

# LEGAL STUDIES

## Units 3 & 4 – Written examination



## 2008 Trial Examination

### SOLUTIONS

Sample answers are written in standard text. Comments, instructions and lists of appropriate content that you can choose from are written in *italics*.

#### Question 1

The Commonwealth Parliament is made up of two houses – the House of Representatives also known as the Lower House and the Senate also known as the Upper House, the States House and the House of Review. There are 150 members in the House of Representatives, with each member representing an electoral division based on the number of voters in that division. Each State has equal representation in the Senate, regardless of the size of the population. This means that each State has twelve senators and each Territory has two. The Governor General represents the Crown.

2 marks

#### Question 2

The principle of the separation of powers refers to the separation of the Legislative, Executive and Judicial powers. These three different types of power are held by the Commonwealth and are exercised by different bodies in order to:

- prevent the abuse of power
- provide a means of checks and balances
- ensure the integrity of the government

The Legislative power is exercised by Parliament which is the power to make laws. The Governor General on the advice of the government exercises the Executive power and Judicial power is exercised by the Courts, this enables them to enforce laws and settle legal disputes.

2 marks

### Question 3

Any **one** of the following could be chosen to answer this question:

- *The role of the parties*
- *The judge's role*
- *The need for legal representation*
- *The burden and standard of proof*
- *Rules of evidence and procedure*

#### ***The role of parties:***

*Each of the parties has full control of their case:*

*Criminal Cases: the accused can plead guilty or not guilty, they are responsible for preparing evidence for the trial and, the type of trial (magistrate, judge, judge and jury)*

*Civil cases: the wronged party must decide whether to pursue legal action*

*Strengths could be:*

- *Some level of satisfaction as each party has some degree of /or total control over their case*
- *The parties involved will prepare the best case they possibly can to support their claim/or plea*
- *Evidence that is relevant to the civil or criminal trial should surface either during the examination, or the cross-examination of each party involved in the case*

*Weaknesses could be:*

- *The adversary system is based on a winner and a loser – creating the possibility of further hostility between the parties*
- *Delays which can be due to gathering information to present in the trial*
- *Parties to the case must bear the legal costs*

#### ***The judge's role:***

- *Acts as an independent umpire that is impartial to both sides*
- *Ensure the parties in both criminal and civil cases follow the strict rules of evidence and procedure*
- *To rule on matters of law, decides what evidence is allowed, provides instructions and guidance where there is a jury, issues sanctions in criminal cases, decides on the outcome in a civil case if a jury is not involved*

*Strengths could be:*

- *Fairness for both parties with the existence of an unbiased, impartial and independent umpire*
- *The judge's decision is based only on evidence brought before the court*

- *The judge is separate from the state and the prosecution, ensuring impartial treatment for all the parties involved in either a criminal or civil case*

*Weaknesses could be:*

- *Limited role in civil/criminal cases by the most experienced person in the courtroom*
- *Under utilisation of the expertise and knowledge of the judge*
- *The judge is not allowed to suggest questions or evidence that could be explored further*
- *The judge cannot offer assistance to parties that are not, or poorly represented*

***The need for legal representation:***

- *Necessary in order for each of the parties to present the best case possible and try to attain a just result*
- *Strict trial procedures ( including pre and post) and rules of evidence means that there is a need for each side to have legal representation, regardless of whether it is a criminal or civil case*
- *There is the possibility of the judge either in the County, or Supreme Court ordering legal representation through legal aid for the accused, in a criminal case, if there is concern about a fair trial*

*Strengths could be:*

- *Equal representation for each party ensures fairness, as each side has the opportunity to present the facts as they see them using expert legal personnel*
- *The use of an expert legal representative to present a party's case means that the court will hear objective and reasoned arguments*

*Weaknesses could be:*

- *Unrepresented parties in a case will be severely disadvantaged in court proceedings*
- *One side may not have the money to afford legal representation, which may stop them from pursuing a civil case, or they may appear unrepresented in court.*
- *Parties can be disadvantaged through the use of inexperienced or less skilled lawyers*

***The burden and standard of proof:***

*The party that is bringing the case to court is also responsible for proving the case. The burden of proof in a criminal case rests with the prosecution to prove the guilt of the accused and in civil cases it rests with the plaintiff.*

*The standard of proof refers to the strength of evidence needed to prove a case. It is the responsibility of the prosecution in a criminal case to prove beyond reasonable doubt, that the accused is guilty of the alleged offence. In a civil case the standard of proof is based on the balance of probabilities and the burden rests with the person commencing the civil action.*

*Strengths could be:*

- *It can be argued that it is a fairer system making the party bringing the action responsible to provide evidence against the defendant – whether it be a criminal or civil case*
- *All individuals are treated equally in criminal cases, as they are deemed innocent until the prosecution proves them guilty of the criminal act*

*Weaknesses:*

*The adversary system aims to provide a winner or evidence against the defendant, rather than the truth in all legal cases brought before a court of law*

***Rules of Evidence and Procedure:***

*The rules of evidence focus on proof of facts which are a mechanism aimed at protecting both parties. Evidence admissible in court includes: oral, objects, affidavits and some circumstantial evidence.*

*Inadmissible evidence includes: opinion, hearsay, irrelevant, information obtained illegally and bad character references.*

*Rules of procedure provide a series of steps and order, to ensure all relevant evidence is presented in court.*

*Strengths could be:*

- *The promotion of fairness and consistency, as both sides are subject to the same rules of evidence and procedure.*
- *The rules ensure that only evidence that is reliable and relevant is presented in court, rather than evidence that may be irrelevant, or unfairly biased against defendant*
- *Evidence can be tested by both sides through a cross-examination of witnesses, to make sure that the truth will surface during the case.*

*Weaknesses could be:*

- *Despite examination of witnesses the truth may not emerge*
- *Oral evidence from witnesses could be affected by threats, communication difficulties or the forgetting of key facts, as there is a time lag between the events and the actual court case*
- *Witnesses are restricted to answering specific questions, rather than being given the opportunity to tell their story.*
- *Some evidence may be useful but deemed inadmissible, therefore not presented during the trial.*

2 + 1 + 1 = 4 marks

**Question 4**

*This response should include a discussion of any one of the following Formal Law Reform Bodies:*

- *Victorian Law Reform Commission*
- *Australian Law Reform Commission*
- *A government inquiry*
- *A parliamentary committee*
- *A Royal Commission*

*It must include the following:*

- *The structure of the formal law reform body*
- *How the formal law reform body researches the need for change*
- *Who the formal law reform body reports to*
- *Whether the findings of the formal law reform body are subject to public scrutiny*

3 marks

**Question 5**

Section 109 of the Commonwealth Constitution deals with inconsistencies between Commonwealth and State laws. It clearly states that if a State law conflicts with a Commonwealth law, then the Commonwealth law will always prevail to the extent of this inconsistency. It could arise in situations where there are concurrent powers – that is where both the Commonwealth and the State Parliaments have the authority to pass laws.

2 marks

**Question 6**

*One of the following should be chosen:*

**County Court:**

The middle court - in the Victorian court hierarchy.

Original Criminal Jurisdiction: Hears indictable offences such as serious assault, rape, drug trafficking, but not homicide related cases.

Criminal cases are heard before a judge and a jury of twelve ordinary people.

Appellate Criminal Jurisdiction: Hears appeals from the Magistrate's Court against a conviction or sentence. Can also hear appeals from the Children's Court in relation to both criminal and family matters. It is a re-hearing with only a single judge presiding.

**OR**

**Supreme Court:**

The highest court - in the Victorian court hierarchy.

Original Criminal Jurisdiction: Hears the most serious indictable offences such as murder, attempted murder, treason and corporate offences, before a judge and a jury of twelve ordinary people, where the accused has pleaded not guilty.

Appellate Criminal Jurisdiction: A single judge of the Supreme Court can hear appeals from the Magistrate's or Children's court on a point of law.

2 + 2 = 4 marks

**Question 7**

*You are expected to use **one** example of a case in which the High Court has interpreted the meaning of the Constitution, in relation to the law making powers of the Commonwealth and State Parliaments.*

*You need to:*

- *Give a brief summary of the facts of the case*
- *Make a brief comment on the outcome of the case*
- *Write about the impact that the case has had, on the division of lawmaking powers between the Commonwealth and the State Parliaments*

*Possible cases to use as examples include:*

*The Brislan Case - 1935*

*The First Uniform Tax Case - 1942*

*The Franklin Dam Case - 1983*

*The Customs and Excise Case - 1997*

*For example:*

The division of law making powers between the Commonwealth and the State parliaments can be altered through the High Court's interpretation of the Constitution, when adjudicating particular cases.

The Franklin Dam case demonstrates just how the High Court's interpretation affected the law making powers of both the Tasmanian and Commonwealth parliaments. In this particular case, the Tasmanian government wanted to dam the Franklin River. The Commonwealth parliament passed legislation that prevented them from building the dam, since it was deemed as a World Heritage site and therefore protected. The Commonwealth put forward the argument that they had every right and obligation to pass such laws, as they were a party to an international treaty. The Tasmanian government challenged the validity of this law, arguing that laws relating to damming a river, came under the residual powers of the States. The High Court was therefore responsible, for deciding whether the Commonwealth parliament could legislate to implement the terms of the treaty. The High Court decided that the external affairs power gave the Commonwealth Parliament the right to make laws, to meet Australia's obligations under such international treaties.

The High Court's interpretation of the Commonwealth Constitution extended the law making powers of the Commonwealth Parliament. In this case it allowed the Commonwealth to legislate in an area that was traditionally seen as being a residual power of the States. As a consequence this restricted the lawmaking powers of the States. While High Court interpretations of the Constitution have altered the balance of power between the Commonwealth and the States, the actual wording has not changed. Instead the High Court has added meaning to the relevant sections of the Constitution, as cases present themselves before this Court.

3 + 2 = 5 marks

### Question 8

Any **two** of the following criminal pre-trial procedures should be chosen:

- *Police Investigations – questioning, searches, arrest, gathering evidence, fingerprinting, blood and body sampling*
- *Bail and Remand*
- *Committal Hearings*
- *Directions Hearings*
- *Arrest with or without a warrant*

*For example:*

Committal proceedings are an example of a criminal pre-trial procedure. Committal proceedings are conducted where the accused has pleaded not guilty to a serious (indictable) offence. Such proceedings are conducted in the Magistrate's court. They provide the opportunity for the Magistrate to examine the evidence presented by the prosecution, to see if there is sufficient evidence for a jury to convict in a higher court. The committal hearing is not a trial, but rather a preliminary examination of the evidence, to establish whether there is a prima facie case. The main aims of this pre-trial procedure are: to avoid wasting time and the expense of taking a case to trial that is unlikely to succeed and to clarify any legal issues that may arise.

### Question 9

- a. A court hierarchy allows for the operation of the doctrine of precedent.

A court hierarchy is the ranking of courts in order of function and jurisdiction. This allows the judges in higher courts to use their wisdom and experience to guide the decisions of judges in the lower courts. This practice creates consistency, predictability and fairness in our legal system.

The doctrine of precedent refers to the process by which judges follow the previous decisions of higher courts. The material facts of the case must be the same or similar for this to occur. It is the ratio decidendi or the reason for the judge's decision that forms the binding part of the precedent that judges in the lower courts must follow.

2 + 2 = 4 marks

- b. *There are a number of strengths and weaknesses that can be chosen to answer this question*

*Your answer could include any of the following (only a sample):*

Strength:

- Courts can make laws quickly when resolving a dispute that comes before them, thus creating a precedent that is binding on lower courts in the hierarchy.

Weakness:

- Courts must wait for a test case to be brought before them before the judge can create or alter a law.
- Judges can only rule on points of law thereby creating narrow, specific laws.
- The primary purpose of a court is to resolve a dispute; law making is a result of this process.

Strength:

- Courts can develop and clarify the law, giving specific meaning to words that may be vague, which were created by Parliament.
- Judges can create areas of law, when cases come before them on issues that have not been previously legislated on by Parliament.

Weakness:

- Courts can be slow in changing the laws. They are dependant on litigants pursuing their case through the court system.

Strength:

- The doctrine of precedent provides a level of consistency since the same legal principles should be applied in cases with similar facts. Parties experience a level of certainty, as their legal representative looks to previous cases for guidance and an understanding of the how the law is likely to be applied in their case.

Weakness:

- Access to precedent can be difficult, time consuming and expensive requiring the legal representative to understand technical, complex terminology and then having to decide on the ratio decidendi of each case that may be similar.

Strength:

- Judges are independent from parliament they are appointed to their position rather than elected. This means that judges can objectively determine the most appropriate law without pressure from the voters in an electorate.



Weakness:

- Judges are unelected lawmakers, which means they are not responsible to, or representative of the community. Their decisions may not reflect those of society, particularly since judges tend to come from a narrow socio-economic group and therefore are unfamiliar with the needs of marginalised groups in the community, such as migrants and aborigines.

2 + 2 = 4 marks

### Question 10

*Any **one** of the five listed countries may be chosen for the comparison. Do not choose more than one country and remember to identify both similarities and differences in your answer.*

*For six marks aim to provide at least **three** points of comparison including at least **one** similarity and **one** difference. The protection of democratic and human rights in Australia and the country of comparison should be explained briefly, clearly comparing and contrasting the two systems. Remember to select the points that you can confidently provide specific details for.*

*For example:*

The Australian Constitution expressly sets out five different protected rights. These are known as entrenched rights and include: the right to freedom of religion, free trade and commerce between all states, not be discriminated against due to one's state of residence, trial by jury for a Commonwealth Indictable Offence and to receive adequate compensation if land is compulsorily acquired by the Commonwealth. There are also two implied rights - one relating to freedom of political communication and the other relating to the right to vote for the House of Representatives and the Senate. The High Court enforces both the expressed and implied rights within Australia.

As already stated Australia has five entrenched rights listed in the Australian Constitution. However a more extensive list of entrenched rights is set out in the Bill of Rights in the South African Constitution. Both have the entrenched right to freedom of religion. Beyond this the entrenched rights set out in the South African Constitution are far more detailed.

The Australian Constitution covers the right to free trade and commerce between states and no discrimination because of one's state of residence. There are also entrenched rights about property and trial by jury. In South Africa the Bill of Rights specifies rights in relation to equity, human dignity, privacy, health care, food, water, social security and basic education.

Both Australia and South Africa have the option of amending the entrenched rights. However, in Australia a referendum is required to change the wording of the rights and this is a complex process that involves two different votes.

In South Africa any amendment to the constitution or the entrenched rights in the Bill of Rights must be passed by a two-thirds majority in the National Assembly and six out of the nine provinces in the National Council of Provinces.

Both Australia and South Africa have constitutionally entrenched rights enforced by the relevant courts which cannot be overridden by the parliaments in either country. The High Court in Australia and Courts in South Africa can declare legislation invalid, if it infringes the entrenched rights.

2 + 2 + 2 = 6 marks

### Question 11

*There are a number of difficulties you can refer to in your answer. Remember you only need to identify **one** and include recent or suggested changes to alleviate this difficulty.*

*Options are:*

- *Lack of knowledge of the law*
- *The high cost of court proceedings*
- *Fear of the legal system*
- *Social or cultural differences*

*For example:*

One problem in gaining access to the law relates to cost. The cost of taking a case to traditional courts is still a major problem for many individuals. Legal aid is only available to applicants who pass both a means and merit test and even then, there are limits as to how much funding is available.

One recent change to overcome this problem is the introduction of a, “no win no fee” structure by some legal firms. The plaintiff is able to obtain legal assistance and representation and only pays the stated legal fees, if they win their case.

Another change is the increased civil jurisdiction of the Magistrate’s court from maximum claims of \$40,000 to \$100,000. This is designed to potentially allow more plaintiffs to access the Magistrate’s court, where disputes are usually settled more quickly and at a lower cost, than in higher courts.

2 + 2 = 4 marks

### Question 12

Any **two** of the following methods should be chosen:

- *Negotiation*
- *Conciliation*
- *Mediation*
- *Arbitration*

*Remember in your answer you need to evaluate the effectiveness of the ADR, in relation to helping resolve minor civil matters.*

*For example:*

Negotiation is the method by which disputing parties come together to discuss the dispute and to try to find a settlement to this dispute, which is acceptable to all parties concerned. There is no third party involved, however parties can choose to bring a legal representative with them, to assist with negotiations. This method of ADR is quick and inexpensive. However, if one party does not meet their part of the agreement, it means subsequent court action will need to be taken. Settlements are more by mutual agreement between the two parties, rather than formulating something that is legally binding.

3 + 3 = 6 marks

### Question 13

- a. *This question relates to Unit 3 of the course and is asking for an analysis of the lawmaking powers of parliament. You need to consider **both** the strengths and weaknesses of lawmaking through parliament. A comment about how courts are also involved in the law making process is also needed. Aim to have at least **three** strengths and **three** weaknesses regarding parliament and at least **two** points on the courts as lawmakers, with a concluding comment.*

*For example:*

Parliament is the supreme lawmaking body in Australia and the courts have a supplementary law-making role to play, as interpreters of the legislation and adjudicators in court. The Parliamentary Counsel aims to draft Acts of Parliament, which are perfect, yet in reality it is extremely difficult to anticipate future events and cover all possibilities. This is where the courts play a complementary role and contribute to the lawmaking process.

Strengths of lawmaking through parliament can include:

- It is their primary role to make laws and change laws as the need arises
- They devote the majority of their parliamentary sitting time to making laws
- Members of parliament are elected into office by the community, which makes them the democratically elected lawmakers
- Parliament is responsible and answerable to the people - if there is dissatisfaction they can be voted out of office at the next election

- Parliament can make or change laws at any time and can respond to any emergency situations
- Parliament can undertake investigation on issues and gather information from expert sources before drafting legislation
- Parliament can delegate power to subordinate authorities that have the expertise in a specific area
- Parliament can override laws made through the courts and subordinate authorities
- The bi-cameral system of parliament means bills have to be passed in both houses, giving rise to extensive scrutiny and debate

Weaknesses of lawmaking through parliament can include:

- Parliament is not always sitting which means that the passage of important legislation can be delayed
- Members of parliament could be more concerned about being voted out of office and they could focus their attention on the preferences of the electorate, rather than taking a stand on controversial laws or issues
- Members of society have conflicting values, so it is not easy for parliament to determine the majority view to be represented in legislation
- Parliamentary investigations can be time consuming and expensive
- Parliament often delegates power to unelected bodies (except local councils) that do not make laws democratically
- Parliament cannot be expected to be able to foresee all future situations and legislate on these accordingly
- Parliament is limited by constitutional restrictions - they can only make laws within their jurisdiction

The role of Courts could be:

- To clarify the meaning of phrases, when applying laws to specific cases
- To make decisions on law rather than be dictated to by political party policies and pressures
- To ensure that the law develops in a consistent manner through the application of the doctrine of precedent
- To enforce and interpret legislation - as parliament relies on them to do this
- Only changing the laws when an appropriate case arises

Conclusion:

- Both parliament and courts have particular strengths and weaknesses as lawmakers
- Parliament's main role is to make laws and they are more effective than courts at doing this
- Courts do play a supplementary role through statutory interpretation and application of the laws to specific cases
- Both contribute to the legal system and are essential in its effective operation.

- b. *This question refers to Unit 4 and is asking you to discuss **two** of the four elements used to evaluate our legal system, as well as make some reference to criminal or civil procedure. You need to select **two** of the elements that you are confident with, to write about and remember to refer to these, when you answer the second part of the question.*

*The four elements are:*

- *The entitlement to a fair and unbiased hearing*
- *Timely resolution of disputes*
- *Effective access to mechanism of the resolution of disputes*
- *Recognition of prevailing values and basic human rights*

*For example:*

There are four elements used to judge the effectiveness of the legal system, when dealing with criminal and civil cases.

One of these is the entitlement to a fair and unbiased hearing. This means that everyone brought before a court, tribunal, or using an alternative dispute resolution method should be treated equally and without prejudice. There should not be any bias shown to either side, as their case is presented before an adjudicator. The same strict rules of evidence and procedure that exist within the framework of the adversary system should apply. The appeals process also ensures that the aggrieved party can take further action, if they feel that they were unfairly treated. The accused is presumed innocent until proven guilty, in a criminal case and courts are subject to public scrutiny increasing the effectiveness of our legal system.

In civil cases, the party who feels that they have had their rights infringed should be able to resolve their civil claim with a fair and unbiased trial. Each party is given equal opportunity to convince the court of their version of the facts, based on the balance of probability. Through application of strict rules of evidence and procedure in a civil case, both parties to a civil case are treated equally. Unreliable evidence from either side is not allowed and rules of procedure ensure the smooth and efficient running of a civil trial. All witnesses in a civil case can be cross-examined to ensure reliability of evidence being presented at the trial.

5 + 5 = 10 marks