COMMERCE PRESENTATIONS AND PUBLICATIONS

VCE LEGAL STUDIES 3/4

CPAP Practice Examination No 1 2016

SUGGESTED RESPONSES / ADVICE

Question 1
Outline <u>two</u> reasons why laws may need to be changed by parliament. 2 marks

Advice: In the 2014 Assessor's Report the Chief Assessor reminded students that the task word 'outline' requires more than simply one or two words – more than "simply stating or identifying something" – but that they should be able to succinctly outline the key information in one or two sentences. This applies to all further instances of the task word in this exam.

In 2015 the Chief Assessor reminded students that, if a specific number of responses is requested, their answers will be marked in the order in which they are given. In other words, the *first* ones will be marked: not the *best* ones. This applies to all other times a specific number of responses is requested in this exam too.

1 mark The name of one reason, in a short sentence, clarifying what it means.

1 mark Repeat for the second reason.

Sample answers could include:

- ✓ *Technology may change so that the law does not cover new possibilities and there is the chance that technological advances may be used to get around the law and harm people.*
- ✓ *Laws may need to change for protection of the community, because a new way for people to be harmed has arisen.*
- ✓ *Economic changes in society such as working hours, booms and recessions may require new laws to deal with them.*
- ✓ *Majority values in the community may change, and the law will be more respected and followed if it reflects these value shifts.*

Question 2
Using one example of an exclusive area of law-making under the Constitution, explain the power over the State parliaments that this gives the Commonwealth Parliament. Comment on why this power may have been made exclusive at federation rather than residual. 3 marks

Advice: In the 2015 Assessor's Report the Chief Assessor reminded students that rote-learned material will not, by itself, usually satisfy questions. This is an example of a question that needs to have the wording of the answer tailored to respond to it.

1 mark One correct example of an exclusive power.

1 mark Some explanation of how the Commonwealth can make laws in this area that the States (or the people living in the states) have to follow, and that the states cannot make laws.

1 mark A reasonable explanation that is more than simply 'To allow the Commonwealth to make laws in the area.' Better answers will give a reason that relates to the power chosen. This mark is meant to differentiate students who can think laterally about the content.

Sample answer: *The Commonwealth was given exclusive power over immigration. This means it can make laws regarding which people are allowed to enter the country and become citizens or permanent residents, and the States cannot make their own laws allowing more or fewer people into*

their State. Since Australia is one connected landmass with little internal border protection, it makes sense for one law to apply to all States, otherwise people could immigrate to the State with the easiest laws and then move.

Question 3
Outline the original jurisdiction of the County Court. 2 marks

Advice: Students frequently believe that the civil jurisdiction of the County Court starts at the amount where the Magistrate's Court caps out – ie over $100,000. This is not so. Students were reminded most recently of this in the 2015 Assessor's Report.

1 mark Its criminal jurisdiction is to hear all indictable offences except for the most serious. Eg. It would hear manslaughter, but not murder.

1 mark Its civil jurisdiction is to hear claims for unlimited damages.

Question 4
The High Court plays a role in protecting express rights, implied rights and structural protections, insofar as they rely on sections in the Constitution.

a. Discuss the significance of <u>one</u> High Court case in terms of its impact on the protection of constitutional rights in Australia. 4 marks

1 mark The facts of the case.

1 mark The legal question or issue.

1 mark The outcome of the case and how the High Court ruled on the legal issue; in other words, the interpretation or the precedent set.

1 mark The way in which this affected the protection of rights.

Advice: In 2015 a similar-style question was asked about a High Court case study, and students were reminded to focus less on the facts of the case and more on the legal impact and arguments: "This question asked for an explanation of the significance of the case, and not an explanation of the case. There is a difference. The first requires a focus on what the case stands for and, in particular, how it impacted on the division of law-making powers. The latter would require only a factual explanation of the case, which may not include an explanation of its significance." Here, the question is a rights case, but the principle is the same.

Cases regarding rights include:

- ✓ *In the ACTV Case the parliament banned most political advertising in the lead-up to an election. The High Court had to decide whether this infringed an implied freedom to speech, or perhaps a more limited freedom of political communication. They found that it did, because ss7 and 24 of the Constitution set up a system of representative government, and so a freedom of political communication was needed to make an informed vote.*

- ✓ *In the Roach Case the parliament passed a law preventing anyone who was in jail from voting, no matter how short their sentence was. The High Court had to decide whether this infringed an implied right to vote. They found that there was no individual right to vote – because people serving more than 3 years could be prevented, for example – but that the structure of the Constitution established a representative government in which large sections*

of the public could not be prevented from voting without a very good reason. Roach was therefore successful.

- ✓ *In Street v Queensland Bar Association (1989) the High Court declared rules that required a lawyer from NSW to give up practising law in that State if he wanted to practise law in Queensland were invalid. Rules such as this imposed a disability on someone from another State rather than a benefit on people from the home State, and this disability was not imposed on residents of home State too.*

- ✓ *As decided by the High Court in the 1986 case of Brown v The Queen, the defendant does not have the power to waive this right. In other words, they cannot elect to have a trial without a jury.*

b. Differentiate between the three ways of protecting rights as named above.
3 marks

Advice: The request to explain differences means to demonstrate the connections between two things. This means that the differences do not count if they are merely implied or suggested by two independent definitions. The connection must be made express.

In 2013 and 2012 a number of questions required comparisons and students lost marks if they did not make the similarities and differences clear. The Chief Assessor has said that marks will not be awarded for definitions or descriptions that are not connected, and where the examiners have to work out the similarities and differences themselves.

This advice should also be applied to other questions in this examination that require similarities and/or differences.

3 marks This question should be marked globally. Students must cover all three ways of protecting rights and they must also outline at least one difference between them. This will be done differently depending on the exact differences chosen, however. Marks should scale up or down depending on the comprehensiveness and quality.

Note: Students cannot receive full marks for simply having three separate definitions separated by a word such as 'however'. This may receive 1-2 marks, though.

Sample answer: *Express rights are listed explicitly in the wording of one section of the Constitution, whereas implied rights and structural protections are not. Implied rights and structural protections exist in precedent, whereas express rights do not – only elaboration on their meaning is in precedent. Express rights and implied rights are both individually-vested rights, whereas structural protections are broad community protections rather than individual rights.*

Question 5
The legal system in Australia is in a process of constant evolution.

a. Describe the <u>three</u> elements of an effective legal system. 3 marks

1 mark One element both named and outlined briefly; one sentence should be sufficient, as long as some outline or explanation is provided in addition to the name.

2 marks Repeat for the other two elements.

Sample answers:

- ✓ *A fair and unbiased hearing requires that all parties who come before the court system are treated equally, that each party has the opportunity to present their side of the dispute, and that the outcome will be reached according to fair and consistent rules and procedures.*

- ✓ *Parties must have physical access to places to resolve their disputes; they must have enough knowledge of the legal system, their rights and the appropriate mechanisms for resolution in order to make decisions regarding their dispute; and they must be able to afford the process.*

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

b. Explain <u>one</u> recent change that was made to the operation of the legal system in order to improve its effectiveness. 3 marks

Advice: In 2014 the Chief Assessor explained that changes to the legal system are different from changes to individual laws: "Emphasis needs to be given to the differences between changes to the law (abortion laws, etc) as opposed to changes in the legal system."

1 mark An outline of one recent change.

1 mark An explanation of how that reform might improve the legal system. A feature of an effective legal system does not need to be explicitly defined here, but the ideas must be present.

1 mark Further detail on the change and/or its benefits. This may be done through identifying the weakness in the system it was designed to overcome.

Note: 'Recent' changes are generally defined as having been made within the last 5 years, from the date of the last exam.

Sample answers:

- ✓ *The National Alternative Dispute Resolution Council ('NADRAC') investigated the use of non-judicial methods of dispute resolution in 2009 and found that they remain "significantly under-utilised" and that there is a concerning lack of understanding. The Supreme Court and a number of Magistrate's Courts across the State have recently introduced compulsory mediation before most civil trials. This removes the need for lawyers to be familiar with the process and willing to recommend it to their clients. The program has been a success, regularly achieving over 80% success in resolution.*

- ✓ *In November 2010 the Magistrate's Court began an 'Early Neutral Evaluation' pilot, in which parties receive a non-binding evaluation of their dispute from a magistrate before the hearing. It is compulsory to attend, as it is ordered by the court, and is usually used for matters where the amount claimed is over $50,000. No evidence is heard apart from each party telling their side of the dispute, and if the parties are unable to settle after the evaluation from the magistrate, a date will be set for the hearing. In 2012 this was made a permanent feature of pre-judicial resolution. This has the ability to encourage people to work towards a more timely resolution of their dispute.*

- ✓ *Justice Hayne of the High Court observed in 2008 that, in the vast majority of civil cases, it is in the best interests of one party to move proceedings along quickly, but it is in the interests of the other party to delay where possible. The introduction of the Civil Procedure Act 2010 (Vic) was designed to increase judicial management of cases, encourage out-of-court settlements and provide penalties if parties did not act honestly or cooperate with each other in good faith. It made attempts at pre-trial resolution (such as using non-judicial methods and exchanging correspondence such as letters of demand) compulsory for all litigants and allowed the courts to impose financial penalties on those parties that did not comply. In 2011 the Parliament amended that Act to allow the court to decide what steps were appropriate on a case-by-case basis.*

- ✓ *In 2011 the Magistrate's Court began an 'Access Court' pilot in the Latrobe Valley, Korumburra, Wonthaggi and Melbourne courts. A life-size image of the magistrate, bar table and witness box will be projected from one court to another so that hearings can be conducted formally in one location even though the magistrate is in another. This delivers more efficient access to the court for people in rural areas. The problem is that the court system is more accessible to people in city locations than to people in country locations – there is more infrastructure in places with more people, because it is more efficient.*

- ✓ *After successful use since 2002, in 2014 an adult Koori Court was opened in Melbourne Magistrate's Court (and June 2016 in Geelong). The Koori Court is a sentencing court only, for defendants who plead guilty, and provides a less formal atmosphere that includes participation by Aboriginal Elders and the offender's family. The process is conducted by discussion, with all parties sitting together, rather than as a formal hearing. The aim of the Court is to reduce the cultural alienation felt by indigenous defendants by including them in a court process that is more culturally sensitive.*

Question 6
Explain how the referral of powers has the ability to alter the division of power between state and federal parliaments, and discuss <u>two</u> weaknesses of this process. 6 marks

1 mark An explanation of the ability of the States to refer residual powers to the Commonwealth OR an outline of one relevant example of the referral of powers. If the content is argued through a case example, it must be responsive to the question.

1 mark Some detail on the operation of the referral. An example may be used here if it was not earlier.

1 mark An explanation of one weakness of referrals.

1 mark Some argument of opinion in relation to that weakness. This may be done by arguing a strength that is related to the weakness.

2 marks Repeat for a second weakness.

Advice: With the referral of powers, there are a number of 'grey' areas concerning the exact operation of the law. Students may describe these powers as becoming exclusive as a result, however this is not the characterisation of a majority of the High Court. It is not incorrect to think of the powers operating as exclusive in practice, however, because of the operation of s109. Students may also state that States can later take the powers back as the High Court has approved of sunset clauses and indications point to States being able to repeal referral legislation, however it is not yet confirmed by the High Court whether the Commonwealth can give powers back itself.

Sample answer for a general explanation of the referral of power:

- ✓ *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. Their legislation will only apply to the State or States that referred the power, but to this extent a referral of power will change the division that is written in the Constitution.*

Sample discussions of weaknesses include:

- ✓ *The States may be politically wary of handing over too much power, so are sometimes unwilling to cooperate with a referral. When it does work, however, the referral of powers involves the State and Commonwealth parliaments working together to decide what the best allocation of power should be for the country's laws to be made effectively.*

- ✓ *The States have the theoretical capacity to hand over every residual power they retained at federation, except for those that are restrictions on Commonwealth power. The referral can therefore hobble the States and ruin the concept of 'federal balance', without even the need for a referendum or any public consultation, and it is unclear whether a State can take back a power once it is referred.*

- ✓ *Many areas of operation of the referral of powers have not been tested in or confirmed by the High Court. For example, it is unclear whether the powers become exclusive or concurrent after the referral or whether it depends on the exact nature of the referral. This means the process is vague and lacks certainty.*

- ✓ *The States have the ability to retain too much power after the referral. For example, they can place a 'sunset clause' time limit on the referral, and (even though it has not been confirmed by a majority of the High Court) it is likely that they are able to reclaim the power if they later*

change their mind. This doesn't give consistency in the law, and certainty going forward – although it does make the process more flexible, allowing it to cater for short-term needs.

- ✓ *Many referrals of power are very narrow, so the act of giving it to the Commonwealth is symbolic and somewhat pointless. For example, the terrorism referral is so narrowly text-based (the States wrote the exact wording of the Commonwealth law in the text of the referral) and the Commonwealth cannot amend it to cope with changing circumstances without the consent of at least four of the States.*

- ✓ *The referral of powers relies on the States and the Commonwealth co-operating with each other, which is often difficult to achieve as they frequently compete for power. This means referrals are more likely to be done only when there are very strong arguments in favour of them, though.*

- ✓ *The referral of powers is a way of changing the meaning and operation of the Constitution without actually allowing the people to democratically involve themselves in it. It therefore undermines the referendum process. The people rejected referrals from the Commonwealth to the States before at referendum, and this would suggest that many people want to be able to have a say.*

Question 7
Provide <u>two</u> effects of statutory interpretation, as performed by judges in the resolution of disputes. 2 marks

1 mark An outline of one effect of statutory interpretation; in other words, some context or explanation must be given in the sentence in addition to the name of the reason.

1 mark Repeat for a second effect.

Sample answers for effects of statutory interpretation may include:

- ✓ *A more specific meaning may be given to words in the act so that they can be more easily and clearly applied to the unique facts of each case in the future.*

- ✓ *Ambiguity or lack of clarity may be cleared up for the public, so the community can feel more confident about what the law is. For example, the Kevin and Jennifer case cleared up confusion over the marriage law for people who had undergone sex changes legally.*

- ✓ *Advances that have been made in technology but that were not in contemplation when the law was originally drafted may be addressed and expressly taken into account.*

- ✓ *An interpretation that is too creative or conservative may influence parliament to pass amendments to the legislation, clarifying and possibly changing the meaning of the words.*

- ✓ *Giving a more specific meaning to the words allows them to be applied to the facts of the case. This allows a verdict to be reached, as the actions can be seen as falling either inside or outside the meaning of the law.*

Question 8
Critically examine the effectiveness of arbitration as a method of dispute resolution, taking into account in your answer the way it is used in the court system and the Victorian Civil and Administrative Tribunal. 5 marks

Advice: The task phrase 'critically examine' has not been used since 2010, but at the time students were reminded that it is an evaluative direction. Every year, including in 2015, the Chief Assessor reminds students that evaluating something means to provide an opinion, and examine reasons for and against that opinion: "consider both strengths and weaknesses, and come to an overall and well-informed conclusion." (2015)

Note 1: Students do not usually receive a mark for their opinion, but they cannot receive full marks without it. The marks come more from the arguments made in relation to that opinion.

1 mark At least one argument in favour of effectiveness.

1 mark At least one argument against effectiveness.

3 marks Further detail and arguments regarding effectiveness.

Note: This answer should be marked globally. Students cannot receive full marks without a clear opinion and a minimum of four arguments (or three arguments and one good example), however the detail and quality of the arguments should be weighed against the number of different arguments presented to determine the overall quality.

Strengths and weaknesses relating to arbitration may include:

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

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

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

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

Question 9
Civil trials are generally disputes where one individual wants something from another individual, and the other individual disputes they have to give it.

a. Define 'damages' in relation to a civil trial. 1 mark

Advice: In 2015 the task word 'define' was used for the first time in many years. Its meaning should be taken as being similar to 'outline'.

1 mark Damages are sums of money paid by the defendant to the successful plaintiff. Students may add that they aim to restore the plaintiff financially to the position they were in before the harm was suffered, but this is not necessary.

b. Describe what parties might reasonably be able to expect from their civil directions hearing, and outline the purpose of having a hearing like this. 3 marks

1 mark A definition of a directions hearing.

1 mark Some detail on specific decisions or things that might happen at a directions hearing.

1 mark One or more appropriate purposes of a directions hearing.

A sample answer for the definition:

- ✓ *Directions hearings are conferences with the trial judge where the court may give any directions for the conduct of the case that he or she thinks will assist effective, prompt and economical resolution.*

Examples of matters that may be discussed or directed include:

- ✓ *The court may direct parties to attend compulsory mediation sessions in an effort to agree on certain issues before trial or to reach an out-of-court settlement.*
- ✓ *The Supreme Court may channel the case into one of their arbitration lists for resolution, if the case is of an appropriate type.*
- ✓ *Witnesses may be timetabled, with each party providing the number and availability of their witnesses and an approximate timeline for questioning them.*
- ✓ *Parties are encouraged to agree on as many issues as possible to reduce the scope of what must be argued at trial.*
- ✓ *Some questions of law may be decided pre-trial. If a jury has been requested by one of the parties, they will be informed of these matters at the start of trial.*

Purposes of directions hearings include:

- ✓ *To allow for questions of law and fact that do not require courtroom argument to be addressed beforehand to ensure the efficient running of trial.*
- ✓ *To encourage parties to make admissions to speed up proceedings at trial, because anything not in dispute will not have to be argued.*

- ✓ *To allow parties to advise of the number of witnesses they plan to call and how long each will take to examine. This provides the court with an estimate on the length of the trial that they can use for the timetabling of rooms and personnel.*

- ✓ *To allow parties to flag any potential issues with the availability of witnesses so that the trial does not need to be adjourned if they cannot attend.*

Question 10
Analyse the relationship between the courts and parliament as law-makers. In your answer, explain the way in which each body goes about making law. 8 marks

Advice: The task word 'analyse' is an evaluative direction. Therefore, students must argue opinions in relation to the relationship and not merely define memorised features.

The 2010 VCAA Assessor's Report reminded students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.

1 mark An explanation of how setting precedent through the hearing of cases enables the courts to make law.

1 mark An explanation of how passing a bill through multiple stages in parliament, debating and possibly amending, enables the parliament to make law.

1 mark Further detail on the law-making processes OR additional material on the analysis.

Detail on how courts make law may include:

- ✓ *Binding versus persuasive precedent.*

- ✓ *The role of the ratio decidendi versus the obiter dicta.*

- ✓ *The principle of stare decisis.*

- ✓ *The application of precedent through statutory interpretation and new common law rules.*

- ✓ *Methods of departure from precedent.*

- ✓ *Case examples.*

Detail on how parliament makes law may include:

- ✓ *The drafting of the bill, usually through the Government and parliamentary counsel.*

- ✓ *The second reading speech and subsequent debate.*

- ✓ *The optional committee stage/consideration in detail and the possible amendments made then.*

- ✓ *The role of the head of state in giving royal assent.*

- ✓ *Case examples.*

Analysis of aspects of the relationship between courts and parliament may include:

- ✓ *Parliament can legislate to confirm the common law. For example, the negligence precedent of one's 'legal neighbour' set in the Donoghue v Stevenson case was confirmed in statute years later. This enables the courts to introduce laws that the facts of human interactions in society demonstrate are necessary and then allows the parliament to see over time how those laws play out before deciding the best way in which to codify them. This can be inefficient, as precedent is made only incrementally and courts can be extremely reluctant to change the law too radically, but in the long-term it can result in highly effective law.*

- ✓ *Parliament can legislate to abrogate the common law if they disagree with it. For example, the common law allowing rape within marriage was overridden by parliament ten days after the decision was handed down. This allows parliament to hold unelected and largely unaccountable judges responsible in an indirect way by changing the common law if it conflicts with community sentiment. More often, however, it simply allows a bully government to override the courts when the courts make law that doesn't suit the policy of the government of the day – for instance, when the Howard Government tried to overrule the common law that the sex of a person for the purposes of marriage was determined at the time of marriage.*

- ✓ *Parliament passes acts to establish courts and give them jurisdiction. Without jurisdiction, the courts would not have the power to hear cases and make law in their own right. This seems an uncomplicated aspect of their relationship, but it does also give parliament the theoretical power to take law-making power away from courts by stripping them of jurisdiction.*

- ✓ *The High Court can declare any legislation invalid if it infringes rights contained in the Constitution, or if the parliament making it has acted outside its powers under the division of powers. This can protect the rights and freedoms of the people, but it can also give the unelected courts the power to override the will of the majority of people as reflected in their chosen representatives.*

Question 11
Compare the operation of the courts and the Victorian Civil and Administrative Tribunal in terms of the general rules of evidence and procedure usually applied, and in terms of the role and function of the third party to the dispute. 7 marks

Advice: The task word 'compare' requires at least one similarity and at least one difference. The above advice regarding similarities and differences should therefore be followed.

In 2015 the Chief Assessor commented that many students lost marks on a question about VCAT because they confused the venue VCAT with methods of dispute resolution such as mediation and conciliation. In 2013 and 2011 the same mistake was made. This question therefore tests student understanding of the difference between avenues and methods.

1 mark An outline of one similarity between courts and VCAT in relation to the rules applied.

1 mark An outline of one difference in relation to the rules applied.

1 mark An outline of one similarity in relation to the third party.

1 mark An outline of one difference in relation to the third party.

3 marks Further similarities and differences in relation to these two features, and/or further detail on the existing similarities and differences.

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

Similarities between courts and VCAT regarding the rules applied may include:

- ✓ *The decisions made through each can be appealed to a higher court if one party believes that an error has been made.*
- ✓ *Hearings and trials both use an adversarial process of resolution in which the parties argue against each other and a win/lose outcome is sought.*
- ✓ *Both VCAT and courts use non-judicial methods of dispute resolution such as mediation and conciliation to encourage the parties to work together.*
- ✓ *Both venues hear from witnesses, giving evidence relevant to each side of the case.*
- ✓ *Both venues have parties presenting opposing submissions.*

Similarities between courts and VCAT regarding the third party may include:

- ✓ *Both VCAT and court utilise judicial determination and arbitration, where an independent third party makes a decision on behalf of the parties.*
- ✓ *The decisions of both third parties are binding on the parties.*
- ✓ *The third party in each has legal training and/or experience, and conducts the hearing/trial in a way that gives each party natural justice and the right to argue their case.*

Differences regarding the rules applied may include:

- ✓ *Parties have a limited right of appeal from VCAT decisions compared with court ones. VCAT decisions can only be appealed on questions/points of law.*
- ✓ *VCAT judicial determination uses a less adversarial process than court, with less reliance on legal argument and cross-examination.*
- ✓ *The VCAT member may ask their own questions, whereas judges do not ask their own questions of witnesses.*
- ✓ *In VCAT, conversations can be held with witnesses and between parties, whereas parties do not talk with each other or have extended conversations with witnesses in the courtroom.*
- ✓ *Court trials are frequently thought to be unjust if one party does not have legal representation (see the Dietrich case), whereas in VCAT, barristers are frequently barred from representing parties.*
- ✓ *VCAT has more flexible rules of evidence and procedure than court does. Written evidence is more readily allowed, for example.*

Differences regarding the third party may include:

- ✓ *VCAT members are more interactive than judges in court are; VCAT members may ask questions of parties or witnesses, whereas judges in court will not.*

- ✓ *VCAT members do not generally provide written judgments, whereas judges presiding over trials do.*

- ✓ *VCAT members are mostly on contract with the executive government and do not enjoy independence of the judiciary and security of tenure; judges are part of the judicial arm and do.*

- ✓ *Most VCAT members are neither judges nor lawyers; all judges are legal professionals, and* were usually lawyers before being admitted to the bench.

Question 12
Explain <u>two</u> weaknesses of juries as arbiters of fact in the legal system, and discuss the extent to which <u>two</u> reforms and/or alternatives to the current system might fix these weaknesses. 8 marks

1 mark An outline of one weakness of the role of juries.

1 mark An outline of a second weakness.

1-2 marks Further detail on either or both of the weaknesses; alternatively, more time can be spent on the discussion component of the answer.

1 mark An outline of one reform or alternative to the current system of trial by jury.

1 mark An argument on the ability of the change to overcome at least one of the weaknesses.

1 mark An outline of a second reform or alternative.

1 mark An argument on the ability of the change to overcome at least one of the weaknesses. Both weaknesses must be addressed at some point in the answer.

Weaknesses of juries may include:

- ✓ *It will often not be not be 'trial by peers'. Groups such as Aborigines and Muslims, for example, have only a slim chance of being tried fairly by "peers" in today's society, because of the strong prejudices that many have against them. Marginalised or disadvantaged groups may in fact receive a more fair trial with a professional judge than with untrained members of the community.*

- ✓ *There may be bias. The media reports on big cases in a great deal of detail before trial, so jurors can be influenced by evidence inadmissible in court. This may create bias.*

- ✓ *There may be a limited cross-section. There are many categories of people who are not able to serve on a jury, such as lawyers, people with a criminal history, blind and deaf people, and people who do not have a strong grasp of English. The views of these groups are not represented.*

- ✓ *The accused may not be able to identify with the jury. If the accused comes from a group that is not allowed to sit on the jury – for example, if the accused is a recent migrant from a non-English speaking country – then they will not have any direct peers judging them or identifying with their point of view. If the accused is from a minority group there is a good chance that no-one from the same minority group will be on their jury.*

- ✓ *The jury may not consider the right factors during deliberations. Juries do not have to give reasons for their decision, so it is almost impossible to appeal. Parties do not know if the verdict was properly based on the law and evidence.*

- ✓ *Juries put inexperienced people in control of someone's life. Untrained and unqualified people are put in charge of making a very important decision because they are non-legal members of society drawn from across a range of groups that have no connection with the law.*

- ✓ *Juries may not understand the case. Jurors may not be experienced or educated enough to understand complex legal arguments, evidence or procedure even if they are somewhat simplified, so may make their decision based on appearances or bias.*

Reforms or alternatives may include:

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

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

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

Note: Changes must be connected to whatever weaknesses have been chosen.

Question 13
The effectiveness of parliament relies heavily on the ability of the people to have input into, and influence, the law-making process.

To what extent do you agree? Give reasons for your answer. 10 marks

Advice: The task phrase 'to what extent' is an evaluative direction. Every year, including in 2015, the Chief Assessor reminds students that evaluating something means to provide an opinion, and examine reasons for and against that opinion: "consider both strengths and weaknesses, and come to an overall and well-informed conclusion." (2015)

Students do not usually receive a mark for their opinion, but they cannot receive full marks without it. The marks come more from the arguments made in relation to that opinion.

The 2010 VCAA Assessor's Report reminded students that extended answer questions do not need comprehensive introductions and conclusions, but they do need points to be arranged into logical paragraphs with topic sentences.

1 mark At least one argument in favour of the public having input.

1 mark At least one argument against the public having input.

8 marks Further arguments, including detail and possible examples. Some may be regarding the ability of parliament to be effective without public input.

Note: This answer should be marked globally. Students cannot receive full marks without a clear opinion and a minimum of six arguments, however the detail and quality of the arguments should be weighed against the number of different arguments presented to determine the overall quality.

Some arguments that could be made regarding public input include:

- ✓ *Petitions enable elected members of parliament to be representative of the needs of their communities because they inform the MP on public opinion. The role of an MP is to speak on behalf of their constituency in parliament, so if they are presented with a petition on an issue, brought to them by a member of their electorate and with signatures from other voters in their electorate, they can choose to table that petition in parliament to stimulate debate or influence proposed legislation. Petitions in favour of the decriminalisation of abortion were presented to MPs and tabled in Victorian Parliament, for example, and these helped convince parliament that changing the Crimes Act would be representing community views.*

- ✓ *Petitions and lobbying from the public can help hold the executive government responsible and accountable for the power it holds. The people do not vote for the Government directly at elections, however they can communicate their opinion on Government policy and actions through petitions and contacting their local MP. For example, constituents of Petro Georgiou's Kooyong electorate lobbied him to oppose the keeping of children in asylum seeker detention facilities, even though he was a member of the Liberal Government, and as a response he spoke out against it in parliament and Government policy was scrutinised as a result. The Immigration Minister was forced to respond to that concern.*

- ✓ *The use of the media can be very helpful to members of parliament who are trying to represent the views of the majority in society. The media has the ability to summarise the vast range of community views on many different issues, thus representing the diversity of opinion and the approximate numbers of people in favour of each side. For instance, many protests have been held both in favour of and against the recently-introduced carbon tax – some on the same day at the same time! Media coverage summarised the arguments of each demonstration, included interviews with organisers, and reported on the numbers of people at each rally. Unfortunately, however, the media can distort numbers of actual supporters depending on the quality of research undertaken or the spin they want to put on the story, and can also overlook important issues in favour of more sensationalist ones if the important stories do not make 'good copy'.*

- ✓ *Parliament is representative of the people: it is democratically elected and therefore answerable to the public. As a consequence, members of parliament passing laws that society finds unacceptable are likely to be voted out of office.*

- ✓ *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 in particular is often controversial, and politicians' fear of outcry – even if it represents a very small proportion of society – may prevent change in the law on these kinds of areas.*

- ✓ *It is difficult to make laws that match the views and beliefs of all members of our community, given the diversity of beliefs, backgrounds and experiences of a diverse society. It may be a practical impossibility to represent everyone, or even a clear majority.*

- ✓ *Some legislation may cause injustice and suffering for small groups within society, but be accepted and supported by the majority of the community. Our parliamentary structure does little to protect the interests of unpopular minorities when laws are made because members of parliament have such an incentive to please the majority. Protecting a vulnerable minority, or a powerless group such as the environment or future generations, may in fact require going against the wishes of an ignorant or selfish majority.*

Arguments in relation to the effectiveness of parliament that don't rely on public input include:

- ✓ *In the second reading the minister responsible for the bill will make a speech outlining its contents and purpose. 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. Debate can ensure the bill is examined from as many perspectives as possible.*

- ✓ *During the committee stage the president of the Senate leaves the House and the bill is examined in detail, clause by clause. It may also be sent to a smaller standing or select committee for scrutiny. The committee stage is optional, but is where the greatest number of amendments is made. These amendments are collected into the committee's report on the bill, and can fix errors and close loopholes.*

Note: Either the committee stage OR the consideration in detail stage should be used – not both.

During the consideration in detail stage the speaker of the House of Representatives leaves the House and the bill is examined in detail, clause by clause. It may also be sent to a smaller standing or select committee for scrutiny. The consideration in detail stage is optional, but is where the greatest number of amendments is made. These amendments are collected into the committee's report on the bill, and can fix errors and close loopholes.

- ✓ *During the third reading further debate and amendments are possible, but unlikely. A formal vote will be held on the bill, called a division of the chamber, and if it is successful the long title of the bill will be read out to signify that it has passed the House. This limited debate and possible amendments can make final improvements to the bill before it becomes law.*

- ✓ *Before giving royal assent the governor-general can request that the originating House make amendments to the bill. After the governor-general is satisfied, however, they sign the bill to signify their approval and once approved it becomes law. This gives the crown the opportunity to catch any fundamental legal errors with the bill before proclaiming it.*

- ✓ *The upper House is usually not controlled by the Government party. Therefore, it is not merely a 'rubber stamp', and the Government cannot simply push through any bill it likes without amendment. This makes the parliamentary process more effective as it is better able to check the quality of proposed legislation.*

- ✓ *The upper House is often not controlled by the Opposition party. Therefore, it is not 'hostile' and generally will not simply block every bill (no matter its quality) in order to be obstructionist. This makes the parliamentary process more effective as party rivalry will not easily be able to kill quality bills.*

- ✓ *If minor parties or independents hold the balance of power, they can help scrutiny of bills by negotiating with the Government to improve bills before voting to pass them. This makes the passage of a bill more effective as multiple viewpoints will be considered when creating new legislation – not just the views of the majority.*