Legal Studies
LST315115

Question 1

Criterion 1

In Section A extended short answer responses (Questions 1, 2, 3 and 4) students are expected to write approximately 1.5 pages, 2/3rd of which is description and 1/3rd analysis. Students should be reassured that they can do very well in this section within 1.5-2 pages if they write concisely, include only relevant material and address both aspects of the question. It is important to include an introduction, to develop points in paragraphs and to end with a conclusion. No dot points please. Take care with spelling. Most students could not spell separation correctly, despite it being in the question.

Criterion 2

Most students were able to describe the three arms of government: the legislature, the executive and the judiciary, their roles, to explain why separation is important and that the separation is incomplete in the Westminster system.

Many understood the critical role played by the convention of the independence of the judiciary but few discussed the convention of ministerial responsibility, the requirement that the executive is accountable to the parliament with the expectation that ministers will resign if they or their departments make serious errors.

Strong answers also included the following:
• Theory: tripartite system of government discussed in Montesquieu’s Spirit of Laws (1748). He specified that the independence of the judiciary had to be ‘real’ and not ‘merely apparent’; he presented it as a method of government suitable for avoiding dictatorship
• First 3 chapters of the Australian Constitution defines the 3 largely separate arms of government
• Overlap – executive drawn from the legislature, appoints the judiciary, judges of superior courts legislate by extending or modifying the principles of the common law or when interpreting legislation, especially the Constitution.
• Conventions: independence of the judiciary; ministerial responsibility; representative & responsible government.

Strong responses often wove evaluation into their discussion of the features of this doctrine, pointing out for example that given the size and complexity of many government departments it may be unrealistic to make ministers accountable.

Some students used their in depth knowledge of the Senate to make the point that the executive is held to account by having to negotiate with the cross bench or Opposition because it rarely has a majority in this House. Many discussed the role of Question Time for this as well.

Question 2

As this is one element of the separation of powers, many students struggled to write 1.5 pages. Strong answers pointed out that the independence of the judiciary is where democracy, the rule of law and the separation of powers intersect.
• It is a pivotal convention which aims to protect and insulate the judiciary from improper pressures and influences from the executive and the legislature so that judges and magistrates make decisions according to law.
• It relates to actual independence and the perception of it. "Justice must be done and seen to be done."
• This convention is protected by legislation and common law. In the case of High Court Justices and Federal Court Judges and Magistrates, it is protected by the Australian Constitution.
• Excellent answers covered the appointment, tenure, remuneration and removal of the judiciary. They pointed out that although the executive appoints judges and magistrates, this is done in consultation with the profession.
• They pointed out once appointed judges have security of tenure, for life or until they reach 70.
• Salaries are set by independent tribunals and should not be subject to interference by the executive, affording the judiciary financial security.
• Courts should not be abolished as a way to remove judges.
• Removal of judges and magistrates is rare and is restricted to serious misconduct or incapacity
• Examples such as the striking down of the Gillard Government’s Malaysian Solution by the High Court and the retirement of Tim Carmody, the Former Chief Justice of the Qld Supreme Court, were used to illustrate the application of this convention.
• A small number of students confused the jury with the judiciary.

Question 3

Criterion 2

Strong candidates understood the main features of Australia’s federal system and outlined them clearly and concisely, without including irrelevant material, covering the following points:
• A two-tier system of government where power is distributed between the Commonwealth and State and Territory Governments where the Commonwealth has carriage over national issues and the States over the provision of services such as health and education and where there is an overlap of responsibilities
• A written, rigid Constitution which specifies the powers of the Commonwealth, places prohibitions on the States and clearly specifies the separation of the three arms of government
• Rules, such as S 109 of the Constitution which determine the resolution of conflict when disputes arise
• A judicial body, the High Court, which has original jurisdiction for disputes arising from the division of powers
• An imbalance of fiscal power between the Commonwealth and the States which results in the central government transferring some of the revenue it collects to the regional governments so they can deliver their responsibilities
• Horizontal equalisation where the Commonwealth distributes grants to the States so that they can provide a similar level of services regardless of their finances.

Some students did not address the final part of the question which required a brief evaluation of the advantages and disadvantages of Australian federalism. Roughly a third of the response should have been devoted to this.

Some students struggled with this aspect of the question, interpreting it as requiring the reasons for Federation and while these can be adapted to fit the contemporary situation, more was required for a strong answer.

Excellent responses pointed out the significant challenges facing Australian federalism such as the extreme vertical fiscal imbalance, resulting in the blame game, dual bureaucracies and an estimated wastage of $20 billion dollars a year and the tensions arising from smaller States receiving a larger share of the national wealth than they generate. They also acknowledged its strengths which include checks on power, choice and diversity, customisation of policies, competition, creativity and co-operation. Twomey and Withers (2007) provide an assessment of the advantages if students want to delve into this further.
Question 4

- Far too many students wrote all they knew about the division of powers rather than answering the question which focused primarily on the ways it can be altered, and to a minor degree, the impact of the alterations. Some students either ran out of time or overlooked the second part of the question because they included so much irrelevant material. Poor responses confused the Westminster System with federalism.
- Strong responses covered the following:
  - High Court interpretation of the Constitution as the major way the division of power has been altered. They briefly discussed landmark cases such as the Roads Case (1926), Uniform Tax Case (1942), Franklin Dam Case (1983).
  - Amending the wording of the Constitution via S128 has resulted in more limited expansion of Commonwealth powers given the difficulty of obtaining a double majority. The most common examples were the Com gaining control of Social Services in 1946 which has resulted in millions of Australians being protected by a social security system (Centrelink) and Aboriginal Affairs in 1967.
  - Referral of powers by the States S 51 (xxxvii) eg over laws relating to terrorist activity.
  - Complementary legislation such as the uniform gun laws after the Port Arthur Massacre when all States signed up to the National Firearms Agreement in 1996.
- Strong responses briefly evaluated these changes in a balanced way, discussing the extreme centralisation and vertical fiscal imbalance which has resulted from the Commonwealth gaining control of the collection of income tax in 1942, coupled with tied grants. This leaves the States with a limited revenue base and heavy reliance on taxes from anti-social activity such as gambling. They also pointed out the high degree of cooperation between the Commonwealth and States on issues such as combatting domestic violence and coordinating responses to gun laws and terrorist threats which suggests that despite the tensions which have resulted from changes, the federation is functional on a number of levels.

Question 5

Criterion 1

In accordance with the standards, candidates need to be familiar with the requirements of an analytical essay in terms of structure, cohesion, correct expression, grammar, punctuation and spelling. The essay should have an introduction that addresses all parts of the question, a discussion in which the paragraphs have a topic sentence and a conclusion.

Expression needs to be accurate, concise and precise in the use of technical terms. The register needs to be formal. Candidates need to tailor their knowledge of the topic of the question asked. A comprehensive answer is admirable while an unnecessarily elaborate one lacks the cohesion to gain high ratings.

Criterion 4

Most candidates demonstrated good knowledge of the adversary system features, including party control, contest, role of the judge, strict rules of evidence and procedure, legal representation, single event process and burden and standard of proof. Some candidates included discussion of the role of the jury, however this is not a compulsory feature of the adversary system.

Strong candidates were able to integrate critical analysis of the features as they went, leading to an overall conclusion about the effectiveness of the system as a means of dispute resolution. Many candidates analysed the features against the elements of an effective legal system and natural justice, such as a fair and unbiased hearing, effective access to the legal system and timely resolution of disputes.

Others introduced the inquisitorial system as a point of comparison and made suggestions of how elements could be introduced into the adversary system. The discussion needed to go further to say how the inclusion of
elements such as a more active role of the judge or the use of written witness statements would increase the effectiveness to resolve disputes.

Some candidates supported their points well with reference to reforms already made, including case management, directions hearings, pre-trial conferences, problem solving courts, increased use of ADR and mediation in all civil cases.

Many candidates referred to Legal Aid as a way for those with few means to access the legal system but pointed out the restrictions imposed to get it and the ongoing need for government funding. Others pointed to the high cost of legal representation as a barrier to access a fair trial.

Many candidates made good use of cases to support points made. They included Dietrich v the Queen 1992, and the cases of Maria Yann, Andrew Mallard, Farah Jama and Patrick Waring. Candidates who chose this question were well prepared and many showed comprehensive understanding of the strengths and weaknesses of the system to be effective as a means of dispute resolution.

**Question 6**

This was a reasonably popular question but also quite demanding. Most candidates however provided a reasonable response to the question. Answers were to address the role of the jury in a civil and criminal trial, the effectiveness of a jury and an evaluation of reform.

The following criteria had to be addressed: criterion 1, good, written communication and criterion 2, identifying features of the jury system in civil and criminal courts and critically analysing the effectiveness of the jury system.

The role of the jury was dealt with by most candidates competently with the definition of a jury in civil and criminal trials; that their job is to be independent, fair and unbiased, jury members must listen, be attentive and concentrate and swear or affirm an oath to this effect, ignore the media, also the selection and empanelment processes. Generally, most candidates were able to refer to the Juries Act 2003 as a source of law and the different types of verdicts in civil and criminal trials. Again, most candidates mentioned a hung jury but did not go into any detail for example the two hung trials involving Brian Green.

Most candidates provided a factual description of the role of the criminal and civil jury. Better answers were able to emphasise that it was made up of the defendant’s peers thus allowing a spread of responsibility for a verdict, a chance for the verdict to reflect community values, involve the community in the legal process and allow the defendant and the community to see that a fair trial is taking place. This transparency in turn, guarantees fundamental freedoms of enjoying a fair trial and civil liberties. The jury acts as a buffer between the defendant and the judge and an overzealous executive. The judge cannot interfere with the jury. These points give the community confidence in our legal system.

The judge is removed from the responsibility of delivering a verdict and is responsible for identifying the law to the jury. These points are well made in the old case of Bushell, 1670 (which can be found in “Legal Studies for Tasmania”, 3rd Ed., Chalmers & Clark, Butterworths, 1992, Page 58).

Of course, these points are also advantages of a jury. Any discussion on the effectiveness of the jury entails a discussion of the disadvantages; is the jury really a fair cross-section of the community? is it timely and costly? Is the evidence too complex/boring particularly in lengthy trials? Is the jury influenced by the media in high profile cases?

Better answers were able to support their argument with cases such as Chamberlain, Eastwood and the Sudoka case. Some answers referred to current or retired judges supporting or criticising the jury system.

Reforms and alternatives were discussed by most candidates: the jury giving reasons for the verdict, being involved in the sentencing of the defendant, making juries more representative, better education before the trial, introducing ‘not proven’ verdicts, specialist help and reducing the size of the jury.
Most candidates also addressed alternatives such as trial by a single or panel of judges, professional jurors and specialist juries.

Better answers were able to link these reforms and alternatives to an evaluation: a proposed reform to demystify the jury room is to provide an explanation or give reasons for their decision. This would provide the Crown and defendant with an explanation of the verdict. This may create complications as applying the facts to the law is a complex task particularly if the facts are complicated and/or the law is complicated. Here the role of the judge is important. A judge in directing the jury, must explain the law simply so that the jury can understand it. However, even then, the jury may need some training to be able to do this and perhaps a specialist foreperson would help in this regard. Here, though the jury runs the risk of being over-powered or unduly influenced by such a person. This may interfere with benefits of the public participation in our legal system.

### Question 7

This question gave candidates a wide scope as they could discuss the main forms of ADR processes (negotiation, mediation, conciliation and arbitration) and/or canvass other forms such as diversionary conferencing and circle sentencing. Overall, candidates demonstrated good knowledge and sound assessment of their chosen ADR processes.

More comprehensive answers included reasons for the growth of ADR processes to overcome some of the shortcomings of the adversary system and the assessment of such processes for civil, family and criminal disputes. They were able to fully articulate the specific role and function of each process (beyond the prescribed text) as well as provide relevant and current examples to illustrate each process’s strengths and limitations. Strengths of the process include: convenience, speed, confidentiality, accessibility and low cost.

Limitations include the development of a two-tier system of justice, where the wealthy can access both the courts and ADR unlike the less well–off who are relegated to ADR. Another limitation is that some disputes should go before the courts because they concern a significant public interest matter. How would the law of land rights and negligence have developed if Eddie Mabo and Mrs Donoghue had their claims resolved by ADR processes?

It is important that when referring to legislation, candidates cite them correctly (name and year), for example, the Alternative Dispute Resolution Act 2001 (Tas) and the Civil Dispute Resolution Act 2012 (Cth). Reference to the role of NADRAC and its publications (despite it being concluded in 2013) provided more depth in the assessment of ADR processes.

It is equally important to provide a context when explaining ADR processes, that is, state the correct jurisdiction. For example, circle sentencing is available in most states such as NSW but not in Tasmania. Also, in Tasmania, civil cases involving amounts over $5000 but under $50,000 are subject to compulsory conferencing at the Magistrates Court civil jurisdiction- which is different to Victoria.

### Question 8

The quality of answers for this question was generally good, with poorer answers struggling with the structuring of a logically developed argument and the inclusion of relevant information. The majority of students had prepared well for this question and there was evidence that they knew the aims of punishment (retribution, rehabilitation, deterrence and denunciation), some including the protection of society as a fifth aim.

All the usual sentencing options were discussed: prison sentence, suspended sentence, fines, community service, but better answers went on to look at more sophisticated options such as court mandated diversion (drug treatment orders) and circle sentencing, as well as mandatory sentencing. Better answers also referred to the Sentencing Act 1997 and the Youth Justice Act as being Acts used by magistrates/Judges when handing down sentences.
Good answers included reference to the Sentencing Advisory Council and its report on the phasing out of suspended sentences due to high rate of failure to follow up breaches.

Excellent answers went on to discuss an expansion of the current Drug Treatment Order regime as well as adding another option, community correction orders. Arguments from Vanessa Goodwin and Nick McKim were also cited, along with comments from Kate Warner and Michael Hill. Better answers also discussed factors the magistrate/judge takes into account when handing down his/her sentence. There were a range including seriousness of the crime, guilty plea, prior convictions, remorse, mitigating and aggravating circumstances. Some students went further and mentioned specific cases to illustrate their point. Mention of the Chaplin Case 2010 for culpable driving, Dupas Case 2007, for murder and Clarke Case 2009 suspended sentence were made.

With regard to the evaluation aspect of the question, strong answers discussed statistics and compared earlier ones with current reports from the TLRI. High rates of recidivism and lack of post-release support reflected low levels of rehabilitation and specific deterrence. (Mention was made of programs implemented by Risdon Prison in particular to make for better assimilation into the community post prison.)

Excellent answers went further and discussed high rates of Indigenous Australians in prison (esp in NT and WA) and the failure to provide alternatives to prison. Circle Sentencing was mentioned as an alternative with elders involved.

**Question 9**

There are a multitude of safeguards to protect an accused. Three of these are listed specifically in the syllabus: police procedures, bail and preliminary proceedings. Although some students covered purely these examples and were not prevented from doing so, many students went outside of this framework, using examples such as rules of evidence, right to silence, burden and standard of proof, appeal and the now limited protection from double jeopardy.

Strong answers used the notion of ‘innocent until proven guilty’ to underpin the discussion and stated that this was supported by the International Covenant on Civil and Political Rights.

Although there was no stipulation on how many safeguards to cover most students attempted to look at 3 or 4 in depth. Unfortunately the evaluation was lacking. This particular question provided no clear point to base the analysis on, however, the evaluation could have focused on the purpose of the safeguards, whether this purpose should be in place, whether the safeguards don’t go far enough or go too far and impinge on the rights of others in society (alleged victims, community).

Generally students who chose safeguards which involved debate were able to evaluate throughout in a more sophisticated way.

Examples were used in most cases and to varying degrees; it should not be assumed that citing a case is enough without explaining how it applies to the question.

**Question 10**

As opposed to question 9, which was on the same topic, this question provided a clear starting point for the ‘critical discussion’ in balancing the rights of the accused and those of the victims and community.

This question was answered in a number of ways with some students providing equal weight to the rights of the accused such as bail, burden and standard of proof and preliminary proceedings and then discussing victims’ rights including victim impact statements, witness assistance service and victims of crime compensation.

Others focussed on rights of accused and then discussed exceptions when these are changed to look at the balance, using examples such as the change in presumption against bail in family violence cases, a change in the burden of proof in cases such as unexplained wealth, or the reform to double jeopardy laws in Tasmania or proposed change to appeal laws by the current Tasmanian government.
Both methods were acceptable, however, many responses did not answer the question of ‘whether it was possible to balance…’ Some answers focussed too heavily on how the safeguards worked rather than why are they in place and whether they are appropriate.

Once again strong answers used the notion of ‘innocent until proven guilty’ to underpin the discussion and stated that this was supported by the International Covenant on Civil and Political Rights. Examples were generally used well in this response to support the discussion.

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**Question 11**

This question required students to evaluate the Senate in reference to recent attempts at law making. Overall, students made positive attempts at this question.

Criterion 1 standards required students to develop a cohesive argument in response to the statement, “The Senate is a barrier to effective law reform in Australia.” Student responses varied from strongly agreeing, strongly opposing, while a number of students argued that generally the Senate is effective, but there are some circumstances regarding controversial bills that the Senate is indeed a barrier to effective law reform.

Strong responses included a clear argument that was supported throughout the essay. These students made their argument clear in their introduction and had a well-structured essay.

Weaker responses provided a description of the role of the Senate but did not have a clear argument regarding whether or not the Senate is a barrier to law reform.

Criterion 3 standards required students to evaluate the bill process in the Senate and evaluate law reform by referring to recent attempts at law making.

Strong responses had a good analysis of the current composition of the Senate, a clear understanding of law reform and interactions between formal and informal bodies, and well-articulated recent bills to support their argument. Strong responses also had a range of evidence to support their argument including statistics and examples of formal/informal bodies relevant to the bill being discussed.

Weaker responses provided a descriptive summary of some recent bills but did not provide much analysis in terms of the effectiveness of the Senate.

**Question 12**

The topical issue of surrogacy was well researched by most students. Students were able to identify the key issues surrounding surrogacy, including:

- why law reform is needed
- residual power and the need for uniform and consistent laws throughout Australia, including a discussion on referral of powers and complimentary legislation
- House of Representatives Standing Committee on Social Policy and Legal Affairs Roundtable and recommendations
- International treaties and the issues surrounding international commercial surrogacy agreements
- COAG’s involvement
- Family Law Court and issues surrounding international commercial surrogacy agreements and the prosecution (or lack of prosecution) of parents entering into commercial agreements

Formal and informal law reform bodies were well identified, these included (but not limited to):

- COAG
• House of Representatives Standing Committee on Social Policy and Legal Affairs Roundtable
• Recommendation of a Parliamentary Inquiry
• Surrogacy Australia
• Chief Justice Dianna Bryant and Federal Circuit Court Chief Judge John Pascoe

Numerous surrogacy cases were referred to by students, including (but not limited to):
• Ellison and Anor and Kamchanit 2012
• Mason & Mason 2013
• Evelyn case 1997
• Baby Gammy 2013/2014
• Baby Dev 2012

As the essay question required students to critically analyse the strengths and limitations of the legal system in its ability to achieve law reform, students who provided analysis of these strengths and limitations were rewarded for their efforts.

Many students were able to identify possible strengths and limitations of the legal system in relation to surrogacy but were unable to take it to the next level and clearly analyse these strengths and limitations.

Some students were able to incorporate the nature and function of law within their evaluation and demonstrated a good level of understanding of the strengths and limitations of law reform bodies, courts and parliament in reforming the law.

**Question 13**

This was the most popular of the topical legal issue questions. The question required students to go beyond describing the definition of meta-data and its uses and consider the effectiveness of the law making processes which enabled the law to be reformed.

**Criterion 3**
Better answers were able to analyse and mention:
• Brief description of the different voices that expressed a view on this legislation eg the voices in Government, the Opposition, independents and minor parties
• The effect of bipartisanship on parliamentary scrutiny and debate
• The role of and effect of Committees such as the Parliamentary Joint Committee on Intelligence and security (PJ(CIS)) and the Parliamentary Joint Committee on Human Rights (PJCHR) and their proposed amendments
• The debate from formal and informal groups,
• The ability of individuals and to influence legal issues such as Ben Grubb case
• Explanation of the limitations and weaknesses of the Act that were exposed as a result of the law reform process such as cost, burdensome, European experience, increase in executive power, checks and balances that were embedded into the Act

Weaker answers focussed on the definition of meta data and the areas that will benefit its use. They did not mention any legal processes such as the parliamentary processes on how the Act came about or any principles and processes of law reform. Expectations for a ‘C’ standard are clearly given in the standards for criterion 3.

**Criterion 1**
Students were rewarded if:
• they addressed the question directly in the introduction,
• had a line of argument throughout the essay, ie were either arguing that it was effective or that it was not
• had a conclusion.
Many students did not address the question and wrote a prepared response. Many students did not have a clear structure and did not use paragraphs throughout their essay.