Legal Studies

Course Code: LST315110

2014 Assessment Report

Question 1

This question was well answered, except for those who confused division of powers with separation of powers.

Most candidates explained the difference between the specific powers given to the Commonwealth Government in 1901 by the States and differentiated between exclusive and concurrent powers. Better candidates understood the importance of s109 in relation to concurrent powers.

The residual powers of the states were included by most candidates, with better candidates referring to the erosion of these powers over time.

Better answers made use of examples and the best answers alluded to relevant topical issues.

Question 2

Although not a popular questions there were some well ‘rehearsed’ answers to this question.

The better answers referred to:

• The principle that everyone is equal before the law – ‘law rules’.
• The executive government, in particular, is subject to the law.
• The fact that the development of law should not be arbitrary but follow and accepted and reasoned developmental path.
• The requirement that the courts should uphold the law and no one should be punished by the state, except for a breach of the law, as administered by the courts.

Question 3

Many candidates treated this question as an invitation to outline the concept of the Separation of Powers. Although this concept is very relevant to an understanding of the independence of the judiciary, the discussion needed to focus more on the judiciary.

Of the three sections of government the judiciary is the most separate and, therefore, the most independent. By being independent the judiciary is much more able to uphold the ‘rule of law’. The judiciary is not easily influenced by the legislature or the executive and, therefore, is less likely to take into account political pressures.
The judiciary is independent because:

• Judges have life tenure and so cannot be easily dismissed for not following the executive governments’ position or the legislatures understanding of the meaning of legislation.
• Judges cannot hold a position in the legislature or executive section of government.
• Although initially appointed by the Governor/Governor General in Council, judges can only be dismissed by parliament.

Question 4

This question was poorly answered because most candidates focused on how international law is made (i.e. the process) rather than the ‘structures’ of international law. Much time was spent describing the formation of treaties etc. rather than the structures of international politics and law.

Answers should have described structures such as the United Nations, NATO, the EU, ASEAN, the G20 etc., which are some of the main political structures formulating treaties and agreements of an international nature. From a legal perspective, candidates could have focused on structures such as the International Court of Justice, the International Criminal Court and the EU courts.

Question 5

This question could have had two angles, i.e., ‘Why do judges, as opposed to parliamentarians or ministers, interpret legislation?’ or ‘Why does legislation need to be interpreted?’ It would have been acceptable to take either of these interpretations of the question on interpretation.

The former version needed a discussion of the role of the separation of powers and the ‘rule of law’. Where as the latter required candidates to discuss the reasons why the interpretation of legislation can be problematic, i.e:

• It can be ambiguous
• It can be unclear
• Circumstances can change over time
• Legislators may not have considered all possible eventualities
• Legislators may leave terms deliberately ‘open’, e.g. ‘reasonable force’

Using examples to illustrate these issues would have improved marks.

However, many candidates discussed judge’s role in sentencing accused persons. Mistaking the interpretation of legislation with the application of sentence options.

Question 6

Most candidates understood the role of the Senate as a ‘house of review’ and many referred to its historical role as a ‘states house’.
Better answers gave details of each of these, e.g:

- The Senate is limited with appropriation bills
- A double dissolution is an option, if a Senate is obstructive
- Senates can be obstructive if the Government doesn’t have a majority in this House or it can be a ‘rubber stamp’ if it does
- The Senate can introduce legislation (e.g. marriage equality bills 2013)
- The committee structure is often used to review significant pieces of legislation in the Senate.
- In order to protect the smaller states the Senate’s electoral system is not proportional.

**Question 7**

Most candidates understood these terms and many gave good examples to illustrate their discussions; although, some candidates confused ‘reversing’ and ‘over-ruling’. The better answers, when discussing distinguishing, understood that lower courts also use this technique to avoid poor decisions or to expand the parameters of the common law in relation to an area of the law.

**Question 8**

The first half of this question was often only given cursory treatment by many. However, other candidates explained that, although not sovereign bodies, delegated or subordinate legislative bodies can make laws that are just as binding and enforceable as legislation made by parliaments. Such bodies are given power by various parliaments by way of an enabling or parent act of various Parliaments, which defines the jurisdiction of such delegated bodies. If such bodies deviate from their jurisdiction, their legislation can be deemed ‘ultra vires’ by the courts. The more common delegated bodies are: the Governor/Governor General in Council (i.e., ministers and their departments), statutory bodies (TasWater etc.) and Local Governments (which are statutory bodies).

The second half of the question was well answered by most candidates.

**Question 9**

Few candidates undertook this question and fewer still did it well.

The ‘single event’ needed to be defined. In this process the trial doesn’t commence until both sides have had time to prepare their cases. When they have the trial starts and continues until both sides have presented their evidence and arguments to the passive adjudicators (judge or judge and jury). Compared to the inquisitorial process, which can be on-going and spasmodic, the adversarial process is relative succinct, brief and continuous.

It is argued that such a condensed complete presentation of a case enables a coherent, erudite and cogent presentation of evidence and argument for those who have to adjudicate and ensures that both sides collect all relevant evidence in a timely coherent manner. There a number of disadvantages of this process but the question did not invite this discussion.
Question 10

This question was generally answered with a lack of precision, e.g., not considering civil juries (which are very rare in Tasmania). An in-depth knowledge of the Juries Act 2003 was not required but knowledge of the general propositions was.

Section 4 states that the selection needs to be ‘random’. The Sheriff makes the selection from the Electoral Roll (ss19 – 20). Certain persons are disqualified and ineligible (s6) and people can request that the Sheriff excuse or exempt them (ss7 – 14). The Sheriff summons (s27) those randomly selected from the Electoral Roll. Those persons must attend the court on the assigned date and muster in the jury assembly room, from where they may be empanelled.

When a person is called for empanelment they may be challenged. In criminal trials the Crown has an unlimited right to ‘stand aside’ (s34) and each accused can peremptorily challenge 6 jurors (s35); challenges for cause are unlimited (s33). In civil trials each side has 3 peremptory challenges (s31) and unlimited right to challenge for cause (s30). In lengthy trial or trial where a unanimous verdict is required, reserve jurors can be empanelled (s26). Once empanelled jurors are to take an oath undertaking to impartially judge the case before them (schedule 3) and not to discuss the case with any others persons other than their co-jurors (schedule 5).

Question 11

Most answers to this question where accurate but often were very general in their discussion and did not reveal a clear understanding of their chosen services.

By way of example, those who chose the Legal Aid Commission could have included:
• That this service was set up in 1974 and was combined with state services in the 1990s.
• It provides legal education, legal advice, duty solicitor services, mediation services and legal representation services.
• It is one of the few services that provide representation in court for clients but they must meet the income, assets and merits tests. Given the budget of the LAC, it is difficult to provide representation except for the very poor.

Question 12

This question was answered reasonably well by candidates.

The essential difference between these two actions is that a crime is an offence against the state or the community at large, which often seriously offends the community’s moral sense. Where as, a civil wrong relates to a wrong against the rights of individuals or groups (including the state), e.g. actions in negligence, contract, rights to land etc. Civil actions result in a remedy, often in the form of financial damages, but could also include and order to stop certain behavior (e.g. an injunction to stop a nuisance) or require certain actions be performed (e.g. an order for specific performance of a contractual obligation). In contrast, crime results in punishment by the state. There are different courts and procedures for criminal matters. One of the more significant procedural differences is the standard of proof. Criminal matters have the higher standard of ‘beyond reasonable
doubt’, because of the serious consequences resulting from a guilty verdict. Civil matters have the lower standard of proof ‘on the balance of probability’ because it is important that the dispute be resolved. Answers could have also included a discussion of the use of juries; why a civil wrong can be consented to but not a crime; and why a person can be given a pardon by the state but the state doesn’t normally pardon civil wrongs.

**Question 13**

It is important to note that crime does not have any intrinsic quality that gives it definition. Simply, a crime is an act or omission that the state says is criminal. Some acts that were previously criminal (e.g. homosexual practices) are now legal and some actions that were previously legal (consuming prohibited substances) are now illegal.

Often crime has an ‘immoral’ dimension, in terms of the values of the times. All crimes have an ‘actus reus’, i.e., a wrongful act (and a few criminal omissions), and almost all serious crime requires ‘mens rea’, i.e., a wrongful mind – intention or negligence or carelessness. Crimes that do not require ‘mens rea’ are known as crimes of strict liability and are usually only minor crimes.

Minor crimes are termed ‘summary offences’ and serious crimes are termed ‘indictable offences’, which is the categorization that has the most practical application. The Criminal Code Act 1924 has various categories, e.g. crimes against – the state, the person, property, morality etc. Criminologists and the media can also identify crimes by certain peculiar features, such as: computer crime, organized crime, white-collar crime, alcohol related crimes and so on.

**Question 14**

Many of those who answered this question needed to include more specific details about each of the three police powers.

The issue of arrest is dealt with in the Criminal Code Act 1924 at s28 and gives the police wide powers to arrest a person without a warrant who they find offending, have reasonable grounds for believing have offended and, in limited circumstances, believe are about to commit a crime. The Police Offences Act 1935 gives similar powers for summary offences. The terrorism legislation gives powers to arrest those who may have information about terrorism or are simply suspects. There is a legislative requirement to arrest juvenile offenders only if it is absolutely necessary.

The powers of detention are mainly set out in the Criminal Law (Detention & Interrogation) Act 1995. This Act does not nominated a specific time limit for detention of those arrested. However, it does say in s4 that an arrested person must be brought before the courts ‘as soon as practicable’ (taking into account of 14 matters listed in the section). Other sections of this Act outline the rights of those arrested and the duties of the police. The powers of detention for terror suspects are very much broader that other criminals. Even people not arrested can be held for 24 hours and suspects for up to 5 days.
For indictable offences, the police will normally lay a charge against a person after they have arrested them and are satisfied that they have committed the alleged offence. For summary offences, the charge is usually made in the summons.

**Question 15**

From the accused’s perspective, the purpose of bail is to:

- Support the presumption of innocence principle. A person who is presumed innocent shouldn’t be incarcerated like a convicted person. An accused should be able to maintain their work and social life until proven guilty beyond reasonable doubt.
- Give the accused time to prepare their case. Natural justice requires ‘hear the other side’. Therefore the accused needs to be given the opportunity to be able to prepare a case ‘to be heard’.
- Prevent the goals from being clogged up by unconvicted persons (who would cost the state a considerable sum of money).

From the alleged victim’s and the public’s perspective, persons who are dangerous or likely to flee should not be granted bail or should be required to fulfill bail conditions to keep others safe and ensure they turn up to court.

A reminder that bail is not money paid to the court to secure a persons release. Bail is an undertaking by the accused to return to court at a specified time to answer charges from the prosecution. If this undertaking is given, the court will release the accused on their recognizance (promise) to return to court. Conditions can be placed on the terms of release and surety (a sum of money) can be required to be deposited with the courts to guarantee an accused’s return.

**Question 16**

Until relatively recent times the victim was the forgotten player in the criminal justice process. However, in recent times significant rights and programs have been established to protect and support the victim. Some of these include:

- The right of a victim to provide a ‘victim impact statement’ to the court prior to sentencing. This statement outlines the impact of the crime committed by the accused/s on the victim but it can be challenged by the accused.
- There is a Victims of Crime Compensation Act 1994, which enables those affected by crime to seek compensation up to $30,000. This is paid for by a levy on each convicted accused in court. It can be claimed even if no one is prosecuted for the crime.
- When an accused person is paroled after serving a prison sentence for a crime against the person the victim is required to be notified of the pending release.
- During a trial and leading up to a trial the victim is supported by the Witness Assistance Program and can get information and guidance from their officers.
Question 17

Criteria 3

In accordance with the standards, better candidates were the ones whose expression remained accurate and precise, particularly when it came to the use of technical terms, and also avoided using casual vernacular in circumstances where it rendered meaning obscure or, more typically, imprecise. Candidates are encouraged to be mindful of the accepted conventions of essay writing, particularly the use of introduction, topic sentences, conclusion and appropriate paragraphing, even within the confines of the time constraints of an examination. It is also recommended that candidates focus on the sequencing of the information presented so as to more effectively address the specific question in a coherent, holistic way, rather than to ‘regurgitate their notes’ or their prepared answer. Candidates who use the notional ‘reading time’ for planning are likely to fare better in these respects. Candidates often confuse comprehensive communication with elaborate communication. The latter can often obscure more than it reveals. Candidates should also be mindful to set aside personal perspective in the interests of objective analysis.

Criterion 4

The first half of the question related almost entirely to this criterion. Better candidates made reference to the notion of sovereignty. It was essential for candidates to refer to specific, exclusive, concurrent and residual powers; S51, 52 and 109 of the Constitution. Better candidates more succinctly and accurately described the meanings of these terms but EA candidates were better able to describe, with flow and sequence, the practical inter-relationship between these terms, along with the implications of the operation of S109 of the Constitution and the role of the High Court. In contrast HA and SA more or less ‘listed’ definitions of the powers and ‘named’ the relevant Sections of the Constitution. Demonstrating knowledge and understanding of the ‘how’ element of the question involved referring to a variety of means by which the division has altered: S128 referenda, S51xxxvii, High Court interpretation and S96 and a range of cases illustrating the alteration of the division. Lower scoring candidates merely listed the cases; higher scoring candidates were better able to succinctly and effectively explain the general implications of those examples for future situations.

It is very important that candidates avoid inaccuracies that make it more difficult to reward otherwise comprehensive treatment of the topic. For example, a number of candidates referred to the declaration of the invalidity of the ACT Marriage Act as an example of the operation of S109 when it is in fact an example of the operation of the Self Government Act (ACT) by virtue of the fact that it refers to laws of a territory, not a state. Candidates also needed to employ more precision describing the ‘double majority’ requirements of a referendum. Many candidates used examples of ‘cooperative schemes’ mistakenly, believing that they were describing a referral of power.

Criterion 6

Most candidates concentrated on comprehensively describing the ‘how’ element of the second part of the question and very few candidates addressed the ‘why’ element and this made it considerably more difficult to demonstrate EA standard in this criteria. Analysis and evaluation of ‘how’ may have comprised showing a good understanding of, and even speculating upon, the relative weight and implication of different forms of alteration of powers. For instance, noting the very high significance of cases involving the external affairs powers or pointing out the relative significance and impact of the
way that the Road’s Case combined with the 1st Uniform tax case to contribute to the influence of ‘tied grants’. A discerning candidate would have given a greater weight to these two elements. Some candidates enhanced their answers by describing the impact of ‘tied grants’ on representative and responsible government. Analysing the ‘why element’ involved describing the motivations toward more centralised power. Some candidates assessed and critiqued these motivations (describing the limitations and concerns of more centralisation) and they were rewarded for this. Some candidates even related the question to the current debate regarding discussion of new models of federalism but it was important to not let this become the predominant component of the response.

Candidates should avoid, on the one hand, listing names of cases in support of a development without any discussion of the circumstances and context of the case and, on the other hand, long narrative description of details of individual cases without emphasis on the general and ongoing implication of the case.

Question 18

It required quite an in-depth discussion in order to cover the Westminster system’s ability to provide representative and responsible government in Australia.

Overall candidates were able to effectively describe elements of the Westminster system including the Crown as head of state, bicameral parliaments in the Federal and most state governments and the Separation of Powers. These elements were evaluated somewhat critically but required more depth, particularly in how they provided representative and responsible government.

Some candidates focused on the Separation of Powers as a concept, describing its features, rather than focusing on how the three branches contribute to representative and responsible government. A small number of candidates were confused and described the Division of Powers and Federalism.

Better answers made links between the elements of the Westminster system and R&R government, such as how the Legislature is responsible to the people through regular elections and how the upper and lower houses operate. The best answers explained the elements of the Westminster system in detail and offered analysis that demonstrated critical thinking such as how the Judiciary is not elected by the people and is therefore not truly representative.

Question 19

The first half of this question clearly related to criterion 4 – knowledge. Most candidates had a good grasp of how international law is made, with clear discussions of the role of treaties (both bi-lateral and multi-lateral), customary international law, decisions of international courts and writings of international jurists.

However, explaining how international law is incorporated into Australia’s domestic law was not dealt with as well. Candidates needed to look at the role of the three sections of government in the ‘incorporation’ process. A minister in the executive gets cabinet approval to sign onto a treaty. However, the treaty needs to be ratified by the legislature (the Commonwealth Parliament) before becoming part of our domestic law. Prior to going through the parliamentary process the treaty is: presented to the
states to review how it might impact on them and reviewed by the JSCOT (the Joint Standing Committee on Treaties) to analyse the future implications of ratifying such a treaty on existing state and federal laws and policies. Once the treaty becomes part of domestic law the High Court can review the legitimacy of legislation passed under the provisions of the treaty to ensure their consistency with the terms of the treaty.

The second half of the question clearly related to criterion 6 – analysis. Candidates generally had a grasp of the limitations of international law but needed to be more expansive re the strengths of international law.

The main limitations discussed included: the problem of not having an effective enforcement agency; the capacity of more powerful nations to elude enforcement strategies; the exercise of veto powers at the UN; and the difficulty in getting nations to sacrifice national interests for international welfare.

However, the strengths that could have been developed were: international law can set clear benchmarks of appropriate behavior; the diplomatic, economic and military pressures, along with notion of reciprocity, can be effective in enforcing international law; and, as the benefits of international law become clearer, there is a growing respect for it.

When discussing the above points better answers used topical legal issues to illustrate their points.

Question 20

This essay proved difficult to answer well, with most responses prioritizing a discussion of the processes of making law through the courts at the expense of critical analysis of the role of the courts in contributing to law making. Responses required analysis of the main areas of judicial legal development namely, the interpretation of legislation and, decreasingly, to the making and refinement of common law legal principles. Responses could also note that the role of the judiciary is primarily as an administrator and enforcer of justice and adopts its capacity to develop and create law as a secondary role.

Better responses outlined the reasons why courts are required to interpret legislation (i.e. wording in legislation may be ambiguous, unclear, are poorly drafted, may not consider future circumstances, are drafted in general terms and may be left open for interpretation) and briefly mentioned that there are legislative parameters and common law rules that guide them in their interpretation (note: the course does not require an understanding of these rules). Analysis required a consideration of the strengths and limitations of this process (e.g. capacity to fill gaps in legislation, courts are reactive (ex post facto), slow in developing law, parliament can abrogate court decisions, etc.), with better responses remarking on the importance of the independence of the judiciary in being an interpreter of legislation; the judiciary’s role in upholding the rule of law through its enforcement against the executive if required; criticisms of the judiciary in frustrating legislative initiatives and obscuring the Doctrine of Separation of Powers through arguably adopting a legislative role.

Many responses devoted a lot of time to citing the mechanisms of precedent (i.e. stare decisis, ratio decidendi, obiter dictum, reversing, overruling, distinguishing, disapproving, binding and persuasive precedent). Better responses analysed the strengths and limitations (see 2010 Examiners Comments), whilst incorporating critical discussion on this role (e.g. interference with legislative role, judiciary is
unelected and thus unaccountable and not representative of the people, the judiciary is independent and thus free of political pressure etc.). Good answers also incorporated a discussion of the ‘conservative’ and ‘activist’ approach to the judiciary’s role in shaping the law in Australia.

**Question 21**

Not a popular question, but generally well answered by candidates. The key groups or bodies discussed were Australian Law Reform Commission, Tasmanian Law Reform Institute, Royal Commission, Political parties, Parliamentary Committees, individuals, pressure groups and the Ombudsman.

Candidates were able to provide detail on each of their chosen law reform group, with better answers including information on the reasons for law reform, the establishment and structure of the groups, the consultation methods and processes used, and the relationship to Parliament as the law making body.

Examples used included the Tas Dams case, Royal Commission into Child Sexual Abuse, Copyright/Digital Privacy and the TLRI project on ‘no defence age’ in relation to sexual offences against young people.

Further research and detail was needed when evaluating the effectiveness in influencing government policy. Better answers provided information on ALRC statistics, acceptance of recommendations provided to the Government in specific cases, time factors associated with influencing government policy and reasons for effectiveness (Parliament Committees for example).

**Question 22**

Most candidates had a good grasp of the passage of a bill through Parliament, and were able to discuss the process from the First Reading through to Royal Assent. Better answers included the process and parties involved before the bill reached the first reading stage, including legislative power, division of power, law reform process, role of cabinet and the drafting of the bill by the Office of Parliamentary Counsel. Most candidates adequately detailed the types of bills that are able to be introduced and it was great to see most candidates recognise that appropriation bills are not able to be introduced by the upper house.

There was very little discussion on scrutiny of bills, with a small number of candidates including information on Parliamentary Committees, question time, and the role of the Senate.

As the question did not specify either the Tasmanian or Commonwealth Parliament, many candidates included both within their essay, mainly when discussing the houses of Parliament. A small number of candidates also included a comparison between the Tasmanian and Commonwealth Parliaments when discussing the resolution of deadlocks between the upper and lower houses.

Greater evaluation of the strengths and limitations is required with further research on current issues and examples to be included to attain higher marks for Criteria 6. The other part to this section of the question, delegated legislation, also needed greater detail, with most candidates understanding the general concept of delegated legislation, but unable to evaluate its strengths and limitations.
Question 23

This was a very popular question with 101 candidates. Most candidates demonstrated good knowledge of the adversary system features, including party control, contest, role of the judge, strict rules of evidence and procedures, legal representation, single event process and burden and standard of proof. Better answers were able to incorporate examples and case studies and some candidates were able to expand on a given feature, for example explaining when the burden of proof is reversed, providing examples, and the impact on natural justice and the presumption of innocence.

Evaluation of the strengths and limitations with “reference to the statement” was poorly done. Many candidates mentioned the statement in their introduction and conclusion, but did not mention it within the body of the essay. Some candidates could adequately identify strengths and limitations of each feature, but did not go further and explain why and how it was a strength or a limitation. Better answers discussed in detail the strengths and limitations, provided examples or cases to demonstrate their knowledge and referred to the statement in their evaluation. When evaluating the strengths and limitations, some candidates evaluated them against the elements of an effective legal system and natural justice, demonstrating good understanding of the legal system.

Appropriate alternatives and reforms were mentioned and better answers provided an explanation of what the alternative or reform was, and the impact on the legal system.

Many candidates discussed Legal Aid, with some able to explain the criteria used to assess who is eligible for Legal Aid. A small number of candidates mentioned in their evaluation that the accused would be at a disadvantage if a Legal Aid lawyer was provided, due to lack of expertise, education and resources. It is important that candidates consider their comments thoughtfully and have adequate research to support their arguments in order to effectively evaluate the strength or limitation.

Question 24

It was a challenging question, which departed from the previous format, and many candidates clearly had difficulty with the primarily analytical nature of the question. Many candidates discussed elements of the jury system which they could easily have linked directly to the concepts centred in the question (custom, fairness and acceptance), which would have paved the way for more in-depth analysis, but failed to make the most of the opportunity. A significant proportion of candidates gave a large amount of irrelevant information that was not linked to the analytical requirements of the question.

A significant proportion of candidates were unable to effectively refer to the electoral roll, with as many as 60% of candidates referring to it as the electoral ‘role,’ and many mistakenly using the word ‘electorate.’ It is vital that candidates are familiar with the essential vocabulary of a topic; however, it was pleasing to see that almost all candidates were able to accurately refer to relevant legislation.

Stronger responses gave a brief description of the role and selection process of juries, and used this as the foundation for analysis based on the three descriptive terms in the question. Almost all candidates also integrated a discussion of potential reforms to the jury system when addressing the ‘pressures for reform’ element. Some candidates attempted to link their discussion of the role and composition of a jury to the descriptive terms without sufficient depth of analysis to do so successfully, and a significant proportion of weaker responses (approximately 15% of candidates) simply launched into a description
of the role, composition and potential verdicts available to a jury without reference to the question, with a few of these responses adding some discussion of possible reforms and their impact on fairness almost as an afterthought.

Generally, candidates were able to discuss ‘fairness’ in detail, although many seemed to struggle with the ‘critical discussion’ element of the question and simply stated that particular features ensured fairness in the trial system. Several responses effectively listed various features of the jury system (often in unnecessary detail) and stated that they promoted fairness or protected the rights of the accused. Stronger responses recognised the need to provide analysis in order to meet the ‘critical discussion’ element of the question, and therefore explored whether elements generally accepted as promoting fairness do in fact achieve this, and analysing whether potential reforms would be progressive or regressive in terms of prioritising fairness in trials.

Some candidates explicitly addressed acceptance; most of these responses dealt with the accused’s acceptance of the verdict, although stronger responses also emphasised that the democratic nature of jury selection not only provides a cross-section of the community which integrates community values with the process, but also helps ensure ongoing community acceptance of, and connection to, the delivery of justice.

Candidates clearly found ‘custom’ the most difficult term to address, and there was clearly some confusion about what the term referred to. Some 25% of candidates referred to the Magna Carta and its role in establishing the right of trial by one’s peers, a perfect opportunity to establish the nature of trial by jury as a customary element of legal systems derived from, or tracing elements of their structure back to this document. One candidate linked this detail to the suggestion that custom could be considered the key driver of our retention of trial by jury, in spite of its various weaknesses. Many candidates referred to the jury system ‘standing the test of time,’ but left the remark to stand-alone; very few candidates discussed the fact that custom and longevity are not strong arguments to support the assertion that juries are effective in performing their function. A handful of candidates engaged in thoughtful analysis of the 1670 Bushell case, giving details of how the ruling established the right of the jury to deliver its verdict unimpeded by the judiciary, and analysing that this longstanding tradition casts light on how custom and tradition, based in legal reasoning, can illustrate why the institution of the jury establishes the right to a fair trial and therefore acceptance of the decisions made by that institution.

**Question 25**

Alternative dispute resolution methods for civil disputes included mediation, arbitration, negotiation, conciliation and collaborative law. Methods for criminal disputes included circle sentencing and diversionary conferencing, with a small mention of drug courts and mediation.

Candidates demonstrated good knowledge of their chosen method. Many candidates discussed 3 methods associated with civil disputes, with a handful of candidates discussing methods from both civil and criminal disputes. As the question did not ask for candidates to discuss methods from both criminal and civil, they could decide on their chosen method.

Better answers were able to fully articulate the finer points of each method, including for example the specific role and function of mediation and conciliation. As these two methods are quite similar, it is
important that candidates know and understand the specific details; otherwise mediation and conciliation can seem like the same method but with different names.

When critically discussing each method, the following aspects were discussed; the application of the method (when to use and in what types of disputes), success rate including statistics, quotes and other evidence, clear strengths and weaknesses of the methods, the use of ADR’s instead of litigation and relevant Legislation.

**Question 26**

It was an excellent question, because it sorted out those candidates who knew enough about the sentencing options available to the courts (note that it was not restricted to Tasmanian courts) to firstly outline the variety of options contained section 7 of the Sentencing Act 1997 (Tas) and the Youth Justice Act 1997 (Tas) as well as different options such as home and weekend detention and circle sentencing available in other states. There seems to be little coverage of the options available to magistrates other than drug treatment orders, such as license suspension. Stronger candidates also discussed the integration of the Family Violence Act 2004 (Tas) with other sentencing options. Approximately 30% of candidates ignored the first part of the question and launched straight into a discussion of three sentencing options.

It is vital that candidates read and respond directly to the question asked, rather than the question they were hoping would be asked; this question was **not** ‘what are the main sentencing options available to the courts,’ but many candidates were under this impression. Factors which should be taken into account when sentencing were also irrelevant, but included by a significant number of candidates. It is clear that relatively few candidates take advantage of previous examiner’s reports when preparing for exams. It should also be noted that candidates ought to avoid discussing options not available in the Australian system, such as the death penalty, and should avoid the use of dot points and lists when responding in essay form, and candidates should ensure that they can correctly spell key terms such as ‘deterrence,’ ‘denunciation,’ ‘recidivism,’ ‘therapeutic’ and ‘abolition.’

The bulk of this question related to the evaluation of three options in terms of their effectiveness in meeting the aims of punishment. Those candidates who covered more than three options were not advantaged; once again, candidates should answer the question set. The strongest responses, which limited their discussion to three options, analysed them in significant depth, integrating evidence from research to support their evaluation. Candidates who discussed more than three options rarely demonstrated a comparable level of analysis.

The three most discussed options were imprisonment, suspended sentences and drug treatment orders. Community conferencing for juvenile offenders and fines were also popular. Generally, candidates are very aware of the negative impact of prison in terms of institutionalisation, recidivism and the need for more emphasis on rehabilitation. Most understood it is an option of last resort; however, there was some confusion on this point, and some candidates described terms of imprisonment as both an ‘option of last resort’ and ‘the most common sentence’ handed down by the courts. Strong responses used the 2008 Tasmanian Law Reform Institutes’ Sentencing Report and the Palmer Report to support their analysis. No candidates discussed the overrepresentation of Aboriginal people in prison, especially in states such as WA and in the NT.
The option of a suspended sentence was quite well understood. The discussion at Lawfest 2014 as well as in the media probably aided this. Strong responses cited the work of criminologist, Lorana Bartels, especially her finding that only 5% of breaches are followed up. Only one candidate was aware that Bartels has since conducted more research on this issue and has concluded that this problem is being addressed (see ABC News Tasmania, 4/4/2014 for a bulletin with these details). Stronger answers discussed the referral of the proposed abolition of suspended sentences to the Sentencing Advisory Council headed in both Tasmania and Victoria by criminologist Arie Freiberg. There is a very accessible interview with Freiberg on 7.30 Tasmania (ABC TV 9/5/2014) where he discusses the probable reasons for the problems currently faced in Victoria after the abolition of suspended sentences. Many candidates discussed prison overcrowding in Victoria after the abolition and for those teachers and candidates interested in this contested sentencing option, Dr Karen Gelb outlines the problems of the Victorian alternatives to suspended sentencing in her excellent report “The Perfect Storm? The Impacts of Abolishing Suspended Sentences in Victoria” (December 2013).

Overall, candidates discussed Drug Treatment Orders well. The very best responses on this therapeutic option pointed out that retribution and denunciation are incorporated because if participants do not fulfil their obligations, a sentence of imprisonment will be activated. There is widespread understanding that this is not a ‘soft option’ but only one candidate commented that the program is underfunded despite support from all political parties. The 80 or so participants are but the tip of the iceberg of drug and alcohol related offenders in Tasmania.

Candidate and teachers are obviously attracted to this topic, cover it well and are able to include research to support analysis in exam responses. There were few responses which scored a D rating.

**Question 27**

Overall, a well answered question. Candidates were asked to explain and critically discuss the safeguards that are built into the criminal justice system to protect the accused. Safeguards discussed included bail, right to silence, presumption of innocence, burden of proof and the right to appeal. Stronger candidates were able to explain how these safeguards protect the accused, while weaker candidates focused only on describing the safeguards.

There were good references to the cases of Andrew Mallard and Patrick Waring and Dietrich v Queen, however this often led to a retelling of the events of the case, rather than being used as analytical evidence to demonstrate how the rights of the accused may not be upheld. Both cases lend themselves well to explaining how the rights of the accused may be violated through flaws within the judicial system, but candidates generally did not take this approach.

**Question 28**

This was quite a challenging question as it essentially had three parts; as such nineteen candidates only attempted it. It required candidates to describe the role of police in investigating crime, outline the strengths and limitations of police powers and also evaluate their effectiveness in dealing with crime.

Overall candidates were able to clearly describe the role of police in investigating, detaining and charging those accused of committing crimes, offering sound examples. In this discussion, candidates
were also able to identify some of the strengths and limitations of police, such as overextending their powers. Cases mentioned included the Andrew Mallard and Patrick Waring cases, but these were not expanded upon to demonstrate police limitations leading to the miscarriage of justice. Limitations described included the accused and witnesses right to silence and strengths included powers to search properties and persons with a warrant and the function of bail. Some candidates were able to refer to legislation giving police their powers, but did not discuss how this is a strength or limitation.

The third part of the question proved difficult for most candidates and many did not refer to police effectiveness in dealing with crime. Some candidates offered general statements that indicated a rise or fall in crime rates but did not provide any evidence to support this.

Better answers referred to the police as a component of the Executive and therefore seen as enforcers of the law, with no judicial role.

**Question 29**

The topical legal and political issues this year are wide and varied with over twenty eight issues being discussed in a sample of one hundred and forty papers.

The problem that has occurred is that the type of legal and political issues are not comparable in the depth and complexity of legal and political processes. For example some candidates wrote about one piece of legislation such as Metadata while other candidates came to terms with Australia’s response to terrorism both internationally and nationally. Next year this disparity will be addressed by TQA approved topics for this section of the course.

It has been emphasised many times that the issue must focus on the legal and political processes of the current year. The topical legal issues that were chosen by some candidates did not address any content from this year but gave a historical perspective and narrative for the entire essay. This falls outside the parameters of the essay. (For the first time the question reminded candidates that “the issue chosen for discussion must be from the current calendar year.”) Candidates must be given this direction during the year.

The essay asks for the political and legal processes involved in the issue as well as explaining the issue itself. One problem that has arisen is the amount of time the candidate uses to explain the legal and political processes involved in addressing the issue in society. Some candidates spent over half of the essay on this information. Given that the candidates need to establish why the issue is topical, the opposing views in society and the development of the issue over the year, candidates can easily compromise the topical issue details required in their response. The best answers had a balance between the amount of information on the issue itself and the explanation of the processes.

Addressing the quote and being able to discuss the topic in terms of the nature and function of law is another level of difficulty for the candidates. This is only well done or done at all in the very best essays.

The quality of the information is another factor candidates need to consider. The weakest answers gave one opinion and gave arguments to support their point of view. The best answers were able to give differing and sometimes disparate views in society without giving their opinion on which is right or wrong but can discuss them using concepts involving nature and function of law.
Communication using essay format was well done. However, how candidates structured their essays to explain the two topics proved difficult for some candidates. Candidates do not have to compare or contrast the two issues but need to keep them separate in their response. Some candidates mixed the two issues together by writing one paragraph on one topic and then followed it with a paragraph on the second topic throughout their essay. This format was less coherent than those who explained fully first one issue and then moved to the second issue.
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