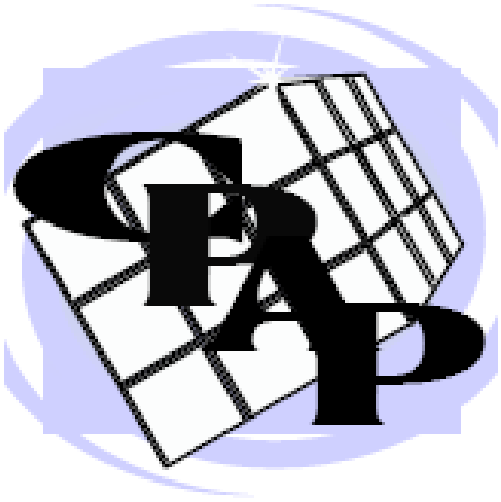

LEGAL STUDIES

2012

Practice examination

SUGGESTED RESPONSES / ADVICE

Question 1
Describe the second reading as one stage in the passage of a bill through parliament.

2 marks

Advice

- The passage of a bill through parliament has not been asked since 2009, so the overall pattern of questions for the past decade would suggest its appearance on the examination in the next year or two.
- Students must know all of the stages that a bill goes through in its passage to becoming an act in detail, as any of them can be specified in the question.
- Students frequently remember the names of the stages, however do not learn the purpose of the stage or precisely what occurs. For example, it is commonly said that the bill is amended during the second reading, even though this is incorrect. This was a common problem in 2009.

1 mark An outline of the second reading speech.
1 mark An outline of the second reading debate.

Sample answer:

- ✓ *The minister responsible for the bill will make a speech outlining its contents and purpose. This is to ensure all MPs are familiar with the proposal.*
- ✓ *Debate will generally be postponed, to allow MPs to consult with their electorates and parties, but when it resumes the shadow minister will begin by giving the main speech in reply. Opposition, Government and independents will then take it in turns to speak before a vote is held.*

Question 2
Outline one way in which courts can avoid following existing precedent when deciding on a case before them.

1 mark

Advice

- In recent years – specifically, every year from 2008-2011 – the methods of reversing, overruling, distinguishing and disapproving have been implied in questions regarding the ability of the courts to make or change the law. In addition to the definitions, it is therefore important that students are able to connect the methods to law-making by the courts.
- In 2011 the Chief Assessor again commented on the error of students explaining a concept by using the word of the concept itself. For example, explaining the term 'reversing' by saying that 'reversing is when a court reverses the precedent'. Synonyms must always be used instead.

1 mark An outline of reversing, overruling, distinguishing or disapproving (disapproving must be by a court at the same level in the hierarchy based on the wording of this question).

Sample answers:

- ✓ *Reversing occurs when the appeal court disagrees with the precedent set by a lower court and so reaches a different one, replacing the original precedent.*

- ✓ *Overruling occurs when a higher court disagrees with the precedent set by a previous case and so ignores it, creating a new precedent that replaces the original one.*

- ✓ *Distinguishing occurs when a court at any level finds that the material facts of their case are different from the precedent case; the precedent therefore becomes persuasive only, and the court is free to reach a different decision, setting precedent for a differing set of facts.*

- ✓ *Disapproving will only avoid following the original precedent if it is done by a court at the same level as the precedent. It occurs when the court disagrees with the ratio of the previous case and so reaches its own decision.*

Question 3
The Victorian Civil and Administrative Tribunal ('VCAT') was controversial, as it was seen to be taking away the power of the courts, however nowadays it is considered a vital addition to the system.

Explain the role played by VCAT in the Victorian legal system.

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.

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 points may include:

- ✓ *VCAT makes significant use of non-adversarial methods of dispute resolution, such as mediation and conciliation.*
- ✓ *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 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 can hear some reviews to its own decisions internally, however appeals generally go to the Supreme Court or Court of Appeal.*
- ✓ *VCAT usually does not provide extensive written reasons for its decisions, as this speeds up resolution.*

Question 4
Explain two ways in which the division of legislative power between the state and Commonwealth parliaments, as set out in the Constitution, can be changed.

4 marks

Advice

- In 2011 the question on changing the division of legislative power scored an average mark of 2.4 out of 5 marks. This was partly due to the different wording of the question from the one above (the 2011 question asked for an 'analysis' of the methods rather than an explanation), however a

relevant problem encountered by students was their inability to explain how the division of powers could be changed by the method. The impact of each method is vital in almost any question on this topic.

1 mark An outline of the first way, with the impact of the division of power clearly shown.
1 mark Further detail, an example, or a strength/weakness.
2 marks Repeat for the second way.

Sample answers:

- ✓ *The Commonwealth Parliament has the power, in s51 of the Constitution, to make laws on any residual matter referred (handed over) to them by the states, even though that power was not given to them in their specific powers – but their legislation will only apply to the state or states that referred the power.*
- ✓ *One example of referring power was the hand-over of terrorism powers in 2003. The states gave a text-based referral, in which they wrote the text of the act in the referral act – this meant the Commonwealth could only pass the act they prescribed, and could not do whatever they liked with the power.*

- ✓ *The High Court can change the division of power by interpreting the scope and meaning of specific powers 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.*
- ✓ *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.*

- ✓ *Referenda can change the division of power by giving the Commonwealth another specific power (either concurrently or exclusively), or by taking a specific power away so that it becomes residual and therefore only for the states. It does this by changing the wording of the Constitution.*
- ✓ *A constitutional amendment bill must be passed by Commonwealth Parliament, after which it is given to the people. If it receives a double majority (a majority Australia-wide plus a majority in a majority of states) it will be given Royal Assent and the wording will be changed.*

Question 5
Using an example to illustrate your answer, explain how statutory interpretation enables the courts to contribute to law-making.

3 marks

Advice

- In 2011 many student confused the effects of statutory interpretation with the reasons for statutory interpretation. The focus of this question is on the effects of statutory interpretation: specifically, its effects on precedent.

1 mark Describing how precedent – and thus law – is set on the meaning of the word or phrase in legislation.
1 mark Using an example that is linked with the answer.
1 mark Further detail on the answer.

Sample answer:

- ✓ *Courts make law through publishing their judgments on cases, and the ratio decidendi of those judgments being followed by judges in future cases. This is the system of precedent, and precedent is judge-made law because it will be binding on society and on future courts (if they are lower in the hierarchy etc).*
- ✓ *Statutory interpretation is when judges give more specific meaning to words or phrases in legislation, and this contributes to law-making because the definition given by the courts forms precedent and thus law.*
- ✓ *An example of statutory interpretation contributing to law-making was in the Kevin and Jennifer case. The Full Court of the Family Court defined 'marriage' as the union of one man and one woman, as it was not defined in the Marriage Act. This interpretation set precedent, and thus became part of judge-made law.*

Question 6
The Magistrate's Court may be the lowest and least powerful court in Victoria, but it still has a vital role to play.

Explain one reason for the existence of a court hierarchy, and describe the original jurisdiction of the Magistrate's Court.

4 marks

Advice

- In 2011 the question on reasons for a court hierarchy was answered well, however court jurisdiction is frequently handled poorly as it requires a strong memory and a degree of rote learning; unfortunately, many students do not focus on memorisation at all, even though this is required in addition to the underlying understanding.
- In 2011 the Chief Assessor reminded students that original jurisdiction includes both criminal original jurisdiction and civil original – just like 'criminal jurisdiction' would include both original and appellate.
- The Chief Assessor also noted that students frequently give too little explanation in description or evaluation questions (where it is required), however give unnecessary detail in short content questions like those on jurisdiction (where it is not). If the question merely asks for the jurisdiction of a court, students should not waste time on information concerning the court's structure or function.

1 mark	An outline of one reason.
1 mark	Further detail on that reason, or an example of its operation.
1 mark	The original civil jurisdiction of the Magistrate's Court: that it hears disputes where the amount claimed is less than $100,000 (better answers will note that claims under $10,000 will be settled by arbitration, but this is not necessary for 1 mark).
1 mark	The original criminal jurisdiction of the Magistrate's Court. The entire criminal jurisdiction does not need to be covered: for 1 mark it is only necessary to include summary offences, committal hearings and indictable offences heard summarily.

Sample answers:

- ✓ *A hierarchy allows courts to specialise and develop expertise according to the types of disputes they hear most frequently.*
- ✓ *Higher courts like the Supreme Court can specialise in serious matters such as murders, giving them the time for cross-examination and legal argument that they require. The Magistrate's Court can develop expertise in smaller, faster matters.*

- ✓ *A hierarchy allows precedent to operate, as precedent will only be binding on lower courts.*
- ✓ *Precedent set by courts higher in the hierarchy is binding on courts lower in the same hierarchy, so if there was no hierarchy all precedent would be persuasive only. Without a hierarchy, courts would not be bound to follow existing principles, and this would be inefficient and inconsistent between cases.*

- ✓ *A hierarchy allows the system of appeals to operate, as appeals are always made to a higher court.*
- ✓ *Errors made in the conduct of court proceedings can be appealed on questions/points of fact or law up to a higher court, where a judge with more experience can review it and correct any errors. This scrutiny by higher courts is to ensure that justice has been done.*

Question 7
Outline one sanction that could be given by the judge at the conclusion of a criminal case, and explain how it can be seen to achieve one aim of criminal sanctions but perhaps not achieve one other aim.

3 marks

Advice

- In 2011 the Chief Assessor again commented on the error of students explaining a concept by simply using the word of the concept itself. For example, explaining the aim of 'punishment' by saying that 'punishment is when the court aims to punish the offender'. Synonyms must always be used instead.
- In 2010 the Chief Assessor reminded students that full definitions need to be given for sanctions even if the student believes they are self-evident. For example, many students defined imprisonment as 'going to prison', which did not receive full marks.

Note: Students should be aware that, in January 2012 a range of sanctions such as home detention, intensive correction orders, community-based orders and combined custody and treatment orders were removed from Victorian law and replaces with a new sanction called a 'community correction order'. Students are advised to steer away from the outdated sanctions.

1 mark	An outline of one sanction.
1 mark	An explanation of how it achieves one of the aims of criminal sanctions. Merely defining the aim will not be sufficient: students must give a reason why it is achieved.
1 mark	An explanation of how it fails to achieve one other aim of criminal sanctions. Merely defining the aim will not be sufficient: students must give a reason why it is not achieved.

Note: The aims of criminal sanctions, as listed in the *Sentencing Act 1991* (Vic), are rehabilitation, deterrence, denunciation, protection and punishment.

Sample answers:

- ✓ *A community correction order is a sentence that is served in the community, but which may also include up to 3 months imprisonment. Conditions include orders such as unpaid community work or restricted movement.*
- ✓ *Rehabilitation is achieved, as the judge is able to select conditions that are most appropriate to the offender's circumstances and crime, with the aim of integrating them back into society successfully.*
- ✓ *Protection of society is not achieved, as the restrictions on personal movement are much more flexible than imprisonment, and still allow the offender to live in society.*

- ✓ *Imprisonment is where an offender is detained in jail for a period of time, called a 'sentence'. They lose their liberty and other freedoms. This is considered the most serious sanction and is called the 'sanction of last resort'.*
- ✓ *Punishment is achieved, as the offender suffers the hardship of being separated from friends and family and losing their liberty.*
- ✓ *Specific deterrence is not achieved, because as of 30 June 2010, over half the prison population in Australia had been in prison before. This suggests that imprisonment does not achieve specific deterrence because people are willing to risk returning.*

- ✓ *A drug treatment order is a sentence of up to two years in prison, but it is suspended while the offender undergoes treatment and supervision. Offenders have conditions attached to their Order, such as having urine tests, counseling sessions and restricted movement.*
- ✓ *The orders achieve rehabilitation, because they are given to offenders who committed crime because of a substance abuse problem, so they have counseling and treatment as a compulsory component of the sanction.*
- ✓ *Punishment is not achieved, because the aim of the Order is not to make the offender suffer hardship – it is to help them improve their lives. We want the offender to enter a happier and healthier place.*

Question 8

Describe pleadings as one stage in the preparation of a civil case for trial, and explain one recent <u>or</u> recommended reform that overcame – or would overcome – a problem associated with civil pre-trial procedures.

4 marks

Advice

- In 2011 almost 50% of the students across the state received zero for the question on a recent reform. This indicates that reforms need significant attention in preparation for the examination.
- In addition to leaving the question blank, the following errors were made: using a reform that was too old; using a reform to one individual law rather than to the legal system as a whole; failing to show how the reform was able to improve the legal system; and knowing the name of the reform, but not understanding the detail involved.
- In 2011 the question on civil pre-trial procedures received an average of 2.5 marks out of a possible 6 marks. Civil procedures are a recurrent problem for students, and are frequently confused with criminal procedures.

Note: The word 'recent' in terms of reforms means within the last 5 years. Students should exercise extreme caution going outside this timeframe; it is highly recommended they do not.

1 mark	Providing a definition of pleadings.
1 mark	Providing further detail on some of the steps that occur during pleadings. All of the steps do not need to be covered, however.
1 mark	An outline of the reform.
1 mark	An explanation of how this reform would, or did, overcome a civil pre-trial problem. The problem does not need to be fully proved and explained, but it must be referenced.

Sample answer for pleadings:

- ✓ *Pleadings are where legal documents are filed with the court and exchanged between parties, containing details of the claims made by the plaintiff, what the defendant will be relying on in their defence and each party's response to issues raised by the other side.*

- ✓ *Pleadings commence with the plaintiff filing the writ and statement of claim, letting the defendant know what they are being sued for; the defendant then informs the plaintiff they will fight the lawsuit by filing a notice of appearance and statement of defence. Either party may request further and better particulars from the other regarding their claims.*

Sample answers for recent reforms:

- ✓ *The Supreme Court established a mediation program in 2009, meaning that parties to civil disputes can be referred to compulsory mediation with a judicial officer – any agreement they make can be ratified by the court and therefore made binding.*
- ✓ *This uses pre-trial time effectively to encourage settlement, which is not always done by lawyers; parties are not being aware of, or encouraged to use, more cooperative, informal and less expensive methods of achieving justice.*

- ✓ *Delays caused by parties failing to make honest efforts to settle during pre-trial procedures has been addressed by the* Civil Procedure Act 2010 *(Vic).*
- ✓ *It makes attempts at pre-trial resolution (such as using non-judicial methods like mediation and exchanging correspondence such as letters of demand) compulsory for all litigants on a case-by-case basis according to what is appropriate, and allows the courts to impose financial penalties on those parties that do not comply.*

Sample answers for recommended reforms:

- ✓ *The 2008 VLRC Civil Justice Review: Report recommended that judges be able to proactively manage disputes by allowing them to order directions hearings by telephone or using other technology, and to call independent witnesses and order experts to try to reach agreement on one joint report for the court listing all the matters they agree upon and the reasons for any disagreements.*
- ✓ *This would try to overcome delays in resolution caused by parties taking an adversarial approach to pre-trial such as discovery, rather than using pre-trial to reach agreement quickly.*

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

- ✓ *The 2008 VLRC Civil Justice Review: Report recommended that interpreter funding be provided for civil disputes. Free interpreters are not present in the County or Supreme Courts, which is where pre-trial procedures such as directions hearings take place.*
- ✓ *This would try to overcome the problem of limited understanding faced by parties with limited English and limited financial resources, as not understanding mediation or directions hearings would slow cooperative resolution and prejudice them in trial preparation.*

Question 9
Australia has a strong democratic system in which the Australian people are represented by a powerful and accountable parliament.

a. Describe one reason why laws may need to be changed by parliament, and provide an example of when this occurred.

2 marks

Advice

- Reasons why laws may need to change are usually done well by students; when it was last asked in 2009, many answers were strong. Students should therefore ensure they have excellent answers prepared on this topic.

1 mark An outline of one reason. Merely naming it will not be sufficient.
1 mark An outline of one example, clearly linked to the reason given. Merely naming the example will not be sufficient.

Sample answers:

- ✓ *Changes in values can prompt law reform. Laws must match community values – otherwise they won't be accepted and followed. So as society's values and beliefs about what behaviour is right and wrong change, laws must also change.*
- ✓ *Values about abortion have changed dramatically over time. When the Crimes Act 1958 was passed many people thought abortion was morally wrong, however over time it has become increasingly accepted and thousands of woman were receiving abortions every year – so in 2008 the Victorian Parliament decriminalised abortion.*

- ✓ *New threats emerging will require laws to be changed and updated. Parliaments cannot always foresee what will pose a threat to the safety of the people in the future, so as new threats, risks or dangerous behaviours emerge, the laws will need to change to protect the public.*
- ✓ *For example, the rising threat of terrorism to Australians has resulted in new laws such as the Anti-Terrorism Act (No. 2) 2005 (Commonwealth) being passed, increasing police powers to investigate and prevent terrorist activities.*

- ✓ *Changes to technology such as the growth of the Internet and social networking leads to new issues and problems in society and increased risk of harm being caused to some individuals; law-makers must deal with these new problems to stop people using technology to find new ways to harm or infringe rights.*
- ✓ *The Summary Offences Amendment (Upskirting) Act 2007 (Victoria) made it illegal to take unauthorised intimate photographs and distribute such images by email or SMS. This legislation addressed a new threat posed by the evolution of mobile phone technology and portable cameras.*

b. Compare the role played by the lower house in the federal parliamentary system with the role played by the upper house.

3 marks

Advice

- The task word 'compare' means examining both similarities and differences; at least one of each must therefore be included. In 2011 a number of questions required comparisons, and students therefore lost marks if they did not make the similarities and differences clear. The Chief Assessor has made it clear that marks will not be awarded for definitions or descriptions that are not connected, but where the examiners have to work out the similarities and differences themselves.
- The role of the upper house has not been asked since 2005, while the role of the lower house was asked in 2007 and 2009. In 2005 the average mark was 1.6 out of a possible 3 marks, and the Chief Assessor commented that students needed to give stronger explanations of what was meant by the Senate being a house of review and a states' house.

1 mark An outline of one similarity between the roles of the houses of parliament.
1 mark An outline of one difference between the roles of the houses of parliament.
1 mark One further similarity and/or one further difference.

Sample similarities include:

- ✓ *Both houses are democratically elected by the people. They demonstrate our system of representative government.*
- ✓ *Both houses have the ability to initiate new laws. They can each introduce and vote on bills to change the law in the country.*
- ✓ *Both houses debate issues of public importance. They have second reading debates with each bill, and allocate other time to general debate.*
- ✓ *Both houses hold the executive government accountable. They conduct Question Time, to quiz ministers about the running of their departments, and debate government bills.*

Sample differences include:

- ✓ *The lower house is the People's House and the truly democratic one, as each electorate is of roughly the same size. The Senate is the States' House rather than the People's House, and does not have one vote one value.*
- ✓ *The lower house is the seat of government, because the party with the majority of seats in the lower house forms government. The Senate has virtually no say in which party holds government; the Opposition could have an upper house majority, but the government party would stay the same.*
- ✓ *The lower house initiates the majority of new legislation, while the upper house mainly just reviews bills second.*
- ✓ *The upper house has a powerful committee system, and is highly effective at scrutinising and amending bills; the lower house, on the other hand, usually just passes bills as the government has a majority.*
- ✓ *The lower house is more effective at scrutinising Government action because most ministers and shadow ministers sit in the House of Representatives and Question Time is therefore more robust; the Senate's Question Time is not as effective.*
- ✓ *The lower house has the role of initiating and amending the budget; the upper house cannot do either of those two things. They can only block or pass the budget.*

c. Critically evaluate the extent to which parliament is able to keep up with the changing needs of society.

5 marks

Advice

- The task words 'critically examine', 'evaluate' and 'analyse' require an assessment of both strengths and weaknesses; no matter how strong the discussion is, full marks cannot be awarded without both of these being present. The Chief Assessor reminded students of this again in 2011.
- In 2011 students scored an average of 50% on the question on the strengths and weaknesses of parliament. There were a number of reasons for this, however two important issue were failing to include both strengths and weaknesses, and failing to discuss points in sufficient detail or give some evidence for them.
- A similar question was asked in 2009, when students were asked to assess whether parliament is always able to respond adequately to the need for change in the law. Some excellent answers integrated elements of the Victorian Law Reform Commission and informal pressures such as petitions and protests into their evaluation.

Note: An opinion on parliament must be given in response to the question, but marks are allocated for the reasons supporting that opinion rather than the statement of opinion itself.

1 mark	One argument in favour of the statement.
1 mark	One argument against the statement.
3 marks	One mark for each of a minimum of three further arguments, either in favour, against, or both.

Note: The task word 'critically evaluate' means that both sides of the argument must be examined. They do not, however, need to be weighted equally.

Sample arguments in favour include:

- ✓ *Parliament's primary role is to make laws and it has therefore developed a special process to consider and create new laws, including three readings, the consideration-in-detail or committee stage, and debate (which allows for differing views to be considered). This will ensure that changes to the law are just and appropriate to society's needs.*
- ✓ *Parliament is representative of the people: it is democratically elected and therefore answerable to the public. Members of parliament passing laws that society finds unacceptable are likely to be voted out of office. This representative nature of parliament is a strength because it should ensure laws match the values of the majority of society.*
- ✓ *Parliament has access to resources it can use to research the need for reform, and that will recommend changes to the law. Bodies such as the VLRC, government departments and parliamentary committees provide access to expert knowledge to inform how the law should change.*
- ✓ *Parliament is the supreme law-making body. Parliaments can change the law as soon as the need arises and can alter any act made by the parliament in the past. This is a strength as it means the law can alter as soon as new problems arise.*

Sample arguments against include:

- ✓ *The fact that members of parliament will often try to please the majority view in order to gain votes can lead to a 'tyranny of the majority' in which the loudest voices are the only ones listened to, and can mean that laws pander to majority interests rather than protecting minority interests, children, the future or the environment.*
- ✓ *Parliament being a representative body that is constantly pressured by lobby groups and the media means that it has little independence, and can often bow to making law to please the*

interest groups that gave the party in power the most money. This may not always be in the best interests of the community.

- ✓ *The supremacy of the Victorian and Commonwealth parliaments is restricted by the Australian Constitution. Each parliament can only pass laws on matters within its jurisdiction. For example, the Commonwealth Parliament may feel that education law reform is required, however their ability to respond will be limited as education is a residual power.*
- ✓ *Investigations into the need for law reform by bodies such as the VLRC can be very time-consuming and expensive. This means law-reform can be slow, despite society changing quickly, and parliament may be forever trying to 'catch up' and react to changes in society. For example, the VLRC's review of IVF and adoption laws in Victoria took over four years to complete.*
- ✓ *The fear of voter backlash from vocal minorities or selfish and short-sighted majorities can prevent necessary law-reform on controversial matters. Law-making around issues such as abortion, euthanasia, gun control, environmental protection and gay rights is often controversial, and politicians' fear of outcry from those opposed to changes in the law – even if they represent a very small proportion of society – may prevent change in the law on such matters.*
- ✓ *Most members of parliament are required to vote for/against legislation according to the instructions of their political party's leader. This limits their capacity to accurately represent the wishes and beliefs of the voters in their electorate when voting on proposed laws.*
- ✓ *The process of passing legislation can be very time-consuming, meaning law-reform can be slow, even if society's needs are changing. This is especially so if there is a hostile upper house, controlled by the opposition and blocking bills introduced by the Government – if this is the case, parliament will be slow (or even unable) to react to new problems in society.*
- ✓ *Parliament may not respond effectively to the need for new laws, because it fails to achieve sufficient review and debate of bills – particularly if the upper house is controlled by the Government. This creates a risk of new laws being rushed through parliament that are unjust and inappropriate.*

Question 10

Because the courts are not the supreme law-makers, people in society often argue that they ought not to make any law because they will not be as good at it as parliament. Evaluate two strengths of the courts as law-makers to consider the extent to which this is true.

6 marks

Advice

- In 2011 the Chief Assessor commented that students are still making the mistake of discussing sanctions in relation to precedent. Sanctions and sentences do not form precedent, and thus are not part of the law-making function of the courts.
- The task words 'critically examine', 'evaluate' and 'analyse' require an assessment of both strengths and weaknesses; no matter how strong the discussion is, full marks cannot be awarded without both of these being present. The Chief Assessor reminded students of this again in 2011.
- In 2011 a question asking students to evaluate two weaknesses of parliament resulted in 50% of students receiving half marks or less. Students lost marks for: failing to look at both strengths and weaknesses; beginning with their strengths even though the question clearly directed them to evaluate weaknesses (the opposite, therefore, to this question); and failing to show how the weakness related to, or balanced out, the strength.

1 mark	An explanation of one strength of courts. The strength must come first.
1 mark	An explanation of a weakness that corresponds to that strength: the flip-side.
1 mark	Further detail and discussion, or a second corresponding weakness.
3 marks	Repeat for the second strength.

Note: Answers that begin with the weaknesses are capped at half-marks, even if they then go on to examine the strengths.

Sample answers:

- ✓ *Courts make law through their decisions on cases, therefore the common law will always be needed in society and relevant to something that actually happened.*
- ✓ *This means, however, that they must wait for an appropriate case to come before them before they can change the law, which may take years.*

- ✓ *Judges usually recognise that it is not their role under the separation of powers to make law, and so prefer to leave large changes in the law to parliament.*
- ✓ *This means that they respect the separation of powers, but it also means they are reluctant law-makers and do not usually take an active role.*

- ✓ *The doctrine of precedent ensures that the common law remains consistent, fair and predictable.*
- ✓ *Judges in courts lower than the High Court may, however, frequently be bound by precedent, and so cannot make changes to legal principle even if the principle is outdated.*

- ✓ *Common law can be flexible: laws made by courts can change as society changes, as judges can change law by distinguishing, reversing, overruling and disapproving. For example, if a judge finds that the material facts of the case before them are significantly different from the precedent case they may develop a new principle of law to cover the different facts.*
- ✓ *But, courts cannot actively seek to reform the law or initiate change in law, as they can only respond to the cases that come to court. Courts can only take the limited, narrow opportunities that are brought to them.*

- ✓ *The common law can also be flexible as a result of judicial activism – particularly in the High Court, as it is not bound by its previous decisions. For example, when it created native title in Mabo.*
- ✓ *However, courts can only make laws ex post facto – they make laws in reaction to events, rather than planning for the future needs of society. This means they cannot prevent issues from arising in society, or try to prevent harm before it has happened.*

- ✓ *Courts can 'fill the gaps' in the law to remedy oversights or omissions by parliament when they created the law.*
- ✓ *However, courts cannot reform a whole area of law. They can only change or make the law in small, narrow areas – only on the issues raised by the case.*

- ✓ *Courts can make law free from any political pressures as they are appointed and therefore independent. They are not influenced by pressure groups (unlike parliaments), they don't fear voter backlash, and therefore they can change the law on controversial issues objectively.*
- ✓ *Since courts are not elected bodies, however, the public is not involved in their law-making; parliament is elected to make laws on behalf of the people, whereas courts are not. This may result in laws that are not consistent with society's values, or not accepted or followed by the community. For example, the old 'rape in marriage' law had to be abrogated by parliament.*
- ✓ *Also, as a representative body, parliament is in a much better position to understand changes in community expectations. Consider the reasons of Justice Dawson in Mabo, when he explained that changing laws to match society's values should be left to parliament and not performed by courts.*

- ✓ *Courts can respond to the need to change the law reasonably quickly when a dispute is brought to them. For example, it took the High Court five days to hear the 2009 challenge to the stimulus package and decide that the law came within the meaning of the Commonwealth's specific powers.*
- ✓ *Courts can suffer extensive delays, however, if the facts or evidence of cases are complex. It also takes time to appeal to higher courts that have the power to make or alter precedents. For*

example, Mabo's case began in Queensland courts in 1982, and was finally resolved by the High Court – making new law – in 1992.

- ✓ *The High Court will also frequently publish their ratio decidendi months after the decision was handed down.*

Question 11
Criminal and civil disputes can be resolved in a range of ways in Victoria.

a. Outline mediation and judicial determination as two methods for dispute resolution in Australia, and analyse their relative effectiveness as options available to litigants.

6 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. Mediation and judicial determination should be treated as methods that can be used in either venue by parties.
- Discussions of court and VCAT are therefore not relevant to this question. They should be mentioned only insofar as they relate to a point about mediation or judicial determination.

1 mark	An outline of mediation, which must include the fact that the parties reach agreement between themselves.
1 mark	An outline of judicial determination, which must include the fact that the judicial officer imposes a binding decision on the parties.
4 marks	One mark for each of four arguments relating to the strengths and weaknesses of mediation versus judicial determination.

Note: Both strengths and weaknesses must be covered, but they do not need to be weighted equally. Mediation and judicial determination must also be compared to some extent: answers that analyse them separately should be capped at 2 out of 4 marks.

Sample answers for descriptions of methods:

- ✓ *Mediation is where a trained mediator supports parties, ensuring that each gets a chance to explain their point of view and keeps focused on solutions. Parties are encouraged to come to an agreement that can be ratified and made binding.*
- ✓ *Judicial determination is a process in which parties explain their sides of the dispute to a third party, who asks questions or looks at evidence. The third party then makes a binding decision for them.*

Sample evaluations:

- ✓ *Mediation is not an adversarial process, so it is more likely to keep the relationship between the parties intact. Parties are problem-solving together rather than fighting to win. Judicial determination, on the other hand, is adversarial and each party fights to win. It is difficult to preserve the relationship in this environment.*
- ✓ *Mediation does not generally result in binding outcomes. The agreement can be ratified by a court, but it does not have to be and the parties do not have to reach an agreement in the first place if they do not want to. This can be less efficient than judicial determination – which will always result in a binding outcome – as one party not complying with the decision can push the matter to VCAT or court anyway.*

- ✓ *The decisions made in mediation cannot be appealed. This can be more efficient, as appeals drag out the process; however, appealing decisions made in judicial determination means that mistakes can be corrected and parties can be confident that justice was achieved.*
- ✓ *Since the decision must be made by the parties in mediation, they must work together and compromise in order to resolve the dispute. This means that the outcome is more likely to be win/win than in judicial determination, where generally one party must win and the other must lose.*
- ✓ *The flexible or absent rules of evidence and procedure in mediation are far more time-efficient than the stricter rules in judicial determination, so the parties' points of view and evidence can come out faster.*
- ✓ *The flexible or absent rules of evidence and procedure in mediation can be less intimidating for parties than the very strict rules in judicial determination. They may be more willing in this environment to relax and work together, whereas the judicial determination rules keep parties at arms length and feeling restricted and formal.*
- ✓ *The strict rules of evidence and procedure in judicial determination mean that the evidence relied on is more likely to be relevant, reliable and legally obtained; it will also not be unfairly prejudicial for either party. In mediation each party can bring in almost anything they think is relevant to how they feel about the issue, which may sway the outcome unfairly in their favour.*
- ✓ *Mediation and conciliation are not appropriate for every type of dispute: for example, criminal disputes, or where there is a history of parties breaking promises. This means they can never replace judicial determination.*

b. Describe the role played by the jury in the hearing of a criminal dispute, and critically examine whether the way in which they are selected and empaneled contributes to an effective jury system.

6 marks

Advice

- The task words 'critically examine', 'evaluate' and 'analyse' require an assessment of both strengths and weaknesses; no matter how strong the discussion is, full marks cannot be awarded without both of these being present. The Chief Assessor reminded students of this again in 2011.
- In 2011 the question involving an evaluation of the jury received an average of 5.3 marks out of a possible 10 marks. The jury is an extremely popular and well-understood topic, but many students lost marks because they do not appreciate the depth of evaluation that is required for these longer discussion-type questions.
- In 2010 the Chief Assessor indicated that any answer on the role of the jury must include the fact that the jury reaches a verdict in the case: guilty or not guilty in a criminal case, and liable or not liable in a civil case.

1 mark	An outline of the role of the jury in reaching a verdict of guilty or not guilty.
1 mark	Further information on the role of the jury: for example, listening to evidence impartially and weighing it up; understanding the law in the area as explained by the judge; participating in discussion and deliberation in the jury room.
1 mark	One way in which the selection and/or empanelment of the jury contributes to effectiveness.
1 mark	One way in which it does not.
2 marks	One mark for each of a minimum of two further arguments, either in favour or against.

Note: An opinion as to the overall effectiveness of the selection and empanelment of juries must be given briefly, but marks are rewarded for the reasons in discussion rather than the statement of opinion itself.

Sample arguments in favour include:

- ✓ *Jury questionnaires are sent out randomly to people in the state. This means that the jury panel can never be 'rigged' or manipulated to suit different defendants or trials.*
- ✓ *Everyone on the electoral roll for the House of Representatives is eligible to be sent a jury questionnaire. This reinforces the fact that jury service is an important civic duty and something that citizens should take pride in, as it keeps our system fair and democratic.*
- ✓ *Jury questionnaires are sent out randomly to people on the electoral roll. This means that the responsibility of jury service is spread out over the population and no one group of people is required to shoulder the burden every time.*
- ✓ *The category of disqualified means that anyone who has done something that makes them inappropriate for judging others is removed from the jury pool.*
- ✓ *The category of ineligibility means that anyone who is unable to hear the case impartially cannot sit on a jury. For example, prison guards or current judges are ineligible.*
- ✓ *The category of ineligibility means that anyone who would not be able to properly hear the case is not allowed to do service. For example, it is believed that blind people would be unable to understand all evidence and would be less able to assess whether a witness was trustworthy.*
- ✓ *The ability for a potential juror to ask the judge to be excused from a trial takes into the account that jurors have lives. The trial may be too long for them, given commitments they have at home. This is fairer on society.*
- ✓ *Peremptory challenges give parties some control over who sits in judgment of them, while stopping short of allowing them to actually pick their jury. It is still random.*

Sample arguments against include:

- ✓ *Empaneling a jury of twelve to fifteen jurors is time-consuming and expensive. It adds at least a day to the length of trial, and potentially thousands of dollars onto legal costs.*
- ✓ *The category of ineligibility means that the same people will be removed from jury duty every time, and many of these people are the ones who know the most about the system and would arguably be able to do the best job! Criminal lawyers and judges, for example, are ineligible.*
- ✓ *The category of disqualification is discriminatory. Just because someone has broken a law in the past does not mean they are incapable of judging truth from lies and legal from illegal in the present; they have paid their debt to society and are hopefully reformed.*
- ✓ *Peremptory challenges allows parties to act on stereotypes and prejudices by excluding people when they have no actual evidence to suggest the jurors would do an inadequate job.*
- ✓ *The category of excused can be used by potential jurors to delay service time and time again. This is easier to do when the juror has a high-pressure job – these will often be people who would be good at hearing trials, though.*

Question 12
Australia, in recent years, has been steadily adopting more and more inquisitorial elements in its dispute resolution, however this can be criticised for not always being a good thing.

Compare the operation of the adversary system of trial with the inquisitorial system, and explain two strengths present in the adversary system that are not found to the same extent in the inquisitorial system.

8 marks

Advice

- The task word 'compare' means examining both similarities and differences; at least one of each must therefore be included. In 2011 a number of questions required comparisons, and students therefore lost marks if they did not make the similarities and differences clear. The Chief Assessor has made it clear that marks will not be awarded for definitions or descriptions that are not connected, but where the examiners have to work out the similarities and differences themselves.
- In 2010 the Chief Assessor indicated that students are still not familiar with the specified five features of the adversary and inquisitorial systems. Students frequently refer to the jury, committal hearings and other pre-trial procedures as essential features of the adversary system: these are incorrect. The jury in particular is a feature of neither the adversary system nor the inquisitorial system, and so should not be addressed at all in this answer.

Note: The features of the two systems are: the role of the judge, the role of the parties, the role of legal representation, the rules of evidence and procedure, the standard and burden of proof, and the role of legal representation. All five do not need to be covered.

1 mark	A comparison of one feature.
3 marks	Repeat for two or more features.

1 mark	An explanation of one strength of the adversary system.
1 mark	An explanation of why that strength is not present in the inquisitorial system.
2 marks	Repeat for a second strength.

Sample answers:

- ✓ *Inquisitorial judges exercise almost complete control over the case. They collect and examine evidence, choose which witnesses to hear, and decide the relevant law and facts.*
- ✓ *The adversary judge, on the other hand, is impartial and does not participate in the contest. They rule over the court, ensuring the rules of evidence and procedure are followed; they listen to the arguments presented by the parties; and then decide which argument was the strongest from those put to them.*

- ✓ *Inquisitorial parties exercise little control over the conduct of their case in the courtroom. The judge will direct them on the evidence that should be put forward and the legal arguments that should be made, and the parties will not lead the questioning of the witnesses.*
- ✓ *In the adversary system, however, the parties have control over all these elements. They must research and prepare their cases, and then have full responsibility to present them effectively in court.*

- ✓ *Rules of evidence in the inquisitorial system are almost non-existent: hearsay, prior convictions and written evidence are all allowed. Because the judge conducts proceedings, rules of procedure are also not as necessary.*

- ✓ *This is different from the adversary system, where strict rules of evidence make sure the parties only present relevant, reliable and legally obtained evidence, and strict rules of procedure ensure that both parties have a fair and equal opportunity to present their case.*

- ✓ *There is no formal burden of proof in the inquisitorial system because the judges investigate all angles of the case simultaneously, but there still must be strong evidence to show that the defendant was at fault. The aim of the inquisitorial system is to find the truth: not to prove the defendant guilty.*
- ✓ *In the adversary system the burden is strictly on the party bringing the action, and both sides of the case are not examined simultaneously. The standard of proof is also high: it is beyond reasonable doubt in criminal trials, and on the balance of probabilities in civil trials. The focus is on the prosecution/plaintiff meeting the standard of proof rather than finding the truth.*

- ✓ *In the inquisitorial system legal representation does not run the trial because parties do not control proceedings. Lawyers support the parties, explain proceedings to them and can make requests of the judge. They may also assist the judge with investigating the case.*
- ✓ *This is different from the adversary system, where legal representation is vital for the best chance of success. Lawyers control most aspects of the case, and are necessary to ensure that witnesses are found and examined correctly, and that all rules of evidence and procedure are followed.*

- ✓ *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 13
Using examples to illustrate your answer, explain the ways in which the rights of the Australian people are protected through the Commonwealth Constitution. Comparing the Australian approach to the constitutional protection of rights with the approach taken by one other country you have studied this year, which approach do you think is the more effective? Give reasons for your answer.

10 marks

Note: The countries you may choose for this comparison are Canada, New Zealand, South Africa or the United States of America.

Advice

- The task word 'compare' means examining both similarities and differences; at least one of each must therefore be included. In 2011 a number of questions required comparisons, and students therefore lost marks if they did not make the similarities and differences clear. The Chief Assessor has made it clear that marks will not be awarded for definitions or descriptions that are not connected, but where the examiners have to work out the similarities and differences themselves.
- Structural protections were new content on the Study Design in 2011, and in the Assessor's Report the Chief Assessor commented that many students were unable to demonstrate that they understood what structural protections were, or how they protected the public from the abuse of government power.
- In 2011 many students were also unable to state that express rights, implied rights and structural protections were the three means by which the Commonwealth Constitution protects rights. The average mark for this question was just over 50%.

3-4 marks An explanation of the way in which constitutional rights are protected in Australia. Answers must refer to express, implied and structural protection of rights, however may also discuss other means such as the ability of the High Court to enforce those rights.

6-7 marks A comparison of the approach taken in Australia with the approach taken in the chosen country. At least one similarity and one difference must be outlined. Arguments regarding effectiveness must also be made, in support of an opinion. Depending on the opinion, arguments may be entirely in favour of one country and entirely against the other, or they may bring out strengths and weaknesses of each. Both countries must be discussed, but they do not need to be covered equally.

Note: The final 10-mark question usually has an element of 'global' marking to it – in other words, answers are looked at overall, to determine their general quality. Full marks cannot reasonably be awarded for answers that make fewer than ten points, however the exact number required also has to be balanced against their quality and detail.

Sample answer for the way in which rights are protected:

- ✓ *An express right is one written clearly into the wording of one section of the Constitution (and can only be changed by referenda).*
- ✓ *An implied right is one not stated explicitly in the Constitution, but that the High Court has found to be implied by the wording of two or more sections being read together.*
- ✓ *Structural protections are safeguards for the public as a whole, or for our democratic system, based on the structure of the legal system that is set up by the Constitution. They are not personal rights held individually by each person.*

- ✓ *Australia is one of the few countries that does not approach the protection of individual rights with a bill of rights. Australia's entrenched (constitutional) rights are scattered throughout the Constitution.*
- ✓ *Australia only has five rights explicitly listed in the Constitution, one additional right found by the High Court to be implied, and an unknown number of structural protections for the community as a whole. It does not have an extensive list of rights.*
- ✓ *Australia's constitutional rights are fully enforceable. This means that the High Court can declare legislation invalid if it infringes them, and neither state nor federal parliament can ignore or override that decision.*

Sample answers for similarities include:

- ✓ *Canada's rights are enforceable by the Supreme Court of Canada, the same as Australia's rights are enforceable by the High Court. This means that the courts can declare legislation invalid or suspended when it has infringed a protected right.*
- ✓ *Both constitutions, in Australia and Canada, contain express rights that are entrenched in their wording, meaning the rights can only be removed or amended by changing the Constitution.*

- ✓ *Rights protection in New Zealand only applies vertically; in other words, the rights protect people from the power of government, but not from the power of other citizens. This is the same as Australia.*

- ✓ *South Africa's rights cannot be infringed by either government policy or legislation. Australia's constitutional rights also apply to the application of policy, and cannot be infringed by the executive either.*
- ✓ *Rights are entrenched in the constitutions of both South Africa and Australia. In other words, the national parliament cannot change or remove rights whenever it wants, simply by passing a normal bill.*
- ✓ *The South African Constitutional Court can declare laws unconstitutional if they infringe rights, and parliament must comply with this decision: in other words, the rights are fully enforceable, the same as they are in Australia.*

- ✓ *The United States of America has an entrenched bill of rights in its constitution; Australia has five express rights entrenched in its constitution. This means that the rights cannot be changed or removed by parliament acting alone: the people must vote as well.*
- ✓ *Both constitutions have an implied right recognised by the highest court (although they are different rights) – the High Court in Australia and the Supreme Court in the USA.*
- ✓ *In both countries, express and implied rights are enforceable by the High Court/Supreme Court; these courts will declare invalid any law made by Commonwealth Parliament/US Congress that breaches constitutional rights.*

Sample answers for differences 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.*
- ✓ *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.*
- ✓ *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.*
- ✓ *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.

- ✓ *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.*
- ✓ *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.*
- ✓ *All New Zealand courts must interpret statutes in a manner that is consistent with the rights contained in the BORA. In Australia, only the High Court is concerned with constitutional matters, and only when constitutional arguments are made in a case before it.*
- ✓ *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.*
- ✓ *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.*
- ✓ *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.*

- ✓ *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'.*
- ✓ *All South African courts must interpret statutes in a manner that is consistent with the rights contained in the Bill of Rights. In Australia, only the High Court concerns itself with constitutional rights, and only when a constitutional argument is made before it.*
- ✓ *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.*
- ✓ *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.*

- ✓ *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.*
- ✓ *Changing, adding and removing rights in the Australian Constitution through referendum is more straightforward than the long, complex process in the USA.*
- ✓ *The US Constitution includes a Bill of Rights – this is a specific part of the Constitution devoted to the protection of many express rights, in which they are all listed together and are easy to locate. There is no such bill or charter in Australian Constitution – they are scattered throughout the document.*