



NAME: _____

VCE® Legal Studies
UNITS 3 & 4 Practice Examination

Reading time: 15 minutes

Writing time: 2 hours

QUESTION AND ANSWER BOOK

Number of questions	Number of questions to be answered	Number of marks
13	13	70

- Students are permitted to bring into the examination room: pens, pencils, highlighters, erasers, sharpeners and rulers.
- Students are NOT permitted to bring into the examination room: blank sheets of paper and/or white out liquid/tape.
- No calculator is allowed in this examination.

Materials supplied

- Question and answer book of 17 pages.
- Additional space is available at the end of the book if you need extra paper to complete an answer.

Instructions

- Write your **student name** in the space provided above on this page.
- You should make use of stimulus material where it is included. However, it is not intended that this material will provide you with all the information to fully answer the question.
- All written responses must be in English.

Students are NOT permitted to bring mobile phones and/or any other unauthorised electronic devices into the examination room.

Question 4 (7 marks)

- a.** Define the term ‘statutory interpretation’. 2 marks

“When bills are being drafted by parliamentary counsel they try to cover a range of situations, however it is not always possible to achieve this aim.”

- b.** Using an example to illustrate your answer, explain **one** reason why statutory interpretation is needed. 3 marks

Question 7 (3 marks)

John was assaulted outside a pub a year ago and successfully sued claiming damages of \$4.2 million.

Prior to the case coming to trial, a number of pre-trial proceedings would have occurred. Identify and describe the purpose of **one** of these pre-trial procedures.

Solution Pathway

NOTE: This task is sold on condition that it is NOT placed on any school network or social media site (such as Facebook, Wikispaces etc.) at any time. NOT FOR PRIVATE TUTOR USE.

Below are sample answers. Please consider the merit of alternative responses.

Question 1 (2 marks)

The Access to Medicinal Cannabis Bill (Vic) is currently at the second reading stage in the Legislative Assembly.

Outline what happens at the second reading.

Outline - A general account or a summary indicating only the key features – used by examiners to indicate that a brief factual account is expected.

In the second reading the minister responsible for the bill will make a speech outlining its contents and purpose. Then there will be a debate in response to the bill and a vote then take place as to whether it will progress will progress.

Marking scheme

1 x mark for outlining the purpose of the speech.

1 x mark for outlining the purpose of the debate and vote.

Total marks = 2.

Question 2 (6 marks)

Describe the principle of separation of powers as it operates in the Australian parliamentary system and outline its purpose.

Describe - To give a factual account. If the question refers to a process, you may be expected to describe the process in sequential order. The description could also list a number of parts, elements or features.

Separation of powers refers to the three functions of government being given to three separate bodies; the legislative power given to parliament, is responsible for debating and voting on new laws, the executive power given to the governor general usually acts on advice from the government and its purpose is to administer laws and conduct the business of government, and the judicial power given to the courts and judges to apply laws when disputes arise and to resolve disputes. In theory, all three powers are kept separate from each other and there should be no interference between the three branches.

Marking scheme

2 x marks for each description and outlining purpose of each of the three separate powers.

Total marks = 6.

Question 3 (4 marks)

Using an example to illustrate your answer, describe *one* role of the Victorian Law Reform Commission (VLRC) in assessing the need for a change in the law.

Illustrate – To use examples to clearly communicate an understanding. In order to ‘illustrate’ using an example, the example needs to directly relate to, and explain or describe the feature of, the legal system specified in the question.

Describe - To give a factual account. If the question refers to a process, you may be expected to describe the process in sequential order. The description could also list a number of parts, elements or features.

The main functions of the Victorian Law Reform Commission include:

- a. **Make law reform recommendations on matters referred to it by the Attorney-General.** This includes conducting research, consulting with the community and reporting on law reform projects.
- b. **Make recommendations on minor legal issues of general community concern.** That is on matters not referred by the Attorney-General.
- c. **Suggest to the Attorney-General that they refer a law reform issue to the commission.** They would generally do this after consultation with various groups.
- d. **Educate the community on areas of law relevant to the commission’s work.** The commission will work with groups to ensure the change to the law is successful. It can also provide information on what the law is. Staff members from the Commission visit schools, TAFEs, universities, and professional and community groups across Victoria to explain the work of the Commission as a free service.
- e. **Monitor and coordinate law reform activity in Victoria.** The Commission works with other law reform bodies, such as the Sentencing Advisory Council, to ensure effective law reform in Victoria.

Possible answer:

The VLRC was set up in 2000 as an independent, government funded organisation and it has a crucial role in providing the government with independent advice in relation to laws that are out of date, discriminatory or too complex. Its recommendations to the Attorney-General of Victoria are based on public consultations and aim to improve the law by making it fairer, up-to-date, inclusive and accessible.

*In 2015 the VLRC delivered its report to the Attorney-General (**medicinal use of cannabis**), with 42 recommendations for changes to the law to allow people to be treated with medicinal cannabis in exceptional circumstances, including multiple sclerosis, cancer, HIV or AIDS, epilepsy and chronic pain. The government announced that it fully accepted 40 of the VLRC’s recommendations and accepted the other two in principle. In December 2015 the Access to Medicinal Cannabis Bill was introduced into the*

Legislative Assembly. It announced that it would legalise access to medicinal cannabis in exceptional circumstances from 2017.

*The Victorian Parliament does not have to implement any of the recommendations by the VLRC, but they will be highly persuasive because of the request from the Government to research in the first place and the exhaustive **process** and expert knowledge that have contributed to the final report.*

Marking scheme

2 x marks for describing the role of the VLRC.

2 x marks for using the appropriate example to illustrate your answer.

Total marks = 4.

Question 4 (7 marks)

a. Define the term ‘statutory interpretation’.

2 marks

Define - State the meaning and identify its essential qualities. You may also be required to provide an example.

Possible Answer:

Statutory interpretation is another way judges make law. This refers to the process by which judges interpret the words or phrases in an act of parliament (statute), in order to give the words meaning. When a judge interprets the meaning of a word, or words, in a statute, the reasoning behind this interpretation sets a precedent which other judges who are required to interpret the meaning of those words in the same act will then follow in the future. The new precedent then becomes part of the law along with the statute.

Marking Scheme

1 x mark for stating the meaning.

1 x mark for identifying its essential qualities.

Total marks = 2.

“When bills are being drafted by parliamentary counsel they try to cover a range of situations, however it is not always possible to achieve this aim.”

b. Using an example to illustrate your answer, explain **one** reason why statutory interpretation is needed.

3 marks

Explain - To give a detailed account or expand on the reasons for something.

The need for this interpretation arises when a case is brought before a court in which there is a dispute about whether the words or phrases contained in an act apply to the particular situation before the courts.

The following reasons for statutory interpretation could be included:

1. Broad and general wording

Many pieces of legislation are drafted in broad and general terms, but they need to be applied to the specific circumstances of the case. As such, the courts are required to provide a more specific meaning to broad terms to determine whether or not a law has been broken

Case example: Deing v Tarola (Studded Belt Case) 1993

In the case of Studded Belt Case (1993) the Supreme Court of Victoria had to give meaning to the broad term “weapon” to determine whether it applied to the very specific circumstances of a man wearing a studded belt.

By law, the defendant was not allowed to carry a weapon, but the Court needed to clarify the meaning to determine whether his belt counted as a weapon.

In this case, the defendant was found guilty of carrying a weapon

2. Meanings change over time

Some words are not static in their definition, but rather they change in meaning over time. Legislation may need to be interpreted to clarify a particular word and to ensure it is given its current meaning.

Case example: Kevin’s Case 2003

For example, the legal meaning of the words ‘man’ and ‘woman’ have changed over time. Medical technology makes it possible for a person to change gender after birth. When they change their gender what are they?

In Kevin and Jennifer’s case (2003), the Full Court of the Family Court had to interpret the word “man” as it pertains to marriage. The court held that the word “man” now includes not just those born male, but also those born female who have undergone gender reassignment surgery.

The meaning of the word ‘man’ was expanded to include transgender peoples as the values of society changed.

3. Ambiguous meaning

The words in legislation may be ambiguous, giving rise to a range of legitimate meanings and they may not be defined in the act. Judges will decide on which of the possible meanings is the most appropriate and best achieves the purpose of the legislation.

Legislators often word statutes broadly in order for the words to cover whole areas. However this means that the meaning of a word may be unclear or have multiple meanings, which means that courts need to clarify the meaning of the words and determine whether the law applies to the case at hand.

Case example: Davies v Waldron (1986)

In the case of Davies v Waldron, the court had to decide what the words “start to drive” meant in the context of the Road Safety Act 1986 (VIC). The court held that these words covered assuming the driver’s seat and turning the ignition, even if the car didn’t actually move.

4. Future and changing circumstances

It is difficult to consider all future applications of an act in our rapidly evolving society. It is almost impossible to predict changes in technology and science, also social and environmental conditions. This means the wording of legislation has to be changed over time to keep up with changing technology. The act might be silent on an issue and the courts may need to fill gaps in the legislation and the legislation should cover the unforeseen situation.

Case Example: Kevin’s Case 2003

For example when Kevin’s case was decided in 2003 the Australian marriage Act 1961 gave no definition of marriage. It assumed on the writing of the act that marriage was between a man and a woman, no one had considered how the law related to transgender people.

In the Kevin and Jennifer case the Full Court of the Family Court ‘filled in the gap’ in the law by determining, that the word ‘man’ in the statute should be determined at the date of marriage and they found Kevin to be male, the marriage was declared valid.

The word man was expanded and given its current meaning and to take into account changes in technology and society.

Marking Scheme

1 x mark for identifying a reason for statutory interpretation.

1 x mark for explaining the reason for statutory interpretation.

1 x mark for using appropriate example.

Total marks = 3.

- c. Describe **one** aid that the judge may use to help them determine the meaning or purpose of an Act of Parliament. 2 marks

Describe - To give a factual account. If the question refers to a process, you may be expected to describe the process in sequential order. The description could also list a number of parts, elements or features.

The following aids that a judge may use could be included:

Extrinsic material: *Hansard, Acts Interpretation Act, Dictionary – Legal or English, Halsburys Laws of England.*

Intrinsic material: *Definitions within the Act, Schedules, Margin Notes.*

English or Legal Dictionaries: *Would be used by judges to understand the origin and “lay” meaning of the word in the general community. For example, in the “Studded Belt Case”(Vic)(1993) the word “offensive” needed to be interpreted. The Judge may have used an English language dictionary to understand the meaning of the word offensive, or alternatively the word “offensive” may have been interpreted in a previous legal case and so this may be useful for the judge.*

Acts Interpretation Acts: *These are Acts passed by Parliament that assists judges reading legislation as to how to interpret it. It may be helpful for a judge to use Hansard to assist here.*

Definitions within Acts: *Often in Acts of Parliament there is a definitions’ section. This is useful for specifying what Parliament meant by a certain term. For example the word “road” is likely to be found in the definitions’ section of the “Road Safety Act”.*

Hansard is a record of parliamentary debate: *It provides a record of speeches given by members and the reasons behind legislation being presented to the Parliament and passed by it. Essentially it provides the “spirit of the legislation”. This may assist judges trying to interpret statutes.*

Halsburys Laws of England or Laws of Australia: *Provides statements on principles of law as they have been developed and is a resource for judges to assist in areas of complex or uncertain law.*

Marking scheme

1 x mark for identifying aid.

1 x mark for describing how it helps judges determine meaning or purpose of an Act of Parliament.

Total marks = 2.

Question 5 (8 marks)

The doctrine of precedent allows for both consistency and flexibility. Evaluate these two strengths of the doctrine of precedent.

Evaluate - To carefully appraise or consider the statement and comment on the relative strengths and weaknesses, as well as an overall judgement.

The doctrine of precedent allows some level of consistency in decision making; similar cases with similar circumstances need to follow precedents in higher cases, thereby ensuring appropriate legal advice can be given in some areas of law. Consistency leads to fairness, as similar cases have the same outcome and predictability for those taking legal action.

However, courts are often bound by previous decisions which could lead to unjust results. Although, courts have ways to move around precedents (distinguishing, in particular), this may result in inconsistency. Furthermore, the courts, keen to promote consistency and certainty, tend to be conservative and reluctant to change the law (as stated by Justice Mason in Trigwell). Overall, this conservative approach by judges results in fewer changes to the law.

The doctrine of precedent allows for some flexibility. Judges may alter precedents through distinguishing, reversing and overruling earlier decisions. For example, if a court feels that the existing law is too rigid they can distinguish some of the smaller material facts even if the cases are similar, and use this as a basis for applying a different common law. The High Court is not bound by any of its earlier decisions and may engage in judicial activism. This is strength, as the common law can change as society changes.

However, these methods of avoiding precedent are limited by nature, disapproving does not change a bad precedent, and overruling and reversing are only available to higher courts such as the Supreme and High Courts.

Overall, Flexibility could lend to an inconsistent approach to cases should judges choose to distinguish or overrule previous decisions, thus jeopardising the strength of consistency.

Marking Scheme

- 2 x marks for evaluation of flexibility of doctrine of precedent.
 - 2 x marks for evaluation of inflexibility of doctrine of precedent.
 - 2 x marks for evaluation of consistency of doctrine of precedent.
 - 2 x marks for evaluation of inconsistency of doctrine of precedent.
- Total marks = 8.

Question 6 (2 marks)

Distinguish between legislative and executive powers in the Australian parliamentary system.

Distinguish - To recognise or note differences, or to note the distinctive characteristics.

Possible Answer:

The Legislative power in the Australian parliamentary system belongs to parliament, whereas the executive power belongs to the Governor General. The legislative power is the power to make laws, whereas executive is the power to manage the business of government.

Marking scheme

- 1 x mark for each difference, need at least 2 points.
- Total marks = 2.

Question 7 (3 marks)

John was assaulted outside a pub a year ago and successfully sued claiming damages of \$4.2 million.

Prior to the case coming to trial, a number of pre-trial proceedings would have occurred. Identify and describe the purpose of **one** of these pre-trial proceedings.

Identify – To determine the key characteristics or state the key features.

Describe - To give a factual account. If the question refers to a process, you may be expected to describe the process in sequential order. The description could also list a number of parts, elements or features.

Possible Answer:

Initially, John would have sought legal advice from his solicitor. His solicitor may send a letter of demand to the defendant in the hope that the dispute may be resolved. This letter informs the defendant of the nature of the claim and the compensation sought. It could state that failure to respond may result in the case being taken to court.

Pre-trial procedures that could be included are:

***Pleadings** is the stage where Documents exchanged between the plaintiff and the defendant in a civil case, normally through their solicitors, to establish the reason for the claim and which facts are in dispute. Pleadings include writ, statement of claim, and notice of appearance and statement of defence. One purpose of pleadings is to require the parties to state the main claims and defences of their case.*

***Discovery** is a stage where both parties engage in full and honest disclosure of all the evidence they have to support their claims and version of the facts. One purpose of discovery is to assist the parties to prepare for the trial by allowing them to see the evidence that will be brought against them.*

***Civil directions hearings** is a pre-trial procedure, where the court may give any direction to the parties about the conduct of the civil proceeding, such as requiring the parties to attend mediation before trial. One purpose of a directions hearing is to set a timetable for future steps in the pre-trial proceedings stage.*

Marking scheme

1 mark for identifying the pre-trial procedure.

1 mark for explaining the procedure.

1 mark for describing the purpose of two of these.

Total marks = 3.

Question 8 (4 marks)

Explain **two** features of the adversary system of trial and distinguish them with the inquisitorial system of trial.

Explain - To give a detailed account or expand on the reasons for something.

Distinguish - To recognise or note differences, or to note the distinctive characteristics judgement.

*One feature of the adversary system of trial is the **role of the judge**. The judge generally acts as an independent and impartial adjudicator, ensuring that the parties adhere to the rules of evidence and procedure. A judge will not become involved in what evidence is brought before the court. In contrast, in the inquisitorial system, the judge(s) plays an active role, taking part in the investigation, the questioning of witnesses as well as generally running the trial, collecting the evidence and ultimately reaching a verdict.*

*Another feature is the **rules of evidence and procedure**. In the adversary system, witnesses must only answer the questions put to them by the lawyers/barristers. There are strict rules relating to evidence involving hearsay, character evidence and past convictions in criminal trials. In the inquisitorial system the rules of evidence and procedure are more relaxed. Witnesses can recount their own version of events and hearsay evidence is permitted. In this way the inquisitorial system seems to be more in search of the truth by letting the witnesses recount their version, in real contrast to the adversary system's strict rules.*

Other features that could have been included:

- *Need for legal representation*
- *Burden of proof and standard of proof*

Marking Scheme

1 x mark for explaining each adversary system feature.

1 x mark for explaining the difference with inquisitorial system of trial for each adversary system feature.

Total marks = 4.

Question 9 (6 marks)

To what extent do you believe that human rights 'are limited and narrowly defined'?

To what extent - A clear statement of agreement, disagreement or partial agreement. The degree to which an institution, process, procedures or law fulfils a purpose or principle.

Possible Answer:

In general, I believe that human rights in Australia are well protected in the Constitution but at times can be limited in number, as many basic rights are not stated in the constitution. They are mainly prohibitions on the law-making powers of the Commonwealth parliaments.

Examples of protected human rights include but are not limited to:

- **Structural protections** in the Constitution such as representative government and the separation of powers provide fairly broad guarantees that the Commonwealth – and to some extent the states – will not abuse human rights of Australians. They are flexible enough to change with changing circumstances, and can be interpreted by the High court on a case by case basis. Express rights often do not have this flexibility. On the other hand, structural protections are not written explicitly into the Constitution, so they are impossible for an everyday Australian to find simply by reading the Act. Instead, a person must know which High Court cases to read and see which rights are protected. This means that their exact meaning and scope can be ambiguous.
- The **express rights** are entrenched in the constitution, and they therefore cannot be removed without the consent of the voters in a referendum, using the s128 process which prevents rights from being repealed or overridden. This gives the express rights democratic protection and security. It also serves as an important role in interpreting and enforcing protected constitutional rights in order to ensure that rights are upheld. Unfortunately, this process rarely results in a change and has limited the entrenchment of further rights. Also there are very few express rights, most are limited in their impact – such as s 80 protection of trial by jury are extremely limited. It only provides for a jury trial for indictable offences. As the Constitution only protects a limited number of rights, our legal system relies heavily on legislation and the common law to protect rights.
- All constitutional rights are fully **enforceable by the High Court**. Any law breaching rights can be declared invalid by the court, and no parliament or government has the power to change or ignore the Court's decision. The High Court has the ability to find more implied rights and more structural protections. We do not need to change the wording of the Constitution for this, so it is a cheaper much more flexible way of adapting rights and the Constitution to a changing society. However, the High Court must wait for a case to be brought to it with a relevant issue before it is able to make a declaration of invalidity. This can be a lengthy and costly procedure for the parties involved. Even though, the High Court has the power to declare legislation invalid if it infringes a protected right, it does not have the power to award damages compensating the individual whose rights were infringed.
- Only having one **implied right** to freedom of political communication – it exists in the Constitution in order to achieve the purpose of having a healthy democracy and a strong representative government. However, implied rights do not provide a comprehensive recognition of rights. There is no free speech in general. These rights develop in an ad hoc manner.

Marking scheme

1 x mark for identifying and explaining how each point protects rights in Constitution = 3 marks.

1 x mark for identifying and explaining how each point does not protect rights (limits or narrows Constitution) = 3 marks.

To gain full marks you need to address the question – “To what extent” first then look at how well protected our rights are and then counter this with how they could be limited and narrow also.

Total marks = 6.

Question 10 (6 marks)

Compare Australia’s approach to the constitutional protection of rights with the approach adopted in one of the countries you have studied this year. Canada, New Zealand, South Africa, or the United States of America.

Compare - To explain the points of similarity and difference. It is not enough to just list similarities or differences and leave it to the examiner to work it out. You need to explain how they are different or alike.

Possible Answer:

Country chosen: *Canada*

In Australia, our rights are protected by a limited number of rights entrenched in the Constitution, whereas Canada has a Bill of Rights (entrenched in the Canadian Constitution) providing an extensive list of rights. In both countries, rights in the Constitution are enforced, and interpreted by the courts. Furthermore, if a person feels that their protected rights have been infringed by legislation, they may bring a case to the courts to have that legislation declared invalid.

However, the Canadian Supreme Court additionally offers remedies to parties whose rights have been infringed and a case is brought, whereas the Australian High Court does not do so.

Our rights in Australia are protected by a limited number of rights, with five express rights, and one implied right that has come through High Court interpretation, and various structural protections offered by the Constitution. Express rights mainly limit what the Commonwealth can do, such as imposing religious observance, whereas structural protections are, for example, representative and responsible government. We do not have a Bill of Rights. Conversely, Canada has an extensive list including fundamental freedoms and mobility rights.

Yet, both countries offer pre-legislative scrutiny to determine if, when their Parliaments pass law, that it complies with constitutionally protected rights. Before the Australian Commonwealth Parliament passes bills, bills are subject to scrutiny by a standing committee – in Canada, the Minister for Justice checks that bills do not infringe Charter of Rights and Freedoms, and they also have standing committees.

However, the Australian Commonwealth Parliament cannot override a High Court Declaration of Invalidity – that is, when a law is deemed invalid because it infringes a Constitutional right, it cannot be reinstated. On the other hand, the Canadian Parliament allows this and can override some rights in the Charter except for mobility and democratic if they expressly state their intention to do so. Overriding protected rights in the Canadian charter creates ‘sunset clauses’ under section 33 that last for 5 years.

Australia's constitution is effective in protecting rights as structural protections and express rights are entrenched within the Constitution and can only be changed by a successful referendum. Referendums involve strict procedures under s128 so our rights cannot be easily altered and are protected.

Furthermore, our High Court is responsible as the guardian of the Constitution and will interpret and ensure constitutional rights are upheld.

Conversely, Australia's constitution only protects a limited number of rights as there are relatively few, and most rights are protected by legislation and common law. Furthermore, most 'rights' given to us are limitations on what the Commonwealth Parliament can do, and do not limit the actions of the states.

Nevertheless, Australia's protection of rights is strengthened by the High Court's ability to find implied rights when a case is brought before them – that is, they do not need to go through a referendum process. New implied rights can be found via statutory interpretation, such as the implied right to freedom of political communication. The rights of Australians are not exhaustively listed by a Bill of Rights, thus our rights are not 'restricted' in that sense.

Yet, a problem with our protection is that there are no remedies provided, even when our rights are infringed. Legislation that infringes rights is merely declared invalid. There is also no dialogue between Australia's courts and parliaments to ensure that new laws would not infringe on Constitutional rights.

In conclusion, I believe that while both countries have weaknesses in certain areas, their strengths generally outweigh their weaknesses and both countries protect individual's rights effectively.

Marking scheme

1 x mark for explaining each similarity = 3 marks.

1 x mark for explaining each difference = 3 marks.

Total marks = 6.

Question 11 (6 marks)

Explain **one** problem that individuals face in using the legal system. Discuss **one** recent change in the legal system designed to enhance its effective operation.

Explain - To give a detailed account or expand on the reasons for something.

Discuss - To present a topic from all sides with a reasoned argument for and against a particular issue. You may add your opinion as part of a balanced argument.

Possible problems that could be included:

- *Financial inequities*
- *Delays*
- *Cultural barriers*

Financial inequities affecting access to the law***Problem:***

People with limited financial means cannot afford to have their case heard in court due to high court fees and the need for legal representation. Financial inequities may mean that people with limited financial means cannot afford to be properly represented, which may lead to an unfair outcome.

Recent changes in civil procedure to overcome financial inequities affecting access to the law include:

Increased use of ADR - Mediation, conciliation and arbitration sessions are proving to be successful methods of resolving civil disputes. The fact they have only a nominal fee and there is generally no need for legal representation reduces the costs involved and means more people can access the legal system to have their dispute resolved. However, if the matter cannot be resolved by ADR or through VCAT, the parties may need to go to court anyway, which will further increase costs.

Judge-led mediation — Two-year pilot set up in the County Court and Supreme Court in 2010 that uses mediation to try to resolve the dispute. These superior courts have a judge, support staff and an ADR coordinator appointed to them, with the purpose of placing ADR ‘firmly within the court system’. However, if the matter cannot be resolved through mediation, the matter will still need to go to court, which will increase costs further.

Melbourne Commercial Arbitration and Mediation Centre - Based at the William Cooper Justice Centre, the new Centre aims to set the standard for commercial arbitration in Australia and beyond. Provides a ‘one-stop shop’ allowing domestic and foreign parties to resolve disputes. The Centre offers neutral ground for arbitrations and mediations, with purpose-built facilities that suit the nature of the processes, and access to high-quality arbitrators and mediators at the Bar and in the wider profession. Arbitration is becoming an increasingly attractive alternative internationally. Australia’s arbitration process seeks to reduce costs, ensure efficiency and deliver certainty to parties.

Delays***Problem:***

Delays in the legal processes and procedures can contribute to problems faced by parties in disputes and limit the operation of the legal system by cases not being resolved in a timely manner.

Recent changes in criminal procedure to overcome delays to uphold a timely resolution of disputes include:

Simplified criminal procedure — The Criminal Procedure Act 2009 (Vic.) consolidated a number of existing acts relating to criminal procedure into one piece of legislation, which is ordered sequentially according to criminal pre-trial and trial procedure, making it easier to find the procedural law.

Sentencing indication — A sentencing indication scheme was formalised in 2009 with the aim of encouraging guilty pleas earlier in the proceedings, thereby reducing the time and cost of a trial. The process involves the judge advising the accused whether they are likely to be sentenced to a term of imprisonment should they plead guilty to the offence at the first available opportunity. This would help reduce the cost of legal representation for the accused person, as well as reducing some of the stress for the victims. However, this may undermine the principle of presumed innocent until proven guilty as defendants may feel influenced into an early guilty plea.

Recent changes in civil procedure to overcome delays to uphold a timely resolution of disputes include:

Increased use of alternative dispute resolution — The Supreme Court now refers matters to mediation during the pre-trial procedures, or during the trial itself. This helps reduce the settlement time for parties to the case, as they do not have to wait for their case to be listed in court. Further, having cases resolved outside of court frees up the court's time and resources to hear contested cases. However, if the matter cannot be resolved through ADR, the parties may need to go to court anyway, which would further delay resolution of the dispute.

Commercial Court in the Supreme Court — This new division of the Supreme Court, established in 2009, combines the Commercial List and the Corporations List of the Supreme Court. Its aim is to resolve disputes in a more timely and efficient manner by taking a case management approach. However, establishing a new court is expensive due to the duplication of administrative cost. This may increase the burden on the tax payer, or lead to higher court fees.

Recent changes in criminal procedure to overcome delays to uphold a timely resolution of disputes include:

Time limits on criminal procedure — The Criminal Procedure Act 2009 (Vic.) sets time limits for various stages of criminal pre-trial procedure. However, this has meant that some cases have had to be abandoned when the time limits were missed.

Sentence indication — An accused person can get an indication of the sentence he or she would be likely to receive, before deciding whether to plead guilty or not guilty. However, this may undermine the principle of presumed innocent until proven guilty as defendants may feel influenced into an early guilty plea.

Magistrates' Court of Victoria: Weekend Bail and Remand— Pilot program commenced in 2013. The pilot will be reviewed continually and will remain in place at this stage until 28/06/2015. The Magistrates' Court at Melbourne open on Saturday and Sunday from 9.00 am and will close at 5 pm. Sits from 10.00 am and adjourn at 4.00 pm. A magistrate hears remands and applications from the previous evening or during the day on a Saturday and Sunday

Juries Directions Act 2015 - Makes a range of amendments aimed at simplifying and clarifying the law on jury directions.

This includes:

- *to reduce the complexity of jury directions in criminal trials;*
- *to simplify and clarify the issues that juries must determine in criminal trials;*
- *to simplify and clarify the duties of the trial judge in giving jury directions in criminal trials;*
- *to clarify that it is one of the duties of legal practitioners appearing in criminal trials to assist the trial judge in deciding which jury directions should be given;*
- *to assist the trial judge to give jury directions in a manner that is as clear, brief, simple and comprehensible as possible;*
- *to provide for simplified directions in relation to specific issues.*

Cultural differences affecting access to the law

Indigenous people

Problem:

Indigenous people do not have equal access to the legal system and may not receive a fair and unbiased hearing.

There are a number of reasons why Indigenous people are disadvantaged in the legal system, such as:

- *Language barriers - There are differences in the way language is used by Indigenous people that can cause misunderstandings, which could have adverse effects. For example, 'kill' may mean to hit someone, probably causing injury, but not necessarily killing them.*
- *Direct questioning - It is considered contrary to conventions of Indigenous courtesy to ask personal questions. Attempts at avoiding direct questioning in the courtroom can be viewed with suspicion.*
- *Body language - Direct eye contact is seen as disrespectful to some Indigenous people, who try to avoid it by looking down or to the side. This type of behaviour appears uninterested or unreliable to those who do not understand Indigenous customs.*
- *Indigenous shyness and submissiveness —Indigenous people tend to be submissive to authority and very willing to respond to police requests, even to the extent of admitting guilt, without realising the consequences of the admission.*

Recent changes to overcome social disadvantage for Indigenous people gaining access to the law include:

Establishment of the Koori County Court - *The Koori County Court extends the principles of the Koori Court division of the Magistrates' Court, and is the first sentencing court for Indigenous offenders in a higher jurisdiction in Australia. Its jurisdiction includes sentencing for all offences dealt with in the criminal jurisdiction of the County Court except sexual offences and family violence cases. However,*

establishing a new court is expensive, which increases the burden on the tax payer and may lead to increased court costs which could reduce access for those with limited financial means.

Expansion of the Koori Court -July 2014 – Koori Court division in the Melbourne Magistrates' Court. The Koori Court has been created under the Magistrates Court Act 1989. It operates as a division of the Magistrates' Court, which sentences Indigenous defendants. Located at Bairnsdale, Broadmeadows, Latrobe Valley, Mildura, Shepparton, Swan Hill and Warrnambool Magistrates' Courts. Children's Koori Courts are also located in Melbourne and Mildura. The County Koori Court is a Division of the County Court

Marking scheme

1 x mark for identification of problem.

1 x mark for brief outline of the causes of the problem.

1 x mark for the effects of the problem in terms of an effective legal system.

Total marks = 3.

1 x mark for identifying recent change.

1 x mark for outline the benefits of the change.

1x mark for outlining the disadvantages of the change.

Total marks = 3.

Total marks = 6 marks.

Question 12 (6 marks)

a. Explain **one** factor that might influence the final composition of the jury.

2 marks

Explain -To give a detailed account or expand on the reasons for something.

Factors that influence the composition of a jury include:

Disqualified

Some people are disqualified from jury service because of something they did in the past that makes them unsuitable. For example, people with a criminal record, or who are bankrupt are disqualified because they may be seen as unreliable or may be biased towards the accused.

Examples:

- *Criminal record*
- *Bankrupt*

Ineligible

Someone might be ineligible because of their occupation or their inability to comprehend the task of a juror. People who are employed in the legal profession are ineligible for jury service because their opinion might carry too much weight. People who are unable to comprehend the task, or carry out the duties of being on a jury are also ineligible, because they would not be able to make an appropriate decision on the facts before them.

Examples:

- *Members of legal profession (too influential)*
- *Poor English, visually impaired, deaf or intellectually disabled*

Excused

Potential jurors may be excused for good reason, such as:

- *Illness or incapacity*
- *Distance to travel (>50km in Melbourne)*
- *Care of dependants or advanced age*

Challenges

Both parties are allowed to challenge prospective jurors. This can influence the composition of the jury. Parties are limited to 6 peremptory challenges in criminal trials and 3 peremptory challenges in civil cases. These are unlimited for cause challenges in both criminal and civil cases.

Marking scheme

1 x mark for identifying factor that influences the composition of a jury.

1 x mark for giving a detailed account for the factor.

Total marks = 2.

- b.** ‘The jury system is impartial and independent and there is no need to improve it’. Discuss this statement indicating the extent to which you agree with it. In your response, explain **two** strengths and **two** weaknesses of the jury system. 4 marks

Discuss - To present a topic from all sides with a reasoned argument for and against a particular issue. You may add your opinion as part of a balanced argument.

Strengths of the jury system include:***Independent fact finding body***

- *Juries are often referred to as the lamp of freedom. The jury consists of ordinary women and men.*
- *They are not prejudiced by past experiences with the operation of the legal system.*
- *They are not bound by the rules of precedent.*
- *They provide a fresh view of how the law should be applied to a set of circumstances. They are independent of political pressures and reflect the common sense values of the community.*

Protect Democracy

- *Judges are appointed to the court, they are not elected democratically to their positions. Their decisions do not necessarily reflect community.*

Values and attitudes

- *A jury, on the other hand, is selected from people in the community. It provides for the input of the community into the operation and administration of justice since the jury reflects community views and attitudes.*
- *Members of the jury, as representatives of the community, reflect the values of the majority of people in the decisions that the jury makes.*
- *The importance of the role of the jury is recognised in this Constitution. The use of the jury ensures public scrutiny of the function of the courts.*
- *The jury system is therefore considered a safeguard of basic human rights.*

Cross section of the community

- *Juries act as a barometer of social norms, values and opinions of the times. The fact that the jury's verdict is decided by ordinary citizens drawn from the community ensures that court decisions are more likely to be accepted by the community.*
- *Juries understand and predict how an ordinary person would behave in the circumstances.*
- *The wider range of experiences means that juries can apply a 'streetwise' understanding of the circumstances rather than a legalistic view.*
- *The real merit of jury trial is that it brings the common sense of the average person into the courtroom to temper, in appropriate cases, the rigidity of the law.*

Flexibility

- *The jury can depart from a strict application of the law and apply its own sense of justice. A jury can ignore obsolete and outdated precedents.*
- *Judges, however, tend to consider themselves bound to precedents. Although the jury is informed of the common law and statute law applicable to a given set of the facts, it does not have to apply these to the case.*
- *Juries do not have to give a legal reason for their decisions.*

Ensures less legal jargon

- *The involvement of the jury means that the law must be simplified so that an ordinary person can understand it.*
- *This encourages lawyers to present evidence in a logical and understandable way.*
- *The presence of the jury limits the excessive use of legal jargon.*

Spreads the responsibility

- *The more people these are involved in the decision making process, the less likely it is that personal prejudices will influence the verdict. Therefore, the decision is more likely to be seen as fair. The jury consists of anonymous men and women.*
- *If a judge alone makes a decision, a person dissatisfied with the decision may identify the judge as responsible.*
- *However, a decision made by a jury is not made by one person. The final decision is therefore more likely to be seen as a decision of the community.*

Public Scrutiny

- *In a criminal trial, the conduct of the police and the courts are on show. The jury can see how these bodies are working.*
- *The jury in this way ensures that the administration of the law is scrutinised by the community through its representatives. To some extent, each of the participants involved in the trial – the police, the prosecution, the judge and the legal profession – is accountable through the use of the jury.*

Ensures fair treatment

- *The prosecution must prove to the jury that the accused is guilty beyond reasonable doubt. The jury is directed by the judge to return a finding of not guilty if the jury believes that the prosecution cannot prove the guilt of the accused.*

Weaknesses of the jury system include:**Judges are better able to make decisions**

- *Judges can draw inferences and reach sound conclusions about the facts and evidence presented by lawyers.*
- *Judges and magistrates are trained for this. They are better equipped to perform the fact finding function than juries. They are less susceptible than juries to emotions, in most cases.*
- *Many criminal and civil cases involve legal and technical complexities. These cases demand the expertise of an experienced professional judge.*

Juries do not give reasons

- *How a jury reaches its decision in the jury room has never been investigated. Other than the judge's final summing up and advice, the jury is not given any direction or formula to reach a decision.*
- *Although the jury must reach a decision, there is no guarantee that all jurors will have the same reasons for their verdict*
- *It is considered important that juries should give reasons for their decision. This would provide grounds for appeal if the decision of the jury were not based on the evidence presented. Because juries do not give reasons for their decisions, there is no way to check that the jury understood the evidence or the judge's charge to the jury.*

Costly and time consuming

- *While jurors do not receive substantial payment for jury service, they still must be paid.*
- *Trial by jury tends to lengthen the legal process.*
- *Significant time is taken to empanel the jury. The time taken to hear a case is often 'stretched' when juries are sent out of the courtroom while lawyers establish the admissibility of evidence or debate points of procedure. Further time is taken for the jury to deliberate on its verdict. The longer the trial takes to reach a conclusion, the greater the costs.*

Understanding evidence

- *Juries are made up of ordinary men and women. They come from various professional and non professional backgrounds. Juries are not given any special training. Jurors are expected to understand and appreciate the adversary process as well as legal formalities.*
- *Juries are required to listen to evidence, collate information, recall information, analyse the arguments presented by both parties and reach a verdict. The average person would find it difficult to sit and listen for more than 45 minutes without losing concentration, but many cases take says, weeks, or even longer.*

Easily influenced by emotional bias or rhetoric

- *The courtroom can be likened to a theatre where each lawyer is a player who 'struts upon his hour upon the stage'.*
- *The skill and eloquence of the barrister may have more influence on the jury than the actual evidence in question. Skilled barristers have gained reputations for their courtroom performances. These presentations may appeal to some members of the jury, and their influence may be unduly reflected in the decision reached by the jury.*

Inconsistent assessments of damages

- *It has been argued that juries are excessively 'pro plaintiff'. Juries tend to favour the plaintiff if the action involves an individual against a large company.*
- *Assessment of damages in civil cases is inconsistent and unpredictable. This results in a lack of certainty. There is no guarantee that the jury will accurately assess the damages.*

Unanimous v. majority verdicts

- *Juries are encouraged to deliberate until they reach a unanimous decision.*
- *This may sometimes take days, and lengthens the trial and increases costs and places pressure on jury members to reach agreement.*
- *By comparison, a majority verdict is required in all other indictable offences. These verdicts save time and expense.*
- *The community accepts majority verdicts, however, some people suggest that in a criminal case a majority verdict means that at least one had a reasonable doubt.*

Not a cross section of society

- *Many people do not perform jury service because they are in one of the ineligible categories.*
- *For example, people who are involved with the legal profession (lawyers, magistrates, court reporters, police and judges are not allowed to serve on a jury).*
- *Others may be excused for good reasons. Many argue that the range of people who are excused from jury service is too broad, therefore, the jury still does not represent a cross section of the community.*

Marking scheme

1 x mark for explaining each strength of the jury system = 2 marks.

1 x mark for explaining each weakness of the jury system = 2 marks.
Total marks – 4.

Question 13 (10 marks)

‘A strength of parliament as a lawmaker is its ability to respond quickly to the needs of the community whilst courts are limited in their ability to respond in this manner’.

Critically evaluate the effectiveness of parliament and the courts to make laws in response to the needs of the community.

Critically evaluate - To carefully appraise the value – considering both the strengths and weaknesses or the arguments for and against something.

Possible Answer:

Parliament is able to respond quickly to the needs of the community because it is representative. MPs have been voted into office by voters from their community, and have a duty to listen, and respond to their views and values. If they do not respond quickly to their needs, they risk being voted out. MPs should answer their community’s concerns and are accountable for how they are represented in Parliament.

In comparison, courts are limited in their ability to respond to the community as judges are unelected lawmakers. When making court decisions, judges do not have to act according to the community’s wishes. They are usually appointed from narrow socio-economic groups and may not be fully in touch with community values, thus cannot respond quickly to their needs. They also tend to be conservative.

However, even though MPs are meant to represent and respond to their people, they are subject to political influence and feel obligated to abide by their party when voting for new laws. If they do not follow the directions of their party, they risk being asked to leave their position. Thus, MPs may not fully respond to what their community needs, as they often have to consider their party’s objectives as well.

Courts are free from political pressure as judges are appointed, and do not fear being removed from their position. They are thus able to make decisions that will benefit and respond to the needs of society, such as Justice Menhennitt’s decision to allow for ‘lawful abortion’, securing the rights of women in Australia. They can objectively make decisions to benefit the community - they are not politically influenced. They also are able to respond quickly to society, as they only need to consider the arguments in a specific case. Parliament, however, needs to be conscious of many conflicting views in society.

Unlike courts, the Parliamentary process provides an arena for debate. As all bills go through debates and discussion processes in both houses, all MPs have an opportunity to immediately represent their community’s views, so that their needs may be met in the future. Debates of bills could be adjourned, to allow further consultation of the community - so that Parliament can better respond to their needs after a period of time.

Conversely, courts can be quite inflexible when making laws for the community through precedent and interpretation. Judges are restricted in their ability to immediately respond to what the community wants as they could be bound by previous precedent, and are unable to avoid following it. Even if precedent is not reflective of community's needs, they still must follow it when they cannot distinguish their case from an earlier one. Also, because judges may be conservative and not consider themselves lawmakers for the community, they may not respond quickly to what the community wants.

On the other hand, Parliamentary investigations to understand the community's needs are time consuming and expensive, which impacts on the ability to respond immediately to community's concerns. For example, the Attorney General referred 'reproductive treatment' to the VLRC in 2002. It took them 5 years to conduct thorough research in society. No matter how much effort or time committees and groups spend to research areas of reform, Parliament may disregard their recommendations, and choose not to respond to society.

Courts do not consult members of the community when changing or introducing growth into the law, which enables faster response to community's concerns. When judges elaborate and expand precedents in a particular area of law, this allows it to develop/grow over time, and be relevant to society needs. For example, the law of negligence has grown from persuasive precedent in UK, to cover negligent advice and duty of care.

Both Parliament and courts can respond quickly to the needs of community. Parliament consists of MPs who directly represent communities and communicate their needs, and make laws accordingly. However, certain factors may hinder Parliament. Courts also respond to communities quickly as they are free from political influence, however Judges are unelected. On balance, both are equally important in ensuring a harmonious society.

Marking scheme

- 1 x mark for considering each strength of parliament = 2 marks.
 - 1 x mark for considering each weakness of parliament = 2 marks.
 - 1 x mark for explaining each strength of courts = 2 marks.
 - 1 x mark for explaining each weakness of courts = 2 marks.
 - 2 x marks for making a judgement/overall assessment
- Total marks = 10.