

T A S M A N I A N

S E C O N D A R Y

A S S E S S M E N T

B O A R D

LS845

Legal Studies

2001 External Examination Report



General Comments

The results for 2001 should be very similar to 2000, although a number of candidates and teachers found the exam a little more challenging than in recent years.

A comment that surfaced regularly with markers, and something that has been a perennial issue, is that the prepared essay seems to be becoming more common. It is quite legitimate to prepare a topic for the exam but it is important for candidates to be able to tailor their information to the question asked.

The issue of the prepared issue was particularly obvious in Section C answers. Both teachers and candidates need to ensure that in preparation for the exam the focus is addressing the question asked and not presuming particular material will be relevant and including such material in an answer regardless of the question asked.

Section A

Question 1

Briefly describe the techniques judges may use to interpret legislation.

A number of candidates had prepared what seemed to be an essay question and wasted time on irrelevant material, most notably a lengthy discourse on the reasons why statutes need to be interpreted. Another common problem in some answers was a reliance simply on the old common law literal, golden and mischief rules.

Better answers included the following points;

- dictionaries;
- interpreting sections within acts;
- previous decisions;
- legislative requirements – Acts Interpretation Acts (C'wealth) 1981;
- Acts Interpretation Act (Tas) 1931 as amended 1992;
- common law rules;
- intrinsic/extrinsic materials.

Overall there was little detailed knowledge of the legislative provisions in both state and federal acts – particularly the importance of object clauses in commonwealth legislation. The Tasmanian legislation to a degree has incorporated the old common law rules and gives judges the option to use or ignore extrinsic materials depending on the circumstances.

Question 2

Show your understanding of the 'separation of powers' in the Australian legal system.

Most candidates understood that the power to govern at a State or Commonwealth level is exercised by three different sections of government, i.e., the legislature or parliament that makes laws, the executive (made up of the Gov/GG

plus PM/Premier and Ministers and their departments) which administers the laws and establish policies to implement programmes authorized by Parliament and the judiciary or courts who enforce and interpret laws.

Better answers identified the overlaps between these three sections of government, especially between the legislature and the executive, and the greater independence of the judiciary. The overlaps between the legislature and the executive are:

- The political party that controls the lower house of parliament forms the Executive Government and all ministers must be MPs;
- Parliament often delegates significant law making powers to the executive.

Overlaps between the executive and the judiciary:

- The Governor/GG, in Council, appoint judges and magistrates. The judiciary is not as independent as some elected judges in the USA.

Overlap between the legislature and the judiciary:

- The courts make law via the common law processes, although parliament can overrule it;
- Parliament can remove a judge for misconduct.

The best answers explained why the powers to govern ought be separated and particularly why an independent judiciary helps guarantee a democratic system of government. They mentioned Montesquieu's theory and the impact of the Boilermaker's Case on keeping the legislature and judiciary separate.

Question 3

What conditions and principles exist for 'common law precedent' to be binding on a future case?

Most candidates, when discussing common law precedents, explained the central principle of the use of precedents, i.e., 'stare decisis' or a court should stand by previous decisions/precedents.

Although 'stare decisis' is the central principle of using precedents a court is not always bound to follow a precedent. A court must follow a precedent when a dispute comes before it if:

- The facts of the dispute and the precedent are substantially similar.
- The precedent comes from the same hierarchy or jurisdiction as the court hearing the dispute.
- The precedent comes from a higher court than the court hearing the dispute.
- The 'ratio decidendi' (reason for deciding) of the precedent relates to the dispute before the court.

Many candidates not clearly explain 'ratio decidendi' and 'obiter dicta'. Ratio decidendi of a case is the statements of legal principle that a judge used to decide the case before him/her. Lower courts in the same hierarchy are bound to apply these legal principles to their case if they are substantially similar to the precedent. Obiter dicta are statements of legal principles in a precedent/case that do not directly relate to the dispute before the court, i.e., the judges is hypothesizing about possibilities not the dispute before him/her – these are statements of legal principle made 'by the way' or outside the parameters of the dispute before the court. Because the common law is honed from real disputes, statements of law that are not related to the dispute before the court (words by the way or obiter dicta) do not bind future courts. Only ratio decidendi can bind future courts.

Better answers also explained how by distinguishing, overruling or reversing precedents could be changed or avoided. Also, more sophisticated responses talked about the notion of persuasive precedents by way of contrast with binding precedents.

Question 4

Distinguish between the burden and standard of proof in a criminal trial.

This was a straightforward question requiring a precise, well-constructed answer. Unfortunately, too many answers did not focus on the criminal trial but presented an answer comparing criminal and civil trial processes.

Criterion 1

- (a) Burden of proof refers to the question of which party has to prove the facts of the case. In a criminal trial the prosecution is required to prove the guilt of the accused because of the well established principle of "innocent until proven guilty". Better answers referred to the reversal of the burden of proof where the accused is attempting to prove insanity or establish a defence such as provocation or self-defence.
- (b) Standard of proof refers to the strength of evidence needed to prove the case. In a criminal trial this is defined as 'beyond reasonable doubt'. Where the burden of proof is reversed the standard becomes 'on the balance of probabilities'. The higher 'beyond reasonable doubt' standard is adhered to because of the seriousness of finding the accused guilty of a criminal offence.

Criterion 8

Candidates were penalised for:

- Not answering the question, particularly where matters relating to civil actions became the focus of the answer.
- Attempting to explain the term "beyond reasonable doubt" inappropriately e.g. as meaning 'absolute certainty' or 'leaving no doubt'.
- Poorly constructed answers, which confused the two terms – separate paragraphs devoted to the two terms are recommended.

Question 5

Describe some of the historically significant legal steps from white settlement in 1788 until Federation in 1901.

The history question had its usual handful of answers. The main points that could be included were:

- The existence of Aboriginal customary law at the time of white settlement
- The importation of English common law – including the concept of terra nullius
- Doubts about the validity of colonial law and steps to rectify this such as The Australian Courts Act 1828
- The move to separate colonial rule for each colony eg Van Diemen's land 1825
- This was further developed by the Australian Constitutions Act 1850
- The Colonial Laws Validity Act was passed in 1865 to remove any doubts about the law making powers of all existing colonial legislatures
- The movement towards federation including constitutional conventions, referendums and the passing of the Commonwealth of Australia Constitution Act by the UK parliament.

Question 6

Describe the responsibilities of the new Federal Magistrates Service.

This was a brand new question and obviously adds to the already extensive list of courts to be revised. There is a good summary of the Court at www.fms.gov.au/services/html/jurisdiction.html

The main points from the website are:

- Jurisdiction includes family law and child support, administrative law, consumer protection, human rights and privacy law. This jurisdiction is shared with the relevant parts of the Family and Federal Courts as well as some state courts. In fact all jurisdiction is shared with other courts.
- In relation to family law and child support the following matters can be dealt with by the FMS: - applications for divorce, maintenance, property disputes under \$300,000 (increasing to \$700,000 from January 2002), parenting orders, enforcement of orders, location and recovery orders as well as warrants for apprehension or detention of child, determination of parentage and recovery of child bearing expenses.
- General federal law. FMS shares with Federal court in administrative law, bankruptcy, human rights, privacy and trade practices and from Oct 2001 review of Migration Review Tribunal, Refugee Review Tribunal and administrative appeals Tribunal.

Question 7

How is the power to make subordinate legislation delegated to other bodies?

This question was attempted by 293 candidates and as such was amongst the more popular questions attempted. It was generally answered well.

Criterion 1

On the face of it, the question: 'how is the power to make subordinate legislation delegated to other bodies?' is very straightforward and appears able to be answered in a single sentence. However, since the instructions to section A indicate that candidates should write approximately half a page for each question, the markers expected candidates to say far more than 'parliaments delegate the power to make subordinate legislation through a parent or enabling act'. Good candidates did so, often defining terms such as subordinate and delegated; giving examples of the different types of subordinate bodies and the delegated legislation made by them; explaining enabling acts and describing how sovereign state and federal parliaments define and limit the extent of a body's delegated powers. Some candidates even went on to cover the controls/checks and balances imposed on delegated legislation by parliaments and courts and/or the perceived advantages and disadvantages of delegated legislation, although the earlier material was considered of more immediate relevance to the question.

Another possible interpretation of the question relates to the parliamentary process (i.e. 'how') involved in passing an enabling act. Candidates who were able to describe this process accurately and well, were given full credit for doing so, although very few candidates interpreted the question in this way.

Two common factual errors were:

- The term is 'parent' not 'parenting' act (this latter term seems to have been borrowed from family Law);
- The courts, not the parliaments, apply the doctrine of ultra vires to delegated legislation that has gone beyond powers conferred by the parent act i.e. the doctrine of ultra vires results from a judicial review of administrative decisions.

Criterion 8

Answers that were organised, well written, factually accurate and complete fared better than those, which were not. It is always difficult for the examiners to say that two fluent sentences satisfy all of the above to more than a 'C' standard, therefore candidates are advised to try and write at least half a page in response to each short answer question.

Question 8

Explain the circumstances for someone to be ineligible or excused from jury service in Tasmania.

Answers should refer to the specifics referred to in Sections 4,6,7,7A,7B and 7C of the Jury Act 1899

Criterion 1

Reference should be made to the following areas:

General qualification - any person on the State Electoral Roll under the age of 65

Disqualification due to: Imprisonment (Sec 6) - currently serving a suspended sentence or having served a term exceeding 3 months within the past 5 years

Disability (Sec 7) as determined by the Sheriff e.g. physical or mental disorder or inability to read, write or understand English

Exemptions as per Schedule I: Certain Government employees and spouses; Members of Parliament and spouses; Members of legal profession and spouses; Medical profession; Education; Commerce (transport).

Exemptions may be granted by the Sheriff for the following: to performed jury service within the previous 3 years; family responsibilities; other reasonable grounds - pregnancy, holidays, employment etc.

Criterion 8

Candidates were penalised for:

- Lack of balance in relation to disqualifications and exemptions
- Poor spelling e.g. electoral rollPoor structure - good answers should proceed from the general disqualification (over 65) to specific disqualifications and exemptions.
- Reference to specifics which are not appropriate to the Tasmanian jurisdiction.
- Reference to the empanelling process which may excuse a potential juror from a particular trial but not from 'jury service' as such.

Question 9

Describe three dispute resolution processes, other than redress to the courts.

This was a very popular question and in general quite well answered. There was a slight problem with people giving too much information on the history of ADR rather than giving details on three specific processes. Better answers were able to identify when the processes might be used and what the strengths and weaknesses of each method might be.

Question 10

What is meant by the phrase 'the rule of law'?

Although there were some excellent answers to this question there seemed to be a large number of answers that confused this with a previous years question about why does society need law.

The rule of law is a specific concept first expressed by Professor Dicey in 1885. The main parts of the concept were firstly that no person could be punished unless it could be shown that there was a distinct breach of the law established in the ordinary legal manner before the courts. This meant that there should be no arbitrary power in the hands of the executive government. Secondly, there was an assumption that the law applied equally to all.

For a more detailed discussion of the rule of law see Chalmers , Legal Studies in Tasmania paragraphs 1113 – 1114.

Section B**Question 11**

Describe and illustrate with examples the importance of the independence of the judiciary.

The question provided an opportunity for candidates to relate their understanding of the importance and characteristics of the independence of the judiciary within the Australian legal system.

Criteria 1

The question was not generally addressed well.

Strong candidates were able to describe the meaning of an independent judiciary. In order to do so they needed to locate the concept within the context of the separation of powers. This concept acknowledges three broad functions of government – legislative, executive and judicial. Strong candidates were able to provide definitions of each of these functions. Importantly, they could outline the judicial function, namely, to interpret law and adjudicate on disputes in relation to the law. A key feature of this role is impartiality in adjudication and freedom from fear or favour.

An independent judiciary has many hallmarks. These include:

- Appointment to office until a fixed retirement age.
- Independent operation and management of the courts.
- Removal from office only on just terms (proved misbehaviour or incapacity) and only by parliament
- Protection from diminution in remuneration. s.72 of the Commonwealth of Australia Constitution Act (1901) provides such protection to federal judges – illustrating clearly the importance attributed to the construct by our founding fathers.

Criteria 4

Strong candidates were able to discuss a range of issues relating to the operation of the independence of the judiciary within the context of the Australian legal system as well as historical examples of the Australian experience.

Within the context of the Australian legal system, the executive branch is drawn from and accountable to the legislative branch of government. This is known as the Westminster System. Through the operation of the two party system, this can give rise to executive domination of parliament. Within this context and independent judiciary are a vitally important check on the exercise of legislative and executive power. The role of an independent judiciary, in this context, is to “...stand between a breathless and rampant legislative/executive and a hapless citizenry, giving shape and meaning to the former’s intent and policy whilst securing the rights of the latter.”

Historical examples are many and varied:

Recent instances in both NSW and Queensland where parliament enquired into the fitness for office of two judges,

The federal process involving the removal of Mr Justice Lionel Murphy

The examples at both federal (Industrial Court) and state (Workcare – Victoria) where new courts were created and judges from prior courts were reappointed with only one or two exceptions, which amounted to removal by other means.

The recent executive preference for mandatory sentencing that inhibits judicial discretion and, arguably, encroaches upon judicial independence,

The High Court decision upon the judicial powers assigned to the HREOC and the breach of judicial independence therein contained.

Criterion 4 was not generally well addressed.

Criteria 8

A number of features were sought in identifying an effective communication of understanding.

Strong responses could be identified by:

A clear **statement of intent or overview** in the introduction.

Essential terms were also defined in the early part of the essay.

Discussion tended to move from the **general to the particular**.

A **logical development** in analysis was apparent.

Paragraphs were used appropriately.

Spelling was accurate.

Expression was **coherent**.

Vocabulary employed was **appropriate** and **efficient**.

Discussion was **concluded** with reference to a theme or preceding discussion was **summarised**

Question 12

State and Federal parliaments have the power to make laws. Describe the power base and comment on the shift in power since Federation.

Most candidates responded well to this question, with extensive knowledge of the division of power, the constitution, the role of the High Court and the mechanisms by which there has been a shift in power from states to the commonwealth. Though candidates would not have been familiar with the term, 'power base', they were able to respond to the question. However, some candidates may have decided to look elsewhere on the paper when confronted with this unfamiliar term.

The question invited comments on the shifts in power since Federation rather than the mechanisms for constitutional change. The emphasis should have been on the powers acquired by the commonwealth and the means by which they were gained rather than detailed explanation of the constitutional requirements for change through a referendum. Few shifts in power have occurred this way; most have been by the use of the external affairs power, referral of powers or financial leverage. More capable candidates were able to explain all three in some detail.

Question 13

'As Australia becomes truly multi-cultural, the law becomes less able to respond.'

Comment on the barriers that limit the operation of the law to serve the ethnic diversity that is Australia in the 21st Century.

Most candidates were able to identify some of the barriers that limit the operation of the law in relation to Australians outside the main ethnic groups that populate our continent and shape out laws. Better answers were broader in their range of 'barriers' for minority ethnic groups and explained the implications of such 'barriers' in greater detail. It was legitimate to mention aboriginal groups because, although they are not immigrants like many of our minority ethnic groups, they do have a different ethnic origin to the ethnic groups that represent the majority of Australians.

When dealing with topics such as this it is easy to get side tracked into emotive social commentary about the equity issues surrounding the disadvantage of such groups. However, it is important to write in an objective way and clearly

identify the salient points and the evidence that supports your points. Some of the central barriers that are faced, particularly by minority ethnic groups in Australia, are:

- The language difficulties faced by not English speaking migrants.
- The differences in values that may can experience (although the dog eating example could have been supplemented with examples relating to family relationships and the treatment of wives or children by some ethnic groups).
- Discrimination and issues of equity.
- Stereotyping and the presumptions made, particularly by authority figures like the police or bureaucracy, about certain ethnic groups and there similarity or otherwise to white Anglo-Saxon protestant Australians.
- The lack of political representation and lobbying power of minority groups.
- The lack of knowledge about the law and the legal system that those who grow up in a society inherit by way of socialization.
- The lack of financial means, especially if the groups are refugees, which could limit access to the legal system.

Good answers gave examples of all these barriers and how some of them had been addressed by the various Governments, e.g., dealing with the language problem by establishing an interpreter's service.

Better answers also raise issues such as:

- Whether the cliché that 'we are all equal before the law' is fair or is it possible to recognize the diversity of values when drawing ups laws (e.g., should we recognize aboriginal tribal punishment processes if they violate our existing laws?).
- Should the principal that 'ignorance of the law is no excuse' be literally applied to new migrants from cultures that are significantly different from ours when they commit an illegal act that would be legal in their country of origin? Should such a set of circumstance mitigate the punishment that would otherwise be imposed?
- Should the principle of the 'rule of law' be compromised when dealing with people from significantly different ethnic backgrounds?

Question 14

Discuss the concepts of justice and fairness in the context of the nature and function of the Australian legal system.

Most candidates presented a limitations of the law essay and almost totally ignored the context in which the essay should have been written, i.e. in the context of the nature and function of the Australian legal system. In dealing with limitations many candidates focused primarily on financial limitations at the expense of other limitations and it was disappointing to see many candidates totally ignore some of the strengths of the legal system, i.e., ways in which the system tries to ensure a degree of justice and fairness.

Some candidates wrote an adversary system essay, however this focus was considered too narrow, especially given there was an adversary system question on the paper. Merit was given however, for strong answers.

Candidates must read questions carefully and consider which topics are being examined. Do not rush in and hope that what you are writing down is relevant. Time must be given to planning essays.

Criterion 1

When addressing the nature and function of the Australian legal system candidates should have given consideration to the following points:

- The recognition of prevailing values and basic human rights.
- The law sets out accepted behaviour of individual members.
- The extent to which individuals are treated equally.
- The entitlement to a fair and unbiased hearing.
- The effective access to mechanisms for the resolution of disputes.

Criterion 4

When discussing justice and fairness better candidates integrated this discussion with their discussion of the nature and function. If candidates analysed some of the points above they would have been able to deal with the issues required. Chalmers (1989, pg 269) has an interesting discussion of justice, substantive justice and social justice.

In terms of individuals not being treated equally, too many concentrated on financial limitations.

It would have been worthwhile candidates considering positive characteristics in achieving justice and fairness. Some consideration of relevant legislation would have been valuable, e.g., anti-discrimination legislation.

Question 15

'The jury in a criminal trial is the cornerstone of the criminal justice system'
Describe and analyse the role of a criminal trial jury in achieving justice.

This question was attempted by 234 candidates.

Criterion 1

This criterion posed the most difficulty for candidates as many ignored, wholly or partially, the need to 'describe' the role of a criminal trial jury. It is important to explain that a criminal jury is a tribunal of fact, not of law, who represent society (as peers) and that their role is to decide whether the prosecution has provided sufficient evidence that the defendant guilty of the alleged acts according to the standard of proof - beyond reasonable doubt. Criminal trial juries are only used in Supreme Court trials when a defendant has pleaded not guilty to an indictable offence. Relevant substantive law includes the Tasmanian Jury Act, the Magna Carta and s80 of the Australian Constitution.

Other relevant information involves the process of the selection of juries (which should be dealt with very efficiently), including reference to: the Sheriff; the electoral roll; criminal checks; categories of disqualification, ineligibility and reasons for being excused; the process of challenges; selection of twelve and the possibility of reserves; swearing in; the requirement to stay until the trial's end; selection of a foreperson; the sanctity of jury room deliberations. The requirements for majority verdicts and the circumstances of a hung jury are also important to outline.

Criterion 4

Most candidates dealt with this criterion more confidently. To 'analyse' the role of a criminal jury it is important to mention the *many* arguments for and against their use in terms of achieving justice. It was preferable to discuss the breadth of opinions rather than look at only a limited number in detail.

Many candidates included a discussion of possible reforms of the jury system. The stronger candidates identified the problems that these reforms are aimed at resolving and further analysed the potential disadvantages that these reforms may create.

Although the question did not specifically ask the candidates to comment on whether the criminal trial jury is the ‘cornerstone of the criminal justice system’ the stronger candidates did evaluate this claim and referred to it throughout their essays.

Criterion 8

A significant proportion of candidates did not write in the essay form. They did not have an introduction, information organised into paragraphs, or a conclusion.

A number of protocols are preferred:

- Write on one side of the page only
- Do not underline for emphasis
- Clearly identify paragraphs
- Do not use the personal pronoun ‘I’ or ‘you’
- Do not use contractions
- Do not ask rhetorical questions, especially in the introduction
- Words commonly misspelled included: juries/jury’s, role/roll, bias/biased and trial
- Give examples appropriate to Tasmania, if interstate or federal law then clearly identify that fact
- Do not tear out pages from the booklet

Question 16

*The adversarial nature of dispute resolution in Australian courts has been described as...
" theoretically sound. But in practice is subject to difficulties."*

Analyse the thinking that might lead someone to that conclusion.

The wording of this question deviated from past papers. It was a question that needed more critical thinking skills than in past papers. Many candidates misread the question, with 10 % of answers giving an account of ADRs. This highlighted how important it is for candidates to read carefully each word of the question and to familiarise themselves with the variations in terminology used to describe the adversary system. It also may have indicated that candidates were not preparing more than two topics to address Section B of the paper and consequently needed to ‘dump’ information.

The approach to this question must address two factors. The theory or purpose of the adversary system (such as provide a peaceful solution to conflict, follow the rule of law, be fair and produce a just outcome) and difficulties and shortcomings which hinder these outcomes need to be discussed. The question did not specifically ask for remedies but this was accepted if it was in the context of improving the system to match its objectives.

Many candidates had prepared answers that followed a pattern where the key elements of the adversary system were identified and then the weaknesses or disadvantages were given. Many candidates explained the working of our system by contrasting it with the inquisitorial system. Although this is valid it can equally be compared to ADRs. Problems arose, however, when candidates tended to spend too much time in description. The other temptation was to take a very superficial look at the differences without being able to analyse either system adequately.

Criterion 1

The quality and choice of information becomes important in this essay as candidates have a wide knowledge of many processes in the adversary system. Candidates have an excellent understanding of the key features of the adversary system. Many candidates knew well the factual details of the system.

Satisfactory answers described the key elements and gave the disadvantages. Some candidates described the differences between the civil and criminal procedure but this was outside the scope of this question if it did not target the shortcomings of the processes. One of the skills candidates need to practise is choosing relevant information to answer the specific question.

Better answers were able to use more refined information with regard to the five elements of the adversary system. The information was more relevant to the question and not merely ad hoc description. Common features were the continuous trial, complex rules of evidence and roles of the individual, judge and jury. The purpose of the adversary system was also given.

The best answers gave detailed knowledge of relevant features that were identified as significant hindrances to the theory behind the adversary system. Such issues as the tactics of the lawyer, the difficulties with the dependence on oral evidence, expert witnesses, right to silence and pre trial processes were discussed in terms that showed wider reading than just the text book had taken place.

Criterion 4

This year's question focuses on critical analysis. It was able to challenge candidates to think rather than regurgitate a prepared answer. It highlighted that some candidates have developed incomplete arguments in their thinking. For example, candidates could identify that the role of the judge is passive and subject to difficulties but they did not go on to identify the problems arising or the consequences.

Satisfactory answers attempted analysis by giving difficulties or disadvantages at the end of an otherwise descriptive answer.

Better answers integrated the disadvantages and difficulties. These answers also used wording consistent with the terms of the question. An argument was constructed.

The best answers were able to give an in depth discussion and analysis on selected features of the system (see above). Using quotes and illustrating their point with a recent case were also excellent features of the best answers.

Criterion 8

Essays were mostly well constructed in terms of paragraphing. A few candidates used dot points in the essay format. This is to be avoided.

The quality of the introduction of the essay ranged from repeating the question with no plan to follow to well constructed and directed introductions. However in some essays some of the points raised in the introduction were never developed in the body of the essay.

Question 17

*"The courts have developed the law through careful consideration of cases. This process involves a balance between certainty in the law and the flexibility to respond."
Carefully evaluate a Judge's ability to make law.*

This question was similar to last year and obviously a fairly predictable question. Prepared essays dominated the answers, BUT if teachers are going to give candidates prepared answers could they at least explain that the answer should be modified to relate to the questions asked!! This question was not on consistency and fairness nor avoiding rigidity - nor was it on the growth of law. All these aspects were relevant but the question this year was different. There was far too much emphasis on Statutory Interpretation; this certainly significant in making the law but not necessary to explain all of the approaches to law making by the courts.

Criterion 1

Candidates were expected to describe the law making role of judges, i.e., the way they could be said to make law. Candidates needed to mention:

- Careful consideration of past cases, especially the concepts of 'stare decisis' 'ratio decidendi' and obiter dictum.
- The importance of court hierarchies.
- Binding and Persuasive Precedence (all of these to bring about certainty and flexibility to respond)
- Sovereignty of parliament.
- methods of being able to change precedent in order to make new law such as:-disapproving, overruling and reversing and distinguishing.

Criterion 4

“Carefully evaluate” was handled in several ways but needed to include:

- The significance of the High Court and the constraints on other courts which may enable the judges to make law, eg., Mabo and the High Court interpretation of the Constitution.
- The willingness of judges to make law. Is it the role of judges?
- Judicial activism (High Court as above) and conservative judges. (a good example was Rape in Marriage)
- Many included the significance of the Separation of Powers.

Description of cases that show the ability of judges to make law - together with the advantages of disadvantages of this were essential.

Question 18

Discuss the purpose, role and powers of the Tasmanian Ombudsman and illustrate your answers with examples.

This was a very straightforward question, but unfortunately seem to have been chosen by those candidates desperate for a second Section B question. Many candidates did not understand the role of the Ombudsman and confused this with either the Small Claims Tribunal or one of the varieties of law reform bodies. Other candidates failed to see the word ‘Tasmanian’ and wrote extensively about either the Commonwealth Ombudsman or an amalgamation of this role in the field of banking, telecommunication, electricity law etc. It is probably a good idea for candidates to underline on the paper the key words in a question, so they can check that they are writing on the topic.

Criterion 1

A definition of the word 'Ombudsman' should have begun any answer, followed by an explanation of his/her role of inquiry into and investigation of complaints against Government departments, local councils and public authorities. A few candidates note that action by the Ombudsman should be a measure of last resort. The power of the Ombudsman to visit various places (such as Risdon Prison), to gain access to government documents, and to write a report recommending changes should have all been discussed.

Criterion 4

Examples were specifically asked for, and the best one for this year was the report into conditions at Risdon Prison. A discussion of the findings and recommendations was appropriate for this criterion. An 'A' answer would have discussed the Ombudsman's role in upholding the principles of natural justice and perhaps an analysis of the advantages of using the Ombudsman to resolve disputes (provides a check on the range of government departments; unbiased; reasonably cost effective; reports and recommendations are usually taken seriously by the Government). The disadvantages too should have been mentioned (insufficient staffing and funding to investigate all complaints; less significant complaints may be over looked; the Government may ignore recommendations).

Question 19

Describe and evaluate the role of the Federal Government in law reform.

Criterion 1

There were a variety of ways of approaching this question and each answer was quite different. The best answers began by noting that parliament is the supreme law making body, and that the valid Commonwealth laws take precedent over State laws, where there is inconsistency. One approach was to discuss the value of a bi-cameral, elected Parliament, where the Cabinet dominates the legislative programme, but where Private Members' Bills could be debated. The jurisdiction of the Commonwealth Parliament (geographically and constitutionally) was explored, and also the limiting effect of the separation of powers. Another approach was to look at the informal and formal pressures on the Government, including pressure groups and the media; parliamentary committees and the role of the government departments through Cabinet.

Criterion 4

This question required a sound evaluation of the Government's role in law reform. This was best done through the use of examples, the popular ones included gun law reform, the recent changes to border protection laws and the euthanasia issue. Unfortunately, there was some confusion with examples from the States (such as police corruption in NSW). The action on reforms needed to be balanced by some discussion on political expediency. It was surprising that none of the candidates answering this question mentioned any economic or tax reforms in their answers.

This question is a departure from the questions on parliamentary made law of past years. There is more breadth and depth needed to respond to this essay well. Candidates could not solely rely on merely describing the passage of a bill through Parliament. Candidates' answers were varied in their content and argument. Unfortunately, four candidates gave the process of delegated legislation as a response.

Question 20

Assess the ability of the Commonwealth Parliament to pass laws that reflect the wishes of the electorate and provide good government.

Question 20 highlighted the need to understand a complete topic and to use information from different sections of the course. It was not a question that could be answered by a prepared answer from one chapter of a textbook.

Criterion 1

There was a wide range of content given. Satisfactory answers referred to the process of a bill through parliament and the structure of the bicameral parliament as the basis for the answer. Better answers gave a limited discussion on voting, party politics restrictions not truly reflecting the views of the electorate, constitutional restraints and ways around this were also discussed.

Any of the following concepts could also have been discussed: government policy making leading to initiation of a bill; representative and responsible government.

The best answers were able to broaden discussions to include the above concepts and give relevant illustrations of Parliament's ability to respond to public opinion and the needs of society as they arise.

Criterion 4

This question is a move in the right direction for examination questions where candidates need to think and create an argument.

The number of prepared answers is alarming and reflects the fact that some candidates are unsure of their own ability to construct an argument. Too many candidates describe the process of a bill through parliament but are unable to show understanding of the significance of the process in democracy, reflecting views of society, refining ideas and providing good government.

Best answers thought through the question carefully and addressed it meaningfully.

Criterion 8

The way in which an argument was constructed was important in this essay. Satisfactory answers were ones that described and did not have a strong direction embedded at the beginning of the essay.

Better answers were able to construct a limited argument and sequence ideas.

Best answers were able to construct an argument with the use of illustrations and limit description to form the basis of their discussion.

Section C**Question 21**

'The future of our society is built on the past: sometimes it limits progress, sometimes it provides the light.'
Discuss this statement using your knowledge of at least two topical legal issues and their relationship to the Australian Legal System.

Most candidates knew something of two issues but the depth of knowledge was sometimes lacking. Explicit links to relevant theory were very helpful in achieving good criterion 3 awards. Examiners preferred not to have to seek implied links within issue descriptions.

Where candidates dealt with more than two topics, they were generally not able to explain the issues and link them to legal theory in sufficient detail.

Historical issues (particularly Mabo and native title, capital punishment and euthanasia) were of limited value unless there was a strong emphasis on recent (within the last year) developments. There has to be specific mention of these recent developments and factual detail included. Specific, tangible developments are needed -examples being recent legislative changes, political developments, pressure group action or court action. Should candidates wish to use these 'old faithfuls', they need to find recent material through the Internet or Austguide. Teachers should be encouraging their candidates to choose issues that are part of current legal and social debate.

A few candidates tried to weave the two issues together, with the legal theory providing the structure. This was seen as being less effective in responding to the task. Explaining each issue and its links to theory consecutively was easier to follow and the candidate's knowledge and understanding were more obvious.

Obviously, candidates are going to be given guidance by teachers in the selection of issues to research, the gathering of material and the linkage to legal theory. However, it was apparent that a number of candidates had rote-learned a topical issues essay prepared by their teacher. Because their understanding of the issues was limited, they were unable to effectively respond to the task set in the exam and, in general, did not score well.

The examiners felt that candidates should be encouraged to individually prepare material for the topical issues question as they will be more intimately familiar with the subject matter and their essays would then reflect their understanding.

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