

LEGAL STUDIES (LST315117)

FEEDBACK FOR STUDENTS AND TEACHERS

QUESTION 1 (88 RESPONSES)

This was a straightforward question requiring students to explain the main features of Westminster systems (federal and state) and evaluate how/whether they ensure responsible and representative government (RRG). Overall those who answered this question did well provided they identified the **main** features and their link to RRG. Good answers included examples in their discussion e.g. the Malaysian Solution case from 2011, Haneef or the s44(i) citizenship cases for separation of powers (SoP), Einfeld for rule of law, the consequences for politicians such as Susan Ley and Bronwyn Bishop of misuse of public money (RRG) amongst others.

Although the question was open to discussion at both federal and state level, students understandably focused on the system at federal level and there was no requirement that they did discuss the state level to do well.

A common failing was to only identify two or three features and/or include peripheral features of Westminster systems. Although one can debate whether features such as a free press/media, independent public service or military under executive control are features of our Westminster system as opposed to liberal democracies generally, the course states:

1.2 AUSTRALIA'S WESTMINSTER PARLIAMENTARY SYSTEM OF GOVERNMENT

Learners will study:

- The main features of the Westminster system adopted by Australia:
 - Constitutional Monarchy
 - Constitutional conventions including the head of Government, the Prime Minister, who leads a Cabinet which is responsible to the lower House
 - Separation of Powers and Rule of Law in Australia
 - Representative and responsible government
 - Bicameral parliament, with the House of Representatives being the

'Peoples House' and the Senate being the 'States House' and a 'House of Review'.

It's a matter of concern that many students included the features previously mentioned which are **not** in the course at the expense of core features such as rule of law or constitutional conventions which **are** mentioned.

Although there is clearly a large overlap and students were given credit for identifying liberal democratic features (as required in the exam specifications), the question was not about liberal democracy and the exam specifications explicitly stated there would not be a question on that specific topic. This same cohort of students also often included a 'loyal opposition' as a main feature, which is very relevant to RRG but is not in itself a main feature of Westminster according to the course.

A further concern was significant misconceptions about the role of the Governor-General (GG). Many students tried to argue that the GG has an important role in contributing to RRG by overseeing legislation and the operation of Parliament generally, to the point of withholding Royal Assent from bills with which he/she considers not to be in the public interest. Others claimed the GG chooses the PM and Cabinet. These are dangerous misconceptions and simply wrong.

The better answers identified the central role of the GG in the Constitution and the fact that this role is mostly ceremonial due to conventions such as PM and Cabinet. An argument with more merit would be to use the example of the Whitlam government, often mentioned by students, as the exception that proves the rule i.e. the GG doesn't interfere in politics unless they are required when there is no clear majority in the lower house to form government. Students could have taken this further to point out that the GG should not have a central role in RRG as it is an unelected position.

Other failings worth mentioning were to simply outline features without explaining how they contribute to RRG or simply discuss only one feature, perhaps two, as though that was the sum of the Westminster system.

This was a very fair question which allowed those students who understood the topic to do well.

QUESTION 2 (55 RESPONSES)

This question focussed on two concepts – the ‘separation of powers’ and the ‘rule of law’.

As there was also a more general question around features of the Westminster System in this section. Students that chose this question either answered the questions very well or quite poorly.

A large number of candidates treated the question like a short answer question on the separation of powers, discussing the theory or separating the arms of government and then also discussing the practice within Australia. Unfortunately the lack of understanding of the rule of law apart from – “everyone being equal in the eyes of the law” was really lacking.

Stronger responses analysed the effectiveness of the two concepts in the Westminster system of government, providing real world examples of checks and balances and failures of the system.

With any essay type response, for candidates to achieve high marks they need to move past just providing information and really focus on evaluating the effectiveness.

QUESTION 3 (50 RESPONSES)

Most students wrote competent answers, effectively addressing parts of the question, but few wrote a complete essay that discussed all elements of the topic. Some wrote good descriptions and analysis of the Division of Powers structure but ignored or only briefly discussed the power balance and change between State and Commonwealth parliaments. Some structured their responses in the reverse manner, i.e. outlined examples/cases that altered the balance between the States and Commonwealth, but only cursorily linked such discussion with the Division of Powers and the Constitution. Few students mentioned the history of the Federal arrangement.

Consequently the fluency of the delivery was patchy, so the complete argument was often not clear. There was a feeling that some candidates ‘dumped’ information into their answer without really crafting a logical, coherent response- thus sufficient knowledge and description for a ‘C’ or ‘B’ rating but not for an ‘A’ answer.

It was clear, however, that most candidates had an understanding of the ‘key ideas’ about Federalism, the Constitution, Division of Powers and that the balance of power between the

states and Commonwealth even if they may not have used the correct terms as often as was anticipated.

SPECIFIC COMMENTS

- Narrative needs to be more sequential - What is the Federal System, where did it come from? The Constitution and its Division or Powers, change over time as result of variety of factors. Implied incorporation of the principles of Liberal Democracy without actually saying so.
- More logical if Division of Powers was described, explained before discussion of changes over time.
- Each part of delivery needs to directly link with the next aspect.
- Not really sufficient just to include, describe and explain a selection of, admittedly, examples/cases that changed the Constitution, but not link with the overall nature of the question.
- Concept of 'shared sovereignty' is an important term and concept to use here.
- Historical context would have been a useful part of the intro to give context.
- 'A' answers needed to evaluate the changes to the Division of Powers and how state and Commonwealth governments perceive the relationship.
- Try to avoid writing paragraphs that are a page or more long.
- Key terms need to be spelt correctly- separation
- Some terms/names need to have a capital letter- ie Constitution, Commonwealth

QUESTION 4 (116 RESPONSES)

CRITERION 1

The vast majority of students went into significant detail in response the first part of the question but only the stronger responses were able to evaluate the consequences of the alteration in the division of powers in any depth.

Strong responses were able to go beyond description into analysis and developed arguments as to the long term consequences of the High Court decisions in the Roads Case (1926) and the Uniform Tax Case (1942) which cemented Commonwealth financial dominance and resulted in an extreme vertical fiscal imbalance. They explored the disadvantages of States being heavily reliant on the Commonwealth to provide the resources for services such as health and education, the high costs of dual bureaucracies, the difficulty of apportioning responsibility when policies fail and the erosion of the strong benefits of federal systems which provide checks on power and allow for regional difference. They balanced these disadvantages with the need for Australia to operate in a globalised economy.

There was also a good understanding of the Tasmanian Dams Case (1982) and the role international law has played in the expansion of Commonwealth power via High Court interpretation. Many students argued that the Commonwealth power was virtually unlimited given the High Court's interpretation of the external affairs power, S.51 (xxix), but didn't factor in political considerations. The Commonwealth does not always exercise this power if it is more expedient to negotiate with States. Stronger responses articulated the gains made for Australian society in general with Commonwealth human rights and environmental legislation springing from the external affairs power.

Discussion of the limited role played by referenda in changing the division of powers was quite strong with many students citing the successful 1946 (Social Services) and 1967 (Aboriginal Australians) referenda as expanding Commonwealth power and on balance being beneficial. A small number of students pointed out the Commonwealth was able to fund the extensive social security measures in the 1946 referendum because of the financial power gained in the Uniform Tax Case and that this set the stage for Australia's welfare system.

Generally students understand the role referral of powers by the States and complementary legislation in changing the division of powers with stronger responses pointing out the benefits of uniform laws with regard to parents and children of de facto relationships being able to access the Family Court and the value in having a National Firearms Agreement-especially when States attempt to weaken its provisions.

CRITERION 7

As always, the most successful essays demonstrated highly developed skills using essay conventions and had well-constructed arguments supported by relevant examples and explanations while weaker responses conveyed information in a disjointed way.

QUESTION 5 (69 RESPONSES)

The nature of the question caused some difficulty for candidates. The first part of the question can be read as requiring a philosophical response, so characteristics of customary law which relate to kinship, family and land, combined with oral tradition compared with a Western perspective of a deliberate, documented and officially enforced set of laws could necessitate a detailed discussion. [Then the aspect of *terra nullius* is only one element of customary law that can be incorporated into Australian law and so requires a more detailed discussion of the perspective of land ownership.] Thus many short answers were unable to effectively link the two elements so many responses were patchy and did not cover the whole question.

Most candidates did, however, have a solid understanding of the concept of *terra nullius* and how the Mabo case extinguished that concept and incorporated Aboriginal and Torres Strait Islanders custodianship into Australian Law. The link between this significant change and traditional customary laws was often not clear.

SPECIFIC COMMENTS

- Sequencing was an issue- to be logical, outline the characteristics of customary law, describe the difference at invasion with *terra nullius* and then how it was then extinguished by Mabo.

- Key idea that should have been in all responses, that *terra nullius* did not recognise Aboriginal and Torres Strait Islanders customary law, so the British settlers were able to justify possession of the land and the next 200 years was a struggle to retrieve that recognition. This link was not always clear or enunciated.
- While the difference in punishment regimes between customary law and Australian law is a clear variance, it should not be the dominant description or discussion point.
- The nature of land, its ownership or its custodianship, needed to be the big idea to achieve an 'A' rating on this question.
- An incorrect understanding of history affected some candidates' responses - Captain Cook was not the leader of the British settlement of Australia, so had no influence on the declaration that New South Wales was *terra nullius*. He have may recommended to the British parliament that there were no permanent residents in this land, but he was not part of the First Fleet. He mapped and claimed the land for Britain, but did that automatically imply *terra nullius*? If this statement is used, it needs to be accurate and supported with evidence. Candidates are advised to be judicious in their inclusion of such statements.

QUESTION 6 (96 RESPONSES)

There was some confusion from teachers and students around the exam specifications for this section. Although Criterion 7 was assessed in the section, only Criterion 2 was assessed as part of the short answers.

The key part of the standards around Criterion 2 is explanation. In regards to the role that parliaments play in passing legislation there was a full range of responses.

Some of the strengths were:

- discussing why politicians or parties might initiate legislation
- different types of bills that can go through parliament (how common these bills are and the likelihood of success)
- as well as the process in some detail

Some students treated this response like a recipe, providing the list of readings, repeating in each house with royal assent at the end. These types of responses received some credit but unless extremely thorough did not generally achieve higher ratings.

The cue word of 'briefly' was not adhered to by many students when evaluating the strengths and weaknesses of legislation, many students forewent the above and jumped straight in to discussing the merits of legislation. On the other end of the spectrum some students did not mention at all or only listed a strength and or a weakness as a tack on at the end of their response.

With these type of responses, the balance/weighting is key and both the standards and cues within the question provide the direction for this.

Strong responses including evidence, examples and exceptions to the norm.

QUESTION 7 (93 RESPONSES)

This question was generally well answered.

Candidates really understood the concept of common law and were able to use a range of examples as well as evaluating the strengths and weaknesses.

Some of the common mistakes were to just use the key terms around common law as if it was a checklist (i.e. ratio decidendi, stare decisis, overruling etc.) without fitting these suitably in to their response.

Some students made obvious errors around how common law worked including discussing consistency in sentencing.

With this response the students that got the balance right between discussing the way that common law is developed before going in to strengths and weaknesses were generally rewarded with higher ratings.

Interestingly for Question 7 many students wrote numerous pages about common law, this is not a requirement to receive a high rating and students that can communicate in a concise manner are able to achieve higher ratings in around 2 pages.

QUESTION 8 (24 RESPONSES)

Identification and definitions of Law Reform groups/bodies was often not very clear. Candidates needed to name specific groups and bodies (the question required two) rather than expect the marker to guess at what they are responding to. Some answers clearly misunderstood the nature of LR groups/bodies- they do not change the law just by their presence; they are asked to investigate, report back and then the politicians decide whether such recommendations will be translated into new or amended law. The reasons for the existence of such groups/bodies was not often clear.

Most students could describe the nature of LR, use some real examples of recent ones (Royal Commissions often), but again not really evaluated their success or barriers, as required by the question. So while many candidates certainly could describe some elements of LR, very few were able to write a complete short answer- maybe ran out of time or did not prepare for this question.

SPECIFIC COMMENTS

- Law Reform as a concept and the groups involved are part of the dynamic process of adapting and updating law, not change it itself.
- There is a difference between 'bodies' and 'groups'. Generally one is a formally instituted 'body' while the other are often spontaneously formed 'groups'. So ALRC, TLRI, Parliamentary Committees, even political parties are formally constructed 'bodies' while lobby 'groups' like Get Up form as a result of a single issue- they may develop into a formal 'body' over time, though.
- Over-generalisation needs to be avoided, e.g. "Government sees recommendations from judges, lawyers [etc.] less valuable."

QUESTION 9 (32 RESPONSES)

This was a broad / general question which had its advantages in that students could describe their observations about the nature of International Law and its place in the world, but that could also be seen as disadvantage for some candidates because being too broad poses the question, what do I actually focus on? The most successful candidates were able to concisely evaluate the value of IL but also to identify that it has limits especially if sovereign states do not

codify IL with domestic law. Better students identified and discussed the enforcement options of IL. Weaker students, however, found this part of the question both challenging and confusing.

Thus, it was pleasing that this question allowed students to present a credible answer on IL, and it was clear that good candidates relished the opportunity to demonstrate their understanding and knowledge. Students who investigated the Rohingya Topical Legal Issue were able to use some evidence in their answer.

SPECIFIC COMMENTS

- Students must make sure they answer the whole question asked, so evaluation is as important as knowing what IL is.
- Students must make sure that their examples link directly to the enforceability component of the question.
- Essential to state that IL can only be enforced domestically if it becomes incorporated into domestic law.
- While detail was impressive, just writing an answer that specifically describes and outlines the IL and Australian perspective of refugees presents an overly narrow response to the question and loses sight of key general conventions- excellent answer but worried whether it took extra time, given its length (4 pages for a 20 minute short answer)

QUESTION 10

GENERAL COMMENTS

A topical issue essay was reintroduced this year, assessing Cr 5 and 7 only. Candidates were also required to address relevant aspects of Part 3 of the course so as to meet the requirements of Cr 2. Strong essays managed to cover their issue in detail, whilst still addressing Part 3 of the course (largely covered in Cr 5 SE 2 and 5).

In future, candidates are encouraged to consider the standard elements of Cr 5 to ensure they meet the expectations of Cr 5. *In addition, students need to give careful thought to addressing the question. In many instances the 'evaluate' part of the question was largely ignored.*

Some essays tended to be opinionative, lack detail and often contained information that was not relevant. Students are encouraged to research their issues well in order to make sure they know

the legal details relevant to their issue. For example, it was disappointing that so many essays on gambling law reform did not mention the relevant legislation or the parliamentary committee on future gaming markets in Tasmania.

MINISTERIAL CODE OF CONDUCT (4 RESPONSES)

CRITERION 5

An effective explanation of the issue required precise and accurate outline of the purpose and role of Ministerial Standards in connection to the law making institutions of our Westminster system. Opportunities existed, for example, to discuss the relationship between our standards, responsible government and the rule of law. Reference to the latest iteration of the Federal Ministerial standards themselves in this respect would have been helpful. It was disappointing how little of the wording from the standards was adopted or even paraphrased in student's responses. Students spoke about the standards in reasonably vague and general terms. Students in future need to be mindful in their preparation to look for and learn precise, accurate and relevant documentary detail (whether its legislation, reports or in this case Standards Documentation) to support their explanations if their topic is centered around a written document.

Most answers concentrated on the Barnaby Joyce situation but found it difficult to explain precisely what standards he had been alleged to have breached and precisely what behavior was alleged to have breached these standards and what exactly had been the consequences of the alleged breach. Precision and accuracy is important in explaining and evaluating a topical issue. For instance, some candidates took for granted that "Barnaby Joyce had been found to have breached Ministerial Standards" when one of the issues to be discussed was whether such an unequivocal determination had been made before Barnaby Joyce stepped aside of his own accord.

More successful answers grappled with the 'status of Ministerial Standards' in terms of our law making processes, managing with varying degrees of success, to point out that the standards were not independently enforceable in the way that laws were, relying on the discretion of the Prime Minister to investigate and enforce the standards. Some candidates pointed out that enforceability ultimately came down to the political mood of the times. It was encouraging to

see students attempting to incorporate differing points of views, particularly in relation to the 'lack of independent oversight' and the newly incorporated ban on sexual relations.

More attempt could have been made by some candidates to cover a range of incidents, such as circumstances surrounding Peter Dutton for example. Students need to be mindful to ensure that their topical issues research stays abreast of the issue as it develops over the year.

GAMBLING LAW REFORM IN TASMANIA (59 RESPONSES)

- Introduction to the issue – why topical, background in Tas, relevant legislation, current situation (Tas Gaming Control Act, Federal monopoly.)
- 2018 State election, position of the parties (this was not a landslide result!)
- Parliamentary Committee – comment on the use and purpose of committees
- Relevant pressure groups
- Relate to nature and functions of the law

THE IMPACT OF SECTION 44(I) OF THE AUSTRALIAN CONSTITUTION: (74 RESPONSES)

- Introduce the issue – why topical, background and impact (mention of specific candidates good, in addition recognising the difference between Senate and H of R vacancies)
- Joint Standing Committee on Electoral Matters (May 2018) – evaluate the use of committees
- Recommendation to change the Constitution – how (specific mention to S128) and barriers to, difficulty of foreseeing changes in the future
- Relevance of the section given the multi-cultural nature of the Australian population
- Role of the High Court as the Court of Disputed Returns (include relevant precedent – students who did this, did so effectively)/interpretation of statutes
- Possible impact on the balance of power

The essays on S44 were generally well structured.

RESPONSES TO THE *ULURU STATEMENT FROM THE HEART* (48 RESPONSES)

CRITERION 5

For the most part students who attempted this question were able to assess differing legal and political views on enshrining a First Nations' Voice in the Constitution to advise on matters whenever Parliament makes laws under section 51(xxvi) and section 122 of the Constitution and establishing a Makarrata Commission to supervise agreement making between Commonwealth and State Governments and truth-telling about history.

What set the strongest responses apart was the argument which underpinned the information selected. They pointed out that a notable change in the discourse since the *Uluru Statement from the Heart* is pressure for substantive change rather than symbolic minimalism. As required, they focused on developments in 2018 such as the bi-partisan Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples 2018 and its Interim Report which acknowledged the diversity of views within First Nations and non-Indigenous Australians and the reasons for and against incorporating this voice into our Constitution which is so difficult to change. Some students cited opinion polls which evidenced majority support for constitutional enshrinement of a First Nations' Voice.

Some students pointed out the ease with which ATSIC (1989-2005), a former representative advisory body, was abolished because it was established by Commonwealth legislation. Other students acknowledged the views of Tasmanian Aboriginal academic, Dr Emma Lee who presented at Lawfest and argued against *The Uluru Statement from the Heart* and for the current Tasmanian model which involves consultation between Indigenous Tasmanians and the State Government to establish joint management processes for Tasmania's protected areas, favouring legislation over entrenchment because there are fewer barriers.

While many students noted the current Federal Government's rejection of *The Uluru Statement from the Heart*, only a handful pointed out the possibility of a different approach if the current government is unseated in the upcoming Federal Election. A few students correctly cited the ongoing treaty negotiations with First Nations Peoples in states such as Victoria and South Australia, with the Victorian Parliament in June 2018 passing Australia's first treaty

legislation, *The Advancing the Treaty Process with Aboriginal Victorians Act 2018*. Given the recent election results in Victoria, the treaty making process there is likely to continue.

For those students in 2019 who are keen understand the Final Report of the Joint Committee, released after the 2018 Legal Studies exam, in essence: “The key point of this report is that The Voice should become a reality, that it will be co-designed with government by Aboriginal and Torres Strait Islander peoples for Aboriginal and Torres Strait Islander peoples right across the nation.

After the design process is complete the legal form of The Voice can then be worked out. It will be easier to work out the legal form The Voice should take once there is clarity on what The Voice looks like.”

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Constitutional_Recognition_2018/ConstRecognition/Final_Report

CRITERION 7

Students who were expecting to be assessed on Criterion 2 were not disadvantaged when structuring their essay around the processes of law reform given the wording of the question and the overlap between Criteria 2 and 5. As always, the best essays demonstrated highly developed skills using essay conventions and had well-constructed arguments supported by relevant examples and explanations.

QUESTION 11 (41 RESPONSES)

It was encouraging to note that many students had clearly utilised the information provided at Lawfest by Tim McCormack and Matt Killingsworth. Of the three topics, these essays were the strongest. The greatest difficulty for candidates was in providing information on domestic legal and political issues in relation to this TLI. Any attempt was rewarded.

Possible points:

- Background – 1982 Burma Citizenship law, recent conflict and consequence of
- Prompted UN Fact-finding mission
- Application of Rome Statute – ICC (limiting factors)
- United Nations Security Council – role of and limitation

- Other relevant international law (where it comes from, both treaties and customary) – UDHR, Genocide Convention,
- Possible means to address the conflict – likelihood of success
- Australia – students offered a wide range of information. Some discussed our treatment of the Rohingya refugees and possible breaches of human rights – Article 9 UDHR and Article 33 Refugee Convention. Noted that we were a dualist country in our approach to international law.

Pressure groups could also be discussed.

QUESTION 12 (196 RESPONSES)

Two central features of the adversarial trial process in resolving legal disputes are party control and impartial adjudicators.

Explain these two central features and evaluate their effectiveness in ensuring that the trial process is just and fair and that the truth is uncovered.

This question had both explanation and evaluation to address. The first part was to explain both party control and impartial adjudicators. The second part addressed evaluation and included concepts of 'just and fair' and 'truth is uncovered'. This seemed a straightforward question. However, there were many different interpretations in response to it.

"Impartial adjudicators" confused many candidates and was interpreted in different ways. Some candidates thought this meant the jury only because "adjudicators" was plural. Others interpreted it as the judge only (as per the course document). A third interpretation was to discuss both the jury and the judge. Because the question did not make it clear, the answers were varied and all interpretations were accepted.

Another difficulty encountered by candidates was choosing relevant information to include and what information to leave out. Candidates know this section of the course well and there is far more to write than can be written in thirty minutes. As already stated, this question requires both explanation and evaluation. The focus was on impartiality of the adjudicators and party control. These two features can incorporate other features such as strict rules of evidence and procedure but it must be written to address the question and shown through analysis that they are connected to the ideas of just and fair or truth uncovered.

Weaker answers focused on description and often did not address analysis or concluded that this was 'just and fair' without showing how. Some responses described unnecessarily all the features of the adversary system and did not organise nor structure their response in terms of the specific question.

Although communication is not assessed in this section, the way in which information was communicated and the format in which it was presented can help or hinder candidates in addressing the question. This section required a short answer of thirty minutes and was different to past years where an essay was required. Many candidates chose the essay format while others addressed the question in paragraphs or headings and some also included dot points into their chosen format. All were accepted as it is the information and analysis that is assessed. Many candidates who wrote in forms other than the essay format tended to choose relevant information to answer the question.

The skill required for this section is to answer the specific question by choosing the crucial information and evidence to support evaluation. When the essay format was employed, too much time was wasted where introductions and conclusions unfortunately gave no information to address the question. It also led to many sentences with little or no information. Another problem with the essay format was that it led to general essays about the adversary system. These answers read as prepared answers.

The best answers kept to the question, had relevant information and were well structured and argued but not necessarily in essay format. These answers moved from description to explanation of the two features and gave evidence or used concepts and theory from the rule of law, independence of the judge and natural justice to evaluate the two features and, therefore, were well rewarded.

QUESTION 13 (113 RESPONSES)

This was a very straightforward and predictable question for students to answer. As such, it was expected that students could be very well prepared to respond to the question. Whilst a conclusion is not necessary for a 30 minute essay, the essays with a brief introduction that highlighted the key commonalities of ADR and the key limitations of the adversary system that ADR seeks to overcome often were well set up to develop strong evaluation.

Most students attempted to address two ADR processes, but not two bullet points of ADR processes, as was given in the syllabus. For example, many students only addressed conciliation and arbitration, which are not two separate ADR processes in the syllabus. Doing this would not have prevented passing the question, but it made it difficult for students to reach the necessary depth of analysis and evaluation required by the question.

Many students discussed mediation as an ADR process, which was often well done, but to achieve greater evaluation an example and a discussion regarding how mediation may overcome limitations in the adversary system was also implemented into stronger answers. Those who discussed restorative justice practices and tribunals often did so quite well. Restorative justice was particularly well evaluated when examples including circle sentencing for indigenous peoples were discussed. For students seeking to achieve very strong marks for this question, raising examples and then utilising them into their analysis was really important.

Whilst a lot of students were able to identify that ADR may be faster and cheaper than the adversarial process, they needed to also highlight that the success of any ADR is dependent upon the parties themselves being willing to compromise and reach an agreement. ADR does not always require a resolution, and failure to meet one could only exacerbate the problems in the adversarial system by causing further delays and costs. Students seeking to achieve a strong mark for this essay also needed to mention other limitations of ADR, such as the lack of precedent established, the difficulty in enforcement and the potential of dissatisfaction between parties due to power imbalances. Many students were able to identify the strengths of ADR including confidentiality, protection of shared future interests and parties sometimes having further control over the outcome.

QUESTION 14 (104 RESPONSES)

The most effective responses to this question, which was very straightforward and open enough to provide many opportunities for candidates, included a range of case and legislative examples to support discussions. Again, the 30 minute responses do not require formal essay structures such as introductions and conclusions, but nevertheless benefited often from having an introduction to highlight the aims of the criminal justice system and why safeguards for the rights of the accused and the victim are necessary.

Strong responses included a good selection of safeguards to protect the rights of the accused. As the question required two ‘main’ safeguards, it was important that the responses did not only mention smaller processes such as access to an interpreter. There were some responses that included double jeopardy as a safeguard which is less relevant today due to the recent large erosion/dilution of the principle in law today. Instead, processes such as bail, legal representation/legal aid, burden and standard of proof, preliminary proceedings and presumption of innocence generally resulted in stronger analysis. When these processes were linked to relevant legislation and examples in case law, the answers were more effective. A common error was that remand was a protection for the rights of the accused.

Strong responses in relation to a safeguard to protect the rights of the victim included mentioning the use of Victim Impact Statements and victim compensation programs. Some answers also mentioned remand as an option to protect the victim. Common errors were to discuss the need for the victim to obtain legal representation through legal aid.

Effective analysis in relation to these safeguards included relevant examples of crimes committed when an individual was on bail and suggested bail reforms and improvements in the treatment of the victim of crimes by the legal system. For example, changes in the way in which the victim can confront their accuser could be used. Stronger answers looked at how this impacts the rights of both the victim and the accused – for example making bail tougher would increase remand which costs the community a substantial amount of money per day and increases recidivism.

QUESTION 15 (205 RESPONSES)

STRONG ANSWERS TO THIS QUESTION

- **Spent less time on background information**, and instead launched, quickly, into the crux of the question. Relevant legislation, the relevant sentencing options and a list of the five aims of sentencing was adequate to begin an answer on this topic. Writing a page or more on the meaning of each of the aims of sentencing was excessive, and took away from the evaluation requirement of this question.

- **Showed knowledge of the sentencing options in Tasmania.** Many answers attempted to list all the sentencing options available in their introduction, but only listed a portion of the options and/or were inaccurate when it came to the “hierarchy” of these options. It is not necessary to list all of the options, but if claiming to do so, getting it wrong can undermine an answer. Some answers incorrectly added ‘parole’ to their list of options. It is safer to focus on the specific options to be discussed, and to make some comparisons where relevant. It may also be relevant to discuss broad ideas, such as whether Tasmania has many restorative/diversionary options in comparison to punitive options.
- ***Described* the sentencing principles that imprisonment seeks to achieve, and *evaluated* these principles using evidence** such as crime data, prisoner demographics (including overrepresentation of Indigenous people in Australian prisons), prison rates, recidivism rates, specific in-house rehabilitation programs, costs, political policies, and expert opinion. Weaker answers focused on examples of criminal cases (e.g. a murder case) and told the “story” of these cases rather than focusing on the sentencing process. Really importantly, effective answers recognised the link between the principle of rehabilitation and individual deterrence. If a sentencing option appears to lack rehabilitative programs and does not appear to target the source of offenders’ criminal behaviour, then it is difficult to argue that it operates as an individual deterrent.
- **Evaluated imprisonment via a discussion of strengths and weaknesses of this option.** The best answers were able to point out the shortcomings of imprisonment in terms of meeting the aims of sentencing, while noting the relative strengths of this option – particularly for violent and dangerous offenders. Some answers painted an overly idealistic impression of imprisonment as a sentencing option.
- **Selected and evaluated a restorative/diversionary option of sentencing.** In alignment with the question, strong answers selected a specific, Tasmanian sentencing option that could be categorised as restorative/diversionary - for example Suspended Sentences, Drug Treatment Orders, Community Service Orders, and in the case of family violence an order to attend a rehabilitation program. These answers involved a clear and accurate description of their selected option. Some answers, which discussed

Suspended Sentences, did not accurately describe this option and confused it with deferred sentencing. Weaker answers did not refer to a specific option and instead wrote broadly about restorative/diversionary or rehabilitative justice; while these terms are highly relevant, failing to refer to a specific option presents challenges for the evaluation aspect of answering the question. Some answers focused on 'fines' as an alternative to imprisonment. Better answers steered away from fines, as this option is not a strong example of restorative/diversionary sentencing (if an example of it at all), and it does not lend itself to rich analysis.

Similarly to the imprisonment option, strong answers discussed the strengths and weaknesses of the restorative/diversionary option they selected. For example, in the case of Drug Treatment Orders, they may be more rehabilitative than prison but whether they achieve the aim of incapacitation is questionable. Further, there are limited places for DTOs in Tasmania (120 state-wide).

- **Recognised the complex nature of sentencing.** Sophisticated answers referred to the variety of factors that come into play when sentencing, and the public's (mis)perception that sentencing is 'black and white' or that judges are simply "too soft". Some answers noted the role the tabloid media may have in the maintenance of this perception. A number of answers also referred to the threat mandatory sentencing legislation may have on the judge's ability to sentence using their expertise and discretion, in order to meet the principles of sentencing. A brief discussion of possible reforms to sentencing legislation was also rewarded.