



## Legal Studies 2015 – Assessment Guide

### VCAA Key Knowledge

### Question

### Answer guide

*The structure of the Victorian Parliament and the Commonwealth Parliament and the roles played by the Crown and the houses of Parliament in law-making*

#### Question 1 (2 marks)

One of the main roles of both the House of Representative and the Senate is to make laws. Outline one other role of each house.

#### Answer:

- One role of the **House of Representatives** is to represent the will of the majority of people. Each seat in the House of Representatives represents an area of approximately equal population.

Other possible examples include:

- *Determining government.* The party, or parties in coalition with a majority of seats in the lower house form government.
- *Providing for responsible government.* Individuals should present the views of their electorate during question time.
- *Scrutinising government.*
- *Controlling government spending and taxation through legislation.*

- One role of the **Senate** is to represent the interest of each state or territory. Irrespective of the size or population of the state, each state has 12 representatives in the Senate (the territories have two each).

Other possible examples include:

- *Reviewing laws passed by the lower house.*
- *Providing for responsible government.* The Senate can be composed of a majority of members not in the governing party or coalition. This can force the government to be accountable for its actions through questioning and scrutiny of legislation.

#### Marking protocol:

One mark for outlining a role of the House of Representatives. One mark for outlining a role of the Senate.

*Principles of the Australian Parliamentary System: representative government, responsible government, and the separation of powers.*

**Question 2** (2 marks)

Explain the principle of responsible government.

**Answer:**

- *Responsible government means that the government is answerable to the Parliament, and therefore, the people for its actions.*
- *Government ministers are responsible for the actions of their departments, and must answer questions and clear up concerns of the Parliament and the people.*

**Marking protocol:**

One mark for each of the above points.

*The means by which individuals and groups influence legislative change, including petitions, demonstrations and use of the media.*

**Question 3** (2 marks)

Zina strongly believes the legal driving age in Victoria should be lowered to 17 to bring it in line with the rest of Australia. Explain one way she may influence the Victorian Parliament to change this law.

**Answer:**

- *Zina could start a petition, which is a document that includes the signatures of people who support her change in the law, and present it to her local Member of Parliament who will present it in Parliament.*

Other possible answers include:

- *Writing a letter to a specific politician to suggest the change in Parliament.*
- *Joining or starting a pressure group to lobby government for the change.*
- *Organise a demonstration to show public support for her proposed change.*
- *Engage the media to bring attention to her idea and gain traction for the change.*
- *Make a formal submission to a law reform body such as the Victorian Law Reform Commission who may look into the proposed change and make recommendations to Parliament.*

**Marking protocol:**

One mark for naming the method and one mark for outlining how it works.

*The reasons why laws might need to change.*

**Question 4** (4 marks)

It has been suggested that courts should leave the law-making and law-changing to Parliament. Explain one strength and one weakness of the Parliament as a law-making body.

**Answer:**

- **Strength:** *The Parliament is democratically elected, which means it is elected by the people it represents. This means that it is representative of the will of the people. If the people do not like a law, then they will not re-elect that government at the next election.*

Other possible strengths include:

- *Parliament can investigate the whole topic and make a comprehensive set of laws.*
- *Parliament has access to expert information and can keep up with changes to society.*
- *No need to wait for a case to arise, Parliament can change laws when the need presents itself.*
- *Parliament can involve the public in law-making through submissions to Parliament and discussion with local members.*
- *Parliament provides for debate.*
- *Parliament can delegate law making to expert bodies.*

- **Weakness:** *Depending on the make-up of Parliament, the Upper House can have the power to deliberately block legislation from passing. Alternatively, if the government has a majority in both houses, it can act as a 'rubber stamp' and pass all legislation that comes from the Lower House.*

Other possible weaknesses include:

- *Parliament is not always up to date with the need for change. One reason for this is that by focussing on the majority's interests, the needs of the minority, including vulnerable members of society may be ignored.*
- *Members are often required to vote along party lines which can prevent important changes from occurring if they are not on the political agenda.*
- *Implementing new laws can be time consuming so it does not always keep up with the needs of society.*
- *Delegated authorities are not democratically elected.*
- *Parliament is not always sitting, so changes can be delayed.*
- *Parliament has the power to make laws retrospectively, which can be unfair.*

**Marking protocol:**

One mark for naming each strength and weakness and one mark for explaining each.

*The reasons why laws might need to change.*

**Question 5** (2 marks)

Using an example to illustrate your answer, explain one reason why laws might need to change.

**Answer:**

- *One reason laws might need to change is that society's values can change over time. An example of this is the changing attitude towards same sex relationships. In 2008, the Same Sex Law Reforms were enacted to recognise the rights of same sex de facto couples.*

Other reasons could include:

- *Changes in technology: In 2010 privacy laws relating to surveillance cameras and GPS devices were referred to the Victorian Law Reform Commission.*
- *Political circumstance: Since 9/11, police powers to hold terrorism suspects for questioning were greatly expanded.*

**Marking protocol:**

One mark for naming and explaining the reason for change and one mark for providing an example.

*The division of law-making power between state and Commonwealth Parliaments under the Commonwealth Constitution, including specific (concurrent and exclusive) and residual powers, and the impact of Section 109*

**Question 6** (4 marks)

Distinguish between exclusive and concurrent powers. In your answer, provide an example of each.

**Answer:**

- *Exclusive powers are specific law making powers listed in the constitution that can only be exercised by the Commonwealth. This is because the constitution has either restricted states from exercising these powers or has dictated that only the Commonwealth Parliament can legislate in these areas.*
- *For example, the power to coin money is listed in s51(xii) and made exclusive by s115 (other possible examples include the power to raise an army listed and the power to impose customs tax).*
- *Conversely, concurrent powers are specific law making powers that are listed in the constitution that can be exercised by both the state Parliaments and the Commonwealth Parliament.*
- *An example would include the power to enact laws regarding marriage in s51(xxi) (other possible examples include taxation and the power to make laws in relation to trade).*

**Marking protocol:**

One mark for each of the above points. Note that there are many different examples that could be given in this response. Further, it is not necessary to include section numbers in examples.

*The process of change by referendum under Section 128 of the Commonwealth Constitution and factors affecting its likely success*

**Question 7** (1 mark)

In order for a referendum to be successful in Australia, there must be a double majority achieved. Explain what the term double majority means.

**Answer:**

- *A double majority is achieved if the majority of voters in the majority of states vote for the change. This is satisfied by a yes vote from over 50% of the votes in the whole country and a yes vote from four of the six states.*

**Marking protocol:**

One mark for the above point.

*The capacity of states to refer law-making power to the Commonwealth Parliament.*

**Question 8** (3 marks)

Explain referral of power and describe its impact on the division of law-making power.

**Answer:**

- *States can refer their residual law-making powers to the Commonwealth when they find there is an area of law-making the Commonwealth is better placed to legislate on.*
- *The Constitution gives the Commonwealth power over matters referred to it by the states, but it can only exercise that power in those states that have referred the power to the Commonwealth.*
- *State Parliaments pass Acts giving their law-making powers to the Commonwealth. Commonwealth Parliament then passes an Act accepting the law-making power from those states from whom the powers were referred.*

Possible examples include:

- *In 2003, all Australian states referred a limited power to allow the Commonwealth to pass the Criminal Code Amendment (Terrorism) Act 2003, which enables Commonwealth Parliament to make laws regarding terrorist acts in Australia. Acts of terrorism were previously regarded as criminal law, which is an area of residual power and under state jurisdiction.*
- *Ex-nuptial children. The Commonwealth had the power to deal with custody battles in the Family Court for married couples, but the States had the power when the children were born to unmarried couples. The states referred their power in this area to the Commonwealth as they felt the matters were better dealt with consistently in the Family Court.*

**Marking protocol:**

One mark for each of the first three above points. Please note: an example is not necessary to obtain full marks for this question.

*The relationship between the courts and Parliament in law making.*

**Question 9** (2 marks)

Explain one relationship between the courts and Parliament as law makers.

**Answer:**

There are numerous possible answers to this question. Possible relationships include:

- *Courts apply and interpret the law. When an Act of Parliament is questioned or the meaning of the words challenged, it is up to the courts to interpret them.*
- *Court decisions influence changes in the law by Parliament. Parliament can codify laws made by the courts. Parliament can pass legislation that incorporates common law principles (known as codifying), thereby strengthening the law.*
- *Courts can act on issues that Parliament won't. Courts often make law on areas where there are gaps or where Parliament is reluctant to make law on issues that are controversial or politically sensitive.*
- *Parliaments pass acts to establish courts. Courts are established through an Act of Parliament and can consequently have their jurisdiction changed or be abolished by an Act of Parliament.*
- *Parliament can change law made by courts. Legislation will override common law; therefore, if the Parliament disagrees with a common law decision, it may legislate to change the outcome.*
- *Judges are appointed by Parliament. However, a government cannot remove a judge from office because they do not like the decisions they are making. Judges are independent and removed from political interference.*

**Marking protocol:**

One mark for identifying the relationship and one mark for explaining it.

*The means by which the Commonwealth Constitution protects rights, including structural protection, express rights, and implied rights.*

**Question 10** (4 marks)

Using examples, distinguish between express and implied rights in the Commonwealth Constitution.

**Answer:**

- **Express rights** are rights that are written in the Constitution and can only be changed or removed through the process of a successful referendum.
- One example of an express right is the right to freedom of religion, which restricts the making of laws that impose any religious observance, or restrict the practice of religion.

Other possible express rights include:

- The Commonwealth can only acquire property on just terms.
  - The right to trial by jury, if changed with a Commonwealth indictable offence.
  - Freedom of trade and commerce, prohibiting the Commonwealth from restricting movements between states, or the imposition of customs duties or taxes to restrict state trade.
  - Freedom from discrimination because someone is a resident of a particular state.
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- An **implied right** is a right that isn't expressly written in the Constitution, but has been created through the High Court's interpretation of the wording of the Constitution.
  - An example of an implied right is the right to freedom of political communication, which is the right to express opinions on political or Parliamentary issues.

**Marking protocol:**

One mark for explaining express rights and a further mark for an appropriate example. One mark for explaining implied rights and a further mark for an appropriate example. Section numbers (e.g. s116) are not required in this question to receive full marks.

*The significance of one High Court case relating to the constitutional protection of rights in Australia.*

**Question 11** (4 marks)

Explain how one High Court Case has contributed to the constitutional protection of rights in Australia.

**Answer:**

- *One High Court Case that has contributed to the protection of Rights in Australia is the Roach Case.*
- *Vicky Roach was a Victorian woman who was serving a sentence in prison in Victoria. She contended that the 2006 amendments to the Electoral Act, which prohibited all prisoners from voting was unconstitutional. She argued it violated the constitutional protections of representative government, which are outlined in s7, and s24 of the Constitution and state that the government should be elected 'directly by the people'. The High Court agreed with this argument and deemed the amendments unconstitutional.*
- *This decision was significant in that it confirmed the structural protection of representative government. This is a restriction on the law-making powers of the Commonwealth as they are now unable to pass a law that unnecessarily restricts citizens from voting.*

The Lange case is another possible case example.

**Marking protocol:**

One mark each for the first (identifying the case) and third (explaining the significance of the case) dot points. Two marks for the second dot point (explaining the facts of the case).

*The ability of judges and courts to make law.*

*The operation of the doctrine of precedent.*

**Question 12** (4 marks)

Outline the two ways judges engage in law-making. In your answer, explain what binding and persuasive precedents are.

**Answer:**

- *Judges play two roles in law-making. One way they can make law is to interpret the meaning of ambiguous words, terms and phrases in Acts of Parliament and delegated legislation.*
- *They can also make new law, called Common Law, when a brand new issue arises on a case, where there is no legislation or common law, or the current law needs expanding.*
- *This new law is called a precedent. A precedent is binding on all inferior courts in the same hierarchy for cases of similar fact situations.*
- *A precedent is merely persuasive for courts at the same level or higher in that hierarchy, and for courts in different hierarchies.*

**Marking protocol:**

One mark for each of the above points.



Use the following information to answer Question 13.

Justin has been found guilty of breaking into a department store and stealing \$5,000 worth of electronic goods.

*The original and appellate jurisdictions of the Victorian Magistrates' Court, County Court, and Supreme Court.*

*The reasons for a court hierarchy.*

**Question 13a** (3 marks)

Justin thinks his case is very important and would like it heard in the High Court. Explain why a court hierarchy exists and which court would be likely to hear his case.

**Answer:**

- *Justin's case would likely be heard in the Magistrate's Court, which hears summary (minor) criminal offences such as small theft and shoplifting.*

Possible reasons for a court hierarchy include:

- *Administrative convenience. A hierarchical structure of courts permits each to develop its own special procedures that help streamline the hearings (quicker and more informal in lower courts and more formal in higher courts where the outcome is more serious).*
- *Specialisation. Courts can develop expertise in their particular jurisdiction. For example, the Family Court only hears cases to do with family law. This means the judges and court personnel are experts in these matters, and the court has developed procedures which makes resolving the cases more efficient than if there was only one court dealing with every matter.*
- *Appeals. If a party feels the outcome of their case was unfair, they can appeal to a higher court. This provides fairness and the opportunity for unjust decisions to be corrected. Without a court hierarchy, appeals would not be possible.*
- *Precedent. Without courts arranged in a hierarchy it would not be possible to have higher courts set binding precedent on lower courts, creating consistency, predictability and fairness.*

**Marking protocol:**

One mark for identifying and explaining the criminal jurisdiction of the Magistrate's court. Two marks for providing one reason in detail or two reasons briefly regarding why a court hierarchy exists.

*Reasons for interpretation of statutes by judges.*

**Question 13b** (3 marks)

Justin has just had his case heard at Court. He is unclear about why the judge interpreted a Victorian Act in her decision. Explain what is meant by statutory interpretation and outline two reasons why statutes might need interpreting by judges.

**Answer:**

- *When courts adjudicate cases, they must apply the relevant legislation to the facts before them. Sometimes courts need to interpret the purpose or meaning of a statute if it is ambiguous.*

Possible reasons why statutes might need interpreting by judges include:

- *That the wording of the statute or some words in the Act are unclear, too vague or too complicated.*
- *Words in a statute may have different meanings in different circumstances, contexts or simply multiple meanings and the courts need to decide which one best suits the purpose.*
- *The meanings of some words may change over a period of time.*
- *Lack of technical knowledge by the drafters of the law can lead to omissions and mistakes.*
- *The statute may be out-dated and inappropriate for the current legal dispute before the court.*

**Marking protocol:**

- One mark for explaining what statutory interpretation is and two marks for outlining two of the above reasons. Please note: 'outline' requires more than just a name, a brief explanation is also required.

*The original and appellate jurisdictions of the Victorian Magistrates' Court, County Court, and Supreme Court.*

**Question 13c** (1 mark)

Justin has decided to appeal his conviction. Which court would hear the appeal?

**Answer:**

- *Justin can appeal the decision to convict to the County Court.*

**Marking protocol:**

One mark for the above point.

Use the following information to answer Question 14.

Gina has been charged with murder and is pleading not guilty.

*Criminal pre-trial procedures and their purposes, including bail and remand and committal hearings.*

**Question 14a** (4 marks)

Explain the difference between remand and bail, and comment on which you think Gina is likely to receive and why.

**Answer:**

- *Remand is where a person charged with an offence is ordered to remain in custody until their trial is complete. This can be in a remand centre or prison. On the other hand, bail is where an accused is allowed to remain in society until their court appearance, on the proviso that they appear at their court date and do not reoffend in that time.*
- *It is likely Gina will be held in remand, as one reason to refuse bail is if a person is charged with murder. Other reasons to refuse bail are if the suspect is a danger to themselves or others or likely to commit other offences.*

**Marking protocol:**

Two marks for explaining the difference between bail and remand. One mark for suggesting Gina would be remanded, and a further mark for explaining why.

*The role of juries, and factors that influence their composition*

*Strengths and weaknesses of the jury system*

**Question 14b** (5 marks)

Gina is worried that a jury will be biased against her. Explain the jury's role in a criminal trial and explain three strengths of the jury system.

**Answer:**

Possible points to explain the jury's role:

- *In a criminal trial, the jury listens to the evidence and the directions from the judge about the relevant law/s and decides a verdict of guilty or not guilty.*
- *In a murder trial, the decision must be unanimous (12 out of 12 jurors must agree).*
- *The standard of proof is beyond reasonable doubt.*
- *The basis of the jury system is that every person has the right to be judged by his or her peers.*
- *The jury is expected to be unbiased and focussed during the proceedings to ensure a fair trial.*

Possible strengths of the jury system include:

- *Juries represent a cross-section of society as they are randomly selected. This allows the whole public to have input into the development of the law, which can increase confidence in the legal system.*
- *A unanimous verdict (for this case) is required so a decision is less likely to be biased, as all jurors have to agree.*
- *Juries protect against a misuse of judges' power by providing a necessary check on the power of judges to decide outcomes by themselves.*
- *Decisions are likely to reflect the views of the community as they deliberate from the perspective of an ordinary person, rather than a legal expert.*
- *Juries provide a trial that is free from political influence, as politicians do not appoint them.*

**Marking protocol:**

Two marks for explaining the purpose of the jury. One mark for each strength explained, up to a maximum of three marks.

*An overview of three types of sanctions and their specific purpose.*

**Question 14c** (2 marks)

If found guilty, explain the sanction Gina would be likely to receive, and the one purpose of that sanction.

**Answer:**

- *A sanction that Gina is likely to receive is imprisonment. Imprisonment is where the offender is removed from general society for a period of time. A key purpose for this is protection of society from the offender.*

Note, other possible reasons include, denunciation, rehabilitation, deterrence and punishment.

**Marking protocol:**

One mark for naming and explaining the sanction. One mark for naming and explaining the purpose.

*Major features of the adversary system of trial, including the role of the parties, the role for the judge, the need for the rules of evidence and procedure, standard and burden of proof and the need for legal representation.*

*Possible reforms to the adversary system of trial.*

**Question 15 (8 marks)**

A legal commentator stated, “While the inquisitorial system has some strengths, the adversarial system of trial is really the most appropriate for resolving legal disputes.” Critically evaluate the adversarial system of trial, and suggest one possible reform to the system.

**Answer:**

There are five key elements of the adversarial system of trial and each has both strengths and weaknesses.

Possible features to critically evaluate include:

- *A strength of the role of the parties is that individuals have complete control over their cases and therefore are responsible and accountable that all relevant facts are presented to support their own argument. This can also be a weakness because parties will only present evidence that supports their own argument, and can result in important evidence not being presented at all.*
- *A strength of the role of the judge is that the judge is impartial and will only interfere to uphold rules of evidence and procedure, or direct juries. This allows for an unbiased trial as personal prejudices will not interfere with the verdict. This can also be a weakness as the experience of the judge may not be fully utilised, especially when parties are not represented equally which can lead to an unfair trial.*
- *A strength of the role of legal representation is that each party has the right to seek legal representation, which means that those representing the parties understand the legal process and have expertise in the area of law. However, the high cost of obtaining legal representation can mean that parties go unrepresented, which puts them in an unfair situation.*
- *The standard of proof and burden of proof in the adversarial system acts to protect the defendant and their rights. The prosecution or plaintiff must prove that the defendant is in the wrong, either beyond reasonable doubt (criminal) or on the balance of probabilities (civil) which upholds the principle of innocent until proven guilty. This high standard of proof, especially in criminal cases, can sometimes be too high for a conviction.*
- *The strict rules of evidence and procedure help maintain consistency and ensure parties are on an equal footing. They can however, cause delays as oral evidence takes more time, which can increase expenses for the parties and clog the legal system.*

Possible reforms to the adversarial system include:

- *Greater investigative role for judges and magistrates may assist in fairness, particularly for unrepresented parties.*
- *Simplification of the rules of evidence and procedure, generally or with specific examples, or more use of written statements for evidence to increase efficiency and lower costs for parties.*
- *Encouragement of alternative methods of dispute resolution such as tribunals and mediation to allow for more flexibility with rules of evidence and procedure.*
- *Increased availability of legal aid to facilitate improved access to legal representation to improve fairness.*

**Marking protocol:**

Note that extended response questions are marked globally, so generally a clear break down of marks is not given. The following is an example of how marks could be allocated: six marks for critically evaluating the adversarial system (critically evaluating at least three features for full marks) and two marks for suggesting one possible reform to the system.

**Other points to note:**

While the scenario mentions the inquisitorial system, the question asks for a critical evaluation of the adversarial system, so students are not asked to compare the inquisitorial system directly. They can however, mention it when describing the strengths and weaknesses of the adversarial system.

*Dispute resolution methods used by courts and VCAT, including mediation, conciliation, arbitration and judicial determination. Strengths and weaknesses of dispute resolution methods used by courts and VCAT.*

*Strengths and weaknesses of the way courts and VCAT operate to resolve disputes.*

**Question 16 (10 marks)**

Samantha has a dispute with her landlord about her rental property that she would like resolved quickly and cheaply. Her lawyer has advised her to use mediation to resolve her dispute, but she is worried that the decision won't be binding and thinks she should take it to court.

Explain mediation and judicial determination and critically evaluate them as dispute resolution methods for Samantha's dispute. In your answer, suggest another appropriate dispute resolution method Samantha could try.

**Answer:**

- *Judicial determination refers to a dispute being resolved formally by a judicial officer who hears explanations, evidence and asks questions to both sides. The Judicial officer then makes a decision, which is binding on both parties. Usually this occurs in a Court, however, there are judicial officers at VCAT who exercise judicial determination also.*
- *Mediation is where an independent third party, the mediator, supports parties to share their point of view with each other and supports the parties to come to a decision themselves. The mediator does not make the decision, but is there to keep the parties solution-focussed.*

*Samantha has specifically said she would like to resolve her matter quickly, cheaply and in a way that is binding.*

- *Mediation is generally considered much more cost effective than going to court, as the expenses of court fees and acquiring legal representation are not involved. Further, it is also much more time efficient as the strict rules of evidence and procedure, selection of juries and time consuming pre-trial procedures are not required. This means parties can have matters resolved quickly and move on.*
- *As mediation is not binding however, disputes can still end up in court if the decision is not followed or the mediation process is unsuccessful in achieving an outcome both parties agree to. This can lead to the process costing more money and taking more time than it would have had mediation not been attempted.*
- *An alternative approach could be to take the matter to be heard through arbitration at the Victorian Civil and Administrative Tribunal (VCAT). VCAT is a much more cost effective option than going to court as only a small administrative fee applies, and lawyers are usually not required. Further, it resolves matters in a much more timely way than courts as there are not formal rules of evidence and procedure. If the matter is heard through arbitration at VCAT, it will be legally binding which means that the parties must follow the decision reached or there will be significant consequences.*

**Marking protocol:**

Note that extended response questions are marked globally, so generally a clear break down of marks is not given. The following is an example of how marks could be allocated: Two marks for explaining mediation and judicial determination. Five marks for critically evaluating mediation and judicial determination, mentioning the time, cost and enforceability of decisions. Three marks for correctly suggesting VCAT/arbitration as an option and explaining why (again using time, cost and enforceability of decisions).