LEGAL STUDIES (LST315117)

QUESTION 1 (84 RESPONSES)

Outline the main structures and processes of the Australian Westminster parliamentary system of government and explain how the main features of a liberal democracy are embodied in the Australian Federal Government.

The question asked candidates to show understanding of both the Westminster system of Government and liberal democratic features and how the latter features are embodied in Australian Federal Government. Although at first reading the question looks straightforward, some candidates were not sure what was required. “Structures and processes” confused some candidates who took processes to mean legislative processes and explained the legislature in terms of passing of a bill through parliament rather than keeping to structures and processes of the Westminster system and liberal democratic principles such as legitimate authority as the relevant principle for the question.

CRITERION 1

It was obvious that many candidates had an enormous amount of knowledge but did not quite know how to organise it to answer the specific question. There were many candidates who did not refer to liberal democracy and yet were able to write fluently on the Westminster system.

The main structure and process of the Westminster system explained was the separation of powers. Many spent the entire essay explaining this structure and process and did not mention that this is also a key feature of liberal democracy.

There are a number of other key features such as constitutional monarchy, rule of law, representative and responsible government, bicameral parliament, conventions and party system. Some of these features are more easily linked to liberal democracy than others.

How Australia is a liberal democracy through the features of the Westminster system was well done in the best essays that addressed both parts of the question. Liberal democratic principles embodied in our Australian Federal Government include for example, legitimate authority (representative government), separation of powers and the insistence on rule of law, pluralism (party system, interest groups), human rights (separation of powers including independence of the judiciary). Procedural fairness is connected to the courts. There were some good discussions on the theory of democracy.

Constitutional monarchy, in particular the role of the Governor-General was misinterpreted and inaccurate in terms of liberal democracy. The concept connected to liberal democracy is that the power of the monarch is transferred to the people. Therefore, the role of the monarch or monarch’s representative entails acting on the advice of ministers and the role is above politics.

Weaker essays were able to describe in great detail the Westminster system and took the information no further. Often these essays were long and well written.

Best answers were able to choose relevant information and give examples of Westminster Parliamentary features working within liberal democratic principles. There were many examples this year such as who can sit in Federal Parliament is determined ultimately by the High Court’s interpretation of s44 of the Constitution. The separation of powers and marriage equality plebiscite being defeated in the Senate. A postal survey was chosen by the Executive and duly challenged in the High Court by Andrew Wilkie as unconstitutional. The High Court ruled it was constitutional in that the Parliament had given permission for money to be used for unforeseen circumstances
- a postal survey. Another separation of powers illustration was Bob Brown’s successful High Court challenge to overturn a state law regarding protesting in Tasmania. Another less recent but important example of separation of powers is the ‘Malaysia Solution’ High Court challenge.

**CRITERION 8**

In this essay many candidates replaced the introduction with a historical narrative, giving no structure to follow for the rest of the essay.

The best essays demonstrated highly developed skills in using essay conventions and had well-constructed arguments supported by relevant examples and explanations.

**QUESTION 2 (51 RESPONSES)**

Explain and evaluate how the structures and processes of the Australian systems of government help ensure representative and responsible government in Australia.

Candidates were unsure of what to include and there were many references to liberal democracy which was not required by the question. Many candidates thought the question required a discussion of the separation of powers only.

Some candidates had prepared for an essay on the features of the Westminster system and the advantages and disadvantages. There was so much information to include students found it difficult to choose the most relevant that moved from ‘describe’ only to ‘explain and evaluate’.

Representative and responsible government was either well done or ignored. The best answers defined these terms and clearly showed understanding through the examples given. Weaker answers used the terms but did not show understanding of each respective term in its context.

Responsible government: There is some misunderstanding of this term. The overlap between the Executive and Legislature in the separation of powers is not a flaw but the essence of the Westminster system. The Westminster system is a responsible government in that the executive is chosen from the legislature, making responsible government a specific term and not to be confused with a government acting responsibly. (USA is not a responsible government because the President is not chosen from the Legislature.) Having the executive drawn from the legislature means that there is greater scrutiny and accountability. The Executive is responsible to the voters but between elections it is also held accountable by the Parliament. Information from australianpolitics.com is very useful.

Responsible government is attained within Parliament through a number of processes including Ministerial accountability, Senate Estimates, Committee inquiries, Opposition, Question Time with questions without notice to the Ministers and written questions with notice, Hansard, the public gallery and a free press. The Government of the day must keep the confidence of the lower house. Responsible government to the voters is attained through elections and obviously the people are able to vote in and vote out a government.

The misunderstanding of responsible government also impacts on arguments regarding separation of powers.

Representative government is attained through free and fair elections - the preferential system of voting in the Federal Lower House and proportional representation in the Upper House (opportunities for analysis of how ‘representative’ these systems were). The Senate cross bench has allowed for scrutiny and debate and stopping unpopular legislation, for example Peter Dutton’s idea of strengthening Australia’s citizenship test. Opportunity to also discuss Tasmania’s Hare-Clark system.

Many candidates gave the numbers in the two houses but took the information no further when in fact they could have discussed voting and representative government and the differences of both houses’ composition due to voting patterns and methods.
QUESTION 3 (38 RESPONSES)

Explain how power is divided between the Commonwealth and State Governments under our Australian federal system of government and critically analyse the strengths and limitations of this system.

This question required students to explain how sovereign power is divided in our federal system and what strengths and weaknesses flow from dividing sovereign power (given that most countries have a centralised system of government). Disappointingly, many students spent a great deal of time explaining how power can shift from the State governments to the Commonwealth government. Although the problem of ‘conflict’ between the Commonwealth and State governments is a limitation of federalism, there are many other strengths and limitations other than this limitation. Many students would have been better off attempting question 4, which invited a discussion about altering the balance of power between the State and Commonwealth governments.

Most students made a genuine attempt to outline how power is divided between the State and Commonwealth governments. Distinction was generally accurately made between specific (exclusive + concurrent) powers and residual power, with good use of examples and reference to some of the key sections of the Constitution.

In relation to the aspect of the essay that required critical analysis of the strengths and limitations of federalism, many answers were wanting, aside from the problem of the diminution of State power and conflict over power.

It would have been useful for students to make comments about the strengths of federalism e.g.:

- The original reasons for federating – defence, migration, transport, common culture etc.
- Dividing power being another check on the abuse of power
- The advantage of dealing nationally with many issues, e.g. defence, foreign policy, communication etc.
- Enabling the states to focus on more localised issues and giving communities greater autonomy over their destiny
- Enabling more creativity and diversity of approaches in dealing with community issues.

Aside from the issue of conflict over jurisdiction and the apparent diminishing of state powers, other limitations that could have been included were:

- The lack of uniformity of laws across Australia, especially for those running national and international businesses
- The cost of so much administration (9 governments for 23 million people)
- The inevitable duplications of administrative structures and legal frameworks
- The need to have mutual co-operation to deal with problems, e.g., river systems, pollution, terrorism etc., which can be difficult to negotiate
- The ‘blame game’ between Commonwealth and state governments over issues that touch both Commonwealth and state jurisdictions.
QUESTION 4 (59 RESPONSES)

Identify and critically evaluate the mechanisms used to alter and interpret the Australian Constitution and how they impact on the balance of power between Commonwealth and State governments. Briefly refer to the recognition of the constitutional status of Aboriginal and Torres Strait Islander people as part of your response.

This was a complex essay question that required students to:

1. Identify the mechanisms used to alter and interpret the Australian Constitution;
2. Critically evaluate the mechanisms;
3. Recognise the impacts of these mechanisms on the balance of power; and
4. Refer to the recognition of the Constitutional status of Aboriginal and Torres Strait Islander Peoples.

In addressing points 1-3, strong answers included the following points:

- High Court interpretation of the Constitution as the most significant mechanism for expanding Commonwealth power (Roads case (1926), Uniform Tax case (1942) which created the current vertical fiscal imbalance, Franklin Dam case (1982), and the Work Choices case, (2006))
- Referral of power by the States to the Commonwealth with examples
- Referenda, for example the 1967 Referendum
- Complementary legislation eg National Firearms Agreement, Gonski.

In addressing point 4, better answers included mentioning one or more of a range of options such as:

- The impact of the 1967 Referendum
- The ‘Recognise’ campaign to change the Preamble
- Removal of discriminatory clauses from the Constitution
- Treaties signed by various States with Aboriginal Nations
- Uluru Statement and its implications.

The vast majority of students attracted to this question had a pre-prepared response on the division of powers, the mechanisms used to alter them and the impact on the balance of power between the Commonwealth and State governments. Most students used the 1967 Referendum as an example of a referendum that changed the balance of power; however, only a small group of students went to the next step of explaining the impact of this referendum on Aboriginal peoples and to mention some of the other changes or reforms that have been proposed since 1967.

Other students pre-prepared answers solely on the status and reforms for recognition of Aboriginal and Torres Strait Islander Peoples. These students only mentioned some of the points from 1-3, often briefly referring to the referendum process.

Overall, only a handful of students diligently answered all four parts of the question.

It would seem the question took many students by surprise, possibly because of the confusing nature of the examination specifications. Although it is speculative to assume that students had not prepared for two sub-sections of the syllabus to be combined into the one essay question, in future, students and teachers will need to prepare for this possibility.
QUESTION 5 (15 RESPONSES)

Briefly describe some of the main possible processes of legislative reform from the initial idea for legislative change to the royal assent of a bill. Explain some of the main barriers to the successful reform of the law through these processes.

This question asked students to follow the process of a bill from the initiation of an idea to the Royal Assent and to explain some barriers to law reform through Parliament. However, some candidates mistook this question to be about law reform bodies through the two words in the question most often connected with law reform ie “reform” and “barriers.” This highlighted that candidates need to read the question carefully.

Because of the confusion with the interpretation of the question there were some very varied answers depending on how key words had been interpreted.

Best answers understood the question and followed the progress of an idea from its origin (e.g. Party election promise, lobby groups, white paper, a Department Secretary) through to Cabinet involvement (Ministerial responsibility overseeing drafting of bill and Explanatory Memorandum), the Bill introduced and debated in Parliament in both houses (three readings in each house and if necessary referral to a Parliamentary Committee for further research and recommendations) and then, if correctly passed with same wording in both houses, it becomes law through the last stage of Royal Assent (Executive Council with the Queen’s representative signing the bill to become an Act on the stated date).

Best answers for barriers to reform included recent bills not being able to be passed by a powerful upper house, the need for the government to negotiate with the minor and micro parties in the Senate and the problems in the Legislative Council where there are now four opposition members, making it difficult to pass legislation. Other problems include the contentious nature of some bills where there is a strong division of opinions in society and the need for thorough research and consultation with public to gauge public opinion. Often this happens multiple times and over many years as illustrated by topics such as marriage equality and euthanasia.

QUESTION 6 (108 RESPONSES)

Briefly describe the passage of a bill through the Commonwealth Parliament and explain the purpose of the various stages of the passage of a bill.

This question required candidates to explain the successive stages of the passage of a bill (addressing the purpose of each) through the Commonwealth Parliament. Many errors were made in candidate responses in outlining this process, with numerous students neglecting to refer to consideration in detail/committee stages and/or the requirement that a bill be passed in the second house. Whilst candidates were rewarded for evaluation, many students were seemingly prepared for a question on the strengths and limitations of the legislature and were unable to demonstrate knowledge on the passage of legislation.

More sophisticated responses harnessed evaluation opportunities in the form of analysis of the bicameral system, the legislative process and the legislature generally, the impact of majority/minority government and the role of the Senate. Some responses were able to integrate examples to further articulate their understanding and add weight to their arguments.
QUESTION 7 (62 RESPONSES)

Describe why the judiciary need to interpret legislation and explain why it is important that the judiciary are the final interpreters of legislation.

This question required candidates to address the reasons why the judiciary need to interpret legislation (such as ambiguity, unclear/imprecise language use, changing times and meaning, legislators deliberately leaving legislation open to interpretation/silent, not foreseeing all possible eventualities, difficulties in applying legislation to specific circumstances, error/incorrect technical terminology, etc.) and why the judiciary, as opposed to the executive or legislature, interpret legislation. Most candidates were able to elaborate on one element of the question but neglected to address both parts of the question. Many candidates recognised that the question invited a discussion about the important role an independent judiciary plays in the separation of powers and in upholding the rule of law.

Unfortunately many candidates misinterpreted or misunderstood the question to require a discussion about the common law and the role of judges in developing the law. It is also important to note that this question, although allowing for some discussion of separation of powers, did not invite a rehearsed separation of powers response.

Candidates were rewarded for utilising case law or legislative examples to demonstrate their understanding and further their argument, but most neglected to do so. Better responses utilised opportunities for evaluation, recognising the effect statutory interpretation can have on the application of the law (such as restriction or expansion), the limits and restrictions faced by the legislature in drafting legislation and the strengths and limitations of the judiciary as the final interpreters of legislation.

QUESTION 8 (38 RESPONSES)

Briefly explain the hierarchy and jurisdiction of courts in the Tasmanian Legal System (include the role of the High Court of Australia). When would a Tasmanian Court be bound by the decision of another court?

This question clearly had two parts. The first required candidates to explain the hierarchy and jurisdiction of the Tasmanian system of courts. The second required candidates to explain when a Tasmanian court would be bound by the decision of another court.

Few candidates dealt with both aspects of the question in an equal manner. There were a number of candidates who wrote quite extensive answers about when a decision of a court is binding on another court but neglected the first aspect of the question.

In dealing with the first aspect of the question candidates needed to be accurate and reasonably comprehensive in their responses. Better responses identified the three main levels of the Tasmanian court system, i.e., the Magistrates Court, the Supreme Court and the High Court, and understood that the Magistrates and Supreme Courts loosely had criminal and civil jurisdiction and that the Supreme Court had an internal appeal jurisdiction, i.e., the Criminal Court of Appeal and the Full Court of the Supreme Court. More erudite responses identified the role of the High Court in relation to appeals from Tasmanian courts and their original jurisdiction over disputes involving Constitutional matters. Pleasingly, many candidates understood the role of the Magistrates Court in dealing with summary criminal matters and minor civil matters but fewer knew of their role with youth justice, coronial matters and other sundry matters.

When dealing with the second aspect of the question some students exhibited a great deal of depth of knowledge about the doctrine of precedent (often using some very good examples of its application). Essentially students need to explain that any court is only bound to follow: decisions from courts in the same hierarchy, from courts that are higher than them in the hierarchy and where the facts are substantially similar. An example, using the Tasmanian court hierarchy, would have been useful to illustrate their understanding of the application of this doctrine.
QUESTION 9 (91 RESPONSES)

Before legislation became our main source of law, common law (i.e. law developed by judges) was the primary source of law. Explain what some of the main advantages and disadvantages of having to rely on common law as the primary source of law.

In general, this question was answered quite well.

It was quite a complex question with a great deal to read and take in. It assumes that precedent is the primary source of law. Of course, legislation has over-taken precedent as the primary source of law.

In a 20 minute answer it is not possible to cover everything so students had to be focussed on providing enough information – and ‘the right’ information – to answer the question and ensuring that, in order to answer the question effectively, they included a good balance of analysis and evaluation. Students should be quite discerning in their revision with these short responses and in their planning whilst in the examination. This is challenging with a lot of content. The expectation of markers is that a standard response is between 1 ½ and 2 exam pages of writing. Students who tried to write everything they knew about judge made law and provided long lists of information without cohesive arguments struggled to attain top rating.

Candidates generally covered the usual suspects of court hierarchy/stare decisis, ratio decidendi, obiter dicta, binding and persuasive precedent, ways to avoid precedent or develop the law and statutory interpretation (although the inclusion of statutory interpretation needed to be well justified given the emphasis on evaluating judge made law as the primary source of law). Most candidates were able to point out advantages and disadvantages. This is basic analysis, although many candidates spent so much of their answer outlining the workings of precedent in detail that they did not allow themselves enough time for the analysis that was required. This can be avoided with careful planning and meticulous time management.

Good answers were able to discuss the features of the system and then address advantages and disadvantages as they went along; although there is nothing wrong with addressing the features and then having a separate discussion on advantages and disadvantages.

For example, ratio decidendi is the reason for the decision and is the binding part of the decision. Judges lower in the hierarchy are bound to follow decisions of the court, higher in the hierarchy. Stare decisis works hand-in-hand with the ratio as it is a principle of precedent meaning to stand by what is decided. Therefore, it promotes consistency and predictability, allowing us to know what the law is. However, the ratio can be difficult to find and narrow down, thus undermining certainty and imposing rigidity.

Better answers were able to address ways to avoid precedent and point out how this is a strength of the system as it allows judges to avoid bad precedent and give the law nuance and complexity. Creativity (i.e. Mabo, Donoghue v Stevenson) versus conservatism is also a good discussion to have. Part of the role of the judge apart from enforcing the law is to keep society up-to-date with changing values and attitudes and Mabo is a good example of this. Judges see a gap in the law and can fill it. But, should this not be the major function of Parliament? It could be argued that judges are acting like legislators in cases such as Mabo and that, given they are not representative, this is not their job - although it did lead to the out-dated concept of terra nullius being expunged from Australia’s common law.

Trigwell is a great example of judicial conservatism and this was used effectively by a number of candidates.
QUESTION 10 (51 RESPONSES)

Briefly describe and evaluate the effectiveness of Interest/Lobby/Pressure groups in bringing about law reform.

Many students were unprepared for this question and struggled to adapt what they knew to address it directly. These students wrote everything they knew about Law Reform Commissions and lobby groups, rather than making the point, for example, that pressure groups make submissions to LRCs, Parliamentary Committees and Royal Commissions.

The best answers, which were between one and a half and two pages, gave examples of lobby groups or individuals who represented them, discussed the strategies they used and evaluated why some succeeded and some did not. Some pointed out that political parties are more susceptible to pressure prior to elections. One very strong evaluation focused on the successful High Court challenge to Tasmania’s anti-protest laws by Bob Brown and Jessica Hoyt, representing environmental lobby groups, explaining the reach of this Constitutional case and potential impact on similar laws in other States. Some students also made the point that although groups may not succeed in pressuring lawmakers to change the law, keeping an issue on the political agenda is a measure of success.

QUESTION 11

International Law

Select ONE of the below scenarios on International Law. In relation to your chosen scenario, and if relevant, other examples, you MUST explain and analyse (a) - (d):

(a) The difference between International Law and Australian Law.

(b) The principle institutions of International Law.

(c) The impact of International Law on Australian Law.

(d) The enforceability of International Law.

GENERAL COMMENTS

This compulsory question was a daunting proposition for the majority of candidates. Students were expected, not only to address a scenario, but to also apply their course knowledge to address all four very specific sub-questions, whilst being sure to include sufficient identification, description and explanation of elements of international law as well as some analysis and critical evaluation to obtain higher grades – all while being sure to relate their answers to their chosen theme. It was also noted that some scenarios appeared to lend themselves more easily to the task than others. Given the complexity of this area of the course many candidates struggled to meet the demands of the question to the required standards in the time allowed particularly given the challenge (perhaps distraction) of the scenario element. Some candidates could manage no more than to repeat the description of the scenario. Others failed to adequately address all of the sub-questions – many only addressed the issue of ‘lack of enforceability of international law’ and then in very general terms. Others gave standard answers that addressed the sub-questions in relation to International Law generally but did not adequately link this to their chosen theme. Many more gave detailed answers but did not address the scenario. The examiners were very impressed by those students who achieved all elements of this very complex task in the time available. Although some responses pushed to 5 pages this was definitely not required to receive a high rating and many quality responses were concisely written in 1 1/2 to 2 pages.
SCENARIO 1: CLIMATE CHANGE (76 RESPONSES)

This was an easier scenario compared to the other topics. Many of the weaker responses provided a timeline or list of treaties in relation to the topic, rather than answering the specific questions around IL. Strongest responses answered the questions around IL using appropriate and factually correct climate change examples to highlight the conclusions they had come to. Institutions included the Intergovernmental Panel on Climate Change, the World Meteorological Organisation, The United Nations with various sub-branch agencies, UNESCO, NGOs such as Greenpeace. Agreements that could have been discussed included

- The 1985 Vienna Convention for the protection of the Ozone Layer.
- The 1987 Montreal Protocol on Substances that Deplete the Ozone Layer
- The 1997 Kyoto Protocol (legally binding)
- The Copenhagen Climate Accord (2009) a political rather than binding agreement.
- The Paris Climate Accord.

Strong responses outlined varying policy responses from Australian political parties as well as factions within these including the working of the Environmental Protection and Bio-diversity Conservation Act 1999 (Cth).

Enforceability issues were dealt with in a similar way to the other choices in question 11.

SCENARIO 2: HUMAN RIGHTS (135 RESPONSES)

This was a very popular theme and there was a huge range of qualities of response in relation to it. A large number of students were able to successfully discuss the differences between International Law and Australian Law by focussing on the respective legal basis, the parties to whom the different types of law applied and differences in enforceability.

With respect to sub-questions (b) to (d) many answers were detailed but many students struggled answering in a way that addressed principal institutions, impact on Australian Law and enforceability specifically as these applied to Human Rights. In terms of principal institutions, whilst many students listed the United Nations General Assembly, the UN Security Council, the International Court of Justice and the International Criminal Court very few were able to explain their specific role in relation to Human Rights. Most students at least mentioned the Universal Declaration of Human Rights but better students identified the three instruments comprising the International Bill of Rights, described the role of the Office of the United Nations High Commissioner for Human Rights, and particularly given the stimulus, described the role of the UN Human Rights Committee as prescribed by the International Covenant on Civil and Political Rights. Very few candidates mentioned let alone described the role of Special Rapporteurs or otherwise mentioned the extensive inspection and reporting obligations (including self-reporting) under international Human Rights treaties.

In terms of impact, students generally understood the implications of ratification and the lack of enforceability without domestic law. The better students made reference to a lack of a Bill of Rights in Australia. Students could have mentioned (and even evaluated) the role of the Federal Parliamentary Joint Committee on Human Rights and given examples of laws incorporating Human Rights obligations, such as the Racial Discrimination Act (Cwth).

In terms of enforceability candidates were able to use the phrase ‘naming and shaming’ with few candidates really explaining or analysing what that meant and referring to bodies and institutions active in this area. Some candidates, amidst all of this, were able to give examples of current or recent issues in which Australia’s human rights record has been criticised.
SCENARIO 3: ASYLUM SEEKERS AND REFUGEES (45 RESPONSES)

This topic proved challenging for most candidates. The distinction between international law and Australian law was only made clear in a handful of responses. In terms of important international laws, it was pleasing to see that a number of students noted the relevance of the Refugee Convention (1951) and specifically the definition of ‘refugee’ and the concept of non-refoulement. Stronger responses also noted other relevant international laws including, but not limited to, the International Covenant on Civil and Political Rights (1976) and the Convention on the Rights of the Child (1989). Some students immediately made comparisons between these international laws and Australia’s domestic laws – while others left this comparison to part C (the impact of international law on Australian law) – either of these options was acceptable. Stronger responses identified the Migration Act (1958) as being relevant to this topic, and noted the 2014 amendments to this legislation, including the narrowing of the definition of ‘refugee’, so that it no longer mirrors the Refugee Convention (1951).

In terms of the key international institutions, a select few made reference to the United Nations High Commissioner for Refugees and its powers. Weaker responses tended to focus solely on the United Nations, and only made references to this institution as a whole rather than discussing more relevant branches. It was pleasing to see some discussion regarding the specific powers of the institutions including powers of investigation, monitoring and reporting via special procedures/special rapporteurs. Strong answers noted the divergence between international law and domestic law in regard to asylum seekers and refugees; some mentioning the seeming disregard for international law and international bodies as displayed by Australian governments over the past two decades. Those who excelled, pointed out that international law is not enforceable unless enacted via domestic law; they also explained that states do oblige for other reasons, however, the current Australian government remains relatively unmoving when it comes to this topic.

SCENARIO 4: INTERNATIONAL CONFLICT (129 RESPONSES)

Scenario 4 appeared to be the most challenging of all the scenarios, resulting in disparity of responses between those that were able to adapt effectively and those that struggled with the requirements of this question. The theme of the Law of War meant that students were required to have good knowledge of International Humanitarian Law (IHL) and recent changes to laws associated with terrorism. Effective discussion of all four parts of this question required a high level of critical thinking. This is a significant burden on students given the small allocation of class time for this topic.

Strong responses discussed all four parts of the question clearly and concisely. Most students were able to discuss the main difference between International Law and Australian law and issues surrounding the enforcement of International Law, but did not adequately address principal institutions or impacts.

- Strong candidates were able to discuss the differences between International Law and Australian Law in detail, referring to ratification processes in Australia and relevant sections of the Constitution. However, some students did confuse Sections 51 and 61.

- With regard to principal institutions, this included discussion of the powers of the various organs of the United Nations such as the General Assembly and the Security Council. Other strong responses also discussed the role of the Organisation for the Prohibition of Chemical Weapons (OPCW) and their role in overseeing the Chemical Weapons Convention. Other candidates, however, identified a range of institutions but did not discuss their role, powers or relevant international agreements they oversee. Some candidates also did not show they understood the difference between institutions and agreements. For example, some candidates listed the Geneva Conventions but did not discuss a relevant institution such as the United Nations.

- Most candidates made logical conclusions about the impact of International Law on Australian law, which of course overlaps with the first part of the question, such as ratification processes. Other candidates discussed the implications for Australian combat troops, upholding various aspects of the Geneva Convention. Strong candidates provided some detail in their response, such as referring to a specific Convention.
• Most candidates identified the benefit of reciprocity for nations to follow international law. Stronger responses also discussed in some detail the problematic nature of enforcing International Law. For example, a number of candidates discussed the obstacles experienced by the International Criminal Court be referring to recent examples.

**QUESTION 12 (47 RESPONSES)**

Explain the essential differences between the conduct of civil and criminal processes in the Australian legal system and why such differences exist.

The responses to this question were poor. Quite a number of students had prepared an adversary system response and thus proceeded to cover the features of the adversary system and whether or not they allow for a fair trial. In general, there was a lack of information and often incorrect information. For example, many described civil matters as minor crimes. Students often articulated themselves clearly, however did not provide enough relevant information. It was pleasing to note that a number of students suggested greater use of ADR processes with respect to civil matters, this was, at least relevant to the question.

Points relevant to the question could include:

• some explanation of civil and criminal processes, acknowledging that one event could be both civil and criminal, Criminal - wrongs against society with a view to achieving aims of punishment, civil - disputes predominantly between private citizens with a focus on compensation.

• parties to each dispute (role of the state in criminal and victim not a party to proceedings).

• pre-trial differences e.g. civil procedures aimed at full disclosure with a view to settlement, preliminary hearing for criminal matters and police involvement.

• burden and standard of proof (including reason for the differing standards).

• greater use of ADR in civil, however development in criminal procedures with a view to a more restorative approach.

• difference outcomes

**QUESTION 13 (175 RESPONSES)**

Two main principals of natural justice and procedural fairness are:

(a) That the adjudicator not be biased; and (b) that each side should have a fair hearing.

Identify the main features of the adversary trial process and explain to what extent these features support the two principals of ‘natural justice’ and ‘procedural fairness’.

A reasonably straight forward question although some may have been thrown by the term ‘natural justice’ rather than a general evaluation.

Strong responses provided a brief definition of the adversary trial process, explained a range of the main features:

• Contest;

• Impartial adjudicator;

• Party control;
- Strict rules of evidence and procedure;
- Single event;
- Role of jury;

and explicitly demonstrated how they achieved fairness and removed bias. Evidence and examples were used at times effectively although some students provided too much information about a particular case at the cost of evaluation. Weaker responses only discussed features; either a range or just one or two. Others said that the features achieved the principles of natural justice but did not say how. It is important to remember not to limit answers to the criminal stream but include civil as well.

**QUESTION 14 (48 RESPONSES)**

Assess the role that the jury plays in criminal trials in Tasmania and critically evaluate the extent to which they ensure that the outcome is just and fair for both parties.

This was not a popular question and not very well answered by most candidates.

It is noted that juries are just one element of the adversary system topic in the course document. It may be that candidates were underprepared to answer a question on just one element of the topic but focussed on preparing an answer for a broader question.

The role of the jury is:

- An independent decision maker
- The decider of facts
- To listen to all the evidence
- To understand and remember the evidence
- To concentrate
- To understand the points of law as explained to them by the judge and apply the facts to the law
- To be impartial
- To come to a verdict – guilty or not guilty
- To participate in deliberations in the jury room

Good answers were able to discuss a role of the jury, advantages and disadvantages and then evaluate whether the jury is just and fair and were able to use examples together with the Juries Act 2003. Criticisms of the jury by commentators such as retired judges is also illuminating on the role of the jury and whether the jury is effective or not. The text address this and also comments from retired judges in Tasmania can be found (eg former Judge Christopher Wright).

Use of examples were not common although the Sudoku case was mentioned. The Chamberlain case was a glaring omission.

Part of the evaluation is also to highlight some reforms such as juries giving reasons for their decision although this would mean inexperienced jurors giving what amounts to a legal opinion, for which they are clearly not qualified - although, reasons would remove any doubt as to how the jury came to that verdict.
The question addresses criminal trials and a lot of candidates also addressed civil trials, which is irrelevant. The selection and empanelment process was also mentioned by many although this is not quite relevant to the jury’s role.

**QUESTION 15 (110 RESPONSES)**

Briefly explain TWO different legal alternative dispute resolution (ADRs) processes and evaluate their capacity to fairly resolve legal disputes

This was a popular question and one of the few straightforward questions on the examination. Most candidates answered it reasonably well.

Most candidates referred to negotiation and mediation as their choices of ADR. There were some who chose tribunals with either negotiation, mediation or arbitration. Some chose to discuss most methods of ADR. The question and the syllabus only requires an answer addressing two types of ADR. Most candidates were fluent in their description of each method and could compare them.

There is some room for a discussion on the disadvantages of the adversary system as this is why ADR has grown strongly over the years. It also highlights the advantages of ADR. For example, the adversary system is a demanding search for the truth whereas ADR is less onerous as it does not include rigorous cross-examination and re-examination. The rules of evidence are strict in the adversary system but not in ADR. Is the search for truth therefore compromised? Is the lack of lawyers involved in some methods of ADR a disadvantage? It could be argued it is an advantage as the process, without lawyers, becomes less complex. This is evident in the Small Claims Tribunal where civil matters up to $5000.00 are resolved. Lawyers are not allowed. It is presided over by a Magistrate and proceedings are closed. The parties present themselves to the Magistrate to begin the proceedings. Parties are then sent outside the court room to negotiate and try and resolve the matter. If the matter is not resolved then the magistrate will make a decision. It is also inexpensive and relatively quick. It is an effective way of handling minor civil disputes and it does not clog-up the Magistrates Court list. The key to a successful ADR is that the parties must be prepared to compromise in order to resolve a dispute.

Interesting also to note that whilst the adversary system is party driven, ADR, particularly tribunals, are inquisitorial. So, ADR in this sense, dovetails nicely with the adversary system.

Most analysed advantages and disadvantages well. Evaluation was not done so well overall although most candidates were able to address the effectiveness of ADR albeit in a basic way.

The use of examples was quite good although it is difficult to use examples with negotiation as these details are not generally public knowledge.

ADR can be used in criminal disputes but only one answer addressed conferencing and circle sentencing. It is also used in Youth Justice as well as therapeutic jurisprudence.

**QUESTION 16 (278 RESPONSES)**

Describe the main aims of punishment. Referring mainly to the Tasmanian context, and where relevant other jurisdictions, critically evaluate how the effectiveness sentencing options such as imprisonment, suspended sentences, drug treatment orders and fines, support the aims of punishment.

Sentencing and aims of punishment essays were relatively straightforward to mark. Candidates were confident with the knowledge and evaluation required in this question. This is a familiar section of the course that does not have any new content, although it is important to keep up with law reform in this area. Candidates were well aware of the ongoing reforms in Tasmania. Some candidates thought they had to only address the four sentencing options listed in the question while others did see the “such as” and knew that other sentencing options could be included.
CRITERION 5

Candidates knew sentencing options well and the ongoing developments with sentencing in Tasmania. Discussions on the aim of punishment were also well done. The essays showed that candidates knew this topic well and were interested in it. However, candidates need to be discerning in choosing the material in order to answer the question asked. For example, some referred to the mitigating and aggravating factors that are taken into account in sentencing when this is not relevant to the particular question.

Most candidates discussed the aims of punishment (punishment, deterrence, rehabilitation, denunciation, protection) and then went on to describe the sentencing options. More average responses did not go much further than this; there was very little, if any, analysis done. These students limited their discussion to the options mentioned in the question.

Better answers went further in their discussion to actually mention the Sentencing Act, Youth Justice Act and referred to the Criminal Code in context of the question, providing some evidence (statistics from ABS, quotes from Michael Hill at Lawfest and reference to Vanessa Goodwin and Risdon Prison Programs with statistics to support declining recidivism rates etc.) It was good to see evidence of candidates having listened at Lawfest with reference to Michael Hill, particularly on therapeutic jurisprudence and to the work of Rosalie Martin at Risdon prison, in terms of literacy.

Excellent answers, did all of the above, but also went much further to provide examples of programs implemented in other states, referred to Indigenous Australians and their overrepresentation in prison along with implementation of circle sentencing, lack of support networks post release, drug treatment orders and therapeutic jurisprudence. (These answers also had many statistics and evidence to support their argument) There was good discussion of suspended sentences, with reference to the Sentencing Advisory Council and subsequent recommendations. These candidates also highlighted how fines were ineffective and disadvantaged lower socioeconomic groups. A+ answers went on to provide some solutions.

CRITERION 8

Weaker responses did not have an introduction but used the introduction as general introduction to the topic rather than an introduction to the structure of their argument. This caused problems with repetition and difficulty in following the discussion of both sentencing options and aims of punishment. Paragraphs need to be clearly defined by leaving a line between each paragraph.

The best responses demonstrated that candidates were able to construct a well-argued response using conventions of essay writing including the introduction and conclusion. The argument of the essay proceeded logically from the introduction, through the discussion and into the conclusion. Each paragraph had a topic sentence and dealt with one aspect of the argument, using relevant information and did not stray into irrelevant information. Expression was clear and concise. Thus, the best essays were well constructed and well argued; cohesive and showing clarity of thinking.

QUESTION 17 (101 CANDIDATES)

Describe how the rights of the accused, the victim and the community are protected in the Tasmanian criminal justice system and assess the effectiveness of these rights in protecting these various parties.

Strong responses had a good balance of information regarding an accused, victims and the community. These candidates effectively described the main safeguards and provided an analysis of the strengths and weaknesses of each safeguard, coming to a logical conclusion. Responses were well supported by a range of evidence such as references to Tasmanian legislation.

- Strong responses also had a clear argument articulated in the introduction, which was well supported by the main body paragraphs.
• Strong responses had a good range of safeguards. For example, in relation to the accused this included police powers, bail, burden and standard of proof, jury challenges, presumption of innocence and preliminary proceedings. Students were not expected to discuss all of these, but strong responses discussed at least three of these. The best answers could also refer specifically to the Tasmanian Legislative provisions that prescribed these safeguards. In relation to the victim, strong responses discussed safeguards such as the Victims of Crime Service in Tasmania and the role of Victim Impact Statements. It is important to note, however, that few students commented on the fact the Victim Impact Statements are used during the sentencing process and not during the trial.

• Some of the best responses were able, not only to point out that it was often a balancing act between protecting the rights of the accused and the rights of the victims and community, but also to discuss the political pressures (“tough on crime” populist policies) that informed where that balance was struck and how that balance has been changing recently. Examples such as the increase in police powers in relation to recent terrorism legislation were useful to illustrate this point. Speculation about issues such as ‘racial profiling’ that can arise if we increase police powers was also discussed.

• A number of students, however, focused almost exclusively on the accused, with brief comments regarding the victims and community. Students must address all parts of the question for a high rating. It was very rare for students to see an increase in police powers as an issue that not only affected the rights of the victim, but also the rights of the public to be free from arbitrary search, detention, “fishing expeditions” etc. So the public could have been discussed from two competing perspectives: the right of the public to be protected from perpetrators of crime vs the right of the public to be protected from the powers of the state.

• In addition, a number of students structured their paragraphs with a case example as the main focus, with limited reference to safeguards. Paragraphs should be structured with a safeguard as the focus, with brief case details as supporting evidence.

**QUESTION 18**

In relation to ONE of the Topical Legal Issues below:

• Youth Detention in Australia
• Whaling
• Marriage Equality in Australia
• Drug Law Reform in Australia
• Anti-Discrimination Law Reform in Tasmania
• The Use of Chemical Weapons in Syria

Describe and analyse the different legal and political views relating to your chosen topical legal issue. Evaluate and analyse how it connects with Australian and/or International legal and political institutions and processes.

**GENERAL COMMENTS**

Stronger responses, not only provided sufficient detailed information and analysis, but also adapted their material to the standards being assessed, clearly articulating the competing legal and political perspectives of their issue and linking the issue to key political and legal processes. They did not give an historical development of the issue but focussed analysis on developments in 2017.
YOUTH DETENTION (94 RESPONSES)

This question was very well answered with a high number of students gaining A ratings. Students embraced this topic, making numerous links to the legal system, often comparing Northern Territory and Tasmanian legislation pertaining to youth justice and analysing the impact of at least two international treaties. Many students pointed out youth justice is an area of residual power, with a variety of legislative approaches across Australia. The Tasmanian Youth Justice Act 1997, based on the Convention on the Rights of the Child, is underpinned by a restorative approach whereas the Northern Territory legislation is more punitive. Students also referred to the capacity of the Commonwealth to be involved given Australia’s obligations under international law. There was strong discussion about the Royal Commission established after the Four Corners expose of the Don Dale Detention Centre and widespread understanding of the overrepresentation of Indigenous youth in detention.

Students who gave examples of alternative approaches to youth detention such as the now discontinued Clarke Island scheme for Aboriginal youth, administered by the Tasmanian Aboriginal Centre and justice reinvestment which has been adopted by the Aboriginal community, the police and magistrates in Bourke, NSW, demonstrated strong understanding of this issue.

WHALING (30 RESPONSES)

A fairly good set of responses. Poorer responses focussed too much on the historical nature of whaling with little to no mention of events from 2017. This year saw two major developments in whaling in the Southern Ocean: a law passed by the Japanese Parliament to eventually resume sustainable commercial whaling while maintaining whaling for “scientific” purposes and the decision by Sea Shepherd not to pursue the Japanese Whaling Fleet in the summer of 2017/18 and to develop alternative strategies. Political and legal institutions that could have been discussed included:-

- International Court of Justice (ICJ) responsible on making rulings in this area of International Law

Stronger responses described a range of views using specific quotes and or polls to outline that there are not homogenous viewpoints within Australia nor Japan. The role of IL, domestic parliaments and interest groups were all covered reasonably well, although some candidates wrote from a persuasive viewpoint rather than an analytic one.

MARRIAGE EQUALITY IN AUSTRALIA (148 RESPONSES)

A significant number of students did not address the standards, instead giving an historical account of the developments in marriage equality, going back as far as Hyde v Hyde (1866). Students are reminded to focus discussion of the issue in the year of study. Quite a number of students claimed that the Constitution needed to be changed to legalise marriage equality, when in fact what is required is the successful passage of a bill in the Federal Parliament amending the Marriage Act 1961.

Stronger answers analysed the developments in 2017 in depth, including the rejection, for a second time, of the Government’s plebiscite bill by the Senate, the High Court challenge to the postal survey, the reasons the High Court unanimously validated the survey and the results of the survey. A pleasing number of students discussed Senator Dean Smith’s Private Member’s Bill which was before the Senate as they were writing examination answers. Too many students still refer to “conscious” rather than conscience votes. Competent responses incorporated Australia’s commitments under international law such as the Covenant on Civil and Political Rights and the UN Human Rights Committee and Michael Kirby’s condemnation of the use of a non-binding opinion poll to drive decision making about the rights of LGBTQI people.
While short answers in the C to B range could describe the different legal and political views on marriage equality and identify the positions of the various political parties and competing lobby groups, the best responses were able to evaluate these views in terms of lawmaking in the Australian legal system.

**DRUG LAW REFORM (29 RESPONSES)**

Generally a weaker response which may have resulted from it being such a vast topic covering medicinal cannabis, the ice “epidemic”, drug testing of welfare recipients/politicians, e-cigarettes and alcohol and this gives rise to many different approaches. There was a lack of depth in responses, some responses referred to specific reports, interest groups, opinion, whilst others gave a general overview often worded in a persuasive style of writing. There were many factual errors and some responses, although appropriate to include to some degree, almost wrote the response as if it was a sentencing essay. Strong responses, discussed the issue with breadth and provided a range of views and statistics to support their answer. Although some responses pushed to 5 pages this was definitely not required to receive a high rating and many quality responses were concisely written in 1 1/2 to 2 pages.

**ANTI-DISCRIMINATION TASMANIA (11 CANDIDATES).**

Very strong responses, this topic attracted capable students. A concern would be due to the predictability of the question, around half a dozen of the responses were almost identical. The use of a range of quotes outlining differing views, specific reference to the process through the Tasmanian Parliament and result, and brief background and connection to other jurisdictions lent itself to strong answers. Although some responses pushed to 5 pages this was definitely not required to receive a high rating and many quality responses were concisely written in 1 1/2 to 2 pages.

**THE USE OF CHEMICAL WEAPONS IN SYRIA (68 RESPONSES)**

Most candidates were able to effectively discuss views, institutions and processes associated with the issue of the use of chemical weapons in Syria. Candidates engaged well with the topic, showing a good understanding of the key issues.

- Strong responses discussed a range of political views, detailed analysis of relevant institutions and their processes such as the OPCW and the UN Security Council. These responses also focused almost exclusively on information from the past year, with factual detail.

- Some candidates provided a good description of recent chemical attacks, such as those in April of this year, but did not provide adequate detail on relevant institutions and process such as inspections by the OPCW or inquiries by the UN.

- As this question is a Topical Legal Issue, the majority of the information should be from the past year. It is quite acceptable to briefly mention key information from 2011 and 2015, but this should be very brief, with the intention of highlighting how this is a current, but ongoing issue.

- Further, some candidates discussed various international organisations. While these organisations play an important role in this issue, the focus of this question is on institutions that have legal and political influence such as the OPCW and the various organs of the UN.

- This question gave candidates the opportunity to discuss this issue purely from an international perspective or through discussing both international and Australian perspectives. Some candidates effectively discussed a range of Australian views, such as those of Prime Minister Turnbull and Foreign Minister Bishop as well as discussing the role of ASNO.