

**LEGAL STUDIES**

**UNITS 3 & 4**

2020

**TRIAL EXAM B**

**SUGGESTED SOLUTIONS/RESPONSES**

**SECTION A**

**Instructions for Section A**

Answer **all** questions in the spaces provided

**Question 1** (6 marks)

1. Explain the meaning of bicameral parliament. (2 marks)

**Suggested Solution**

*Bicameral parliament is a parliament made up of two houses, in the Commonwealth system the two houses include the House of Representatives (lower house) and the Senate (upper house). In Victoria bicameral parliament is comprised of the legislative assembly (lower house) and legislative council (upper house).*

**Marking Guide**

**1 mark** for stating it is comprised of two houses of parliament

**1 mark** for providing detail about the Commonwealth or State houses of parliament

1. Examine to what extent the double majority acts as a check on parliament in law-making. (4 marks)

**Suggested Solution**

*To a moderate extent a double majority checks the ability of parliament to make law. The double majority is a voting system, requires a national majority of all voters in Australia and a majority of electors in the majority of states (4 out of 6) to be achieved. A double majority is required for a change to be made to the Constitution at a referendum. As a check on the powers of parliament it has proven to be a significant barrier to parliament increasing their law-making power, with only 8 out of the 44 referendums put to the Australian voters being successful. However, it has had a limited effect over time checking parliaments law making powers, because it applies only to constitutional change. Predominantly the Commonwealth is free to legislate on all other matters within its jurisdictional authority, as provided by the Australian constitution. This means the Commonwealth Parliament is free to legislate in all matters (under its jurisdiction) without putting a proposal to the people to gain the double majority.*

**Marking Guide**

**1 mark** for articulating the nature of the double majority (majority of all voters and majority of states)

**1.5 marks** discussing a strength of the double majority

**1.5 marks** discussing a weakness of the double majority

**Question 2 (6 marks)**

**The following excerpt contains errors:**

A Supreme Court judge presiding over a negligence case determined that the defendant was guilty. The Judge saying, they had no choice because the previous ruling by a Supreme Court judge in a similar case formed binding precedent. The defendant unsatisfied with the ruling disagreed, his legal representation saying the judge should have overruled the original precedent and formed new precedent through the obiter dictum.

Identify the **three** errors in the scenario above and provide the correct legal concepts and processes that should be used.

***The first error*** *in a negligence case a judge does not determine the defendant guilty. The defendant in a civil case is found either liable or not liable.*

***The second error*** *is the ruling made by a supreme court judge is not binding precedent. When a case examining a similar precedent is heard at the same level in the Court Hierarchy it is persuasive precedent.*

***The final error*** *obiter dictum does not form new precedent. Obiter dictum is ‘comments said by the way’ towards forming the binding precedent. It is the Ratio Decidendi that forms binding precedent not obiter dictum.*

**Marking Guide**

**1 mark** for each error identified

**1 mark** for an explanation of what is the correct process, procedure or outcome

**Question 3** **(15 marks)**

Frank has been charged with a serious sexual assault offence. Jenny his alleged victim, was attacked as she walked home from work, at around 8pm. Frank is denying the charge saying he was home watching television on the night in question. Frank who has Asperger’s syndrome (a condition also known as Autism) cannot afford legal representation and has contacted Victorian legal aid for support.

Since the alleged attack, Jenny has not been able to leave her house and has not worked for several weeks. Doctor reports reveal Jenny is suffering from a severe anxiety condition and that Jenny no longer feels safe outside of her house. Committal proceedings commence in 2 weeks’ time in the Magistrates Court.

1. Explain **one** right Jenny is entitled to as the victim in this case. (2 marks)

*Jenny as the victim is entitled to be informed about the proceedings ensuring she is informed about the charges the accused is facing, whether bail has been approved and provided information about the outcome of a trial; specifically stating the verdict and any sanction imposed.*

**Marking Guide**

**1 mark** for correctly identifying a right of the victim (right to give evidence as a vulnerable witness, right to be informed about proceedings, right to be informed about the likely release date of the offender)

**1 mark** for detailing what the entitlement to this right means

1. Advise how the burden of proof and the standard of proof are applied for Frank to be found guilty of the charge of sexual assault. (4 marks)

*The burden of proof in this criminal case of sexual assault lies with the prosecution. The prosecution must prepare for the case, present the case and prove the accused Frank guilty to secure a conviction. The standard of proof is ‘beyond reasonable doubt’, that is the case presented before the Court must prove Frank guilty beyond reasonable doubt. Leaving the jury with no reasonable doubt or with no other reasonable conclusion that could be reached or entertained.*

**Marking Guide**

**2 marks** for correctly detailing the burden of proof in a criminal case

**2 marks** for correctly detailing the standard of proof in a criminal case

Tim, Frank’s friend, told Frank that if the case goes to trial he will not be entitled to a trial by jury because of his psychological condition.

1. Do you agree with Tim? Why or Why not? (3 marks)

*I disagree with Tim because he is incorrect to say Frank is not entitled to a trial by jury. Under the Criminal Procedure Act in Victoria any person charged with an indictable offence and pleads not guilty, requires a jury to be empanelled. The rule of law applies, and no person will be treated with fear or favour before the Courts and is entitled to due process at trial.*

**Marking Guide**

**1 mark** for stating Tim is incorrect

**2 marks** for explaining that each person accused of an indictable offence is entitled to a trial by jury (Criminal procedure Act protects this right in Victoria)

1. Discuss to what extent the role of Victoria Legal Aid might affect the level of fairness and access achieved by Frank should the case go to trial. (6 marks)

*Victorian Legal Aid (VLA) provide legal aid, provide free legal advice and low-cost or no-cost legal representation. Frank who cannot afford legal representation is seeking assistance from legal aid and assuming he meets the strict eligibility test for VLA, will be assigned a lawyer who will prepare Franks case and represent him in court.*

*Should Frank secure the services of legal aid it will enable him to prepare and present his best case possible enabling Frank to participate with a degree of fairness when it comes to the examination and cross-examination of witnesses. But should Frank’s lawyer be not as qualified or as skilled as the senior prosecutions barrister, it may result in a poor defence of Frank and increase the possibly of an innocent person being incarcerated.*

*Access is upheld through VLA helping Frank understand his rights before the law and being able to attain free legal advice helps Frank make an informed decision about how he will proceed with the case. Acquiring legal assistance will assist Frank gain access to representation that will be necessary to resolve the dispute before the court and help Frank to understand the processes and procedures that he will subjected to at trial. Alternatively, without VLA support Frank will have little chance of understanding the complexities of the strict rules of evidence and procedure used in a criminal trial.*

**Marking Guide**

**2 marks** for outlining the role of VLA within the criminal justice system

**2 marks** for discussing how this may impact fairness

**2 marks** for discussing how this may impact access

**Question 4** (3 marks)

Identify and explain **one** of the relationships between parliament and the courts in law-making.

*The act of codifying common law where parliament can confirm a precedent set by the courts. Parliament as the supreme law-making body can reinforce principles established by a court ruling and enshrine these principles in statute law. One example of codification is the High Court Mabo 1992 decision that was codified in law with the Native Title Act 1993.*

Alternative Responses of possible relationships between parliament and courts

* Supremacy of parliament
* Ability of courts to influence parliament
* Interpretation of statutes by courts
* Abrogation of common law

**Marking Guide**

**1 mark** for identifying one of the relationships identified

**2 marks** for explaining how the relationship demonstrates the way parliament and the courts interact with each other

**Question 5 (10 marks)**

A Victorian Supreme Court Judge recently commented…

“Delays and a lack of access are the two main barriers facing the Victorian civil justice system”

Evaluate whether you agree with the comment. Suggesting features of the Victorian civil justice system that might reduce delays and improve access.

*Delays and access are significant barriers to achieving justice before the Victorian civil justice system. In pursuing a civil claim an aggrieved party is faced with an extensive level of pre-trial procedures that cause significant delays to reaching court to have the case resolved. Pleadings, discovery and exchange of evidence all pre-trial procedures can cause several months of delays in reaching court. Although, the increase in the use of and availability of alternative dispute resolution methods has worked to alleviate some of these delays.*

*Mediation and conciliation offer parties to a civil dispute a low cost and efficient way of resolving a dispute prior to it reaching court. An independent third party can be engaged to facilitate discussion and to find a mutually agreeable solution to the dispute. Professional mediation or conciliation services can be arranged or through a judge referring a dispute to mediation parties can attain a more timely and efficient resolution to their dispute.*

*To a large extent many citizens are denied access to effectively exercising their civil rights before the law. Language barriers experienced by newly arrived migrants or non-English speaking citizens results in many citizens being unaware of their rights before the law. In reference to tenancy laws, workplace laws and commercial contract laws the complexity and uncertainty of people’s rights further compound the difficulty of migrants and non-English speaking citizens understanding their rights before the law.*

*Community legal centres and Victorian legal aid have acted on reform recommendations by providing a range of support services for non-English speaking citizens. Victorian legal aid offers interpreter services in over 25 different languages and provide a range of legal services. Victorian legal aid providing advice in matters where a person may be contesting a workplace or tenancy dispute but is unaware of their rights in the matter.*

*Overall, the barriers of delays and access still do impede many people in Victoria fully exercising their civil rights before the law. Deterrents such as drawn-out pre-trial procedures and the expense of engaging legal representation, leave many legitimate claimants unable to access the law. In addition, the complexities of civil law remain a significant barrier to non-English speaking migrants because the language barrier denies them fully understanding their rights before the law.*

**Marking Guide**

**Advice to students: This question is marked globally; meaning a range of criteria are evaluated when assessing the mark such as, quality of response, level of legal reasoning used and the skill of using legal terminology precisely and correctly.**

4 marks for discussing and providing a method of addressing delays

4 marks for discussing and providing a method of addressing access

2 marks for a definitive position (evaluate question requires this) on whether you support or disagree with the statement with reasoning

**END OF SECTION A**

**SECTION B**

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| **Instructions for Section B**  **Use stimulus material, where provided, to answer the questions in this section. It is not intended that this material will provide you with all the information to fully answer the questions.**  **Answer all questions in the spaces provided.** |

**Question 1** (17 marks)

**Source 1:** The following is an extract from Victorian Law Reform Commission: https://lawreform.vic.gov.au/projects/victims-crime-criminal-trial-process/victims-crime-criminal-trial-process-terms-reference

**Attorney General’s Terms of Reference for VLRC 2014**

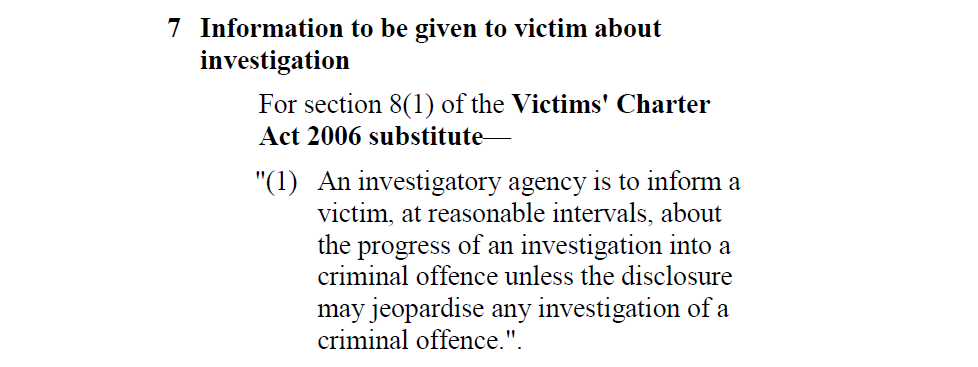
[Referral to the Commission pursuant to section 5(1)(a) of the Victorian Law Reform Commission Act 2000 (Vic) on 27 October 2014.]

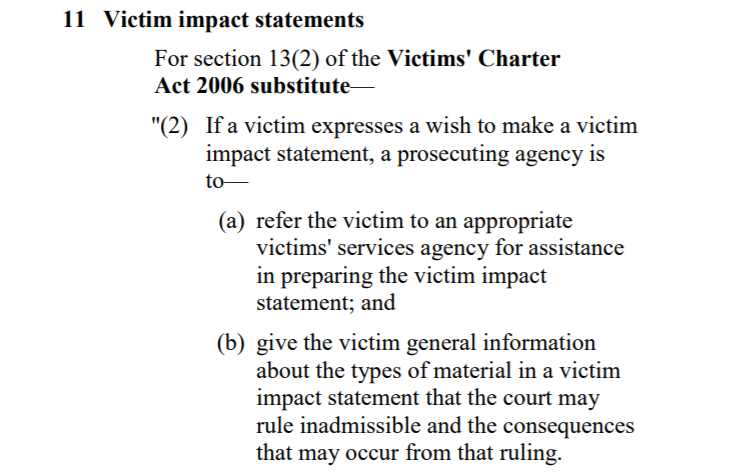
The Victorian Law Reform Commission is asked to review and report on the role of victims of crime in the criminal trial process.  
 In conducting the review, the Commission should consider

(c) recent innovations in relation to the role of victims in the criminal trial process in Victoria and in other jurisdictions;  
(d) the role of victims in the decision to prosecute;  
(e) the role of victims in the criminal trial itself;  
(f) the role of victims in the sentencing process and other trial  outcomes;  
 The Commission is to report by 1 September 2016.

[Sections (a), (b), (g) and (h) have been removed]

**Source 2: Sub section 7 & 11 [**Victims and Other Legislation Amendment Act 2018 (Vic)]

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1. Outline one pressure that may have influenced parliament to pass the Act. (2 marks)

*Lobby groups that work to support victims of crime and write to members of parliament to lobby for changes to the processes used in the criminal justice system to better support Victims. Groups such as Victims Support Agency making submissions to MPs or parliament with data highlighting systemic failings of the criminal justice system, pressures the parliament to legislate. Changes to the law ensuring victims are treated with more dignity and respect by legal institutions, by legal processes and provide for a more open and transparent relationship with police prosecuting their case.*

**Marking Guide**

**1 mark** for identifying an internal or domestic pressure (such as, lobby groups, political opposition, law reform bodies, individuals)

**1 mark** for explaining how the pressure for reform is applied

1. With reference to the *Victims and Other Amendment Act 2018*, describe the strengths and weaknesses of parliament in making law. (4 marks)

Suggested Solution

*One strength of parliament as the elected supreme law-making body with authority to make any law within its jurisdiction. In reference to any VLRC recommendations parliament can target specific areas for reform such as legislating to ensure victims ‘are informed at reasonable intervals’ during the criminal investigation. However, a weakness of parliament is the delay and time taken for laws to be changed. The VLRC receiving the terms of reference in 2014, but it was not until 2018 four years later that amendments were made to the Act. Another strength of the parliament is the wide range of resources at their disposal to investigate entire areas of law. In this instance the parliament choosing to make use of the VLRC, alternatively they could have had a Parliamentary Committee thoroughly investigate this area of law. Although, the downside of this extensive investigation is it is very expensive and ties up precious resources investigating specific areas referred to the VLRC.*

**Marking Guide**

**2 marks** for articulating 2 strengths of parliament in law making

**2 marks** for articulating 2 weaknesses of parliament in law making

1. Evaluate the effect of these changes on the level of fairness achieved by victims before the Victorian Criminal Justice System. (6 marks)

*The amendments to the Victims Act 2018 move some way to improving the degree of fairness and justice experienced by victims before the criminal justice system. Although, there is still plenty of room for future reforms to improve the level of fairness experienced by victims of crime.*

*The amendment that instructs the prosecution to update the victim about the progress of an investigation helps to support the victims achieve fairness before the law. Victims who may be experiencing psychological trauma because of the crimes perpetrated against them, may have in the past suffered secondary victimisation due to a lack of care taken by investigatory authorities. Through the amendment making it mandatory for police to keep victims updated on the progress of the prosecution it can alleviate the stress of feeling like their case is not being investigated properly or that their claims are not being taken seriously by the DPP.*

*In the amendment Act, its purpose is to give greater significance to victim impact statements and the effect these have on the sanctions imposed by judges. The prosecution being responsible for referring victims to an appropriate agency to prepare the victim impact statement adds another level of support, again alleviating the stress of victims not knowing how to approach this important submission.*

*However, these measures do not go far enough to ensure all victims are treated fairly before the Victorian criminal justice system. Vulnerable witnesses having to give evidence multiple times causes undue stress and unnecessary psychological trauma. Further reforms to the treatment of victims when giving evidence could alleviate these concerns and improve the level of fairness experienced by victims before the criminal justice system.*

**Marking Guide**

**2.5 marks** for discussing how the reform supports fairness

**2.5 marks** for discussing how the reform does not address fairness issues for victims

**1 mark** for taking a position of whether further reforms are necessary to properly address the issue

1. Analyse the ability of the Victorian Law Reform Commission to influence law reform. (5 marks)

*The VLRC has a strong influence on parliament in relation to law reform. The direct relationship between the Attorney General and the VLRC means the Attorney General(AG) provides the terms of reference for the area of law for review. However, parliament is under no obligation to introduce law reform to adopt any of the recommendations made to amend the Victims of Crime legislation.*

*Another strength of the VLRC, is its ability to investigate the area comprehensively so that the new laws can cover the whole issue of how criminal processes and procedures can better support victims of crime. Seeking submissions from victims of crime and holding public hearings ensures all issues of concerns are uncovered, discussed and ensures the final recommendations best meet the necessity for law reform in this area. Although, the terms of reference set by the AG can limit the scope of inquiry, leaving other areas of reform required to improve the treatment of the victims of crime being overlooked, in the VLRC inquiry.*

*Overall, the VLRC is very successful in influencing parliament to adopt their recommendations. Given that parliament has adopted all or some of the VLRC recommendations (approximately 70-80%) when the final report is tabled before parliament.*

**Marking Guide**

**2 marks** for discussing the strengths of the VLRC in influencing law reform

**2 marks** for discussing the weaknesses of the VLRC in influencing law reform

**1 mark** for a definitive conclusion of how effective the VLRC is in influencing law reform

**Question 2** (10 marks)

**SOURCE 1: Koori Court Article**

**New Koori Court for Shepparton**

26 July 2018

Aboriginal Elders will play a major role in Shepparton’s justice system, when Victoria’s newest Koori Court opens in the regional centre today.

“The Shepparton County Koori Court represents a significant step towards improving the justice outcomes for the Koori community in our State.”

Judge-In-Charge Paul Grant said the County Koori Court used the same sentencing law as the criminal division of the County Court.

“What’s different about the Koori Court is that it provides an opportunity during the plea hearing for Elders to speak directly with offenders about their offending and the importance of offenders changing their behaviour,” Judge Grant said.

“Offenders can only come into the Court if they plead guilty and consent to participate in a process that involves engaging with Elders and Respected Persons from the Aboriginal community.”

The sentencing conversation follows and includes the Judge, the Elders and Respected Persons, the accused, the lawyer for the accused, the Prosecutor, the Koori Court Officer, the Corrections Officer and those people who may be present to support the offender.

Aboriginal Elders and Respected Persons are appointed from each region where a County Koori Court is located and have strong cultural ties and knowledge of the local area and their community.

**https://www.countycourt.vic.gov.au/news-and-media/news-listing/2018-07-26-new-koori-court-shepparton**

1. Examine the extent to which cultural differences limit the ability of the Victorian Criminal Justice system to achieve the principles of justice. (6 marks)

*To a large extent cultural differences restrict indigenous Australians from achieving access and equality before the criminal justice system. Aboriginal and Torres strait Islander people face language and cultural barriers when involved with the processes and procedures used in the Victorian criminal justice system.*

*Language barriers contribute to a lack of understanding of court procedures, misunderstanding the need for the same story to be retold again and again, figuring that maybe the story needs new and different details, making indigenous Australians an easy target to appear as an unreliable witness. This undermines the equality experienced by indigenous Australians in the courtroom, because of their misunderstanding of the examination and cross-examination protocols and the complexity of the strict rules of evidence and procedure,*

*To a small extent the expansion of the Koori Court is addressing issues around equality being achieved. By indigenous offenders pleading guilty to an offence and having an opportunity to collaboratively (with Aboriginal elders present) establish an appropriate sanction, moves some way to attaining greater equality before the law.*

*Access to the criminal justice system is undermined when indigenous Australians are uninformed as to their rights before the law. For instance, the right to silence or the right to have legal representation present before answering any questions is often not common knowledge amongst the aboriginal community. Furthermore, many indigenous Australians act in a submissive way when confronted with authority and without meaning to will admit guilt, without comprehending the implications of these admissions. To a small extent, the Koori Court does improve the indigenous Australian’s level of understanding of the sentencing process they are facing, having elders present during the hearing assisting all people around the table to have a voice and a say in the outcome of the sentencing hearing.*

**Marking Guide**

**3 marks** for taking a position (for or against) of the reform addressing access and equality issues faced by indigenous Australians

**3 marks** for discussing how the Koori Court does address access and equality issues

1. Explain how the Koori Court reforms may influence the level of reoffending by indigenous Australians. (4 marks)

*The expansion of the Koori Court across the state of Victoria should have a positive effect on the rate of recidivism of indigenous offenders. The opening of the Koori County Court in Shepparton in 2018 now means Aboriginal elders are involved in the sentencing procedures. The Koori Court process involves the accused, the accused’s family members and a respected Aboriginal elder sitting around an oval table to discuss the impacts of the crime and decide on a culturally sensitive sentence that bridges the purposes of customary law and Victorian criminal law. The differences and values of the indigenous community are recognised in this sentencing approach and has proven to be successful in rehabilitating indigenous offenders, thus lowering the rate of recidivism amongst aboriginal and Torres Strait Islanders in Victoria.*

**Marking Guide**

**2 marks** for describing the measures used and the more restorative method of sentencing that is culturally sensitive

**2 marks** for describing why this should have a positive impact in reducing recidivism

**Question 3 (13 marks)**

**SOURCE 1: Commonwealth Constitution: Section 92**

The following is an extract from the Commonwealth of Australia Constitution Act 1900.

# COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 92

**Trade within the Commonwealth to be free**

On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

**SOURCE 2: Commonwealth Constitution: Section 117**

The following is an extract from the Commonwealth of Australia Constitution Act 1900.

# COMMONWEALTH OF AUSTRALIA CONSTITUTION ACT - SECT 117

**Rights of residents in States**

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

**SOURCE 3:** Excerpts from the ABC article published https://www.abc.net.au/news/2020-04-23/fact-check-state-border-closures-australian-constitution-corona/12164440

**Is it illegal under the constitution for a state to close its borders to other Australians?**

**Thursday 23 April 2020 ABC News.net.au**

Efforts to halt the spread of COVID-19 have led to a range of restrictions at some interstate and territory borders.

When Queensland closed its borders on April 3, former foreign minister and high commissioner to the United Kingdom Alexander Downer took to Twitter, questioning the constitutional validity of the move: "I don't think an Australian state can legally close its borders to other Australians under section 117 of the constitution."

Anne Twomey, a professor of constitutional law at the University of Sydney, told Fact Check section 117 "is not absolute in its application".

"Most importantly, section 117 does not affect state laws that are reasonably necessary for the safety of the state or its people," Professor Twomey said.

Constitutional law experts contacted by Fact Check said that while section 117 is relevant to the legality of state border closures, section 92 of the constitution is the more applicable provision.

Section 92 says that "trade, commerce, and intercourse among the states, whether by means of internal carriage or ocean navigation, shall be absolutely free."

George Williams from the University of NSW told Fact Check the key word is "intercourse", which refers to movement and travel.

In effect, it guarantees free movement throughout the federation.

1. What is one purpose of express rights entrenched in the Australian Constitution?

(2 marks)

*Express rights, such as S.92 and S.117 found in the constitution act as a check on the powers of parliament to ensure parliament does not make laws that may infringe on the rights of Australian citizens; for example where there is an unlawful closure of state borders. In effect, it enables the people to challenge laws made by Commonwealth or by State parliaments that are in contravention to protections each Australian has under the 5 express rights.*

**Marking Guide**

**2 marks** for articulating the express rights act as a check on parliaments law making powers

1. Discuss whether state governments might be breaching these express rights protected by the constitution. (4 marks)

*With the Queensland, South Australian and Western Australian governments continuing to ban any travel of Victorian citizens to these states it is possible these State governments are breaching S.92 and S.117 of the constitution. A broad reading of the word ‘intercourse’ from S.92 meaning this right guarantees the freedom of movement between states, which is being blocked by the state border closures. A similar broad interpretation of S.117 “shall not be discriminated against” could equally be interpreted as currently contravening the rights of Victorians, with Victorians being treated differently to other citizens based on their state of residence.*

*However, should these current border closure laws be contested as being unconstitutional and invalid, it is likely this claim would fail. S.92 and S.117 are not absolute in their application and do not prevent state governments from making laws in times of emergency that are necessary for the safety of the state and its people.*

**Marking Guide**

**2 marks** discussing why the Commonwealth, state or individual could challenge these border closure laws as being unconstitutional

**2 marks** for discussing why a challenge to the border closure laws may be unsuccessful given circumstances that override the application of these express rights

In a recent interview the Australian prime minister Scott Morrison said,

“… if the state borders are not opened soon the Commonwealth will abrogate the border restriction laws”

1. Is it possible for the Commonwealth to abrogate the state made laws? Justify your response. (3 marks)

*The Commonwealth parliament cannot abrogate state laws. Abrogation involves parliament disagreeing with precedent that is established in court and passing legislation that effectively overrides decisions made through courts. Therefore, it is not possible for the laws to be abrogated and the claim made by Mr Scott Morrison is incorrect.*

**Marking Guide**

**1 mark** for stating parliament cannot abrogate state laws

**2 marks** for justifying this position as abrogation involves parliament overriding judge-made law

1. Analyse how influential traditional media may be in influencing state governments to remove ‘hard’ border closures within Australia. (4 marks)

*One advantage of traditional media, such as the ABC news online or other traditional News-print media, is it can examine, discuss, and inform people about the problems caused by border closure laws. For example, issues surrounding access to emergency medical services. Traditional media is still accessed by millions of Australians and thus can shape the views and attitudes based on the way the political issue of border closures is presented. However, some media organisations lack impartiality in the way they report on the issue of national border closures, particularly State based news sources presenting stories in a way that protects the interests of the citizens of their state. To this regard, this can discredit these traditional news sources as the reporting could be perceived to be used as a persuasive means of influencing states to reform their border laws.*

**Marking Guide**

2 **marks** for discussing the strengths of traditional media in influencing law reform

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**2 marks** for discussing the weaknesses of traditional media in influencing law reform