ASSESSMENT REPORT

LST315117 LEGAL STUDIES

SECTION A – Analytical Essay

General Overview of Westminster

The two major points to emerge from both Westminster questions are:
- students must be aware that liberal democracy is not assessed in the exam
- the Governor-General does NOT exercise executive power in any meaningful way despite widespread belief amongst candidates to the contrary

It was a source of dismay that many students framed their response in terms of liberal democracy rather than Westminster. The exam specifications made it clear that liberal democracy would not be assessed and it’s vital that this is communicated to students.

Although key features such as separation of powers (SoP) and rule of law are common to both systems, many students performed well below potential due to being sidetracked by discussions of pluralism, procedural fairness, legitimate authority and human rights. Legitimate authority does underline the principle of representative and responsible government but is not a substitute for informed discussion of this feature.

Candidates who have a working knowledge of the Westminster system and the Australian Constitution should be able to distinguish between executive power as described in the Constitution and executive power in practice. Constitutional conventions ensure that it’s the Prime Minister and cabinet who wield executive power, not the Governor-General (G-G). Students repeatedly claimed that the G-G:
- has/does scrutinise and/or veto legislation
- has/does dismiss/appoint ministers
- is the commander-in-chief of the armed forces (literally true under s68 but NOT in practice)
- is a key element in the operation of the separation of powers by acting as a check on the power of the legislature
- is the executive power

Although these first three powers theoretically exist, they have never been exercised in the federal sphere under constitutional conventions. Many students made these claims negatively affecting their exam performance.

A legitimate point which could have been made about the G-G is that the limitations on their power is one of the benefits of a constitutional monarchy, as the monarch is unelected.
Question 1 – Identify and explain the main features of the Westminster systems of government in Australia. Evaluate the extent to which these features ensure effective and fair government in Australia.

- General confusion about what exactly the ‘features’ of Westminster are. Many students seem to be going off-course when it comes to the features. Some are using liberal democracy features rather than Westminster features. Student should be writing about the features of Westminster as outlined in the course document.
- General confusion regarding constitutional conventions. Many students attempted to evaluate this feature but most fell short. Without a clear foundational understanding of how conventions work, the ability of students to evaluate how these conventions impact Representative and Responsible Government is lacking.
- Lots of confusion in definitions of constitutional monarchy AND constitutional conventions. Students struggling to clearly define these features.
- Confusion about Hansard. Hansard itself doesn’t make government accountable. It is a record of parliament which can be used to scrutinise things said in parliament.
- Liberal democracy is not a feature of Westminster.
- Too many students writing that Sir Peter Cosgrove is still GG. At this level students writing on Westminster should have up to date knowledge of the system and its central figures.
- The Australian House of Reps currently has 151 members not 150 as stated continually in responses.
- Many students used example cases to highlight the idea of the rule of law but a significant number failed to connect their example cases to that feature. How do the cases of Pell and Einfeld demonstrate the rule of law? How does this ensure effective and fair government?

Question 2 – Explain what is meant by the concept of ‘separation of powers’ (SoP) and evaluate the extent to which this concept is effectively applied in our Westminster systems of government in Australia.

It’s important to note the disparity in performance between questions 1 and 2. Westminster is a complex topic and candidates performed poorly on this question. In order to pass students needed to demonstrate a sound knowledge of the theory and practice of the SoP in Australia. Candidates who perform strongly on this question provided substantial evidence of SoP in practice and the ability to link it to the other Westminster features.
Question 3 – Explain how the power to govern is divided between the Commonwealth and state governments in Australia and evaluate how their capacities to govern effectively have been altered by constitutional referendums, referral of power and High Court decisions.

Most of the students wrote relatively detailed responses for the time allocated. However, it was important that the responses were specifically connected to the question throughout the discussion. The most successful candidates were able to utilise their introduction to explain the Division of Powers structure in Australian government itself first before moving to elaborate on how this has altered over time. This foundation of explanation facilitated more analysis as it allowed students to explain the concept of ‘shared sovereignty’ and elaborate upon its functionality in Australia. It was good to see that many responses included examples and cases that altered the balance of power between the States and the Commonwealth, however the more successful students were able to integrate these examples into their discussions and use them to further establish a clear critical evaluation and a strong point of view.

In the responses that didn’t connect explicitly to the question, there was a distinct lack of analysis in the responses which ultimately lead to a feeling that some candidates simply rewrote the information from their notes as their answer without really crafting a logical, coherent response, which was really insufficient to lead to an A rating. It was particularly interesting to note that the candidates whose essays were more thoughtful and intentionally structured were able to develop analysis and evaluation more easily.

Question 4 – Explain the status of Aboriginal and Torres Strait Islander (ATSI) peoples in the Constitution of the Commonwealth of Australia and evaluate possible constitutional reforms to their status.

There were only a handful of responses on the issue of constitutional recognition of ATSI peoples. Unfortunately none of these actually addressed the question and focused instead on their social status or custom law. Mabo was raised a number of times, which was not relevant to the question. There was no discussion of the previous push for ATSI recognition in the Constitution, the Uluru Statement from the Heart plus responses to it, nor the recent appointment of an Advisory Council led by Marcia Langton to guide the Minister on this issue.
SECTION B (Part 1) – Short Answers

Question 5 – Critically analyse the characteristics of Aboriginal and Torres Strait Islander customary law in the legal and political systems of Australia, paying particular attention to the concept of terra nullius.

Most candidates were able to give a good account of customary law as it was before British settlement. It was rightly pointed out that ATSI peoples had well-developed structures, traditions and laws. Customary law was orally based, dating back to their ancestors in the Dreamtime. There were tribal agreements, kinship ties, rituals and traditions. To ATSI peoples, the land is sacred and they are custodians of it. The land owns them and therefore, all people have the responsibility to look after it. This is a different view from that of the British settlers who came with the concept of land ownership. Customary laws related to which food could be eaten and how it should be shared, to peoples’ rights and obligations, marriage arrangements and punishments for those who broke the rules. There was not a single customary law as there were 700 language groups and 200 different kinship groups. Their laws were not codified and there was no government. Instead, disputes and punishments were decided by a group of highly respected elders. The form of punishment depended on the seriousness of the crime committed. For lesser crimes, shaming and public ridicule were effective and for more serious crimes, the threat of supernatural punishment and banishment from the tribe were effective deterrents. The punishment of spearing, which leaves a lifelong scar, was also common.

The majority of candidates could define and explain the concept of terra nullius or empty land, based on the fact that Aboriginals were nomadic and had no organised structure of land ownership. ATSI customary law was ignored by the settlers. The taking of land led to the breakdown of customary law and kinship ties. ATSI people were not recognised by the British as natural people with a legal personality. Governor Macquarie’s 1816 Proclamation to the Aboriginals showed that the protection of the law was a privilege to be granted or withheld from ATSI people. Since the British government did not consider the Aboriginals as civilized people, they had none of the rights of a conquered nation, but they could be brought before the courts for any misdemeanors against the settlers. They were now British subjects without the rights of British citizenship. The case of R v. Jack Congo Murrell 1836, found that ATSI people are subject to British law and not protected by customary law. Similarly, Grey’s Report (1840) stated that English law should entirely supersede custom law. The case of Tuckiar v. the King 1934 showed the lack of procedural fairness and disregard for ATSI customs and law with an all-white jury convicting Tuckier in two hours without hearing evidence or allowing proper representation, and as such, under appeal this was overturned by the High Court. Candidates rightly referred to the 1967 referendum that allowed the Commonwealth Government to make laws for the ATSI people, as opposed to the separate states, and allowed them to be counted in the census, thereby recognising them for the first time as Australian citizens. It should be noted that they had already been granted the vote in 1962. Terra nullius was finally overthrown by the Mabo decision in 1992 after Eddie Mabo fought the Queensland Government over the ownership of Murray Island and finally took his case to the High Court. The following year, Paul Keating’s government passed The Native Title Act, which lay the foundation for some ancestral lands to be handed back to ATSI people.

Some candidates discussed how currently, customary law is being integrated to some extent into Australian law in the form of circle sentencing and, in some cases, judges and magistrates allowing customary law punishments. Some also pointed out that the existence of ATSI peoples are yet to be acknowledged in Australia’s Constitution.
Question 6 – Explain the role that cabinets and parliaments play in initiating and passing legislation. Briefly evaluate the main strengths of parliamentary legislation as a source of law.

A twenty minute short answer requires candidates to choose relevant information to address each part of the question. In this question there are four key parts to the first sentence of the question: the role of Cabinet, the role of Parliament in both initiating and passing legislation. The question also asked to briefly evaluate parliamentary made law as a source of law. The best candidates chose relevant information to address all parts of the question.

Candidates knew well the process of passing a bill through Parliament. However, this was not the only focus of the question. Many candidates repeated the first sentence of the question, commenting that the Cabinet and Parliament played significant roles and mentioned it no more, but went on to describe in detail the process of a bill’s passage through Parliament. Some candidates mixed up the concepts of initiation of a bill with the introduction of a bill into Parliament.

Initiation of a bill and the role of Cabinet were not attempted by many candidates. Cabinet is in control of the initiation of bills. This is a process where ideas for bills can come from a variety of sources such as election promises, a public servant, Royal Commission, white papers (Government proposals for legislative change), an incident in society (eg. gun law reform or laws on terrorism) or interest groups. Each bill is assigned to the Minister responsible for that departmental area. The Minister responsible then needs to overseer the drafting of the bill, calling on experts and using parliamentary counsel to write the bill. An explanatory memorandum is also drafted. (This gives the intentions of the bill, its financial impact and ensures that it does not contravene human rights.) Cabinet also prioritises bills, including giving time in Parliament for Private Members Bills which are initiated by members other than the Government.

The process of passing a bill through Parliament was well understood and documented by most candidates. The role of the Opposition and the role of the Upper House were less well done.

As this question had many parts, some of the answers were three to four pages which is too long for a twenty minute short answer.

Question 7 - Explain the role of judges in developing common law. Briefly evaluate the strengths and weaknesses of the Doctrine of Precedent in the common law-making processes.

Candidates who chose this question had a good understanding of common law. However, some advice to students is to read the question carefully to ensure all parts are answered, especially the evaluation, and to practise correct spelling of words you know you will be using, such as precedent, persuasive, obiter dictum.

The first part of the question required reference to the Doctrine of Precedent, statutory interpretation and judicial creativity, as seen in the Mabo case.

Candidates successfully described the significance of court hierarchy in the development of precedent and its elements such as stare decisis (to stand by what has already been decided), ratio decidendi (the reason for the decision), obiter dictum (words said by the way), binding and persuasive precedent and most were able to successfully discuss some strengths and weaknesses of the doctrine. Many, quite
rightly, used cases to support their explanation of common law, but some went into a lot of detail at the expense of evaluation, the second part of the question.

When asked to evaluate, candidates need to “provide a detailed examination and substantiated judgement concerning the merit, significance or value of something.” That is, candidates needed to discuss the elements of the Doctrine of Precedent, and its strengths and weaknesses and come to an overall conclusion about its merit, or otherwise, in lawmaking in Australia.

Many candidates discussed the flexibility of precedence, depending on the level of courts in the hierarchy and where the material facts of the case are similar, as a positive of the doctrine. Some spent too much time on explanations of reversing, overruling, distinguishing and disapproving at the expense of making more points. In a twenty-minute answer, candidates need to be concise in order to answer the question fully.

Some strengths of the Doctrine of Precedent are:

- Courts need only consider issues of justice and rights when hearing cases. They are not subject to political considerations.
- Precedents are set for the future, which allows consistency and predictability for future cases.
- Courts can overrule or reverse a previous decision, based on interpretation of the meaning of an Act. For example, courts can restrict the law through a narrow interpretation of an Act, for example *Deing v Tarola* (1993) ‘Studded belt case’, where a weapon was more specifically defined.
- Courts can also extend the law through a broad interpretation of an Act, for example, *Tasmanian Dams Case* (1983), where ‘external affairs’ was extended to cover international treaties.

Weaknesses include:

- Precedents can be slow to change because there has to be a case brought to court and poor law can be entrenched in the legal system.
- The courts cannot take the initiative and create a new legal principle in the absence of an actual case coming before them.
- The courts do not always reflect current community thinking and values and they are not accountable to the public.
- Case law through the courts is ex post facto, that is, legal rules are created after the fact.
- The parliament are sovereign and can override judge-made law.
- Judges may be conservative, rather than activist. They may not see their role to be lawmakers.

Overall, the Doctrine of Precedent allows the law to be interpreted and furthered, especially in tort law such as negligence. In addition, courts can influence parliamentary lawmaking through their interpretation of an Act, their statement (obiter dictum), by highlighting problems such as bullying – Brodie’s law and acting creatively as in the High Court’s Mabo decision. If a case is brought before a court, it can also act in areas that parliament is reluctant to.

In this question, many students chose to express at least some of their discussion in dot points or by the use of headings. As criterion 2 is the only criterion assessed on this question, this is perfectly acceptable.
Question 8 – Explain the role of two main groups/bodies who can initiate or influence changes to the law. Briefly evaluate some of the main barriers to successfully reforming the law.

This question gave students broad scope to discuss any law reform groups, both formal and informal. Candidates who discussed the ALRC, Royal Commissions or other formal bodies, and/or specific lobby groups gave themselves the best chance of success. Unfortunately, a number of students were too vague or general and referred to examples such as general action on climate change without identifying specific groups and the law reform that may or did result from their actions. The key issue here is how groups influence law reform so there must be actual examples of law reform and/or the law reform process discussed. And they should be Australian groups!

Some also used Mabo as an example which is actually listed in the course document as an example of an individual’s influence. It’s true that the Mabo case involved multiple applicants initially but it’s pushing the point to describe them as a lobby or interest group.

Although brief introductions may benefit responses. Writing long introductions/conclusions can waste valuable time that would be better spent addressing the key aspects of the question.

Finally, the question required discussion of the barriers to reform. This term is referred to in the standard for criterion 2 and the best responses were framed in terms of whether there was political will, political power and community support to change the law. Each of these is a potential barrier. Difficulty organising political demonstrations and/or getting media coverage are not suitable examples.

Question 9. Explain how International Law differs from Australian domestic law. Briefly explain why a state/country may obey International Law and how International Law can be enforced. In your response refer to ONE of the following themes:

- Protection of the atmosphere and climate change
- Human Rights
- Migration and Refugees
- International Conflict (War and War on Terrorism)

This question was reasonably well done with most candidates having a good knowledge of the differences between Australian domestic and international law. Most were able to refer to one of the themes to demonstrate their understanding and to show how this takes place. Whilst only ONE theme was expected, some went further to cover more than one theme.

Good answers discussed legislative and administrative processes and structures of domestic and International Law as well as the judicial processes and structures. Reference was made to Australia’s dualistic nature and International law having no direct effect in Australia’s law. Reasons for International Law are similar to reasons for domestic law:

- IL helps regulate relations between nations in order to minimize the possibility of disputes. International Law is about dispute avoidance and contributes to International Law harmony.
International Law establishes procedures and forums for the settlement of disputes between nations if they arise. (International Court of Justice, International Criminal Court, War Crimes Tribunal)

International Law provides a practical way of managing and regulating many issue of global concern.

A definition of each along the lines of:

- **Domestic law in Australia** consists of the statutes created in the Parliaments (Federal, State, Territory), the regulations created by various delegated bodies and the Common Law created by judges in the higher courts.

- **International Law** governs the legal rights and obligations between Australia and other countries and their citizens. The two principal sources of International Law are set out in Article 38 of the Statute of the International Court of Justice (ICJ):
  1. **International Conventions or treaties** – Australia enters into a treaty arrangement with one or more other countries and is bound by the provisions and obligations of that treaty. (can be bilateral, multilateral)
  2. **Customary International Law** – long established understandings, arrangements or precedents between nations on certain matters become part of International Law.

- For International Law to be legal in Australia, it must be incorporated in, or implemented by way of, legislation. (transformation of international law into domestic law)
  - e.g. - Australia implemented its obligations under the Convention on the Elimination of Racial Discrimination by enacting the Racial Discrimination Act (Cth) 1975.
  - e.g. – Australia meeting its International Human Rights obligations. In 2010 Australian government established a Parliamentary Joint Committee on Human Rights, which scrutinises compliance of all new Bills with human rights treaties, tied to international human rights instruments and makes recommendations in relation to it.

- International Law has some indirect effects on Australian Law as it can influence statute law.

- International Law may influence the development of the common law. e.g. – reference to International Law regarding the meaning of ‘terra nullius’ in the High Court’s decision in Mabo (1992), which recognised Aboriginal entitlement to native title and the Tasmanian Dam Case (1983) where, through the International Law interpretation of “external affairs” International Law widened the scope of Commonwealth power.

**How is International Law enforced?**

International Law cannot be enforced in same way as domestic law. Australia has its own lawmaking bodies (parliament/courts) whose laws are enforced by the police and courts-no equivalent exists at the international level.

There is no international legislature that can enact rules of International Law that are binding on all nations and there is no international court that has authority to compel a country to appear before it. We do have the International Court of Justice, but there is no international police or military force that can enforce its decisions.

In many ways, compliance with international law and the decisions of the International Court of Justice is optional. In practice most countries do conduct themselves within the limits of international law to maintain international harmony. Countries that don’t, come under huge diplomatic and moral pressure from other countries.
There is recognition of the need to protect common and universal human values. For example, Australia is dedicated to alleviating human suffering and protecting civilians in times of armed conflict through the application of international humanitarian law and has been a strong support of the Geneva Conventions since 1950. Australia has also become a signatory to OPCAT as it recognises the importance of the protection of the liberty of people under Human Rights law.

Other mechanisms putting pressure on States to comply include: Special Rapporteurs, Universal Periodic Review, Periodic Reports, Statements on Interpretation and Individual Complaints Mechanisms.

SECTION B (Part 2) – Topical Issues Essays

General Overview of Topical Legal Issues

Essentially the topical legal issue (TLI) essay is about law reform and the process of changing the law. It requires students to understand the institutions and processes involved in changing the law. Students need to be familiar with the informal and formal bodies that push for changes to the law. The course document covers these in Section 3.4.

The question this year asked students to evaluate, in reference to their topic, how successful these processes have been in bringing about change or reform.

To answer a TLI essay effectively students need to have a clear understanding of:
- What is the issue?
- Why the issue is topical in the current year i.e. 2019?
- What is the law/laws that cover the topic and how are they to be reformed?

This assesses criterion 5.

Next, students need to break down the relevant processes for change, they need to ask themselves:
- What Institution or process has attempted to change the law? i.e. has there been for example, a Law Council report and, if so:
  - What changes is it recommending?
  - What action is it taking to change the law?
  - From there, how successful has this process(es) been? (evaluation)

This assesses criterion 2.

When preparing for the topical legal issue students should keep the following in mind:
- The bulk of the essay should come from developments in the year of study.
- This is not a persuasive essay - the task is to outline the competing legal and political views on the issue and evaluate the developments which facilitate or impede law reform.
- Think of this essay as essentially being concerned with changing the law and use your issue to show how legal change does or does not occur.
- Be able to discuss the impact of International law on your issue, the extent to which domestic law mirrors our international obligations and the limitations of enforcing international obligations.
- Keep up with the latest developments.
- Be clear about the role of governments, parliamentary commissions, law reform commissions, lobby groups, the media and public appetite for law reform.
- This essay assesses three criteria so make sure you allow sufficient time to do it justice. You can use dot points in short answers if you need to, but not in essays without detracting from your response.
Question 10 Topical Legal issues

Banking Royal Commission (BRC)
Better student responses included:
• understood the BRC came about after many years of public pressure from the media, consumer groups
• understood that a Royal Commission is a law reform body that influences and recommends changes to the law
• evaluated and understood the strengths and limitations of a Royal Commission and used the BRC as example in that discussion.

Weaker responses:
• Spent too long explaining the detail of the recommendations of the BRC. There was very little reference to the law reform process and little or no recognition of the weaknesses of the BRC such as:
  o Royal Commissions can be used as a tool against political opponents.
  o No obligation on the part of the parliament to support or introduce law reform by adopting any of the recommendations.
  o Royal Commission investigations can be time-consuming and costly.
  o Extent to which a Royal Commission can influence law reform depends on matters such as the subject matter and whether there is bipartisan support for the reform.

Raising Age of Criminal responsibility
Better student responses:
• included current events from 2019, such as but not limited to COAG (CAG) working party report, the Law Reform Commission report June 2019, ABC 4 Corners report on Qld Watch Houses, Crossbenches Bill Oct 2019, pressure groups (Amnesty International etc), UN Convention and the Committee on the Rights of the Child, the UN address by Dujuan Hoosan
• the effectiveness of the rebuttable presumption of doli incapax
• evaluated the above processes in terms of the influence they have had to change/reform the law and considered whether it has been successful

The course document requires students to address the topicality of the issue not to show the historical development of the issue.

Weaker responses:
• spent too long focusing on the medical, social and environmental factors that relate to the minimum age of criminal responsibility (MACR) rather than the legal issues
• showed very little reference to the question, did not assess whether the law reform process has been successful
• many students mentioned Karl Stefanovic, the TV hosts opinion as expert opinion, had pre-prepared responses and became muddled in remembering them
Drug testing at music festivals

This question required students to describe the main legal and political issues relating to drug testing at music festivals. Secondly, students were required to explain the institutions and processes involved in changing the law to allow future testing at music festivals. Thirdly, this question required evaluation of law reform to date and the likelihood of drug testing occurring at future music festivals across Australia.

Although there were excellent responses to this question, the main short coming in weaker responses was their inadequate length and lack of legal and political content. These responses tended to describe the process of pill testing and provide the student's opinion on whether to introduce it at music festivals. There was either no or very little attempt to address the processes of law reform.

Generally responses included.
Description of legal and political issues
- A description of relevant laws. Some of the most discussed laws include the following: Misuse of Drugs Act 2001 (TAS), Poisons Act 1971 (TAS), Criminal Code Act 1924 (TAS), Drug Misuse Trafficking Act 1985 (NSW), Police Offences Act 1935 (TAS).
- A description of relevant political parties and specific parliamentarians either for or against pill testing at festivals.
- Strong responses included a description of police powers relating to searching and arresting for drug possession and other legal issues such as the liability of festival organisers if pill testing was to occur.
- Strong responses described relevant powers such as the residual power of states in this issue.

Explanation of institutions and processes
- Explanation of the pill testing process and the legal issues related to this process, such as the fact that those conducting the testing do not have possession of a drug at any stage.
- Explanation of the role of state parliaments and the bill process if an existing law would need to be amended.
- Explanation of how police powers at festivals could be modified to involve discretion in the use of search and arrest powers involving patrons entering and exiting pill testing areas.
- Strong responses included an explanation of the different levels of government, such as the role of the Hobart City Council as a formal pressure for change. A small number of candidates discussed all three levels of government, referring to federal laws relating to the importation of drugs.

Evaluation of law reform
- Evaluating the success so far, such as the results/experiences from the trial in Canberra at the Groovin the Moo music festival.
- Evaluating the success of informal pressures for change in terms of gaining media attention.
- Strong responses included an evaluation of the obstacles to law reform, such as the lack of political will to move away from a punishment focus to a harm minimisation focus.
- Strong responses also included an analysis of issues surrounding recent searches of festival attendees in NSW, linking it to civil liberties.
- A small number of candidates discussed the issue of rule of law if police discretion is to be used in the future at testing sites.
- Many candidates made references to changing values and needs of society, where the slow pace of law reform in this area, particularly in comparison internationally, is not being met.
Question 11 – Topical Legal Issues

Extradition

This was a difficult topic to apply to law reform and students were rewarded appropriately. Many students approached this topic using case studies.

Case studies used: Hong Kong riots, proposed Australia—China extradition treaty, Julian Assange case Manka Leifa, Hakeem al-Araib.

Better students:
• highlighted the issues surrounding extradition law, rather than just describing the cases in detail
• had a good understanding that Australia has an effective extradition regime to ensure criminals are not able to evade justice simply by crossing borders (Law Council of Australia, 2017)
• understood that if Australia cooperates with foreign countries, Australia must adhere to fundamental rule of law principles and its international obligations (Law Council of Australia, 2017)
• understood that Australia does not facilitate the conviction or treatment of a person in a manner inconsistent with its own democratic values and international obligations. (Law Council of Australia, 2017).

Addressing International Environmental Obligations

Better students
• had chosen a clear focus to the essay such as Great Barrier Reef, Adani mine, climate change
• were abreast of current issues and events for the whole year of 2019
• had a strong knowledge and understanding of the relevant International Law treaties that related to their topic, and subsequently Australia’s obligations
• understood the constraints of domestic policies on International Law obligations and how this impacted on their focus
• showed knowledge of law reform groups that related to their focus eg Extinction Rebellion (climate change).

Other comments, to note for improvement:
• Too many students only focussed on events at the beginning of the year. Whilst it is not expected that students are required to include information to the day of the exam it is not unreasonable that students be aware of events that happen in September, eg Scott Morrisons’ visit to the USA and Dujuan Hoosan, addressing the UN.

Medevac Bill

This question required students to describe the main legal and political issues surrounding legislative changes relating to the medical evacuation of asylum seekers from offshore detention centres to Australia. Students were also required to explain the institutions and processes that brought about this change and evaluate the success of this law reform.

Overall, the standard of the Medevac responses was very high. Good responses were able to explain the atypical way the change to legislation occurred early in 2019 because of the Morrison Government initially being in minority. There were several major developments in 2019 evaluated in strong responses which were framed in terms of reforming the law, directly addressing Criterion 2. Many students made excellent use of the insights into the relevant international and domestic law material by Andrew Wilkie’s address at Lawfest.
Generally responses included.
Description of legal and political issues

- Strong responses also briefly described the purpose of the Migration Amendment (Repairing Medical Transfers) Bill 2019. A small number of candidates also described the purpose of Andrew Wilkie’s Refugee Protection Bill 2019.
- A description of relevant political parties and specific parliamentarians either for or against the medical evacuation of asylum seekers.
- A description of relevant International Law. Some of the most discussed by candidates included the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

Explanation of institutions and processes

- Explanation of the bill process in Federal Parliament. Strong responses discussed the position of the Government at the time of the Medevac Bill passing and how this changed after the most recent Federal Election.
- Strong responses also explained Westminster features such as bicameral parliament and the role of the Senate.
- Strong responses also explained the bill processes before and after the Medevac Bill, especially the repeal bill currently before the Senate.
- Some candidates also explained the relationship between International Law and domestic law relating to human rights.

Evaluation of law reform

- Evaluating success in terms of the number of asylum seekers receiving essential medical treatment since the legislation was passed.
- Evaluating success in terms of an independent process in the hands of medical professionals and not politicians. Strong candidates were able to link this evaluation to the separation of powers, human rights and upholding Australia’s international treaty obligations.
- Strong responses evaluated current government policy and criticism that it breaks international law, while also referring to the difficulties in enforcing International Law.
- Many candidates made references to an increasing need to protect asylum seekers and to provide basic human rights.
- Strong responses also evaluated the likely success of the repeal bill that is currently before the Senate and the impact of this for both asylum seekers and upholding International Law.
Question 12 - Two central features of the adversarial trial process in resolving legal disputes are that the parties in dispute largely control their case (i.e. 'party control') and that disputes are heard before an impartial adjudicator.

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 required candidates to explain and evaluate the two features of the adversarial trial process identified in the question. It was not necessary to identify, explain or evaluate any of the other features in their answer.

The majority of candidates who answered this question were able to correctly describe party control and impartial adjudicator as they relate to the operation of an adversary system but were unable to properly explain these features. Most students were unable to critically evaluate the role the two features played in the effectiveness of the adversarial system as well as the advantages and limitations of the system.

Common errors made by candidates who answered this question:
- identifying, describing and analysing features of the adversarial system not set out in the question
- describing and explaining the features of the adversarial system in considerable detail without any analysis or evaluation
- failing to provide any analysis or critical evaluation of the role the two features play in the effectiveness of the adversarial system
- not providing relevant case examples to support the candidate’s analysis or critical evaluation
- too much emphasis on information not relevant to answering the question such as the differences between a criminal and civil trials, and onus and standard of proof
- analysing the effectiveness of only one of the features asked. In answering this question, there was a tendency for candidates to analyse only party control, not the impartial adjudicator
- a general lack of understanding of the role of the impartial adjudicator including confusing this with the role of the jury.

The best answers initially explained each feature, going on to critically evaluate its role in the effectiveness on the adversary system, incorporating advantages and limitations into their answers. These candidates provided relevant case examples showing both the advantages and where the system broke down as well as contrasting the adversarial and inquisitorial systems. Candidates who did well identified that the trial process does not necessarily uncover the truth, but rather, it is a contest to see which party is victorious at the expense of the other party and therefore the truth.
Question 13 – There are a number of Alternative Dispute Resolution (ADR) processes available to solve legal disputes instead of going to court.

Identify and explain TWO ADR processes and critically evaluate the effectiveness of these processes as a means of resolving legal disputes.

This question required candidates to identify and explain two ADR processes and critically evaluate these processes. It was not necessary to address the first statement of the question by listing all the ADR processes.

ADR processes covered were mediation, ombudsman, restorative justice and conciliation and arbitration. There is key information to cover: types of cases suitable for the ADR processes and then the evaluation against the adversary system. Many students also gave examples of cases and the legislation that enables ADR: Alternative Dispute Resolution Act 2001 (Tas) and Ombudsman Act 1978 (Tas).

Most students had a good knowledge of what alternative dispute resolution processes were and could, therefore, describe the operation of two of them, although some candidates decided to include all key processes.

Some students became confused, it seemed, with what was the ADR and talked about the forum where it occurred. For example, a Tribunal is a forum where Arbitration occurs, not an ADR it itself. Similarly, Restorative Justice is the ADR and so the different options should then have been identified and discussed, rather than Circle Sentencing or Community Conferences being the only ADR option described and evaluated.

Many students were able to identify, describe and evaluate the ADR’s they chose, but many did not support their description and analysis with real or hypothetical examples, cases or relevant Acts of Parliament to demonstrate their understanding of the ADR. An inventive and successful approach attempted by a few candidates was to create a hypothetical situation, maybe a neighbour fence dispute, and trace its progress through the mediation process.

Majority of students were able to effectively describe their chosen ADR’s and expand upon the basic process and most did attempt the evaluation, but the difference was that such analysis needed to be more expansive, use real or hypothetical cases, cases or relevant Acts of Parliament to support their comments. Hence, the more expansive answers, those that used clear and justifiable examples, were more likely to receive the higher ratings. The question asked for evaluation, so to receive the ultimate rating, candidates would be expected to judge and make an assessment of the effectiveness of their selected ADR’s – this is where data in the form of statistical change or accounts of cases/examples becomes very useful.

Some better candidates did stress that ADR’s are primarily used for civil disputes, although the majority assumed the Marker knew that. Students need to ensure they know the difference between the non-binding (at least initially) Conciliation process and the binding Arbitration process. The use of Restorative Justice as an option was both popular and generally well described, although several candidates confined themselves to just one of the strategies, omitting any mention of the others, thus skewing their discussion. As mentioned above, precision is important for example, ensure that the difference between Conciliation and Arbitration is clearly understood. Making the sweeping, inaccurate statement that legal representation is required in mediation meetings should be avoided.
Question 14 – Identify and explain two main safeguards that are built into the criminal justice system to protect the accused and one safeguard or process that protects the victim. Evaluate the effectiveness of these safeguards in protecting the accused and the victim.

Most candidates were able to correctly nominate the two accused rights/safeguards and the one victim right/safeguard but their description and explanation was often too brief, so when evaluation was required the depth of understanding was not as clear as it could have been. Where many candidates came up short was the avoidance of any reference to either legislation, specific real world processes or examples/cases that would support their description and evaluation.

Rule of thumb for ‘A’ answers: Explanation of theory → evaluation of effectiveness → support assessment with reference to examples/cases/legislation/rights ‘bodies’.

While this is a short answer response, do not assume the Marker knows all the references you include, nor may they know the acronym you use if you have not written it out earlier. Again, while a short answer response, more than a page of description/evaluation would have been expected.

Most students were able to evaluate the concept of rights with the term safeguards, so from a theory perspective, most candidates were able to access the question easily.

If bail was one of the safeguards used, it would seem logical that the Bail Act 1994 be referenced. Similarly, if the jury was an option, the reference to the Juries Act 2003 would surely be necessary. Further, some candidates confused the role of the police in the criminal justice system - they investigate the crime, present their evidence to the Justice Department who then decide whether it requires a trial where their lawyers then prosecute the case. Precision of term/concept description and evaluation is important, especially to achieve the ‘A’ rating.

Question 15 – Critically evaluate the effectiveness of imprisonment and a therapeutic/diversionary sentencing option in achieving the aims of punishment.

Therapeutic/diversionary sentencing options may include but are not limited to:

- Drug treatment orders, home detention orders, family violence rehabilitation programs, mental health diversion list, youth court.

Stronger responses:

- Included a clear and accurate explanation of imprisonment and a diversionary/therapeutic sentencing option (i.e. what does the sentencing option involve?). This explanation lead to evaluation of the effectiveness of these options in terms of meeting the aims of punishment (rehabilitation, denunciation, retribution, incapacitation, and deterrence).
- Referred to relevant legislation such as The Sentencing Act 1997 (Tas) and Youth Justice Act 1997 (Tas).
- Used their own words, and constructed their own arguments to show the examiner their understanding and ability to apply their knowledge in new contexts.
- Used the language of the question throughout their answer (e.g. diversionary and therapeutic jurisprudence).
• Used facts/statistics to support their analysis. Some examples include recidivism rates, rates of Indigenous incarceration, prisoner demographics, risk factors for crime, and the cost of imprisonment compared to other options. It is important to include the source and date of these statistics e.g. (ABS, 2018). Teachers and students can locate relevant and up to date data from sources such as the Australian Bureau of Statistics, Australian Institute of Criminology and the Australian Productivity Commission. It is also important not to simply list facts/statistics without explaining their relevance e.g. Indigenous over-incarceration rates may suggest the ineffectiveness of prison, and need for more culturally appropriate sentencing options. Explanation of the facts/statistics and how they link to the aims of punishment and the specific exam question shows understanding of the content rather than just memorisation of the content.

• Supported their argument with information from reports from the Sentencing Advisory Council for Tasmania, Department of Justice, and academics writing for the Australian Institute of Criminology such as Bartels (2009).

• Mentioned that imprisonment can include rehabilitation programs (e.g. Storybook Dads, ChatterMatters, TAFE courses etc), while also recognising that these rehabilitation programs tend to lack resourcing.

• Mentioned post-release programs for those who have been imprisoned (and lack of these in Tasmania).

• Explained how a specific sentencing option was diversionary/therapeutic e.g. the requirement for participant consent for Drug Treatment Orders, or the use of education programs for Family Violence Orders.

• Avoided sweeping statements such as that the therapeutic/diversionary options are ‘easy options’ or that people return to prison because they ‘like it’ there.

• Ensured that key words were spelt correctly – including deterrence – which was the most commonly misspelt word.

Weaker answers:

• Dedicated too much time describing each of the aims of sentencing (e.g. long definitions of deterrence, incapacitation etc.) without linking to the question/sentencing options.

• Did not discuss a specific diversionary/therapeutic sentencing option (which were listed in the question) but instead referred broadly to ‘rehabilitation/rehabilitative programs’ – without specific information as to how these programs operated.

• Described rehabilitative options as consisting of rehabilitation centres/facilities.

• Tended to argue that imprisonment and/or the diversionary option was completely effective – rather than evaluating by presenting both strengths and weaknesses of each in terms of meeting the aims of sentencing.

• Included some contradictions which affected the strength of their overall argument e.g. stated the recidivism rates for those who have undertaken a prison sentence in Tasmania are high, and then argued that imprisonment was a highly effective deterrent.

• Referred to a specific example of a sentence as conclusive evidence for a sentencing option meeting/not meeting the aims of sentencing e.g. John Smith was sentenced to 8 months imprisonment and this is evidence that imprisonment is a deterrent. *Note that if a specific example of a sentence is used it needs to be clear that this is not conclusive evidence for the effectiveness of the entire sentencing option.

• Argued that imprisonment was the most common sentence given in Tasmania, and that it is primarily for those charged with rape and murder. According to the Australian Institute of Criminology (2018) acts intended to cause injury and illicit drug offences are the most common crime for those occupying our prisons.