

GENERAL COMMENTS

Generally, the examination was handled very well in 2002 and there were many students who completed excellent answers within the time allocated. Students had clearly practised writing answers to past examination questions and a high quality of answers was evident.

Presentation of answers

Although most students have taken the advice presented in past reports there are still some writing their answers in pencil, or pens that are very light. It is much easier to read answers written in dark blue or black pen. It is also very important that students consider the way in which they will present their answers. There should be a logical development within an answer that addresses the question in a way that is clear and easy to follow. Students should avoid using abbreviations (especially those that are uncommon or mean something to the student but are unclear to the reader). Answers also need to be numbered clearly, and accurately, and it is helpful if a small space is left between answers to different questions and between sections.

Choice of questions

Most students were able to follow accurately the instructions on the examination although a small percentage attempted all questions on the examination rather than choosing one question from Section B and one question from Section C. Section A questions are compulsory. Schools are provided with an example of the front page of the examination (that provides students with instructions for completing the examination) in a examination edition of the *VCE Bulletin* prior to November and it is important that students see this to ensure that they are familiar with the expectations of the examination. Well prepared students are those who not only have a detailed understanding of the material covered throughout the year, but who also have a clear understanding of the requirements of the examination. When choosing questions in Sections B and C students should make sure that they are able to answer all parts of the question thoroughly. At times students choose questions where they can provide a detailed answer to the first part of the question; however, they are unable to maintain the same level of detail in later parts of the question. If a student does attempt questions in Section B and/or C, both will be marked and the better mark awarded. Usually, those students who answer both questions do not have sufficient time to provide good answers.

Allocation of time

Answers to questions worth 10 marks should be longer than those worth 4 marks. Students may be tempted to write everything they know about a topic in a question; however, it is very important that they do not spend more than the appropriate amount of time on an answer. The quick rule for determining how much time to spend on a question in the examination is simply to double the marks for the question. This will give the maximum time that can be spent on that question. For example, a question worth 4 marks should have no more than 8 minutes spent answering it. It may be tempting in Section A to spend a lot of time answering 2- and 4-mark questions; however, there is absolutely no advantage in providing more information than is asked for. For example, if **one** method of changing the law is asked for there will be no further marks given if a student provides **two** methods of changing the law. Generally, there is not enough time in the Legal Studies examination for extensive plans and most students will only require a plan when answering a 10- or 12-mark question, and even then, for some, plans will not be necessary.

Use of detailed answers

The best answers to examination questions are those that provide detailed responses given time constraints and the demands of the question. In response to questions like Question 6, students may be tempted to make comments such as *A court hierarchy exists for convenience*. Without an explanation this statement does not provide an appropriate answer. Students needed to explain what they meant by *convenience* and **why** a hierarchy enables it. Students needed to ask themselves, 'Have I given as much detail as I can in answer to this question?' Oversimplification extends to issues such as law-making by judges and often students' understanding was limited to the opinions of the media. While newspapers do provide an excellent resource for Legal Studies students they need to be read critically and with a firm grasp of theory. It is important for students to practise using the material they have learnt in a way that is relevant to the question. More successful answers demonstrate an ability to apply what has been learnt to the particular demands of a question; prepared answers rarely address the specific demands of a particular question and should be avoided.

Use of terminology and examples

Legal Studies has a particular vocabulary that students are expected to use correctly. Students are expected to know what 'jurisdiction' means as well as other terms used in the study design. The examination is clearly based on the Legal Studies study design and questions reflect the demands and vocabulary set out in this document. Students should practise examination questions that are based on the wording used in the study design, and it might even be helpful for them to write their own questions using such wording.

Examples used should be relevant and correct. For example, High Court cases may be required as examples about Constitutional interpretation and it is important that students can distinguish between cases that involve interpretation of the Constitution by the High Court, and cases decided by this court on appeal from state jurisdictions.

SPECIFIC INFORMATION

Section A

Question	Marks	%	Response
Question 1	0/4	29	Describe two of the principles of the Australian parliamentary system.
	1/4	10	This was the most commonly unanswered question on the paper, with some students leaving it out altogether, and others leaving it at first to return later. The question uses the term <i>principle</i> , which comes directly from the study design so students should have been prepared with an appropriate answer. The principles listed in the study design are:
	2/4	20	responsible government and representative government, separation of powers, structure of the state and Commonwealth parliaments, roles played by the Crown and the Houses of Parliament. The most popular responses were representative and responsible government and the bi-cameral structure of Victorian and Commonwealth parliaments.
	3/4	13	
	4/4	28	
	(Average mark 2.01)		
Question 2	0/2	12	Outline one characteristic that makes a law effective.
	1/2	17	Students were required to briefly outline (give an account of) one characteristic of an effective law and this could include such things as:
	2/2	71	• details of laws are known to members of society • law is accessible • law should be easily understood • law must acceptable to the majority of members of society • law is stable yet flexible • law is enforceable.
	(Average mark 1.59)		Some confused the characteristics of an effective law with the characteristics of an effective legal system; however, generally responses showed a good knowledge of the material.
Question 3	0/2	7	Individuals and groups can influence a change in the law. Explain one method they might use.
	1/2	18	Some methods that could have been used to answer this included:
	2/2	75	• taking part in opinion polls • writing letters to MPs and Ministers • organising and signing petitions • joining associations/pressure groups and lobbying MPs • taking part in strikes and demonstrations • voting a particular party out of government • returning a government because of a particular policy on change • disregarding or flouting the law in dispute • deciding to run for local council or Parliament to influence a change • court challenges/initiating test cases • private member's bill.
	(Average mark 1.67)		Petitions and demonstrations were the most popular methods explained by students. The task word 'explain' requires students to show that they understand the relationship between the method chosen and the way this can influence change in the law. More successful answers explained that actions by individuals and groups (such as petitions and demonstrations) can influence change in the law because they draw the government's and parliament's attention to an area of law that requires attention. This is because the parliament is a representative and responsible body that must reflect the values and needs of the community. If petitions containing many signatures are ignored, the parliament risks the criticism of not representing the electorate.

Question 4	0/4 29 1/4 16 2/4 20 3/4 21 4/4 14 (Average mark 1.75)	Outline the jurisdiction of both the: - Victorian Victims of Crime Assistance Tribunal, and - Victorian Civil and Administrative Tribunal – anti-discrimination list. The jurisdictions of the courts and tribunals that students are expected to know are listed in the study design. It is not possible to be selective in learning these jurisdictions as they all are able to be examined. The Victorian Victims of Crime Assistance Tribunal awards payments/financial assistance for compensation to primary, secondary and related victims of crime for injuries suffered, including loss of income and medical and related expenses and limited recognition for pain and suffering, incurred as the result of a criminal offence. Crime must be reported to the police though not necessarily solved. The Victorian Civil and Administrative Tribunal – anti-discrimination list determines complaints from people who feel they have been discriminated in particular areas – employment, education, provision of goods and services, accommodation or membership of a club, through a range of grounds including gender, marital status, race and impairment. Some responses gave too much detail for 4 marks, yet other responses simply restated the titles of the tribunals as an answer, for which no marks were awarded.
Question 5	0/4 6 1/4 9 2/4 23 3/4 30 4/4 32 (Average mark 2.73)	Describe the process of mediation and suggest one way it differs from a formal court hearing. Students were required to describe mediation, which is a cooperative method of resolving disputes where the parties are assisted by a mediator (third party). The most common error was to say that mediators can suggest solutions to the dispute. This is not the case and distinguishes mediation from other types of dispute resolution that occurs outside of the courtroom. Some responses gave too much detail about the ‘steps’ of mediation than was required for the marks available. Other responses indicated that mediation is also available for criminal cases; however, although mediation between offender and victim has been trialled, mediation is generally reserved for non-criminal disputes. Students also had to suggest one way that mediation differs from a formal court hearing. Students needed to demonstrate that they understood how the two differed. Acceptable points included: - mediation is often a voluntary process compared to a formal court hearing, which could be described as compulsory dispute settlement, though increasingly it can be ordered by the court - mediation is usually a cheaper alternative to a formal court hearing because legal representation may not be necessary - mediation allows a decision to be made more speedily compared with formal court hearings - strict rules of evidence and procedure, as in a formal court hearing, do not apply to mediation - in a court hearing, the judge or magistrate (and jury if relevant) hears the evidence put forward by each party and then makes a decision which is binding on both parties; this is not the case in mediation.
Question 6	0/2 8 1/2 16 2/2 76 (Average mark 1.68)	Explain one reason why we have a court hierarchy. Generally, students were able to present the range of acceptable points in answer to this question. However, many students were too brief and expected the statement <i>The court hierarchy allows for appeals</i> to earn full marks, but this was not the case. To earn full marks responses were required to give an explanation of the reason, for example, it could be explained that we have a court hierarchy because it allows for litigants to have the decision of a court reconsidered by courts that are higher in the hierarchy. A hierarchy is based on the principle of an ascending order of courts and these higher courts are considered to be more senior and

		therefore are able to change (or affirm) the decisions of courts lower in the hierarchy. It is important that the concept of the 'hierarchy' is understood and that it provides advantages that are associated with the idea of courts not being seen as of equal 'importance'. • specialisation, of courts and personnel • the operation of the doctrine of precedent • to allow for appeals • administrative convenience, more efficient use of resources.
Question 7	0/2 21 1/2 15 2/2 64 (Average mark 1.43)	Describe one reform, which has been made, or could be made, to Victoria's jury system. Generally, students are very familiar with material associated with the jury system and most were able to provide relevant material in their answers. Many students are aware of the most recent legislative changes to the jury system in Victoria. Reforms which have been introduced include: • introduction of majority verdicts (11 out of 12) • increasing the range of people able to be called for jury service with the new <i>Juries Act 2000</i> by making all people, who are ineligible or disqualified, available for service unless they have good reason • introduction of one day attendance (if people called in are not selected for a jury in one day that is the limit of their attendance). Other possible reforms include: • juries giving reasons for their decisions • introduction of not proven verdict • reducing the size of the jury • introducing professional forepersons • providing more assistance to jurors (e.g. making them more comfortable, encouraging them to take notes) • increasing juror pay • special jurors for particular offences (e.g. complex fraud cases) • reducing the number of peremptory challenges.

Section B

Question 8

a.

Explain how the division of powers under the Australian Constitution enables some laws to be the same all over Australia while other laws are different from state to state. Explain how either interpretation by the High Court of Australia or a referendum can alter this division of power.

Students were expected to explain that some laws are the same, and some differ between the states, because of the way the law-making powers of the states and the Commonwealth are divided by the Constitution. Answers needed to include an understanding of:

exclusive powers – law-making power that is not shared with the states

concurrent powers – powers that both the Commonwealth and State Parliaments have authority or jurisdiction; most powers listed in S.51 are concurrent. If a federal law conflicts with a state law, the state law, to the extent of its inconsistency, is invalid

residual powers – the states retain the power to make law in a number of areas not mentioned in the Constitution.

This question was more popular than Question 9 and generally students had learnt the major 'categories' of constitutional powers. The major issue in responses to the first was a failure by students to relate what they knew to the question. It is very important that students answer the question, not just write what they know about a topic. A more successful answer to this question said:

When Australia became a federation in 1901 the Commonwealth of Australia Constitution Act set out the law-making powers of the newly established Commonwealth Parliament. These powers were specified in the Constitution. Some law-making powers were given to the Commonwealth exclusively, (that is, the state parliaments are not allowed to make laws in these areas) such as the power to make currency that is made an exclusive power because the states are specifically prohibited from making money. These exclusive law-making powers mean that laws made in these areas will be common throughout Australia because the states aren't allowed to make laws in these areas. Many of the powers specified for the Commonwealth are

concurrent powers. This means that the states and the Commonwealth can both make laws in the same area. Where there is an inconsistency in the laws the Commonwealth's will prevail to the extent of the inconsistency. The laws made under these powers could vary from state to state unless the Commonwealth has made law in the area, in which case the law will be the same all over Australia. Those law-making powers not listed in the Constitution are called residual powers and are the law-making powers of the states. These laws will vary from state to state, such as road laws.

The second part of the question asked for an explanation of how either interpretation by the High Court of Australia or a referendum can alter the division of law-making power. Some students provided details of both methods of altering the division of law-making power. It is very important that students read carefully the instructions in the question if they are to allow themselves enough time to answer the question adequately. The emphasis of the answers should have been on 'how' these methods alter the division of power.

Change through referendum

The Constitution requires that a proposed change must be introduced to either house as a bill and approved by both houses of parliament before the proposal can be put to the people. A referendum must receive a yes vote by the majority of electors in Australia and yes by the majority of states (at least four out of six). Using this information a student could explain that a referendum is the only way to change the wording of the Constitution. Therefore if the Commonwealth wants to increase its law-making powers it can use the referendum procedure to insert a section into the Constitution that spells out what the law-making power is. Existing concurrent areas of law-making power could be made exclusive by inserting a section that specifically prohibits the states from legislating in that area. By inserting these sections the Commonwealth could alter the balance of law-making powers in its own favour. (However, given the lack of success of referenda it is unlikely that the Commonwealth would use this method to alter the balance of powers).

High Court interpretation

If a dispute about law-making powers arises, the High Court has the power to decide disputes about the meaning of the Constitution. The Court applies the meaning of the text of the Constitution but does not alter the written word. Most students chose this option and used a case to demonstrate the altering of the balance of power. It was important, in order to achieve full marks, that answers concentrated on 'how' the High Court's interpretation can alter the balance of law-making powers. Many students knew of a case that altered the balance of power (most used the Franklin River Dam case); however, only more successful answers really used the case to answer the question.

b.

Parliament as a lawmaker is more able than the courts to respond to the needs of society.

Discuss this statement and indicate the extent to which you agree or disagree.

This topic has been examined in the past and students were generally able to provide appropriate material in response to the quotation. More successful answers referred back to the question when responding to the needs of society. There were several possible ways students could have attempted this question. They could have discussed the advantages and disadvantages of both courts and parliament as law-makers. They may have considered the quote as stated literally and discussed the strengths of parliament compared to the disadvantages of the courts. They could have disagreed completely with the quote and argued the disadvantages of parliament and the advantages of courts. Or they could have taken a balanced viewpoint about the strengths and weaknesses of both institutions as lawmakers. Whatever the focus, students needed to discuss their points, not just state them. The following points were used in answers to this question:

Parliament – advantages

- parliament can investigate the whole topic and make a comprehensive set of laws
- parliament has access to expert information and is therefore better able to keep up with changes in society
- parliament provides an arena for debate
- parliament can delegate its power to make law to expert bodies
- parliament is able to involve the public in law-making
- parliament can change the law as the need arises
- parliament can make law *in futuro*
- parliament is democratically elected.

Parliament – disadvantages

- investigation and implementation of a new law is time consuming and parliament is not always able to keep up with changes in society
- the process of passing a bill is time consuming
- delegated authorities are not elected by the people and there may be too many bodies making laws
- it is not always possible to change the law in accordance with changing values in society
- parliament is not always sitting, so changes in the law may have to wait some time
- changes in the law may involve financial outlay, which may not be economically viable at the time
- parliament can make laws retrospective, which can be unfair
- division of law-making powers between the federal and state parliaments is in dispute from time to time

- parliament's Upper House can rubber stamp or deliberately obstruct legislation
- Cabinet's legislative proposals may dominate law-making by parliament, particularly where the government controls both houses
- parliament's response to community views may not be adequate.

Courts – advantages

- courts can keep the law from becoming too rigid by distinguishing, overruling and reversing previous decisions and giving meanings to words in statutes
- courts can fill the gaps in the law by making a decision on a matter when it arises
- courts can interpret the words of an act of parliament to give a more just result
- judicial decisions are free from outside pressure
- the doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions
- appeals process allows for the review of decisions.

Courts – disadvantages

- courts cannot change a law unless a case is brought before the court
- courts may be bound by an old precedent which could lead to unjust results
- changes in the law through the courts are *ex poste facto*
- change through the courts can be very expensive for the parties involved
- parliament can override court-made law
- some judges are very conservative and could be reluctant to change bad laws
- not a democratic system of law-making and judges tend to be drawn from a narrow, socio-economic background and are usually male (though increasingly less so now).

In this type of question the calibre of the discussion was the discriminating factor. It was not expected that a student could cover all the points noted above.

Question 9

a.

People driving in the City of Port Phillip with blaring car stereos may be fined. The council has amended a local law making loud amplified music from cars an offence.

Why is it necessary for local councils and other subordinate authorities to have the ability to make laws? Explain two problems associated with delegated legislation. Outline one check placed by parliament on delegated legislation.

Generally, students had a good knowledge of delegated legislation and the reasons why it is necessary and the problems associated with it. Many responses mentioned that one problem is that the makers of delegated legislation are not elected; however, the question related to local councils and more successful answers noted this and suggested two other problems associated with delegated legislation. The 'check' part of the question was handled with less confidence than other parts of the answer. It is very important that students answer all parts of a question and it is better to attempt an answer than to provide no information. Some responses used a check that is not a 'parliamentary' check and therefore earned no marks for this part of the answer.

Some reasons for delegated legislation include:

- eases workload on parliament
- parliament does not have the expertise of the relevant authorities
- some subordinate authorities allow for greater community participation
- subordinate authorities can implement changes more rapidly.

Some weaknesses of delegated legislation include:

- delegated authorities are not elected by the people (except local councils)
- regulations made not open to public scrutiny
- consultation not necessary
- regulations and laws can be fragmented, perceived lack of supervision and control by parliament.

Parliamentary controls include:

- ministerial responsibility
- parliamentary questions
- parliamentary authority in giving and revoking power to statutory authorities
- checks by parliament re disallowance and publicity
- parliamentary committees
- sunset clauses
- regulatory impact statements.

b.

Explain how the law can be made by parliament and through court decisions. Comment on the effectiveness of these two methods of law making.

This question had two parts and students could have presented their material by explaining how the parliament makes law and then commenting on its effectiveness and then dealing with the courts, or they could have explained how the law is made by both bodies and then commented on their effectiveness by comparison and contrast. It is best to present material so that it is not repetitive and an answer to a 12-mark question usually requires some careful paragraphing and logical development in order to achieve full marks.

Some responses did not address the first part of this question and presented a prepared answer about the advantages and disadvantages of the two law-makers. These types of answers did not achieve good marks because generally they did not address the question.

The legislative process used to make laws include the following steps (however, some good answers dealt with the process in general terms, without listing these steps):

- introduction in either House, but most commonly the Lower House
- first reading
- second reading
- committee of the Whole House
- third reading
- repeat of steps in the other House, usually the Upper House
- Royal Assent and proclamation.

Explanation of the way in which courts make law was less well-handled. Some responses did not mention statutory interpretation and others showed a lack of understanding of the doctrine of precedent. A major misunderstanding with the topic of the doctrine of precedent was its application to sentencing. Precedent does not operate when judges are sentencing an accused and teachers need to take care to explain correctly how the doctrine applies to questions of law. Teachers might find it helpful to consider previous reports and comments made on questions relating to courts as law-makers. More successful answers were able to use the essential information about the doctrine of precedent to comment on how effectively it operates. For example, part of a very successful answer could present the following information:

The doctrine of precedent can be a very effective method of lawmaking because it provides a very predictable and consistent way of making laws. Judges are required to 'stand by' decisions that have been made in similar cases and this means that people wishing to go to court have a good chance of predicting their likelihood of success. However, it is very expensive to take a case to court, especially to the superior courts where precedents are made and this could prevent people from having the precedent applied in their favour. Because judges are bound by decisions made in higher courts about cases that are so similar that they can't be distinguished, it may be that the doctrine of precedent is too rigid a method of making laws. It may not be able to change as values change and if old precedents are applied to new cases injustice may occur making the method an ineffective way of lawmaking ...

Doctrine of precedent answers could have mentioned some of the following (although not all points were expected):

- similar cases are decided in a similar manner
- the *ratio decidendi* is the part of the judgment which is binding on lower courts
- higher court decisions are binding on lower courts in the same hierarchy (the doctrine of *stare decisis*)
- a decision of a superior court remains law until it is overruled by a higher court or altered by an act of parliament
- a higher court is able to overrule the decision of a lower court in the same hierarchy
- the High Court can overrule its own decisions
- a single judge is not bound by the decision of a single judge of the same court although such decisions will always be given considerable respect
- precedents from another hierarchy are not binding but treated as a valuable source of legal reasoning; how persuasive they will be depends on the status of the court
- precedents from lower in the court hierarchy can also be persuasive precedents
- statements made by the judge which are not directly relevant to the point of law in question (*obiter dictum*) can be persuasive
- a decision is no longer binding if reversed on appeal
- a minority judgement of a higher court is not binding
- a judge can avoid following a precedent if the case can be distinguished on the facts
- through disapproving a decision, a higher court can indicate to lower courts that a decision should no longer be regarded as good law.

Students could have used the following points to comment on the effectiveness of courts as law-makers:

- statutory interpretation by superior court judges can set a precedent which will be either binding or persuasive on other judges
- a wide interpretation may extend the law to cover a new situation or new area of law
- a narrow interpretation may restrict the law to cover only certain situations
- statutory interpretation does not amend or modify the actual words in the act in any way
- the given definition or interpretation of a particular word is only valid for the statute interpreted.

Section C

Question 10

ai.

Explain two pre-trial procedures that might be taken to bring a criminal case to trial in the County Court of Victoria and two pre-trial procedures that might be taken to bring a civil case to trial in the Supreme Court of Victoria.

aii.

Explain the criminal and civil jurisdiction of these two courts.

Generally, this question was handled well by students, although there is still some misunderstanding about the nature of 'bail'. Previous reports have noted that bail is the release of a person from custody, not the money that is often a condition of release.

Criminal pre-trial procedures could include:

- exercise of police discretion to charge
- police collection of evidence, search and seize
- police questioning before filing a charge
- arrest, with or without a warrant
- filing a charge, arrest or summons
- bail or remand
- fingerprinting
- blood and body sampling
- police questioning after charge
- right to contact another person
- right to an interpreter
- committal proceedings/hand up brief
- directions hearings.

Civil pre-trial procedures could include:

- letter of demand
- pre-trial negotiation
- writ of notice or originating motion
- notice of appearance
- statement of claim
- statement of defence
- counter-claim
- interrogatories
- discovery of documents
- interlocutory order
- pre-trial conference (County and Supreme Court)
- certificate of readiness for trial.

Although tribunal jurisdictions still provide problems most students have a good grasp of the courts' jurisdictions.

County Court of Victoria

Criminal

- hears and determines all indictable offences except for the most serious offences such as murder, attempted murder, child destruction and treason.

Civil

- for claims on personal injury matters, the jurisdiction is unlimited. In all other civil matters, the limit is \$200 000. (Where parties give their consent, it is possible for the court to hear matters involving a higher amount but for mark allocation this did not have to be included.)

Supreme Court of Victoria

Criminal

- highest court in Victoria and can hear all indictable offences but mostly only hears murder/manslaughter, attempted murder and treason
- Civil jurisdiction is unlimited.

b.

Our adversary system of trial needs to be reformed and features of the inquisitorial system could be considered. To what extent do you agree or disagree with the views expressed in this statement. Give reasons for your answer.

Many students who chose this question had a good knowledge of the two systems and the more successful ones structured their answers by commenting on the main features of the adversary system, discussing their advantages and disadvantages and then contrasting these with the inquisitorial system. For example, a more successful answer might include the following information:

Our adversary system is very effective and should be retained for trials in Australia. One reason why the adversary system should be retained is because of the role of the judge. In the adversary system the judge is an impartial adjudicator who has little to do with the case before it reaches trial. This ensures that the judge is absolutely impartial and is making decisions based only on what is presented to the court by the parties. On the other hand because our judges are not involved in the preparation of the case it may be that parties to a dispute in the adversary system are disadvantaged if they have no or poor legal representation. In the inquisitorial system the judge is much more involved in the collection of evidence prior to the trial and this could be a helpful reform to the adversary system. If we had judges that were more involved prior to trial parties to a dispute would not have to rely as much on representation and this would save a lot of money and might even mean that people could go to court to protect their rights even if they had no representation at all.

This type of structure allows for a logical presentation of material and avoids repetition.

Some strengths of the adversary system are:

- historical; tested over time; community has confidence in system
- individuals responsible for conduct of their own cases – fair and just
- rules of evidence and procedure – both parties have equal footing
- those directly affected by the case bear the costs involved
- as individuals responsible for presenting the best case to support their point of view, all relevant evidence will be presented
- belief that judge is independent and impartial thus people treated fairly
- standard and burden of proof protects the innocent; rewards those who suffer injury through the fault of another.

Limitations or weaknesses include:

- adversary system makes each party responsible for the presentation of its case – costs of legal representation are high; to appear unrepresented puts a party at a disadvantage; provision of legal aid not adequate
- each side may only present evidence favourable to its case; consequently evidence of important facts might not be presented
- is the training and expertise of the judge used efficiently in the adversarial system?
- rules of evidence can be selective and complex
- single continuous trial – evidence is sometimes not given until a long time after the event
- can burden and standard of proof also protect the guilty?

Some advantages of the inquisitorial system are:

- the enhanced role of the judge is more likely to determine the truth of the matter
- the judge is not an impartial arbiter but can call witnesses and carries out the initial questioning of witnesses so is able to fully explore all issues which appear relevant. When making its decision, the court is not restricted to the issues and evidence placed before it by the parties.
- the absence of strict rules of evidence and procedure means that witnesses can give evidence in a narrative form and useful evidence will not be excluded. The examination of witnesses can take place on the characteristic of an informal discussion aimed at finding the truth. The right of counsel to question witnesses is retained.
- legal representation may not be as essential in the inquisitorial system so the issue of the cost of representation and any disadvantage through lack of representation is lessened.

Although most responses were generally in favour of the adversary system it was possible to get full marks for this question by suggesting that the adversary system was flawed and should be reformed by using features of the inquisitorial system, or it could have been argued that the inquisitorial system's features were of no value to the adversary system for particular reasons. All approaches were acceptable but the discriminating factor was the calibre of discussion and the use of accurate material.

Question 11

a.

Describe the role played by both the judge and jury in criminal and civil trials. Explain two advantages and two disadvantages of the jury system.

This question was the most popular in Section C. Many answers were far too long for 4 marks and most were disorganised and confused. A better response could be phrased:

In a criminal trial for an indictable offence where a defendant has pleaded not guilty there will be a judge and jury of 12. The role of the jury is to decide questions of fact. They must listen to the evidence and on the basis of the judge's direction decide beyond reasonable doubt the guilt or innocence of the accused. Criminal juries must reach unanimous decisions in trials for murder; in other cases a majority verdict of 11 out of 12 is acceptable after at least six hours deliberation. The role of the judge in criminal trials is to preside over the court and apply the rules of evidence and procedure. The judge will also answer questions from the jury and rule on points of law. If a defendant is convicted the judge will decide the appropriate sanction. In civil trials the role of the judge is the same (except applying a sanction) if there is a jury. Civil juries of six are optional and used only if one or other of the parties choose. Their role is to listen to the evidence and reach a verdict (which may be a majority of 5 out of 6) on the balance of probabilities about who is liable. If the plaintiff is successful the jury will decide the amount of damages. If there is no jury the judge's role will include the determination of liability and damages.

Although this seems a great deal of information, students have 8 minutes (at the most) to write this (well-prepared students should not have any difficulties).

The second part of the question asked students to explain two advantages and two disadvantages of the jury system. The points they could raise include:

Advantages of the jury system:

- decisions reflect the views of the community
- juries are a cross-section of the community, reflect prevailing community attitudes (particularly with the Juries Act)
- decision-making spread across a number of people
- less likelihood of a wrong decision
- provides a trial which is free from political interference
- juries have considerable flexibility (e.g. not bound by precedent)
- safeguard of personal freedoms as juries not bound to apply perceptions of 'bad law', jury acts as social conscience
- it has stood the 'test of time', historical significance
- juries more able to come to a decision with the introduction of majority verdicts.

Disadvantages of the jury system:

- juries are not required to give reasons for the decisions and nobody knows officially what goes on in the privacy of the jury room
- juries are not a true cross section of the community since many people are excused, and challenged that it does not meet the fundamental tenet of our system of judgement by ones' peers (though this is lessened perhaps with the introduction of the Juries Act)
- trial by jury is costly and time consuming – jury trials are generally longer, through such processes as empanelling, checking the admissibility of evidence and deliberation and therefore more costly, plus payment for the jury
- evidence can be complex and technical – do all members of the jury have the necessary skills to comprehend and understand this type of evidence
- juries are required to listen and collate information and must also understand the processes of the court; are ordinary people able to sit and listen for such long periods of time and undertake such difficult tasks?
- jurors may be influenced by other than the facts before them – emotion, the media, the rhetoric of skilled counsel
- difficulty of reaching a decision even though majority verdicts have been introduced in Victoria in all criminal cases but murder, treason and a serious drug case.

b.

An effective legal system aims to provide for fair and unbiased hearings and the timely resolution of disputes. Discuss how our legal system attempts to achieve these two aims.

This question addresses two of the elements of an effective legal system as outlined in the study design. Most responses presented several points for each of the aims; however, many responses did not contain enough material for 10 marks. It is important that students do not run out of time in the examination. Many answers did not achieve full marks because they made insufficient points or gave insufficient detail. Some responses used too many examples of specific laws that have been introduced rather than concentrating on processes and procedures that provided better evidence for this question. More successful answers provided a discussion of several points by drawing attention to the ways the aims were and were not achieved. For example, part of a successful answer included the following:

Fair and unbiased hearings are those where a person is given every opportunity to present their case in the best possible way. In our legal system this is attempted by providing various avenues of dispute resolution. Tribunals where legal representation is not necessary have been developed to allow people who are involved in disputes about things like rental accommodation and faulty goods and services to present their own case without having to worry about complex rules of evidence and procedure. This saves money for people and allows them to present their case without feeling that they are disadvantaged because the other party has legal counsel. However, even tribunals can get expensive, for example, anti-discrimination matters usually require lawyers and the costs associated with this part of VCAT can be very high, thus disadvantaging those who cannot afford the best representation and reducing the likelihood of a fair and unbiased hearing.

This type of answer demonstrates that the student understands the complexity of trying to achieve the aims of an effective legal system and uses appropriate material to present a good discussion.

Points to demonstrate the achievement of a fair and unbiased hearing include:

- our system of pre-trial, trial and post-trial procedure and its component parts (covers a very wide range and could be almost any part of Unit 4)
- provision of legal aid, pro bono services
- community legal centres
- provision of avenues for alternative dispute resolution
- investigating and improving the range of, and access to, resources in rural areas
- increasing the number of women appointed to the bench
- use of interpreters in court
- use of video conferencing facilities and remote witness facilities
- recognition of cultural differences, e.g. Koori Court
- attempts to deal more effectively with the reasons why some offend, e.g. Drug Court pilot; criminal diversion scheme in the Magistrates Court.

Examples relating to the timely resolution of disputes and efforts to reduce delays include:

- efforts to reduce the complexity of procedures and lengths of trials (directions hearings, trials starting without the jury for legal argument)
- employing more legal personnel (e.g. judges, magistrates) and availability of judges
- improved court resources (e.g. improved physical resources)
- other initiatives introduced by the courts to streamline procedures (Pegasus, Civil Initiative, PERIN Court, Mention Court) and to streamline pre-trial negotiations
- use and encouragement of methods of Alternative Dispute Resolution
- establishment of a range of structures to hear disputes, e.g. court hierarchy and tribunals.

Students must be able to present a coherent discussion/argument that is well supported with evidence. Students who are able to demonstrate a thoughtful approach to the material covered in Legal Studies and who can apply correct material in a relevant way to the questions are well rewarded.