

COMMERCE PRESENTATIONS AND PUBLICATIONS



# LEGAL STUDIES

2009

Practice examination

# SUGGESTED RESPONSES/ADVICE

### Question 1

**Identify one stage in the passage of a bill through parliament during which it can be amended. 1 mark**

A sentence or two would be better than a single word or phrase.

- ✓ Committee Stage (UH)/Consideration in Detail (LH) – the majority of amendments are made here.
- ✓ Third Reading – amendments are unlikely, but possible.
- ✓ Royal Assent – the Governor General may request amendments from the initiating house before giving assent to the bill.

Students may also point out that any amendments made by the second house may be further amended by the initiating house when they consider them.

### Question 2

**Outline the jurisdiction of one of the following lists of the Victorian Civil and Administrative Tribunal:**

- **Anti-Discrimination List.**
- **Residential Tenancies List.**

**2 marks**

Students frequently provide information on more than one list, when only one can be marked. This occurred in the 2008 examination. Students gain nothing from providing more than is requested.

- ✓ The Anti-Discrimination List hears disputes where a party alleges unlawful discrimination or sexual harassment, which is repeated and unwanted words or behaviour of a sexual nature.
- ✓ To be unlawful, discrimination must be on specified grounds (such as race or age) and in specified areas (such as employment or education). Sexual harassment must have occurred in specified areas.
- ✓ The tribunal member may dismiss the claim, or otherwise make orders such as a payment of compensation to the complainant, or that the discrimination stop. Other examples will also be appropriate.
- ✓ The Residential Tenancies List hears disputes between landlords and tenants in relation to tenancy agreements. (Agreements may also cover caravans and rooming houses.)
- ✓ An example of a dispute must be provided. Eg. A dispute where the tenant has failed to pay rent, or where the landlord has raised the rent without notice.
- ✓ Claims can generally be for no more than \$10 000.

- ✓ The tribunal member may dismiss the claim, or otherwise make orders such as the cancellation of a rental increase, or that the tenant pay rent owing. Other examples will also be appropriate.

### **Question 3**

**James has been charged with theft of a motor vehicle. Explain to James how this case could be heard in either the Magistrates or the County Court. 2 marks**

This topic was handled poorly on the 2007 examination because students did not understand the process of hearing an indictable offence summarily. Students should carefully review this area of the course.

- ✓ Theft of a motor vehicle is an indictable offence that can be heard summarily.
- ✓ James would choose whether to have it heard in the Magistrates Court as a summary offence, or in the County Court as an indictable offence.

Better answers will outline one or more factors in favour of each court.

### **Question 4**

**Explain how one formal law reform body effectively investigates the potential for law reform, and what influence they can have on changes to the law made by parliament. 3 marks**

- ✓ Appropriate bodies include: the Victorian Law Reform Commission, the Australian Law Reform Commission, a Royal Commission, a parliamentary committee or a government inquiry.
- ✓ Methods such as petitions, protests, lobbying or writing a submission to a law reform body would be inappropriate.

The detail required will depend on the body chosen, but answers must outline specific ways in which these bodies investigate. For example: receiving submissions from stakeholders and the public, conducting opinion polls, investigating other jurisdictions, etc.

Answers must make clear that these bodies cannot make the changes to the law themselves: they can only make recommendations to parliament, which may decide to implement all, some or none of the recommendations.

### Question 5

**Mark has supplied Jane with building supplies for years, but he has a history of breaking agreements and of fighting dirty. Jane doesn't know why she has kept contracting with him, but he has broken another contract worth half a million dollars and once she sues him she plans never to use him again.**

**Explain one civil pre-trial procedure that might be conducted at the Supreme Court, and outline how it achieves its purpose. 3 marks**

In the 2008 examination the question relating to the purposes of pre-trial procedures was poorly handled, although the procedures themselves were often correctly identified.

- ✓ Appropriate pre-trial procedures include: writ, pleadings, discovery and directions hearing.
- ✓ Inappropriate procedures include: any criminal procedure such as a committal hearing; a letter of demand, as this would not occur at the Supreme Court; and compulsory mediation, as this would not suit the parties, given the circumstances.
- ✓ Specific detail must be given regarding the procedure, and what happens during it. It is not enough to simply give the name. For example, an answer on discovery must explain that parties must exchange the evidence they have (except for privileged information); this usually begins with each party providing a list of documents such as photographs and witness statements, which will be followed by the production of documents: giving copies of anything requested by the other party.
- ✓ The purpose of the procedure must be identified, and students must make it clear how the detail on *what* happens supports or achieves this aim. A link must be made.

### Question 6

**Explain the principle of representative government, and comment on its desirability. 3 marks**

In the 2007 examination the concept of 'representative government' was confused with the concept of 'responsible government'. Students need to review this area of the course.

- ✓ Representative government is a system of indirect democracy, where people elect representatives to parliament to make decisions and laws on their behalf.

- ✓ Students may refer to features of this system such as: one vote one value means each vote is worth the same; the country is divided into electorates, and generally one member of parliament is elected to represent each electorate; members may not be re-elected if their electorate is unhappy with the way they have been represented.
- ✓ It would be incorrect to say that the 'government' is elected by the people, but markers can be flexible depending on the meaning that is conveyed by the way in which the student writes their answer.

Answers must include at least one advantage of representative government, or one disadvantage.

- ✓ Advantages may include: citizens have a choice in their representative; representatives are held accountable for their behaviour; or indirect democracy allows all citizens to 'have a say'.
- ✓ Disadvantages may include: the systems allows for 'tyranny of the majority', which does not help minority groups; future generations or the environment are likely to be forgotten because they can't vote; representatives generally vote with their party instead of their electorate; or an electorate can be won with 51% of the vote, which means the other 49% of the electorate are effectively not represented.

Answers should make it clear whether or not they think the system is desirable.

### **Question 7**

**Explain the function and jurisdiction of one of the following specialised courts, and explain how aspects of the court help it achieve its function better than a court of general jurisdiction like the County Court could.**

- **Coroner's Court**
- **Children's Court**

**4 marks**

Approximately two marks are allocated to jurisdiction, and two marks to how it achieves its function. Students frequently provide information on more than one court, when only one can be marked. This occurred in the 2008 examination. Students gain nothing from providing more than is requested.

- ✓ The Coroner's Court investigates reportable deaths in Victoria (examples of reportable deaths must be given); and fires in Victoria that are suspicious, or that cause death or significant damages to property (other examples of fires may be given).
- ✓ The Coroner's Court has an investigative function, which includes aims such as finding the cause of a fire, or giving recommendations for

preventing deaths. It does not conduct an adversary trial that determines guilt or innocence.

Answers must reflect this difference between investigation and adversary contest, and link it with one or more aims.

- ✓ The Children's Court Criminal division hears matters (except for those involving death) where a child between the ages of 10 and 17 inclusive has been charged with an offence, and is no older than 19 at the time of trial. The Family Division hears matters where a child under the age of 17 is in need of protection, or that involve their welfare. Examples must be given. The Koori Court jurisdiction may also be given, but is not necessary.
- ✓ The aim of the Children's Court is to keep children away from mainstream courts with seasoned offenders, and provide an environment that is more supportive and less conducive to them reoffending. Answers may refer to aspects such as: only young children being brought before the court; the Court being located in a separate building; free interpreters being provided; greater access to counseling and support services; or the Koori Court involving Aboriginal elders in sentencing.

Answers must reflect the fact that it specialises in the needs of a particular group of offenders who are more vulnerable.

### **Question 8**

**Outline two ways in which Australia could improve its constitutional protection of democratic and human rights by learning from the approach taken in one of the following countries: Canada, New Zealand, South Africa, the United States, or the United Kingdom.**

**4 marks**

In the 2008 examination students failed to explain the comparison: too many simply listed the information for each jurisdiction. Also, students failed to focus on the broad approach to rights protection. It is not appropriate to simply compare specific rights.

Two marks are allocated to each way in which Australia could "learn". In addition, answers must demonstrate a detailed knowledge of how an aspect of the approach works in Australia, as well as how that aspect operates in the other jurisdiction. Arguments must be backed up by detail and content.

- ✓ Students may argue that Australia could learn from the foreign approach because the approach they take is better than ours; or, they may argue that we could learn from mistakes the foreign country has made. Both are legitimate responses.

- ✓ The focus must be on how Australia could improve, however: it would not be enough to simply list differences between the countries.

### **Question 9**

**Will was punched in the face by a drunken fan at a football match, and needed to undergo expensive reconstructive surgery. He also missed his Legal Studies examination. He plans to sue his attacker, but the police will also be pressing charges.**

**Apart from the difference regarding who will be bringing the matter to court, outline for Will three other differences he will find between his civil case and the criminal one. **6 marks****

In a question with similar structure in the 2008 examination, students failed to answer both parts of the question. Both the criminal and civil must be explained. In the 2008 examination the differences between criminal and civil terminology was also poorly handled, with many students using criminal terms for a civil question. Two marks allocated for each difference; one for the civil terminology or feature, and one for the criminal terminology or feature.

Possible answers include:

- ✓ A criminal case results in a sanction such as a fine or imprisonment; a civil case results in a remedy such as damages or an injunction.
- ✓ In a criminal case the standard of proof is beyond reasonable doubt; in a civil case the standard is lower: on the balance of probabilities.
- ✓ In a criminal case in the County Court or above, there will be a jury of 12 people; in civil cases the jury is optional, and will consist of only 6 people.
- ✓ In a criminal case going to the County or Supreme Courts, a Magistrate will conduct a committal hearing to decide if there is enough evidence to support a conviction; civil cases go directly to the appropriate court, without a summary of the evidence being first heard in the Magistrates Court.
- ✓ A criminal jury decides guilt or innocence, but not the sanction to be given; a civil jury decides liability, as well as the amount of damages to be awarded (except in defamation cases).

### Question 10

**Parliament is the supreme lawmaker in Australia, but some question its effectiveness.**

**Evaluate the effectiveness of parliament as a lawmaker in Australia.**

**6 marks**

It would be difficult to achieve full marks with fewer than two strengths and two weaknesses. Further, a list of strengths and weaknesses with no explanation or discussion would usually not be sufficient for full marks.

Better answers will balance one strength against a corresponding weakness, in a process of weighing the advantages against the disadvantages to come to a reasoned conclusion.

This structure of question is frequently poorly handled because students do not begin with a clear statement of opinion, and then often fail to divide their answer into logical sections or paragraphs as they discuss arguments to support that opinion.

Examples of possible arguments are, in brief:

- ✓ Lawmakers in parliament are elected, therefore are accountable to the people for the law that they make; because of this accountability, however, parliament may make short-term decisions to attract votes, rather than making the best decisions for the long-term.
- ✓ Electing parliament means that laws are more likely to reflect majority values and needs, because each MP needs a majority in their electorate; this can lead to tyranny of the majority, however, and can mean that laws pander to majority interests rather than protecting those who need assistance.
- ✓ The passage of a bill involves debate and scrutiny, to ensure that flaws in proposed legislation are fixed; this debate can slow the process down, however, or alternatively can be cut short by the Government using its majority to 'guillotine' debate and push the bill through.
- ✓ Parliament is more accessible to the public through lobbying, interest groups, campaign funding, and making submissions to law reform bodies; this means that it has less independence, however, and can make law to please the interest groups that, for example, gave the party in power the most money, which may not be in the best interests of the community.

Examples of cases and real-life situations would be desirable to illustrate.



### Question 11

**a. Explain how the role of the judge differs between the adversary and inquisitorial systems, and critically examine which of these approaches provides for a more effective system. 4 marks**

This structure of question is frequently poorly handled, and this problem arose in the 2008 examination. Students must start with a clear statement of opinion on which system is more effective, and it must be logically supported by the detail in the answer.

Answers must provide some detail about what the judge does in each system, and also clearly explain how the two are different. There must therefore be both content and comparison.

- ✓ The keywords for the role of the judge in the adversary system are: passive, impartial, umpire, independent.
- ✓ The keywords for the role of the judge in the inquisitorial system are: active, involved, control, take charge, investigate.

Reference to one or more elements of an effective legal system is fine if used appropriately: lengthy descriptions of the elements are not necessary.

**b. Outline two further features of the adversary system. 4 marks**

This topic was poorly handled in the 2007 examination because students focused too much on the inquisitorial system when the adversary was the focus. Students provided very strong answers on the role of the judge, but were frequently unable to discuss other features. It must also be noted that the jury is **not** a feature of the adversary system.

Two of the following features may be given:

- ✓ The strict rules of evidence and procedure.
- ✓ The need for legal representation.
- ✓ The active role of the parties.
- ✓ The standard and burden of proof.

One mark is given for identifying each, but the second must come from additional detail on the operation of that feature.

## Question 12

**a. Using examples, explain how the Commonwealth Parliament is given power in the Australian Constitution. 3 marks**

In the 2008 examination the concept of 'specific powers' was poorly handled.

- ✓ Specific powers are powers given to the Commonwealth Parliament at federation, and listed (enumerated) in the Constitution, primarily in s51 – known as the 40 Heads of Power. Specific powers include the power to make law over taxation, marriage and external affairs, for example. The majority of specific powers are held concurrently with the states, however some are exclusive.
- ✓ Exclusive powers are those specific powers that can only be exercised by the Commonwealth Parliament: in other words, they are restrictions on state power. Expressly exclusive powers are mainly listed in s52, however powers can be made impliedly exclusive by reading two or more sections together. For example, s51 gives the power over defence to the Commonwealth, and s114 takes that power away from the states.
- ✓ Concurrent powers are the remainder of specific powers that were given to the Commonwealth at federation, but also left with the states. Both levels of parliament can therefore legislate in these areas (for example, marriage and divorce); if there is a conflict between state and federal law, however, the federal law will prevail to the extent of the inconsistency, as per s109, the 'inconsistency rule'.

**b. Using two cases to illustrate, show how the High Court has used its power of interpretation to alter the balance of legislative power between the Federal and state parliaments. 5 marks**

In the 2007 examination, this topic was handled poorly because many students concentrated too much on the facts of the case, and did not explain the legal impact. The legal impact is the most important part.

Another common mistake was choosing cases that do not illustrate High Court interpretation of the Constitution changing the balance of power. For example: Daryl Kerrigan is not a real case; Mabo did not involve interpretation of the Constitution; nor did the Studded Belt Case involve interpretation of the Constitution.

Appropriate cases include:

- ✓ The Tasmanian Dams Case of 1983: the Commonwealth gained power to legislate regarding the subject matter of a treaty, even if the treaty concerned a residual power.

- ✓ The Roads Case of 1926: the Commonwealth was allowed to attach compulsory conditions to its 'tied grants' in areas of residual power, allowing it to essentially force the states to legislate in areas in which the Commonwealth had no power.
- ✓ The Engineer's Case of 1920: the Commonwealth was allowed to use its specific powers to the full extent of their literal meaning, even if using these powers meant taking away some of the power of the states.
- ✓ Brislan's Case of 1935: the Commonwealth gained power in respect to wireless, as it was deemed to be included in the broader notion of "postal, telegraphic, telephonic and other like services", and therefore did not need to be explicitly listed as a specific power.
- ✓ Jones v Cwllth of 1965: the Commonwealth gained power in respect to television, as it was deemed to be included in the broader notion of "postal, telegraphic, telephonic and other like services", and therefore did not need to be explicitly listed as a specific power.

### Question 13

- a. **David is a Legal Studies student, and is surprised when he goes to court and the judge interprets the relevant legislation. It sounded like the judge was deciding what the law was, and David thought that making law was the parliament's role.**
- i. **Outline to David two reasons why the judge might have had to interpret this legislation. 2 marks**

In the 2008 examination students were able to identify reasons for statutory interpretation, but were frequently unable to explain **why** that meant the judge would need to interpret the act.

Examples of reasons include:

- ✓ The wording was vague or general and needed a specific meaning to apply to the circumstances.
- ✓ The wording was ambiguous, with more than one possible meaning, and the judge needed to decide which meaning was the appropriate one.
- ✓ The act did not refer to new forms of technology, and the judge needed to decide whether they ought to be included within the meaning of the act.
- ✓ A mistake had been made during the drafting of the act, making it unworkable or the outcome inappropriate, and the judge needed to interpret the act in order for it to work properly.
- ✓ A word or phrase had not been defined within the act, so the judge needed to decide which definition was most appropriate.

Examples to illustrate would be desirable.

**ii. Explain to David two other features of the relationship between parliament and the courts as lawmakers. 3 marks**

In the 2007 examination the question on the relationship between courts and parliament was poorly handled. Students had trouble thinking of multiple features of the relationship and explaining how courts and parliament interacted.

- ✓ Parliament passes acts to establish courts, and to grant them jurisdiction so they can operate.
- ✓ Legislation passed by parliament sets the boundaries of the common law, because judges cannot make law in conflict with valid legislation, and can only interpret the words: not change them.
- ✓ Parliament can pass legislation to abrogate or confirm the common law made by courts.
- ✓ Courts can inspire parliament to change the law by making creative decisions that highlight the need for a positive change.
- ✓ Courts can inspire parliament to change the law by making conservative decisions that highlight the need for parliament to update the law and abolish inappropriate and outdated rules.

Examples to illustrate would be desirable.

**iii. Even though the courts can make law, they are more restricted than parliament because they can only make law through precedent. Explain how the courts are limited in this way in their lawmaking function. 5 marks**

In the 2008 examination an 8 mark question on the courts as lawmakers was poorly handled. Students seem to find the process of lawmaking through precedent a difficult concept to explain and critically examine.

Answers must focus on the weaknesses of courts as lawmakers: strengths are only appropriate insofar as they are being used briefly to limit the extent of these weaknesses.

Limitations or weaknesses of courts may include:

- ✓ Courts make law through their decisions on cases, therefore they must wait for an appropriate case to come before them before they can change the law.
- ✓ Judges usually recognise that it is not their role under the separation of powers to make law, and so prefer to leave large changes in the law to parliament.

- ✓ Judges in courts lower than the High Court may frequently be bound by precedent, and so cannot make changes to legal principle.
- ✓ Reversing can only be done if parties have the time, money and grounds to appeal; overruling can only be done by a higher court; and distinguishing and disapproving don't actually change the legal principle in question: they merely make an alternative one.
- ✓ Judges are unelected and therefore unaccountable for the law that they make.
- ✓ Individuals have little access to courts to give their opinions on the existing and possible new common law; unless they have standing in a relevant case, they cannot communicate with the judge.
- ✓ Precedent is an incremental way to make law only. Significant, sweeping changes cannot be made: it must be done little by little, slowly, with each new case.

**b. Chrissy and Leigh were in business together, but it went bankrupt and they are now arguing about who owes what to their debtors. Someone has suggested to them that they are perfect candidates for alternative dispute resolution, and that choosing this method of resolving their argument will avoid all the problems of court.**

Students frequently find it difficult to respond to questions based on given scenarios. Problems frequently arise with reading the question completely and correctly, and then in tailoring the answer to the requirements of the scenario. Answers must respond to the facts given: answers that are pre-prepared and memorised will usually not be appropriate.

**i. Clearly explain three problems with pre-trial or trial procedure, and how one or more methods of alternative dispute resolution ADR would avoid these problems. 6 marks**

A similar question in the 2007 examination was poorly handled because students failed to refer to specific procedures or ADR methods to support their more general arguments. Specific detail from identified procedures and ADR methods must be used.

- ✓ An example of an appropriate point might be: "Australia uses the adversary system of trial, which involves two opposing parties fighting to win the case. Each is encouraged to highlight only the evidence that supports their version of the facts rather than admitting fault where appropriate, because one must win and the other lose. This also increases animosity between the parties, because the focus is not on achieving a

win/win outcome. Mediation is a form of ADR that aims to fix this problem, and for the past 18 months or so it has been compulsory for most civil cases going to the Supreme Court – with around a 60% success rate. The focus in mediation is to get the parties problem-solving together to fix their relationship, admitting fault where appropriate and focusing on the future and what they both can do to move past the dispute. This encourages compromise, and decreases animosity. This would be ideal for Chrissy and Leigh, as they have an existing relationship that would help them work together in their mediation discussions.”

**ii. Discuss one recent change that you believe has improved the effective operation of the court system, and advise of one further change to the system that could improve it even more. 4 marks**

There is no strict time limit for ‘recent’ changes in the Legal Studies course, but students are **strongly** encouraged to use examples from the past five years, to show that they are keeping abreast of contemporary issues and recent developments.

In the 2007 examination a similar question was handled poorly by many students because they focused on a change to a specific law, rather than a change to the legal system as a whole.

Approximately two marks are allocated to each change: one mark for a content description of what the change involved, and one mark for how it made the system more effective, or how it could make it more effective in the future. This is a rough marking guide.

Students should relate their arguments regarding effectiveness to one or more elements of an effective legal system, but it does not need to be done in great detail.

Examples of recent changes include:

- ✓ The opening of the Koori Court in the Children’s Court, to involve family members and Aboriginal elders in the sentencing of youthful Koori offenders.
- ✓ The compulsory referral of the majority of civil claims to pre-trial mediation in the Supreme Court.
- ✓ The compulsory referral to mediation of most civil claims in the Dandenong Magistrate’s Court, with currently an 87% success rate.
- ✓ The adoption of the 2006 ‘new model for less adversarial trials’ in the Family Court to give the judge more control and to allow them to decide the issues in contention and what evidence will be heard.

Examples of further changes to the legal system include:

- ✓ Compulsory referral to mediation in the County Court as well.
- ✓ Free interpreters being reintroduced to the County Court and the Supreme Court after them being removed in the 1990s.
- ✓ Specialist jurors being introduced in the Supreme Court for trials involving complex forensic, medical or financial evidence, to assist the jurors in their understanding of it.
- ✓ Increasing the jurisdiction of VCAT to include civil matters such as fencing and neighbourhood disputes, as these are extremely common, and usually simple enough not to require court time.