ASSESSMENT REPORT 2020

LST315117 – LEGAL STUDIES

Question 1 – 114 responses

Explain the 'constitutional monarchy' and 'separation of powers' in the Westminster System of government in Australia's federal level of government. Evaluate the effectiveness of these Westminster features in Australia.

Analysis/evaluation in this question was very limited. Many students were able to describe the Separation of Powers and the Constitutional Monarchy, and to a lesser extent identify constitutional conventions, but very few students were able to meaningfully articulate how these features function in reality or evaluate their effectiveness. Many students had clearly prepared for a more generalist question on the Westminster features and displayed limited capacity to respond to the specificity of this question in depth. It was disappointing that an hour was allocated for the response to this question, but most answers were only 1½ pages in length (more akin to a 20 minute short answer response).

Candidates who did well on this essay were able to:

- integrate discussion/analysis of other features of the Westminster system in the context of the two features named in the question (e.g. bicameral system in their discussions of the legislature in the Separation of Powers)
- expanded their discussion to include the limitation of the Governor General's powers due to constitutional conventions (e.g. the Prime Minister and Cabinet wield executive power, the Governor General does not veto any bills for Royal Assent, the Governor General does not head up armed forces S68) rendering the powers as ceremonial
- refer to relevant examples to substantiate their discussion.

Candidates who did not do well on this essay:

- did not discuss how each branch is held accountable (e.g. how judiciary maintains their independence) and whether these are genuine checks and balances
- confused the executive with the judiciary; and didn't reiterate the independence of the judiciary in the separation of powers
- did not adequately outline the role of the Governor General; they merely mentioned he was the Queen's representative.

Question 2 – 65 responses

Explain 'representative and responsible government' and 'bicameral Parliament' in the Westminster system of government as adopted by Australia. Evaluate the effectiveness of these features at the federal level of government.

This question on two particular features of the Westminster system was more specific than those of the recent past. Students should show they are answering the question asked of them by using the words from the current question, rather than from a previous year.

In short, strong responses:

- clearly addressed the question and focused on both representative and responsible government and bicameral parliament
- made relevant links to other features of the Westminster system in a way that helped support the primary focus of their argument
- structured their essay in a clear and coherent way
- defined the terms representative and responsible government and bicameral parliament and then considered the strengths and limitations of these features, coming to an overall conclusion
- included relevant examples and clearly linked them to their overall argument.

While weak responses:

- were very short and/ or did not clearly address the question
- included multiple features of the Westminster system without clearly showing how they were related to the question asked – at times this was at the expense of discussing representative and responsible and/or bicameral parliament
- showed limited knowledge of the key features of the Westminster system
- contained minimal detail with minimal evaluation of the features referred to in the question.

Question 3 – 117 responses

Briefly explain the original division of powers between the two levels of government in the Australian Constitution. Evaluate the High Court's role and the role of other sections of the Constitution in changing this division of power over time. Part of your answer (but not restricted to), should refer to the significance of TWO High Court cases.

Most students provided relatively detailed responses to this question, with many demonstrating a comprehensive knowledge of the division of powers and significant High Court cases, referenda and referrals of power.

A number of essays directly responded to the 2019 exam question. This indicates that these answers were pre-prepared, rather than written in response to this year's question. Stronger answers directly addressed this year's question and students are encouraged to revise in a way which allows them to respond to the question on the exam paper, rather than a past question.

Candidates who did well on this essay:

- used the language of the division of powers (DoP) throughout and made it clear that the three mechanisms (High Court interpretation, referrals and referenda) have continually allowed the Commonwealth to encroach on residual lawmaking areas as well as making state laws in concurrent areas inoperable
- made links to the constitution throughout, clearly stating which section related to each of the mechanisms
- were able to clearly state which residual/concurrent lawmaking area was impacted by specific mechanisms and example cases.

Candidates who did not do well on this essay:

- did not explain the DoP in their essay; the question specifically asks for students to 'briefly explain' the DoP
- misspelled 'Referrals', 'concurrent' and 'High Court' throughout their response. This key terminology should be spelled correctly. 'Concurrent' does not require a hyphen between the 'con' and the remainder of the word as it appeared in multiple responses. 'High Court' is two words and is a proper noun so should have two capital letters.
- Some candidates listed complementary legislation as a fourth mechanism for altering the DoP. Complementary legislation does not alter the DoP, rather it provides an interesting contrast to referrals.

Question 4 – 8 responses

Explain the legal status of the Aboriginal and Torres Strait Islander Peoples in the original Constitution and how the 1967 referendum changed their status in the Constitution. Evaluate these changes and any further reforms needed to improve the status of the Aboriginal and Torres Strait Islander Peoples in the Australian Constitution.

Only a few students chose this topic. Student responses tended to include everything they had studied from the course on aboriginal issues, rather than answer the question directly.

Candidates who did well on this essay included information and showed understanding that at the time of writing the Constitution, there was no Aboriginal voice in the Constitution and Aboriginal Peoples were made a state responsibility. This meant that there were different laws in different states.

In the original Constitution:

- Section 25 recognised that the States could disqualify people from voting in the elections on account of their race. (still in the Constitution)
- Section 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws'. This was the so-called, 'races power'.
- Section 127 went further in providing: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as aboriginal natives.
- Section 51(xxvi) was inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race. Aboriginal people were not originally subject to this section because it was thought that the Aboriginal issues were a matter for the States and not the federal government. (George Williams https://www.aspg.org.au/wp-content/uploads/2017/09/Race-and-the-Australian-Constitution.pdf).

Better candidates were also able to evaluate and show their knowledge and understanding of developments since the 1967 Referendum that are needed to reform and improve the status of ATSI people in the Constitution:

- 1967 Referendum: changed – s127 deleted and s51 (xxvi) race powers deleted "other than Aboriginal"
- UN Declaration on the Rights of Indigenous Peoples endorsed in 2009, provides the right for Indigenous Peoples to participate in decision making affecting them and develop their own Indigenous institutions.
- Uluru Statement of the Heart – A constitutional convention bringing together over 250 Aboriginal and Torres Strait Islander leaders. The majority resolved, in the 'Uluru Statement from the Heart', to call for the establishment of a 'First Nations Voice' in the Australian Constitution and a 'Makarrata Commission' to supervise a process of 'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islander peoples.

- The Federal Government have put this issue to The Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, March 2018. The Committee presented its interim report on 30 July 2018 and presented its final report on 29 November 2018.
- Minister for Indigenous Affairs Ken Wyatt (an Aboriginal Elder from WA and the first Indigenous Minister), has set up the Voice Co-Design Senior Advisory Group, a recommendation of the Parliamentary Committee.

Question 5

Select ONE of the following 2020 Topical Legal Issues (TLI) derived from the Australian legal system:

- **Social Media Use and Employment / Workplace Law**
- **Religious Discrimination Legislation**
- **Anti-protest Laws in Australia**
- **Legal Responses to Climate Related Natural Disasters in Australia.**

The Australian legal and political system needs effective processes and institutions to resolve issues and/ or change the law.

Using ONE topical issue (from the list above), explain the relevant Australian legal and political institutions and processes involved in resolving this issue. Evaluate the effectiveness of these institutions and processes in working towards changing or clarifying the law for your chosen topical issue.

Topical Issues – Social Media – 8 responses

Only eight students selected Social Media Use and Employment/Workplace Law as their Topical Legal Issue response and overall, the standard of responses was disappointing although this was a more challenging issue given its evolving and quite technical nature and the limited opportunities to discuss law reform.

Several students briefly mentioned the Folau case, the role of the *Fair Work Act 2009* and the Fair Work Commission in outlining the law and the dispute resolution process covering unfair dismissal due to social media use by employees but none thoroughly analysed the important recent High Court decision, Comcare v Banjeri (2019), a definitive, unanimous decision which held that the implied right of political communication in the Constitution is not a personal right of free speech but exists to protect responsible and representative government. The High Court held that Banjeri's dismissal was legal because her 9000 anonymous tweets which were critical of government policy, breached the APS Code of Conduct, derived from the *Public Service Act 1999*, which requires Australian Public Servants to be apolitical. The High Court held that this is a reasonable expectation. This ended a six year legal battle, involving the Federal Circuit Court, a claim for workers' compensation, the Administrative Appeals Tribunal and finally the High Court, between Banjeri, who worked in the Department of Immigration and Citizenship and the Commonwealth.

Several students referred to BP Refinery Pty Ltd v Tracey (2020) (the "Hitler meme" case) a decision of the Full Federal Court. They described how Tracey challenged his dismissal for posting a satirical meme, based on the film Downfall, during wage negotiations with his employer, BP and initially lost his case in the Fair Work Commission which held the meme likened BP executives to Nazis. Some students accurately pointed out that Tracey won his case in the Federal Court, was awarded compensation and was reinstated because of the satirical nature of the meme.

Topical essays – Anti-protest – 101 responses

Strong essays referred to a range of specific anti-protest laws in Australia (Tasmanian and Queensland laws were often used). Most candidates were able to describe some of the viewpoints for and against the creation of such laws, although weaker answers focused too much of their essay on these arguments. Weaker responses also tended to spend too much of their essay listing specific protests without strong links to law reform or legal/political institutions.

Strong answers accurately explained the role of the High Court and its interpretation of the constitution in overturning legislation (Brown V Tasmania [2017] case). Clever links were made between anti-protest laws and democratic/Westminster principles such as representative government and pluralism. Some strong answers analysed the relationship between lobby groups, political parties and law reform.

A number of students noted the relevance of international law, particularly the International Covenant on Civil and Political Rights, in relation to the right to assemble and the right to political communication. Discussions of the role of parliament, and particularly the upper house (using example of Tas upper house) assisted in showing student knowledge of the law reform process.

Topical Issues – Religious Discrimination Legislation – 111 responses

Strong essays included analysis of the draft bills and the bill process, evaluation of a wide range of views/submissions that related to the second exposure draft and evidence such as references to statute law in Australian States, references to relevant sections of the Constitution, and references to relevant international treaties and conventions.

Strong essays stood out by their objective and independent evaluation that formed a clear argument throughout the essay. This evaluation often related to the tensions between the second exposure draft and Australia's international obligations, as well as tensions between addressing concerns among religious organisations with concerns from non-religious individuals/organisations.

Most candidates were able to describe or explain some views and concerns related to the draft bills. The distinction for 'A' ratings being the development of an argument that demonstrated sound analysis and evaluation that was well supported by explanation/example/evidence.

Topical Issues – Legal Responses to Climate Related Natural Disasters in Australia – 26 responses

Strong responses were able to explain the practical, immediate responses to climate related natural disasters (often the 2019/20 bushfires) as well as how this relates to the more general approach of governments to climate change. Most students described the viewpoints of various political and legal figures in regard to natural disaster management and climate change. Particularly strong answers were able to summarise these viewpoints by explaining that the federal government tends to apply a response of adaptation/management, whereas groups like the Greens tend to want to respond through prevention/addressing climate change.

This topical legal issue lent itself to an evaluation of federalism, particularly as the response emphasized the tensions/lack of coordination between Commonwealth and state governments; the topic of law reform through a discussion of the various interest/lobby groups involved in influencing legislation ranging from insurance law to environmental law; the Royal Commission; parliament; the courts and political parties.

Answers that evaluated the methods used by these groups/institutions tended to be effective. Some students made a link between Australia's domestic law and international climate obligations.

Question 6

International treaties must be incorporated into domestic law before an International treaty applies to Australia. Using your chosen topical issue, explain the relevant institutions and processes involved in applying International law to the Australian legal system. Evaluate the effectiveness of International law adopted in Australia for your topical legal issue.

Topical issues – Anti-doping Domestic and International – 20 responses

Candidates who did well on this essay were able to address the question directly. Students were able to explain the relationship and connection between WADA, and ASADA (Australian Sports Anti-doping agency) now known as Sports Integrity Australia and show how international law has impacted on Australian domestic law. Some mentioned the concerns around Australia adopting the WADA code and the implications for standard of proof and human rights violations that Senator Nick McKim has highlighted.

Strong answers were also able to use examples, of where both the International and domestic policies surrounding enforcement of anti-doping policies were applied e.g. Essendon Football club, Shayna Jack.

Many candidates only demonstrated an understanding of the issues surrounding law reform at the domestic level. It was important that students covered both aspects of the topic to receive a high award.

Topical Issues – International legal framework(s) for Developing and Enforcing Emissions Targets – 27 responses

Strong essays evaluated the Kyoto and Paris agreements at a high standard, demonstrating sound understanding of the impact of international law on domestic Australian law. Most candidates were able to describe or explain some aspects of the Paris Agreement, but lacked analysis.

Many candidates provided a significant amount of facts, statistics and domestic policy relating to climate, but did not demonstrate an independent argument or evaluation.

A small number of candidates provided a sound understanding of domestic politics but did not explain in any detail relevant international treaties and their connection to domestic law. Strong essays had a clear and objective understanding of enforcement issues surrounding the Paris Agreement and how this relates domestically.

Question 7 – 152 responses

Explain the role of the jury and strict rules of evidence in indictable criminal cases in Australia. Evaluate the role of the jury and strict rules of evidence within the adversarial dispute resolution system in Australia.

This question was problematic as it focused very narrowly on two features of the Adversary system for which there is far less available evidence than others and which often don't receive detailed consideration due to the very tight syllabus. That said, students who addressed the jury and strict rules of evidence specifically were still able to provide detailed responses in many cases.

Strengths:

- Many students were able to identify, describe and, occasionally, explain some features of the jury system.
- Better students were able to critically evaluate those features and/or analyse the advantages and limitations of the jury system in general terms.

- The better responses included reference to examples such as the Bjelke-Petersen trial or R v Courtney ('On Trial') to highlight flaws in the jury system.
- Most students had a reasonable idea of admissible/inadmissible evidence and the requirement for evidence to be relevant (although many didn't use that word which is an issue – 'suitable' or 'useful' don't cut it when the law is very clear on the precise word) and could provide a sound list of the most common forms of inadmissible evidence.
- Some students highlighted a range of types of 'typical' admissible evidence and pointed out the characteristic reliance on oral evidence in the adversarial system – occasionally skillfully attaching discussion of the rules of procedure about examination of witnesses to their discussion of rules of evidence.
- Connections were made between the need for strict rules of evidence enforced by a neutral adjudicator and the presence of party control.
- Some students skillfully made connections between the rules of evidence and the disadvantage suffered by self-represented litigants who try to navigate those rules and the trial system generally. Provided the clear connection was made, this allowed students to discuss issues of equal representation, fair contest and legal aid for which there is abundant data/evidence. Some also linked the rules of evidence to the issue of timeliness of dispute resolution.
- Stronger answers included reference to relevant legislation such as the *Juries Act 2003* (Tas), S80 of the *Constitution and the Evidence Act 2001* (Tas).

Weaknesses:

- Often students cited case examples without explaining how they illustrated advantages/limitations of the adversary system. They were used in a descriptive way rather than as evidence supporting critical analysis and evaluation.
- Many students were under the misapprehension that the Mallard case illustrates issues with the rules of evidence, specifically admissibility, but that is not so. The issues in that case were to do with the prosecution deliberately withholding vital evidence pre-trial (in discovery) and during the trial, which is clearly not allowed in our system, as well as corrupt police procedures. The evidence in question was clearly admissible, the issue was the withholding of it. This could have been used to support the argument about the adversary system encouraging parties to only bring forward supportive evidence for their case, but it wasn't.
- Many students think the jury decides on an accused's guilt or innocence. NOT CORRECT! The only options are guilty or NOT guilty (acquittal), and a not guilty verdict simply means that there was insufficient proof to satisfy the criminal standard of beyond reasonable doubt. The downside of the onus of proof is that an accused person acquitted of a crime can still have a cloud over their head as their innocence was never proven, since our system doesn't require it.
- Students need to be more careful with comparisons to the inquisitorial system as the focus needs to remain on the features of our system, as the inquisitorial system is not in the syllabus. It can be a very useful comparison when analysing the jury feature but it's easy to get side-tracked.
- There was widespread belief that juries were often misled by inadmissible evidence, when, in reality, they will only ever hear occasional comments from witnesses which may subsequently be ruled as inadmissible by the judge. Voir Dire proceedings and preliminary proceedings ensure that most questions about admissibility are resolved without the jury present.
- Some crazy stats were quoted by a few, to the effect that ¼ of Australians have committed a crime serious enough to warrant legal representation (but many couldn't afford it and legal aid couldn't step in)! This beggars belief - even if you include offences such as low-range drink driving, we don't have 6.5 million Australians annually committing significant crimes. It would be a tiny fraction of that number, so only use stats that are reliable and credible.

- Students without exception simply claimed that evidence illegally obtained was 'inadmissible'. *The Evidence Act 2001* (Tas), however, provides that a court has a discretion to exclude evidence where that evidence is improperly or illegally obtained. Such evidence may be admitted as evidence at the trial by a judge or magistrate in the exercise of their discretion, but evidence proved to be obtained under duress must always be disallowed. It may be worth pointing this out to students when teaching this section of the course or alternatively when teaching 'rights of the accused, victim and public'.

Question 8 – 119 responses

Alternative dispute resolution (ADR) has tried to address some of the limitations of the adversary system. Explain TWO ADR processes from the list below and evaluate their effectiveness as dispute resolution processes and in addressing the limitations of the adversary system.

ADR processes:

- negotiation and settlement
- mediation
- tribunals
- conciliation and arbitration
- restorative justice
- ombudsman

Considering that this question is drawn directly from the syllabus document and contains elements of previous external examination questions, it was not well answered.

The question can be broken down into three parts:

1. the explanation of two Alternative Dispute Resolution (ADR) processes from the list
2. an evaluation of the effectiveness of ADR as a dispute resolution process, and
3. an evaluation of the effectiveness of ADR in addressing the limitations of the adversary system.

The best responses addressed all of three parts of the question together with setting out relevant legislation and providing applicable real-world examples of the selected ADR processes. Better responses identified the limitations of the adversary system and explained how ADR attempted to overcome these.

It is important to note that the syllabus and the exam considered 'conciliation and arbitration' as one ADR. Many students only addressed arbitration and one other ADR. They did not mention conciliation and were therefore not able to gain a high grade.

Most responses were able to provide an explanation of two processes selected, with mediation, conciliation and arbitration, and restorative justice being the most popular; very few responses selected tribunals or ombudsman. A significant number of responses did not address the third part of the question: evaluating ADR's ability to address the limitations of the adversary system. Many responses identified the advantages and disadvantages of each of the selected ADR process without providing any context of how they relate to or address the limitations of the adversary system.

Better responses identified that the listed processes compliment the legal system and help to resolve disputes; but are often not mandatory. It is important to remember that ADR processes are not only used when matters go to court; they can be used whenever there is a dispute. ADR services may be used in order to resolve the dispute before even considering court proceedings.

The majority of responses contained errors arising from a lack of understanding of the ADR processes, many of which were repeated across numerous candidates.

Common recurring errors include:

- Stating that the ADR is conducted in accordance with the *Alternative Dispute Resolution Act 2001* (Tas.) (ADR Act) or similar Act, or stating that the ADR Act established ADR. The primary purpose of the Acts are to provide a mechanism by which courts may refer matters to ADR.
- Making a blanket statement such as matters "must go to ADR before they can proceed to trial".
- Incorrect terminology/ confusing terminology. For example, explaining what mediation is but using arbitrator or conciliator instead of mediator.
- Not updating the information contained in textbooks or information from other jurisdictions so that it relates to the Tasmanian or Australian context.
- Confusing mediation and conciliation.
- When selecting conciliation and arbitration as one of the processes to use in an answer, only explaining either conciliation or arbitration, not both.

Question 9 – 86 responses

Explain TWO features that protect the rights of the accused and ONE feature that protects the victim. Evaluate the effectiveness of these safeguards in the criminal justice system in Tasmania.

To be successful in this essay the candidates needed to correctly demonstrate understanding of two accused rights/safeguards as well as one victim right/safeguard in order to then evaluate these safeguards as well.

Students struggled if the explanation of these safeguards was lacking – there were then limited opportunities to evaluate and provide a clear point of view about them. In particular, where candidates lacked reference to cases and legislation, this generally led to significant hurdles in terms of any analysis.

In terms of evidence, there were common laws (e.g. the Bail Act or the Juries Act) that would have been useful in demonstrating a depth of understanding if talking about the corresponding safeguard (e.g. bail or juries).

Reference to case studies as examples was often very useful for students to demonstrate their understanding of how effectively these safeguards would protect the rights of individuals in the criminal justice system, and without this reference candidates often struggled to really coherently respond to the essay question.

Question 10 – 201 responses

What considerations does a Tasmanian judicial officer (Judge/Magistrate) take into account when sentencing an accused/defendant who has been found guilty of a crime? By using TWO sentencing options available in Tasmania, evaluate the extent to which they fulfil the aims of punishment.

Stronger:

- Included an understanding of the considerations of sentencing including circumstances of the offender and circumstances of the offence, aggravating and mitigating factors, parsimony/parity and the aims of punishment (Deterrence, Rehabilitation, Denunciation, Incapacitation and Punishment).

- Pointed out that the Judges/Magistrates use their discretion in sentencing and that sentencing is a complex, multi-layered process that involves the consideration of a variety of factors.
- Accurately explained what is involved in the two sentencing options selected including relevant data.
- Evaluated the effectiveness of the options in relation to the aims of punishment and supporting this with relevant data.
- Used concepts/language relevant to the topic that demonstrated awareness of the 'big picture' of crime and sentencing in Australia (e.g. punitive approach, therapeutic jurisprudence, diversionary, culturally appropriate sentencing, 'tough on crime' political policies, populism, judge discretion, mandatory sentencing, post-release programs, institutionalised etc.).
- Acknowledged that while the prison environment is not necessarily conducive to rehabilitation, that rehabilitation programs do exist in the prison.
- Included some recent information on sentencing, corrective services and penal policy e.g. building of new prison in north, the threat of mandatory sentencing in terms of judicial discretion.

Weaker:

- Did not address the question, part of which emphasized the considerations a judicial officer takes into account when sentencing.
- Spent too much time writing lengthy definitions of each of the aims of punishment (e.g. Incapacitation is… Rehabilitation is…).
- Described imprisonment as the most common/most popular sentencing option.
- Gave very brief, general explanations of two sentencing options OR only discussed one sentencing option.
- Provided inaccurate information about the sentencing options selected e.g. Describing Drug Treatment Orders as involving rehabilitation centres.
- Were overly idealistic about the sentencing options (e.g. Imprisonment is highly effective) without any criticisms/weaknesses in terms of meeting the aims of punishment – in other words there was limited, if any, evaluation.