Explain what is meant by the term ‘constitution’.

(2 marks)

A constitution is a binding set of rules that the government must abide by. The Commonwealth Constitution of Australia was created at Federation in 1901 and has established the three branches of government, their roles, and the separation and overlap between them.

Using sections of the Commonwealth Constitution (Australia), outline the jurisdiction of the High Court of Australia.

(3 marks)

Chapter 3 establishes the judicial branch and therefore the High Court. Section 71 creates the High Court of Australia as the “federal supreme court”. Section 72 establishes the appointment, removal, and salary of judges. Sections 73, 75, and 76 create the High Court’s jurisdiction (power to judge upon).

Discuss the extent to which the Commonwealth Constitution (Australia) is relevant to the accountability of the High Court of Australia.

(5 marks)

The Constitution creates a paradox between judicial independence and judicial accountability.

Section 72 creates judicial independence, however, this threatens the accountability of the courts. This section protects judge’s salaries and job security. It is very difficult to remove a judge - both Houses must convene in a joint sitting to decide and “proven misbehaviour or incapacity” is required. The Constitution does not explain what “proven”, “misbehaviour”, or “incapacity” entails, making it very difficult to remove a judge. This threatens the accountability of the High Court.

However, Section 72 also creates judicial accountability, as Parliament has the ultimate power to remove judges. Although this violates the separation of powers, it allows for the judiciary to be held accountable. If the public is unhappy with a court decision, Parliament should act on their behalf to remove the offending judge, as they are directly responsible to the people.

The Constitution keeps the High Court accountable in theory but only to a limited extent in practice. No judges have ever been removed from the High Court of Australia.

Identify two aspects of the appointment of justices to the High Court of Australia. (2 marks)

One aspect is that they are appointed by the Governor General “in council” - on the advice of the Prime Minister and the Attorney General.

Another aspect is that they must have at least five years of experience as a lawyer in at least a federal or state court.

These are established in Section 72.

Outline the process for removal of justices of federal courts in Australia.

(3 marks)

A federal justice after misconduct is thoroughly investigated. A judge can only be removed on the grounds of “proven misbehaviour or incapacity”, which can be difficult to prove. Both Houses of Parliament must convene in a joint sitting to approve the removal, and the removal is done by the Governor General on the advice of the Prime Minister and the Attorney General.

*The appeals process is the ultimate judicial accountability measure.*

Evaluate this statement.

(5 marks)

The appeals process refers to the ability to take a case to a superior court if parties are unhappy with a decision.

The appeals process holds the judiciary accountable as it is a direct check on the quality of a lower court’s decision and provides the opportunity to correct mistakes. Judges must also provide a written reason for their decision (ratio decidendi) which can be reviewed and overturned if necessary, and holds them directly responsible for their choice as it must be carefully thought out.

The appeals process does not effectively hold the judiciary accountable as grounds for appeal are difficult to achieve and appeals are very expensive for clients. An appeal must claim an error of fact or law, and can cost over $3000 to file. This results in a very small percentage of appeals being heard.

Overall, the appeals process holds the judiciary accountable to a limited extent, and is not as effective as methods such as parliamentary scrutiny and removal of judges.

What is public confidence in relation to accountability of the judiciary? (2 marks)

Public confidence refers to the level of faith the public has in the judicial arm of the government. Although the judiciary is not democratically elected, the legislature has parliamentary sovereignty and a responsibility to the people to keep the judiciary accountable.

Outline three features of the Australian legal system that promote transparent processes and public confidence in the judiciary. (3 marks)

One feature is ratio decidendi. This is a judge’s written reason for a decision. It creates transparency in the legal process as the judge’s reasoning for any decision can be reviewed.

Another feature is the rigorous appointment process. Standards for a judge are very high, and it is incredibly difficult to get positions in high level courts without much experience and trust.

The third feature is the Judicial Code of Conduct which ensures the integrity of judges and those involved in the court system.

‘*Parliamentary sovereignty is only one aspect of judicial accountability’.*

Evaluate parliamentary sovereignty as an accountability measure of the judiciary. (5 marks)

Parliamentary sovereignty refers to parliament as the supreme legal authority. This is due to the democratic principle of direct election of politicians. This allows the parliament to create legislation that overrides common (court-made) law.

One pro of parliamentary sovereignty is that it can keep legislation updated and relevant to society’s wants and needs. Courts create precedent when they make a ruling on a case which is then applied to similar cases, and this is hard to change. However, politicians are responsible for representing the people to retain their voting support, and are quick to pass legislation to stop complaints. For example, people were complaining that judges were too lenient and not providing proper punishment for crimes. Therefore, mandatory sentencing laws were passed in Parliament that force judges to jail offenders, holding the courts to account for not sentencing criminals to community expectations.

One con of parliamentary sovereignty is that it overrides the separation of powers, which is a key principle of democracy. In theory, the judicial branch is intended to be entirely separate from the Parliament to keep them impartial and apolitical. When parliament passes legislation that impact the judiciary, they are directly influencing judges which could create bias and promote a political agenda. For example, the mandatory sentencing laws have been criticised for removing judicial discretion and forcing judges to jail offenders in cases they may not deem necessary to do so.

Overall, parliamentary sovereignty works as an accountability measure of the judiciary to some extent. While it can keep courts accountable and reduce the possibility of unfair judgements, it also infringes on judicial independence and the separation of powers.