

Solution Pathway

Question 1

This principle refers to the fact that there are three types of separate powers in our parliamentary system and that these powers are held by separate bodies so no one body has absolute power or control over the functions of the legal system.

Legislative – resides with Parliament to make laws.

Executive – resides with government to administer the laws and manage the business of government.

Judicial – resides with courts and tribunals to enforce the law and settle disputes.

1 mark for overview of the separation of power. 1 mark for identifying which body holds what power.

Question 2a

Any one of the following:

- Changing values and attitudes (in order for the law to remain acceptable to individuals in society it must change to keep up with these changing values). Example: divorce has been made easier as values have changed as have attitudes towards abortion.
- Changes in society (buying habits have changed and so there is a reliance on goods being safe and fit for the purpose for which they are purchased deemed important because of changes in not being able to inspect all goods prior to purchase). Example: *Fair Trading Act* encapsulates this change and offers protection for consumers. Water storage levels and shop hours are also acceptable examples to demonstrate the changes of society.
- Advances in technology (as it improves new situations need to be covered by the law to reduce the opportunity for individuals to be exploited or harmed). Example: Stalking on the internet, mobile phone camera use and ability to distribute photographs easily.
- Protection of the community (the community needs to be protected in a variety of ways so that it can continue functioning harmoniously. One of the major roles of the law is to protect individuals from physical harm or unfair or unscrupulous practices). Example: Protection of road users (anti hoon laws) as many people are killed or injured every year.
- Protection of rights (when these rights are infringed and injustices are unable to be resolved through the law, the law needs to change to deal with these injustices). Example: Discrimination or bullying in workplaces is now against the law.
- Access to the law (as people become more educated about the law and their rights, they are more likely to want to seek justice if they believe their rights have been infringed. The law supports people in getting access to the law). Example: VCAT ensures that there are alternative avenues which provide avenues for dispute resolution.
- Generating changing values in society (in some instances law-makers have changed the law in order to encourage a change in society's values). Example: Discussions regarding the rights of individuals have begun because of the development of *The Charter of Human Rights*.

1 mark for identifying why laws need to change and 1 mark for using an example to illustrate.

Question 2b

Any two of the following:

- Petitions: names submitted on paper as a group in a formal way for action for a particular law to be changed
- The Media: could write letters to the editor or report on sides of stories of debates.
- Demonstrations: meeting as a group to indicate attitude for or against a law.

1 mark for identifying how to bring about change and then briefly explaining each one (x2).

Question 3

The Constitution under Section 51 gave the Commonwealth Parliament specific powers for the whole of Australia and from these powers may be either Exclusive or Concurrent.

Exclusive are those that only the Commonwealth Parliament may exercise.

Concurrent are those powers that are shared with the Commonwealth and the State Parliaments.

This is why some laws are the same all over Australia.

Powers that were left with the states are known as Residual Powers and this is why some laws differ from state to state.

1 mark for correctly identifying Section 51 Specific powers.

2 marks for correctly identifying Exclusive and Concurrent powers and why some laws are the same.

1 mark for correctly identifying Residual powers and why laws are different from state to state.

Question 4a

Under Section 128, a referendum is the only way that the actual words of the Constitution can be changed.

Process:

- A proposed referendum/change must go through both houses of Commonwealth Parliament as a bill.
- The proposed change is put to the people not less than two months and not more than 6 months after the passage through parliament and voted in a yes/no vote.
- Double majority achieved (majority of people in a majority of states).
- If majority achieved, royal assent is granted and the changes to the referendum are put in place.

1 mark for each stage of the process correctly identified (x4).

Question 4b

Why relatively ineffective:

- Lack of bipartisan support (lack of both major political parties support).
- Confusion and suspicion of the voters of the intended change.
- Voter conservatism.
- Double majority is hard to achieve.

1 mark for each reason given for not working (x2).

Question 4c

1946: Under the *Constitution Alteration (Social Services) Act 1946*, S51(xxii) was extended to give the Commonwealth Parliament the power to legislate on pensions other than invalid and age pensions by adding S51(xxiiA), which includes allowances such as maternity allowances, unemployment benefits and child endowment.

Before the change: there was no inclusion of allowances.

After the change: allowances were included.

1967: The Constitution was changed to include Aboriginal people, making it possible for the Commonwealth Parliament to make laws relating to Aboriginal people and to include Aboriginal people in the Australia-wide census. This change had general support from both major political parties, and the people voted overwhelmingly in favour of it.

Before the change: stated that people of any race *other than the Aboriginal race* in any state for whom it is deemed necessary to make special laws.

After the change: stated that people of any race for whom it is deemed necessary to make special laws.

1 mark for identifying a successful referendum and the year.

1 mark for identifying what the change was in the referendum.

2 marks for explaining what happened for the change to occur/what happened beforehand.

Question 5

Courts:

- Strength: due to strict rules of evidence and procedure, individuals can feel secure that their case is best presented.
- Weakness: not all evidence is shown by either party so truth may not emerge.

VCAT:

- Strength: adjudicator works with the parties to identify the issue.
- Weakness: parties may feel that they have not been able to best represent their issue due to speed of proceedings.

1 mark for strength AND weakness of how courts resolve.

1 mark for strength AND weakness of VCAT resolve.

Question 6

The two major features of comparison can be drawn for those in the following table.

<i>Feature</i>	<i>Adversary</i>	<i>Inquisitorial</i>
Role of the parties	Parties present their own case. Parties have freedom to use legal representation if afforded. Proceedings are initiated by the prosecution in criminal cases and by the plaintiff in civil cases (burden of proof).	Parties in the inquisitorial system have less control than in adversary system of trial.
Role of Legal Representation	Legal representatives control a case by deciding the evidence to present and which witnesses to call. Legal representation is advantageous in court because of the reliance on oral evidence and the complexity of the law. While both parties are given the right to legal representation, not all have the resources at their disposal to afford it.	Less need for legal representation in the inquisitorial system as their role is more to assist the judge in finding the truth.
The need for rules of evidence and procedure	Strict rules of evidence must be adhered to in the adversary system – each witness undergoes thorough examination. Cannot admit any inadmissible evidence. Whereas	The decision makers have the discretion to bring out any new material at any time in the process in their attempt to reach the truth. It does not insist on strict rules of evidence and

	in inquisitorial you can admit more as they believe you get the truth as opposed to infringing on a person's rights.	procedure and any evidence that will help to find out the truth is examined.
Role of the adjudicator/judge	Adjudicator oversees proceedings to ensure rules of evidence and procedure are followed. A judge decides issues of law and a jury decides issues of fact The judge must remain independent and not assist parties. Judges can only ask questions to clarify issues that have not been adequately covered in evidence.	The decision makers role is more active. They will investigate the facts, question the parties and relevant witnesses, examine the law, apply the law to the facts and reach a decision. The decision maker is not tied to only considering those facts that are deemed relevant by the parties but can take the investigation further to get at the truth.
Standard and burden of proof	Standard in criminal is beyond reasonable doubt and in civil is on the balance of probabilities and is a very strenuous level of being proven as compared to the inquisitorial. Burden rests with prosecution in criminal and with plaintiff in civil. In inquisitorial it rests with the judge always.	No formal burden and standard of proof as the judge is responsible for finding and presenting evidence. Emphasis is on finding the truth.

*Recent Reform*Family Court: whereby the judge plays a more active role in proceedings

Successful aspect: both parties leave the dispute feeling that they have both been given a fair hearing, more focused towards what is best for the family as a whole.

*Proposed Reform:*Greater investigative role for the judge or magistrate

Successful aspect: the most qualified person in the courtroom has more input and this can provide a better resolution for all. However, many are concerned that they may become biased.

Greater use of written statements

Successful aspect: less reliance on oral statements (strict rules of evidence and procedure) and could therefore reduce delays which would better for all individuals. However, less ability to question witnesses through taking this direction.

More informal conduct of trial

Successful aspect: less strict rules of evidence and procedure may allow more of the parties involved to feel more comfortable. However, this may mean that incriminating evidence is presented.

2 marks for the reform and whether it has been successful/will be successful

2 marks for each feature identified and contrasted with the adversary system (x2).

Question 7a

Magistrates' Court (Committal Hearing).

Question 7b

Bail can be refused when a person is charged with murder, treason or arson causing death; someone who has previously failed to answer bail or when someone is considered to pose an unacceptable risk to society or likely to abscond or further endanger the community.

1 mark explaining how bail can be refused.

1 mark for indication of yes/no with this provision of information.

Question 7c

Committal hearing

A preliminary hearing (in criminal law) of an indictable offence in the Magistrates' Court to determine whether the prosecution has enough evidence for the matter to proceed to a full trial before a higher court (whether a *prima facie* case has been established)

Committals are designed to discontinue cases where the evidence is not considered strong enough to support a conviction.

There are two types of committal:

The traditional method – which relies on oral evidence given under oath by prosecution witnesses

The hand-up brief procedure – where evidence is given through the delivery of sworn statements

2 marks for correctly identified and correctly explained.

Question 7d

Sanction: imprisonment (varying types of sentencing), fine, community-based orders or intensive correction orders (*1 mark for identifying and explaining correctly*).

Purpose: punishment, deterrence, rehabilitation, denunciation or protection (*1 mark for explaining and linking an appropriate purpose*).

Question 7e

The Supreme Court, Court of Appeal.

Students must correctly identify both aspects here in order to achieve the full mark.

Question 8a

Any two of the following:

Pleadings:

Pleading – a stage of civil proceedings where the plaintiff makes a claim against the defendant and the defendant either admits, does not admit or denies the claim(s). Involves both parties to a civil dispute stating their case in written form through the exchange of documents

Discovery:

Allows the opposing party a chance to copy or inspect the other party's documents that are relevant to the case and to ask relevant questions of the other party.

Directions hearings:

Directions hearings – pre-trial conference between the trial judge and counsel to establish key issues such as the law to be applied and the key evidentiary issues in dispute.

May occur at any stage of pre-trial proceedings – it is a hearing by a judge who may give directions (order) to assist the parties in preparation for their trial.

2 marks for correctly identifying each of any two stages.

Question 8b

Burden of proof: Plaintiff (*1 mark*)

Standard of proof: On the balance of probabilities (*1 mark*).

Question 8c

If a jury is present, a jury will issue the remedy. If it is judge alone, the judge will issue the remedy (*1 mark*).

The purpose of remedies is to restore the plaintiff back to the original position that they were in prior to the civil wrong occurring (*1 mark*).

Question 8d

Example of remedy:

Compensatory damages:

- Compensation awarded to a plaintiff to recompense for specific costs that resulted from a defendant's civil wrong, as well as general damages for pain and suffering.

Exemplary damages:

- Awarded to a plaintiff if the court wishes to 'make an example' of the defendant and deter others from committing the same civil wrong.

Aggravated damages:

- Compensation awarded when the court considers a defendant's conduct showed a reckless disregard for the plaintiff (and their welfare).
- The court looks at the civil wrong as well as at the manner in which the defendant infringed the plaintiff's civil rights.

Nominal damages:

- Damages that are small in terms of dollar value – awarded when the plaintiff was more interested in proving a legal point that the defendant was in the wrong.
- Nominal damages are considered to be of insignificant value.

Contemptuous damages:

- Compensation awarded to a plaintiff, usually of insignificant monetary value because the court disapproves of the plaintiff for taking civil action in the first place (even though the plaintiff is legally right).
- The court acknowledges the legal rights of the plaintiff have been infringed, but it may disapprove that legal action was ever taken by the plaintiff.

Interest paid on damages:

- A plaintiff is entitled to receive interest on damages.
- The plaintiff could have suffered monetary loss as a result of a defendant's actions, and could have used those funds to earn interest instead of paying bills.
- When this is the case – interest is charged from the date the defendant should have paid the plaintiff.
(*2 marks for correctly identifying and correctly explaining a remedy*).

Question 9Financial barriers:

Problem: Prevent people from accessing legal advice and representation.

Legal advice and representation can be very expensive (fees of lawyers/barristers very high).

Changes: many law firms offer 'no win no fee'.

Sociocultural barriers:

Problem: Lack of understanding of legal rights and how to seek advice.

Migrant and refugee attitudes to the legal system due to past experience.

Intellectual disability and the difficulty in understanding complex legal procedures.

Cultural and language issues that relate to behaviour while being interviewed by police and appearing in court (especially for Indigenous people).

Poverty and isolation.

Changes: the introduction of the Koori court has sought to alleviate some of the problems created. Further specialist courts have also been created for this area too.

Structural barriers:

Problem: Delays in the hearing of cases can deny people access to the law because witnesses can forget key evidence and material relevant to the case can be lost

If a trial drags on for a long period then people are not treated fairly.

Changes: the increased jurisdiction of the Magistrates' Court from \$40,000 to \$100,000 has sought to alleviate some of the delays created by waiting for a case to be heard in the County Court.

1 marks for each problem identified (x2).

2 marks for each change linked to overcome the problem (x2).

Question 10

The Commonwealth currently has 5 express rights which are also referred to as entrenched. This means that the rights can only be removed from the Constitution by amending the Constitution using the referendum procedure in Section 128.

1. Freedom of Religion S116
2. Free interstate trade and commerce S92
3. Not to be discriminated on the basis of the state where you live S117
4. Receive just terms when property is acquired by the Commonwealth S51(xxxi)
5. Trial by jury for indictable offences S80.

The Commonwealth currently recognises only 1 implied right (right to political communication). This is a right that has been accepted by the High Court as created by an interpretation of a case regarding an aspect of the Constitution.

All express and implied rights are fully enforceable by the High Court. This means that if an act infringes on one of these rights, then the High Court can declare that the law is unconstitutional and hence invalid.

Structural protection is the systems or mechanisms in the Commonwealth Constitution that indirectly protect human rights by preventing the abuse of power, such as the separation of powers or representative government. Structural protection reflects the fact that there are checks and balances built into the Constitution, which prevent power being abused and therefore protects human rights. An example of a structural protection is the recognition of the limited right to vote in *Roach v. Electoral Commissioner (2007)*.

Roach v. Electoral Commissioner (2007).

Vicki Lee Roach was a Victorian woman of Aboriginal descent, who was serving a six year term of imprisonment, having been convicted on five counts of offences that included burglary, conduct endangering persons and negligently causing serious injury. She challenged the validity of the 2006 amendments made to the *Electoral Act 1918* (Cth), by the passage of the *Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006* (Cth). The amendments prohibited all prisoners who were serving a sentence of imprisonment for a Commonwealth, state or territory offence from voting in federal elections. Before the amendment only those prisoners serving a sentence of three years or longer were excluded from voting. Thus, Ms Roach was excluded from voting. Ms Roach's challenge to the validity of the 2006 amendment was heard by the High Court in September 2007. The High Court held that the complete ban on prisoners voting was unconstitutional, as it was inconsistent with the principles of representative government. This principle requires that members of parliament are elected into office by the people they seek to represent. Sections 7 and 24 of the Constitution require that Senators and members of the House of Representatives are directly chosen by the people; therefore there is a right to vote, that had been violated by this legislation. The 2006 amendment was declared to be invalid. The outcome of the case had far reaching implications for the legal system in terms of recognising that there is a constitutionally protected right to vote in Australia. However, as Vicki Lee Roach was serving a prison term of longer than three years, and the original provisions of the *Electoral Act* were upheld, Ms Roach was still ineligible to vote in elections.

Appropriate other cases include:

Cole v. Whitfield (1988)

Nationwide News Pty Ltd v. Wills (1992)

AMS v. AIF (1999)

Attorney General (Vic); ex rel Black v. Commonwealth (1981)

Re Loubie (1986)

Australian Capital Television Pty Ltd v. Commonwealth [No. 2] (1992) – Political Advertising Case

Lange v. Australian Broadcasting Corporation (1997)

2 marks for explaining express rights.

2 marks for explaining implied rights.

2 marks for explaining structural rights.

2 marks for explaining a case.

Question 11

Courts make law through precedent (binding and persuasive) and statutory interpretation.

Binding precedent:

Operates where an inferior court is bound to follow the legal principles delivered in a similar case by a superior court in the same hierarchy. Ratio decidendi – the only part of a judgement that must be followed. It is the rule of law stated by the judge as the reasons for the decision being binding in future cases (the reason for the decision).

Persuasive precedent:

Exists when a court is not bound to follow a previous decision.

They usually come from:

Ratio decidendi – decisions from courts of equal standing in the same hierarchy (e.g. the Victorian Court of Appeal is not bound by its own past decisions)

Ratio decidendi – decisions of courts lower in the hierarchy (e.g. the judges of the High Court would treat a decision of the Victorian Supreme Court as persuasive precedent)

Statements made during a judgement that are not part of the ratio decidendi – these obiter dictum (things said by the way) comments involve important legal principles and facts that led the judge to reach the eventual outcome

Courts of the same standing, interstate courts and overseas courts hold persuasive precedent over each court in our hierarchy.

Statutory Interpretation

This is the process whereby the courts are asked to interpret the meaning of words or phrases in a statute made by parliament. Courts make laws when a new issue arises and there is no existing law, or when the courts are called on to give meaning to laws already in existence.

Appropriate cases demonstrating court made law include:

Donoghue v. Stevenson (1932)

Deing v. Tarola (1993)

McKenzie v. Stratton (1971).

Reasons why court made law is considered effective:

- Precedent ensures consistency through similar facts achieving similar results.
- Courts fill in gaps in the legislation.
- Courts provide flexibility through distinguishing, overruling and reversing.
- The change in the law can come quickly as cases arise.
- Judges are not subject to political influence.

Reasons why court made law is considered ineffective:

- Courts are restricted to only making laws of cases that come before them (must wait for a case to come before them).
- Change can be slow whilst waiting for a case to come before them.
- It is difficult to find varying precedents.
- Courts make law ex post facto (after a case/accident has occurred).
- Courts are bound by previous decisions.

2 marks for explaining binding precedent.

2 marks for explaining persuasive precedent.

2 marks for explaining statutory interpretation.

2 marks for explaining reasons (x2) why this process is effective/ineffective.

Note: when marking for the higher range questions, the mark scheme is an indication only. Try to mark globally where possible, marking for detail where appropriate.