



POLITICS AND LAW

ATAR course examination 2021

Marking key

Marking keys are an explicit statement about what the examining panel expect of candidates when they respond to particular examination items. They help ensure a consistent interpretation of the criteria that guide the awarding of marks.

Section One: Short answer

30% (30 Marks)

Question 1

(10 marks)

- (a) What is a 'Shadow Minister' in the Commonwealth Parliament? (2 marks)

Description	Marks
Outlines what a Shadow Minister is in the Commonwealth Parliament	2
Makes a general statement about a Shadow Minister	1
Total	2
Shadow Minister is: <ul style="list-style-type: none"> • a senior member of the opposition in the Parliament who occupies the opposition front benches • is usually allocated 'shadow' portfolio(s) to match those of the government • if there is a change of government a Shadow Minister may become a Minister. This is why it is important for them to understand the work of the department they 'shadow' and consider how they would run their portfolio. 	

- (b) Outline **three** roles of the Shadow Ministry in the Commonwealth Parliament. (3 marks)

Description	Marks
Outlines three roles of the Shadow Ministry in the Commonwealth Parliament	3
Outlines two roles of the Shadow Ministry in the Commonwealth Parliament	2
Outlines one role of the Shadow Ministry in the Commonwealth Parliament or Makes a general statement about the role of the Shadow Ministry in the Commonwealth Parliament	1
Total	3
Roles could include but are not limited to: <ul style="list-style-type: none"> • it holds government ministers and their departments to account for their actions and policies through appraisal, criticism and scrutiny • it is the opposition's senior group in Parliament and presents alternative views to Parliament through its processes and procedures • Shadow Ministry puts forward and explains opposition policies and is considered the alternative government. 	

- (c) Discuss **two** disadvantages faced by the Shadow Ministry in the Commonwealth Parliament in recent years. (5 marks)

Description	Marks
Discusses two disadvantages faced by the Shadow Ministry in the Commonwealth Parliament in recent years	5
Outlines two disadvantages faced by the Shadow Ministry in the Commonwealth Parliament in recent years	3-4
States one or two disadvantages faced by the Shadow Ministry in the Commonwealth Parliament in recent years or Makes a general statement about the disadvantage(s) faced by the Shadow Ministry in the Commonwealth Parliament	1-2
Total	5
Disadvantages could include but are not limited to: <ul style="list-style-type: none"> • the Shadow Ministry/Shadow Ministers have access to fewer resources than their government counterparts • no public service departments or large offices of advisers to support them resulting in lack of access to information and advice • the pandemic initially forced the Shadow Ministry to support government policy • strong Government Ministers - difficult to get runs on the board • internal divisions and infighting within the opposition, weakens the Shadow Ministry • often seen as a negative force in terms of 'anti-government'. 	
Note: examples if used must be from the past 10 years.	

Question 2

(10 marks)

- (a) According to Westminster conventions, outline the role of the constitutional monarch. (2 marks)

Description	Marks
Outlines the role of the constitutional monarch according to Westminster conventions	2
Makes a general statement about the role of the constitutional monarch according to Westminster conventions	1
Total	2
Role could include but is not limited to: The Queen, Elizabeth II: <ul style="list-style-type: none"> • is Head of State of the Commonwealth of Australia acts on the advice of the Prime Minister (as Chief Advisor) regarding use of executive and legislative powers such as appointment/removal of the Governor-General of Australia and assent of legislation respectively • role is largely ceremonial and historical as the Queen is governed and bound by both Constitution and convention. <i>The recent release of the 'Palace letters' also reveal a desire by the Queen to remain politically neutral and a willingness by Governor-General Sir John Kerr not to inform the Queen in advance of contested actions.</i> 	

- (b) Outline **three** roles of the Prime Minister as head of the Cabinet. (3 marks)

Description	Marks
Outlines three roles of the Prime Minister as head of the Cabinet	3
Outlines two roles of the Prime Minister as head of the Cabinet	2
Outlines one role of the Prime Minister as head of the Cabinet	1
Total	3
Roles could include but are not limited to: <ul style="list-style-type: none"> • controls the business list (or agenda) influencing the items available for discussion or decisions in Cabinet meetings • sets the priorities of government including introduction of government legislation and budget decisions • determines the outcome/consensus of Cabinet decisions • determines who attends Cabinet – through appointment of Ministers to Cabinet portfolios or elevation of certain portfolios to Cabinet level, as well as the invitation to special guests (experts and Assistant Ministers) • decides when to waive Cabinet secrecy/confidentiality – such as PM Abbott's decision to release Rudd government Cabinet documents on the home insulation scheme https://www.theguardian.com/world/2014/feb/24/tony-abbott-cabinet-documents-royal-commission • enforces Cabinet solidarity conventions – including when PM Abbott compelled his Cabinet Ministers to support him during his first leadership spill https://www.abc.net.au/news/2015-02-06/pm-tony-abbott-facing-leadership-spill-motion/6075470?nw=0; . 	

- (c) Discuss **two** issues the political executive in Australia faces under Westminster conventions. (5 marks)

Description	Marks
Discusses two issues the political executive in Australia faces under Westminster conventions	5
Outlines two issues the political executive in Australia faces under Westminster conventions	3-4
States one or two issues the political executive in Australia faces under Westminster conventions	1-2
Total	5
<p>Issues could include but are not limited to:</p> <p>Westminster conventions of responsible parliamentary government include:</p> <ul style="list-style-type: none"> • are unwritten – numerous and assumed knowledge of those participating in the political system; this can lead to vagaries in understanding, inconsistency in application • are unenforceable – reliant on the will of participating parties to follow, including the Prime Minister, Ministers and Governor-General, with limited mechanisms to address broken conventions • create potential political liabilities for government – causing unfavourable media coverage, parliamentary scrutiny and or changes in public sentiment and opinions; increase the risk of association for the government with the (in)actions of an individual's probity and propriety that is in question (GG Hollingworth or a Minister); or hinder a government's political agenda • encourage a contest of power and process between conventions and the Constitution – including in 1975 when Sir John Kerr took advice from the Chief Justice and a Justice of the High Court (without informing the PM) and used his reserve powers to dismiss the government and the leader of political party with confidence of the House • are uncertain when a Governor-General may query the advice received by the Federal Executive Council. 	

Question 3

(10 marks)

(a) Briefly explain 'individual ministerial responsibility' (IMR).

(2 marks)

Description	Marks
Briefly explains IMR	2
Makes a general statement about IMR	1
Total	2
Individual ministerial responsibility could include: <ul style="list-style-type: none"> • in terms of their portfolio/department <ul style="list-style-type: none"> ◦ is responsible for their portfolio/department and is answerable to Parliament for what is done in their name ◦ is directly responsible for a serious matter/issue that can be clearly attached to the minister and should resign ◦ should answer and explain faults and shortcomings of those in their department or their actions, but is not directly responsible for them. • as an individual, a minister should resign/be dismissed for: <ul style="list-style-type: none"> ◦ indiscretion ◦ arbitrary exercise of power ◦ misleading Parliament ◦ condoned or authorised a blatantly and unreasonable use of executive power ◦ impropriety. 	

(b) Distinguish between the Senate Estimates and **one** other committee of the Commonwealth Parliament.

(3 marks)

Description	Marks
Distinguishes between Senate Estimates and one other committee of the Commonwealth Parliament	3
States the difference between Senate Estimates and one other committee of the Commonwealth Parliament	2
Makes a statement about Senate Estimates and/or one other committee of the Commonwealth Parliament	1
Total	3
Answers could include but are not limited to: <ul style="list-style-type: none"> • Differences could include: <ul style="list-style-type: none"> ◦ their establishment ◦ their purpose ◦ what happens as a result of the inquiry by the committee designated. • Senate Estimates: <ul style="list-style-type: none"> ◦ questions Ministers and officials. Questions must relate to the estimates of expenditure but this is interpreted widely, thus is related to any government operation/financial position ◦ only Ministers from the Senate are required to appear in person ◦ have power to 'send for persons or papers' hence it can demand that individual officials and documents are made available ◦ questions are normally answered at hearings, but information can be supplied later ◦ there are no 'in camera' hearings and all tabled documents are public ◦ submit reports where appropriate. • Other Committees of the Parliament include Joint Committees, statutory committees, Privileges Committee of each House <ul style="list-style-type: none"> ◦ can deal with any matter that the Parliament/House decides e.g. Senate select committees include: Sports Grants; Autism; COVID-19 	

- if no current committee exists, a House can establish a committee for a specific purpose
- standing committees such as the Legal and Constitutional Affairs Legislation committee which looks at current legislation before the Parliament.

(c) Discuss **one** strength and **one** weakness in terms of Senate Estimates holding the executive accountable. (5 marks)

Description	Marks
Discusses one strength and one weakness in terms of Senate Estimates holding the executive accountable	5
Outlines one strength and one weakness in terms of Senate Estimates holding the executive accountable	3-4
States one strength and/or one weakness in terms of Senate Estimates holding the executive accountable or Makes a general statement concerning Senate Estimates and executive accountability	1-2
Total	5
<p>Answers could include but are not limited to:</p> <ul style="list-style-type: none"> • Strengths include: <ul style="list-style-type: none"> ◦ hearings are in public ◦ documents submitted are public ◦ question public servants directly ◦ the term appropriation is broad in meaning and hence the hearing can probe deeply into particular matters. • Weaknesses include: <ul style="list-style-type: none"> ◦ only Ministers in the Senate are required to attend ◦ Ministers may prevent a public servant from giving particular information ◦ witnesses cannot be asked to speculate, merely answer the question asked. 	

Question 4

(10 marks)

- (a) Briefly explain 'economic rights'. (2 marks)

Description	Marks
Briefly explains 'economic rights'	2
Makes a general statement about 'economic rights'	1
Total	2
<p>Answers could include but are not limited to: As defined in the <i>International Covenant of Economic, Social and Cultural Rights (ICESCR) 1966</i> including:</p> <ul style="list-style-type: none"> ◦ Right to work (Article 6) ◦ Just and favourable conditions of work (Article 7) ◦ Right to form and join unions, right to strike (Article 8) ◦ Right to social security (Article 9) including protections for maternity leave (Article 10) ◦ Right to an adequate standard of living (Article 11) ◦ Right to enjoy personal natural wealth and resources (Article 25). <p>https://humanrights.gov.au/our-work/commission-general/international-covenant-economic-social-and-cultural-rights-human-rights</p> <ul style="list-style-type: none"> • Also includes other international instruments that provide other economic rights, or restrictions from infringement of those rights. 	

- (b) Distinguish between constitutional and statutory protection of human rights in Australia. (3 marks)

Description	Marks
Distinguishes the difference between constitutional and statutory protection of human rights	3
States the difference between constitutional and statutory protection of human rights	2
Makes a statement about constitutional and statutory protection of human rights	1
Total	3
<p>Answers could include but are not limited to:</p> <ul style="list-style-type: none"> • Difference: <ul style="list-style-type: none"> ◦ inflexibility v flexibility of change/ability to evolve, statute is 'lesser' protection against infringement than constitutional ◦ statutory protection may be caused by an international instrument which needs to be ratified. • constitutional – mechanism of protecting human rights through explicit embedment in a constitution (e.g. Express rights in Sections 116, 80, 51(xxxi), 92, 117 in the Commonwealth Constitution) or implied through interpretation of a constitution (e.g. implied right of political communication); or the deliberate amendment of a constitution to embed a Bill of Rights • statutory – mechanism of protecting human rights through specific laws passed by Commonwealth or State parliaments (e.g. <i>Sex Discrimination Act 1984</i>) to protect specific type of right (and may give ratification to an international instrument) or legislation to codify a group of rights through a statutory charter of rights (e.g. <i>Human Rights Act 2004 (ACT)</i>; <i>Human Rights and Responsibilities Act 2006 (Victoria)</i> or <i>Human Rights Act 2019 (QLD)</i>). 	

- (c) Discuss **two** ways in which human rights are protected in a country other than Australia. (5 marks)

Description	Marks
Discusses two ways in which human rights are protected in a country other than Australia	5
Outlines two ways in which human rights are protected in a country other than Australia or Discusses one way in which human rights are protected in a country other than Australia and states another way	3-4
States one or two ways in which human rights are protected in a country other than Australia	1-2
Total	5
<p>Answers could include but are not limited to: Most countries will include:</p> <ul style="list-style-type: none"> • constitutional • statutory • Bill of Rights or Charter of Rights – if separately enacted, both documents that set out a number of rights and freedoms of peoples in a particular jurisdiction. <p>Some countries may have:</p> <ul style="list-style-type: none"> • international law – by accession • common law. <p>Note: Responses should include sufficient evidence to demonstrate an understanding of the scope of rights protection offered by that mechanism – not a reference to a sole right.</p> <p>e.g. United States of America</p> <ul style="list-style-type: none"> • Constitutional protection through: <ul style="list-style-type: none"> ◦ Constitution: Article 1 (prohibits the suspension of habeas corpus, ex post facto laws or discrimination on the basis of state as well as providing for free trade within the USA), Article 3 (trial by jury), Article 6 (no religious affiliation for federal or state office) as well as rights protections afforded through separation of powers ◦ Bill of Rights – the first ten amendments to the US Constitution passed en bloc - that offers numerous protections such as freedom of religion, speech, press, peaceful assembly, to petition (First Amendment); protection against self-incrimination and deprivation of life, liberty or property without due process (Fifth Amendment) ◦ Amendments: various protections afforded through Amendments 13, 14, 15, 19, 24 and 26 ◦ may reference Supreme Court cases such as <i>Brown v Board of Education 1954</i>; <i>Hamdi et.al v Rumsfeld 2004</i>; <i>Citizens United v Federal Election Commissioner 2010</i>; <i>United States v Windsor 2013</i>; <i>Obergefell et.al v Hodges 2015</i>; or in contrast <i>Shelby County v Holder 2013</i> to demonstrate right(s). • Statutory protection through legislation of the US Congress such as the <i>Civil Rights Act 1964</i> and <i>Voting Rights Act 1965</i>. 	

Section Two: Source analysis

20% (20 Marks)

Question 5

(20 marks)

- (a) Outline what is meant by 'grant of special leave'. (2 marks)

Description	Marks
Outlines what is meant by 'grant of special leave'	2
Makes a general statement about 'grant of special leave'	1
Total	2
<p>The answer could include but is not limited to:</p> <ul style="list-style-type: none"> • the High Court itself decides if it will hear a case • most (though not all) matters of appeal brought to the High Court require special leave of the Court to proceed • a case will usually have to raise new points of law; be deemed to be of high public importance; be likely to involve many future cases; involve questions of law that have been decided in inconsistent ways by two or more lower courts • the following appeals require special leave: <ul style="list-style-type: none"> ◦ appealing a decision of a State Supreme Court ◦ appealing a decision of the Federal Court of Australia ◦ appealing a decision of the Family Court (absent a certificate by the Full Court that an important question of law or public interest is involved) ◦ appealing the decision of any court of a state exercising federal jurisdiction, even where a state law prohibits any appeals from that court. <p>https://www.hcourt.gov.au/about/operation</p>	

- (b) With reference to **Source 1**, explain in your own words, **two** reasons why the High Court, by majority, dismissed the appeal of the NSW Aboriginal Land Council (NSW ALC). (4 marks)

Description	Marks
Identifies two reasons why the High Court, by majority, dismissed the appeal of the NSW ALC Explains each reason in the candidate's own words with direct reference to the source	4
Identifies two reasons why the High Court, by majority, dismissed the appeal of the NSW ALC Explains one reason and outlines the other reason Answer is mostly in the candidate's own words with some reference to the source	3
Identifies two reasons why the High Court, by majority, dismissed the appeal of the NSW ALC or Identifies and explains one reason why the High Court, by majority, dismissed the appeal of the NSW ALC Attempts to explain in the candidate's own words	2
One or two reasons are cited verbatim from the source	1
Total	4
<p>Reasons why the High Court, by majority, dismissed the appeal of the NSW Aboriginal Land Council could include:</p> <ul style="list-style-type: none"> • land was occupied by Correctional Services NSW (CSNSW) at the time of the claim • land did not have to be used specifically for the purposes for which it was allocated – in this case a goal to be classified as 'lawfully occupied' • the High Court referred to the <i>New South Wales Constitution Act 1855</i> and stated that s 2 did not 'abrogate the executive's powers over waste land' • Court ruled that NSW through the executive government could lawfully occupy the claimed land. <p>Note: reasons must be drawn from the source</p>	

- (c) With reference to examples, discuss **two** jurisdictions of the High Court of Australia (HCA). (6 marks)

Description	Marks
Identifies two jurisdictions of the HCA Discusses each of these jurisdictions making reference to relevant examples or Discusses one jurisdiction of the HCA and outlines the other jurisdiction making reference to relevant examples	5-6
Identifies two jurisdictions of the HCA Outlines each of these jurisdictions making reference to at least one example or Discusses one jurisdiction of the HCA making reference to a relevant example/and identifies another jurisdiction	3-4
Identifies one or two jurisdictions of the HCA or Outlines one jurisdiction of the HCA or Gives an example related to the jurisdictions of the HCA	1-2
Total	6
Jurisdiction of High Court set out in Constitution of Australia: <ul style="list-style-type: none"> • s 73 Appellate Jurisdiction of High Court • s 75 Original Jurisdiction • s 76 Additional Original Jurisdiction • High Court sitting as the Court of Disputed Returns. https://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution/chapter3	

Question 5 (continued)

- (d) Evaluate the significance of **one** contemporary issue relating to legal power in Australia. (8 marks)

Description	Marks
Outlines one contemporary issue relating to legal power in Australia Evaluates the significance of the issue Incorporates detailed relevant evidence in the evaluation of its significance	7–8
Outlines one contemporary issue relating to legal power in Australia Describes the significance of the issue Incorporates some relevant evidence Attempts to evaluate the significance of the contemporary issue relating to legal power	5–6
Outlines one contemporary issue relating to legal power in Australia Makes a statement concerning the significance of the issue There is no attempt to evaluate its significance	3–4
Identifies or outlines one contemporary issue relating to legal power in Australia or Makes a general statement about legal power in Australia	1–2
Total	8
<p>Contemporary issues relating to legal power could include but are not limited to:</p> <ul style="list-style-type: none"> • a particular judgment of a court <ul style="list-style-type: none"> ◦ <i>Taylor v Attorney-General</i> (Cth) [2019] HCA 30 ◦ <i>R v A2; R v Magennis; R v Vaziri</i> [2019] HCA 35 ◦ <i>Glencore International AG v Commissioner of Taxation</i> [2019] HCA 26 ◦ <i>Palmer v Western Australia</i> [2021] HCA 5 • a decision of the High Court not to hear a case • cases where the court decided who/how a member is replaced after an elected member is disqualified from sitting: <ul style="list-style-type: none"> ◦ ex Nick Xenophon Team Senator Skye Kakoschke-Moore could not replace herself in the upper house (2018) ◦ in the matter of questions submitted to the Court of Disputed Returns pursuant to Section 376 of the <i>Commonwealth Electoral Act</i> 1918 (Cth) concerning Ms Skye Kakoschke-Moore (2018) HCA10 • review of judicial review process in Australia. <p>Evaluation:</p> <ul style="list-style-type: none"> • what was the significance of the contemporary issue relating to legal power? • a narrative of an example is not an evaluation. <p>Note: 'contemporary' means within the last three years.</p>	

Question 6

(20 marks)

- (a) Outline what is meant by 'preselection'. (2 marks)

Description	Marks
Outlines what is meant by 'preselection'	2
Makes a general statement about 'preselection'	1
Total	2
Answers could include but are not limited to: <ul style="list-style-type: none"> • methods by which political parties select a candidate to stand for an up-coming election. • it can include local members/local branches as well as the State party organisation. 	

- (b) With reference to **Source 2**, explain in your own words, **two** factors that contributed to Tony Abbott's defeat in the 2019 election. (4 marks)

Description	Marks
Identifies two factors that contributed to Tony Abbott's defeat in the 2019 election Explains each factor in the candidate's own words with direct reference to the source	4
Identifies two factors that contributed to Tony Abbott's defeat in the 2019 election Explains one factor and outlines the other factor Answer is mostly in the candidate's own words with some reference to the source	3
Identifies two factors that contributed to Tony Abbott's defeat in the 2019 election or Identifies and explains one factor that contributed to Tony Abbott's defeat in the 2019 election Attempts to explain in the candidates own words	2
One or two reasons are cited verbatim from the source	1
Total	4
Factors that contributed to Tony Abbott's defeat include: <ul style="list-style-type: none"> • his role in destabilising the party after he lost the Prime Ministership in 2015 • being out of touch with his standing in the party • Warringah Liberal Party members did not totally endorse Abbott at preselection for 2019 election. 	
Note: factors must be drawn from the source	

Question 6 (continued)(c) Discuss **two** reasons why elections may not keep the Senate accountable. (6 marks)

Description	Marks
Identifies two reasons why elections may not keep the Senate accountable Discusses each of the reasons or Discusses one reason and outlines the other reason	5–6
Identifies two reasons why elections may not keep the Senate accountable Outlines each of the reasons or Discusses one reason why elections may not keep the Senate accountable/and identifies another reason	3–4
Outlines one or two reasons why elections may not keep the Senate accountable	1–2
Total	6
Reasons could include: <ul style="list-style-type: none"> • length of time between elections of Senators (6 years) • the proportional representation voting system • particular Senators are protected by the party ticket • voters do not necessarily connect the Senate with particular legislation. 	

- (d) Evaluate the extent to which **two** procedures and processes of the Commonwealth Parliament keep it accountable. (8 marks)

Description	Marks
Identifies and discusses two procedures and processes of the Commonwealth Parliament that keep it accountable Uses relevant and detailed evidence in evaluating the extent to which the two procedures and processes of the Commonwealth Parliament keep it accountable	7–8
Identifies and discusses two procedures and processes of the Commonwealth Parliament that keep it accountable Uses relevant evidence in attempting to evaluate the extent to which the two procedures and processes of the Commonwealth Parliament keep it accountable	5–6
Outlines two procedures and processes of the Commonwealth Parliament that keep it accountable Makes a statement concerning the extent to which the two procedures and processes of the Commonwealth Parliament keep it accountable There is no attempt to evaluate or Identifies and discusses one procedure and process of the Commonwealth Parliament that keep it accountable Uses relevant and detailed evidence in evaluating the extent to which the procedure and process of the Commonwealth Parliament keeps it accountable	3–4
Makes a general statement concerning the extent to which the procedures and processes of the Commonwealth Parliament keep it accountable or Lists one or two procedures and processes of the Commonwealth Parliament that keep it accountable	1–2
Total	8
<p>Procedures and processes of the Commonwealth Parliament could include:</p> <ul style="list-style-type: none"> • Standing Orders including ‘naming procedure’ • legislative committees and particular legislation • particular processes involved in passing legislation through both Houses • reference to the Parliamentary Privileges Committee for breach of parliamentary standards • grievance and/or adjournment debates (in terms of the accountability of Parliament). <p>Evaluation:</p> <ul style="list-style-type: none"> • does the procedure/process contribute to accountability? • how and to what extent? 	

Section Three: Essay

50% (50 Marks)

Marking guide to essay answers

Questions 7–10

Description	Marks
Explains relevant terms and outlines parameters of discussion	
Explains all relevant terms and outlines parameters of discussion	5
Explains some of the terms and outlines parameters of discussion	4
Indicates what will be addressed in the discussion	3
Attempts to provide a focus for discussion	2
Makes a general statement concerning the topic/claim	1
Subtotal	5
Discussion of relevant issues including pertinent examples	
Discusses comprehensively relevant issues using a well-structured format and supportive examples in a cohesive, logical sequence and uses relevant political and legal terminology	9–10
Discusses some relevant issues incorporating some examples in a cohesive, logical sequence and uses relevant political and legal terminology	7–8
Limited discussion with limited examples in a logical sequence and uses relevant political and legal terminology	5–6
Limited discussion of the issues with limited political and legal terminology	3–4
Makes general statements concerning the topic	1–2
Subtotal	10
Evaluation/assessment/analysis	
Evaluates/assesses/analyses the claim using specific evidence which demonstrates a comprehensive understanding of the topic	7
Evaluates/assesses/analyses the claim using appropriate evidence which demonstrates an understanding of the topic	6
Evaluates/assesses/analyses the claim using some evidence which demonstrates some understanding of the topic	5
Constructs a relevant but weak evaluation/assessment/analysis	4
Constructs a weak evaluation/assessment/analysis	3
Limited evaluation/assessment/analysis	2
No evaluation/assessment/analysis. A statement only	1
Subtotal	7
Conclusion	
Draws together the argument linking the evidence	3
Summarises the argument	2
Makes general/superficial statements	1
Subtotal	3
Total	25

Section Three: Part A

Question 7

(25 marks)

The powers exercised by the States in Australian federalism have changed significantly since Federation.

Evaluate this claim.

Relevant terms and parameters of discussion:

- Australian federalism: system of separate and sovereign governments within the Commonwealth with a division of powers: exclusive, concurrent and residual
- 'powers exercised by the States': those concurrent and residual powers provided to the states through the Commonwealth Constitution (Sections 51 and 107 respectively) and their relevant state constitutions and laws (protected by Section 106 and 108 of the Commonwealth Constitution)
- changed significantly: having a noticeable influence or effect.

Issues including pertinent examples could include:

- at federation (1901) shared sovereignty between the Commonwealth and States in Australia's federal compact – with emphasis on the States' powers (concurrent and residual) as well as financial federalism
- change in powers exercised by the States:
 - No change:
 - critical functions of government have continued with States providing essential services in ongoing fashion since federation including: health and hospitals, housing, police powers, education, transport, recreation, community life, some income support, quarantine, state and intra-state borders
 - States retain choice on use of their powers
 - High Court has protected the sovereignty and independent legislative, executive and judicial functions of the States through decisions such as: *Melbourne Corporation v The Commonwealth 1948* (State Banking case), *Austin v Commonwealth 2003*, *Williams No.2 2014*
 - States have always been bound by s 109 - the 'inconsistency of laws provision'
 - States always have choice to refer any powers to the Commonwealth and maintained the standing to challenge any possible Commonwealth legislation that may be considered *ultra vires*.
 - Decreased:
 - Commonwealth financial powers may have forced the hand of States (due to lack of fiscal autonomy and reliance on tied grants) to make choices or comply with Commonwealth policy in areas of residual power
 - High Court has made significant decisions in cases that have restricted the exercise of State powers (and therefore expanded the breadth and depth of powers of the Commonwealth) including:
 - s 51(xx) *Workchoices*;
 - s 51(xxix) *Tasmanian Dams & Koowarta*;
 - s 51(ii) *Uniform Taxation Cases 1942/1957*; and
 - s 90 *Ha and Hammond 1997*.
 - referenda have been approved in accordance with s 128 – to provide for additional concurrent powers for the Commonwealth to legislate in respect to Indigenous peoples and provide for social security benefits.
 - Increased:
 - States have been emboldened in contemporary times, especially in the COVID-19 era, to determine own course and delivery of outcomes (sometimes independently and other times cooperatively with other States and or the Commonwealth); this has led to flexing of powers and tensions with the Commonwealth government;

Question 7 (continued)

Commonwealth reliant on the States' declarations of emergency (e.g. *Emergency Management Act 2005* (WA) and WA's *Quarantine (Closing the Border) Directions*);

- High Court has upheld State exercise of powers in proportional circumstances of the pandemic *Palmer v The State of Western Australia 2021* and denied implied right of freedom of movement proposed in *Gerner & ANOR v State of Victoria 2020* <https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2021/hca-5-2021-02-24.pdf>; <https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-48-2020-12-10.pdf>
- since the GST was introduced, this has provided greater fiscal autonomy to the States (through a higher proportion of general assistance grants) and allowed them to exercise their powers more freely
- following the Australia Acts 1986, the States may now advise the Queen directly on State matters.

Evaluation: all three aspects of the question (although not necessarily equally) should be addressed and an evaluation made:

- examination of State powers at federation
- has the exercise of State powers in Australian federalism changed?
- has any (real or perceived) change been significant?

Note: The focus is **not** on which has more power – the Commonwealth or States; but instead the extent to which this power may have shifted since federation (and how).

Commentary: whilst the scope of powers exercised by the States may have decreased they remain integral to the delivery of essential services and governance in Australia; the autonomy of the States in exercising powers has changed significantly since federation with a possible revival of State prominence since 2020.

Question 8

(25 marks)

The House of Representatives in the Commonwealth Parliament has several functions, but these have been compromised in recent years.

Evaluate this claim with reference to **three** distinct functions of the House of Representatives.

Relevant terms and parameters of discussion:

- House of Representatives: lower house in the Commonwealth Parliament
- functions of the House of Representatives include:
 - legislate
 - scrutinise/check the executive
 - initiate appropriation bills
 - form government
 - represent the people/electorates

https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/Practice7/HTML/Chapter1/Aspects_of_the_role_of_the_House_of_Representatives

- compromised in recent years: the function is no longer completely the prerogative of the House of Representatives in the last 10 years.

Issues that could be raised in relation to specific functions include:

- the role of party politics relative to the particular function
- the control/dominance of the House by the executive in terms of function, processes and procedures
- the bias of the Speaker
- minority government (Gillard/Rudd 2010–2013; Morrison October 2018–May 2019)

Evaluation:

- has each of the functions discussed been compromised in the past 10 years?
- have they been equally compromised?
- any factors in particular responsible for the compromises?

Section Three: Part B

Question 9

(25 marks)

Judicial independence is a fundamental element of the rule of law. However, this does not mean that the Australian courts are unaccountable.

Evaluate this claim.

Relevant terms and parameters of discussion:

- Judicial independence:
 - the judiciary is the third arm of government
 - their role is to interpret law and settle disputes
 - a key feature of the judiciary is their independence from the parliament and executive.
- Rule of law:
 - no one is above the law
 - everyone is equal before the law
 - the law must be applied to everyone equally, regardless of their status
 - the law is clear and understandable
 - the law is essential in restricting the use of arbitrary powers.

<https://www.ruleoflaw.org.au/what-is-the-rule-of-law/>
- Accountability: there are processes available to ensure that members of the judiciary and court proceedings can be subject to scrutiny and are able to be held responsible for decisions/actions.

Issues related to judicial independence include:

- parliament cannot overturn an existing judgment in an individual case and that parliament cannot exert pressure on judges to make decisions that the politicians approve of
- judicial independence is vital to the effective functioning of a democratic and just political and legal system. However, it has been suggested that this independence creates its own set of problems whereby judges are not forced to be accountable for their own actions
- role and effectiveness of appeals process
- tenure of judges
- remuneration of judges
- appointment, censure and removal of judges
- the extent that judicial processes are transparent including judgments
- the role and effectiveness of judicial commissions in particular states/territories (New South Wales, Victoria, South Australia, ACT) or other means of complaining in other jurisdictions (Western Australia, Queensland)
- clear separation of judicial and non-judicial power. These powers cannot generally be mixed in the same institution
- code of judicial conduct.

Note: The discussion of judicial independence issues would be brought back to aspects of the rule of law in the evaluation.

Issues related to accountability could include:

- at the federal level in Australia, there is no independent regulatory mechanism to deal with complaints that are made against a judge. Under the current system, complaints against individual judges must be made either to the Attorney-General or the head of jurisdiction (that is, the chief justice or judge) of the relevant court
- if a complaint is made, investigated and found to be substantiated, there is no penalty available short of removal of the judge. Rather, the chief justice might recommend the judge undertake counselling, or training, or reassign them from sitting on certain cases, or from sitting on any cases
- removal of a (Federal) judge can only occur if both houses of parliament agree to it
- judges work in a collegiate environment where each judge makes decisions independent of others so that their decisions reflect their own expertise and judicial values. As a result,

mechanisms of accountability where judicial decisions have come under scrutiny have generally occurred in a self-regulating manner. For example, a group of senior judges may counsel another judge or suggest they should retire. Generally, there has not been an external body that has reviewed and checked the performance of judges

- the ability of parties to a case to access the appeals process via the court hierarchy makes independent accountability mechanisms irrelevant
- there is no guarantee of right to appeal (particularly to the High Court)
- Parliament (Commonwealth or State) is the sovereign legal institution as it represents the people so it has the power to overturn any court precedent via the passage of legislation. The only exception to this is constitutional law where the High Court has undisputed legal authority.

Examples:

- there has never been a federal judge removed in Australia. The closest was the inquiries into the removal of Justice Lionel Murphy in response to allegations in the 1980s that he had attempted to pervert the course of justice
- Justice Heydon High Court 2019
- Greg Borchers NT 2019
- Sara Hinchey Vic 2019
- Peter Maiden NSW 2019
- Dominique Burns NSW 2018
- Alexander 'Sandy' Street Federal Court 2018.

Evaluation:

- is judicial independence a fundamental element of the rule of law?
- is the Australian court system accountable or are there aspects of the court system that suggest improvement is possible in terms of accountability?

Question 10

(25 marks)

Evaluate the extent to which the political and legal rights of a particular group in Australia have improved since Federation.

Relevant terms and parameters of discussion:

- Political rights:
 - rights related to involvement in the establishment or administration of government
 - rights that entitle adult citizens to vote, hold public office, to participate in other political activity
- Legal rights: rights that are recognised and protected by law.
In Australia this could include:
 - constitutional rights such as: protection against acquisition of property on unjust terms (Section 51 (xxxi)); the right to a trial by jury (Section 80); freedom of religion (Section 116) and prohibition of discrimination on the basis of State of residency (Section 117)
 - statute (Commonwealth and State)
 - common law
 - fair trial
 - fair access to justice.
- 'have improved since federation': have become better since 1901
- Particular groups in Australia include: First Nations peoples; women; the mentally ill; LGBTIQA+ communities

Issues and pertinent examples are examined relative to the particular group in Australia chosen in terms of their political and legal rights and any changes over time.

Evaluation:

- the political and legal rights of the group at federation/early years of the Commonwealth are addressed
- particular political and legal rights are identified and discussed to show how these are an improvement or not for the group concerned.

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