximately 2 marks and the formalisation of the reform or alternative through Parliament approximately 3 marks.

The jury system provides the community the opportunity to participate in the legal system. It is not perfect however and as such there are alternatives which if implemented could strengthen the jury system. Of course this would mean that there would need to be changes to the Juries Act (Vic)(2000) which would need to go through Parliament.

The jury system is also representative of the community. In a typical year a jury questionnaire is sent to approximately 200,000 people randomly selected from the electoral roll. These people fill in the questionnaires and wait until their eligibility is determined. People who do not serve on a jury generally fall into one of three categories, disqualified, ineligible and excused for good reason. It could be argued that because these categories exist that the jury is not a broad cross section of the community, however in the past 10 years in Victoria the Jury Commissioner has been working hard to make jury service more flexible so that more people can serve at a more convenient time. This work has meant that the juries are now more representative.

The jury system allows members of the community to participate in the legal system by being the decision making body deciding the verdict. This forces the legal system, particularly legal representatives to present their cases to the court so that the jury can understand them. However there are circumstances when the facts of the case are so complex that it is very difficult for the average person to understand proceedings and the implications of certain actions.

An alternative to the current jury system would be to have a professional jury. This would be a group of people who as their occupation sit on juries and determine the verdict for a case. They would be employed by the government as public servants. They would develop their expertise as they decided more and more cases, and because of this they would be more likely to understand complex fraud cases that required extensive forensic accounting. There would not be any inconvenience to the public in having professional jurors as the current system of randomly selecting people from the electoral roll would no longer be used. However this would be a dramatic change to the jury system and it would be necessary for Parliament to change the Juries Act.

In order for this alternative to become law, Parliament would have to formalize it. Before it did so it would direct the VLRC to examine this proposal and advise the best way for the reform to be implemented and to note any other implications for any other Victorian Acts of Parliament.

Once this was complete the amendment of the Juries Act would have to be drafted by the parliamentary draftsperson in close consultation with the Attorney General, who is effectively the Minister for Law. Once ready it would be examined by cabinet and become an item on the governments legislative agenda.

It would most likely be introduced in the first reading, then adjourned. Once adjourned for approximately 2 weeks it would then go to the second reading stage where the Attorney General would introduce it formally to the House and explain the reasons for the changes. Debate would again be adjourned for at least 2 weeks and then the Consideration in Detail stage may be applied to the bill if any clauses required debate. It would then pass to the third reading and a vote. If successful it would undergo the same process in the other house of parliament.

Once successfully through the process the bill would be given royal assent and would be proclaimed to come into effect on a certain date or 28 days after proclamation.

This process would be time consuming, especially if it was referred to the VLRC for advice. However an Act that is thorough in its construction is less likely to have problems later on and so is worth the time and effort that initially goes into it.

This is how the alternative of professional juries could be enshrined in law in Victoria.

10 marks

