



GENERAL COMMENTS

The new examination format for 2006 worked successfully for most students. The marks available for each question and the lines provided for answers give some guidance about the required time and effort students should devote to their answers; however, students need to make a judgment about whether it is necessary to use all the lines for their answer. Questions that are worth one mark generally do not need as much detail as those worth two or more marks, and the lines provided may only be fully used by students who have larger handwriting. If students need more space and choose to continue their answers on the extra lines provided at the end of the examination booklet, it is important that they indicate this clearly. They should make a note to assessors that the answer is 'continued in extra space' and provide a clear indication of the question number at the beginning of the continuation of the answer.

Time management in the examination still requires attention. The examination is marked out of 60 and students have two hours to complete their answers, therefore one strategy could be to double the marks to calculate the maximum time that should be spent on an answer. However, some students may not require two minutes to provide a full answer to a one mark question, and continuous practice of questions done under examination conditions is the best way to learn how to organise time.

As part of their examination preparation, students should use the *Legal Studies VCE Study Design* as a tool to help organise their study notes and to provide a basis for writing practice examination questions. Further attention should also be given to the use of reading time. It takes practice to read and think for 15 minutes without being able to make notes or highlight information, and teachers should incorporate the development of this skill into their teaching practice. Part of this skill includes careful consideration of the material that will be used to answer questions. Students should realise that it is improbable that the same material will be used to answer more than one question. Where a student is using the same material, they should re-read the question, ensuring that they have made an accurate assessment of the material required in the answer and that they are not duplicating their answers. This problem arose with Questions 5 and 6b. Some students misread Question 5 and explained the 'division' of constitutional powers, rather than the 'separation' of power. However, the division of constitutional powers was relevant in Question 6b. and students should have questioned their use of the material if they were repeating it.

In past Assessment Reports there have been comments about the misunderstanding of legal terminology and in the 2006 examination there were still examples of this. Civil remedies still cause problems for students who incorrectly explain that 'compensation' is a remedy. Students also explained terms such as 'exclusive powers' by using the words of the term; for example, 'exclusive powers are exclusive to the Commonwealth Parliament'. Further work needs to be done to ensure that students can give an explanation that does not repeat the term itself.

The re-accredited *Legal Studies VCE Study Design* included a new Area of Study based on the protection of human and democratic rights in Australia and other jurisdictions. Most students clearly expected a question that reflected this new area; however, some of the answers given indicated that more work needs to be done on this area of the study design. Teachers and students must be able to explain how human and democratic rights are protected. They should evaluate the methods for protecting human and democratic rights and come to a conclusion about the extent to which human and democratic rights are protected effectively by the Australian Constitution and by methods used in one of the United Kingdom, the United States of America, Canada, New Zealand or South Africa.

Task words such as 'evaluate' need to be better understood by students. 'Evaluate' requires students to consider the strengths (advantages) and weaknesses (disadvantages) and make a judgment about how good or bad something is (that is, how valuable it is). In order to determine the actual benefit or strength, it is appropriate when evaluating the strengths of something to consider how the strengths can be reduced by associated weaknesses.

It was clear from some answers that students had referred to past Assessment Reports and many students used a dark blue or black pen, rather than pencil, and provided a logical structure, including good paragraphing, in longer answers. However, students need to ensure that they do not answer questions that they expect to see or that they hope to see, rather than what is actually asked. It is very important that students' answers relate directly to the question asked and that all material is relevant to this question. Better answers were able to use relevant, accurate information that specifically responded to the demands of the question. Examples are a useful addition to answers and can contribute to a full explanation of the points being made.

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SPECIFIC INFORMATION

Question 1

Marks	0	1	Average
%	12	88	0.9

Students were confident with the reasons for organising the courts in a structure that provides a system of seniority and experience (a hierarchy). The most common reason provided was that a hierarchy provides the opportunity for an appeals system to operate under which the higher courts can review the decisions of lower courts. Another popular answer noted that the hierarchy allows the doctrine of precedent to operate, with the higher courts indicating to the lower courts which precedents should be followed.

Question 2

Marks	0	1	Average
%	6	94	0.9

This question was well answered by students. Students were aware that the law may need to change for various reasons, including to reflect changes in community attitudes and values and due to developments in technology. Most students provided an example of a law that had changed in order to support their point.

Question 3a.

Marks	0	1	Average
%	52	48	0.5

Many students were able to give the original civil jurisdiction of the Supreme Court as unlimited with respect to the amount of damages it can award. Students should be aware of the jurisdictions listed in the *Legal Studies VCE Study Design*.

Question 3b.

Marks	0	1	2	Average
%	35	27	38	1.0

The following points outline the type of remedies that could have been used to answer the question:

- damages – an amount of money ordered to be paid to the plaintiff, by the defendant, to generally compensate them for injury, impairment or damage suffered
- an order for specific performance which means that the defendant must carry out their obligations under the contract
- an injunction – to restrain a party from behaving in a particular way
- rescission – an order cancelling the contract.

The answers to Question 3b. were disappointing because many students stated that ‘compensation’ was a remedy, while other students stated that mediation and VCAT were remedies. This shows a misunderstanding of this part of the course and more work needs to be done on what remedies are available in civil matters and what purpose they fulfil.

Question 4

Marks	0	1	2	Average
%	15	29	56	1.4

Statutory interpretation is required in the course of dispute resolution by the courts. The laws made by parliament may require judges to give meaning to the words and phrases in these laws for various reasons, including:

- the meaning of a word might be ambiguous; that is, it might have more than one meaning and the court has to determine what parliament intended in this context
- the meaning of words might have changed over time
- mistakes might have been made in drafting the legislation, or as a result of amendments made after the Bill was introduced into parliament. Consequently, the statute might lack clarity
- parliament might not have perceived all possible circumstances which could arise in connection with the legislation, so the courts might have to determine the scope of a statute to see whether it applies to a particular situation.

Many students provided an example to support their answer. The most common example was the case of Kevin and Jennifer, which was well known and understood. Following is an example of an excellent answer.

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Courts may need to interpret statutes as the meaning of words change over time. Parliament legislates in futuro so the act may be in place long enough for the accepted meaning of the words within it to alter. As such, courts must identify the intent of parliament when passing the act in order to interpret it. This was necessary with the interpretation of the words 'man' and 'woman' in the Kevin and Jennifer marriage case.

Question 5

Marks	0	1	2	Average
%	23	33	44	1.2

Some students confused the 'separation' of power with the 'division' of constitutional powers. This is a perennial problem and teachers should work to develop students' ability to read examination questions under pressure and categorise the material appropriately. The following is a good answer.

The separation of power refers to the three arms of government – the executive (administers the law), the legislature (makes the law) and the judiciary (interprets the law) – being kept independent from each other. This independence ensures that a system of checks and balances exists so that no one body can hold absolute power or abuse its power. This ensures stability within a democracy.

Question 6a.

Marks	0	1	2	Average
%	32	35	33	1.0

The legislative process is a fundamental part of the Legal Studies course. Students were familiar with the various stages in this process; however, many students do not have a good understanding of the purpose of these stages. The following student example shows one way of expressing the correct answer.

At the second reading stage, the purpose of the Bill is outlined by the Minister who has introduced the Bill into the parliament. There is then a general debate on the purpose of the Bill.

Question 6b.

Marks	0	1	2	3	4	Average
%	13	6	15	27	38	2.7

Students had a good understanding of the constitutional division of powers; however, there was still some confusion about which powers fall into each category. Too many students gave taxation as an example of either a residual or exclusive power, but it is actually a concurrent power. Some students failed to use the term 'Commonwealth parliament' and referred only to the 'parliament' as having exclusive powers. Greater precision is needed in responses to this type of question, particularly in explanations of terms where words within the terms should not be used to explain the term. The following is an excellent response.

Exclusive powers are law making powers that can only be exercised by the Commonwealth parliament and no other body. These are specific powers, listed in the Constitution, that are made exclusive to the Commonwealth. For example, the power to coin money is listed in s51(xii) and made exclusive by s115. Residual powers are those not mentioned in the Constitution at all. The Commonwealth has no power in these areas, thus they belong solely to the states. Criminal law and education are examples of residual powers. Which parliament legislates in the area is the main difference between these powers. A second difference is that exclusive powers are stated in the Constitution and residual powers are not.

Question 7a.

Marks	0	1	Average
%	33	67	0.7

The Victorian Civil and Administrative Tribunal, in the anti-discrimination list, would hear this dispute.

The jurisdictions of the tribunals specified in the *Legal Studies VCE Study Design* require further study as many students were unable to provide an answer to this question.

Question 7b.

Marks	0	1	2	3	4	Average
%	9	8	19	31	34	2.7

Students were very familiar with the methods of dispute resolution that can be an alternative to litigation; however, the skill of 'evaluating' material requires further work. Students need to use material in a way that demonstrates an ability to make a judgment about the value of something. This requires consideration of the strengths and weaknesses and



coming to a conclusion. The most popular methods chosen for discussion were mediation and conciliation. The following is a good answer on mediation.

Mediation is a cooperative problem solving process whereby an impartial third party facilitates discussion between two disputing parties, and ensures that both parties have their say, but doesn't suggest a resolution; the parties come to a non-binding agreement between themselves.

This is an effective method of resolving disputes as it is a much cheaper method than taking a matter to court, and is also a lot quicker. As parties come to an agreement between themselves, they are more likely to abide by the decision and be satisfied with the outcome. This increases the effectiveness of mediation as a dispute resolution method and has meant that it is being used more and more in many different types of disputes.

However, the process of mediation may be inappropriate if parties aren't of equal bargaining power, one party might compromise too much in order to appear cooperative. Furthermore, as the agreement reached is not binding it cannot be ensured that the parties will honour the decision. These factors clearly undermine the effectiveness of mediation, nevertheless, its benefits far outweigh the disadvantages and it is still a much better alternative to litigation.

Question 8

Question 8 reflected the new material included in the reaccredited *Legal Studies VCE Study Design*. The questions asked students to 'explain' and 'compare' the constitutional protection of human and democratic rights. This required careful consideration about how effectively human and democratic rights are constitutionally protected in Australia and either the United Kingdom, the United States of America, Canada, New Zealand or South Africa. Teachers should emphasise the development of these skills when considering this material in the classroom.

Question 8a.

Marks	0	1	2	Average
%	31	29	40	1.1

The type of material expected in responses to this question could have included some of the following information. The material provided here is more detailed than was required for a two mark question – further details have been provided here as this material is new to the study design.

The Five Express Rights

1. Freedom of Religion

Section 116 provides that no law may establish a state religion, impose any religious observance, prohibit the free exercise of any religion, or require a religious test as a requirement for Commonwealth office. Other comments could have included:

- s.116 protects non-believers by indirectly providing for what the High Court called the 'right of a man to have no religion'
- s.116 prohibits only Commonwealth laws from restricting religious freedom in these ways. It does not apply to state laws
- in the *DOGS* case the High Court held that government assistance to religious schools did not amount to establishing a state religion.

2. Interstate Trade and Commerce

Section 92 states that interstate trade and commerce is to be free. However, this right is more in the nature of a structural underpinning of the economy to prevent parochial restrictions on economic activity, rather than a fundamental democratic or human right.

3. Discrimination

It is unlawful for state and Commonwealth governments to discriminate against someone on the basis of that person's state residence (s.117).

4. Just terms when acquiring property

The Commonwealth must provide 'just terms' when acquiring property s.51(xxxi). This means that the Commonwealth can acquire someone's property, but must pay fair compensation. It does not apply to acquisitions of property by state governments.

5. Jury trial

There must be a jury trial for indictable Commonwealth offences (s.80). However, this is a very limited right because:

- most indictable offences are crimes under state law, and s.80 only applies to Commonwealth offences



- the High Court has ruled that 'indictable' means 'crimes tried on indictment'. Hence, the government can avoid s.80, and thus avoid a jury trial for a particular offence, by legislating for the offence to be a summary offence.

Implied right

The High Court has found that the Constitution contains an implied right to free political communication. The first High Court decision to recognise this was *Australian Capital Television v The Commonwealth*. The case concerned new Commonwealth legislation which sought to substantially control political advertising on radio and television. The judges varied in the bases of their decisions, but in general terms they all indicated that, as our Constitution established a system of representative government, free political communication was necessary for that system to operate properly.

There have been several cases since then which have discussed the extent of this right, and the exact basis for it. Finally, in *Lange v Australian Broadcasting Corporation*, these matters were clarified. The court found that the requirement can be drawn from ss.7, 24, 64 and 128 and other related sections in the Constitution.

The court has not found that a general right to free speech is protected by the Constitution, but only a right in regard to matters which can be described as 'political communications'.

Right to Vote

The constitution **does not** guarantee a right to vote, but rather provides that the Senate and the House of Representatives will be directly chosen by the people (sections 7 and 24). At the time of federation, 'the people' did not include women, Aborigines or men under 21. Exactly who can vote is determined by Commonwealth legislation, not the Constitution (for example, whether prisoners can vote and the age at which people can vote). Nevertheless, by providing that the two houses must be directly 'chosen by the people' the Constitution does imply that a substantial proportion of the population must be able to participate in the electoral process, or the houses could not be described as being chosen by the people. By contrast, the Canadian Charter of Rights quite unequivocally states that there is a 'right to vote'.

When discussing the right to vote it was crucial that students were aware of the limited nature of this implied right and did not consider it as an express right to vote.

Question 8b.

Marks	0	1	2	3	4	Average
%	18	17	23	21	22	2.1

Many students provided good answers to this question, and the better answers were distinguished by the specific detail that they provided. Material that could have been used to answer this question is given in the following points.

US

- The protected rights are set out in the Bill of Rights that takes the form of a series of amendments to the US Constitution. Australia does not have a constitutionally protected Bill of Rights.
- The Bill of Rights contains a comprehensive or extensive list of rights. Students should have used examples to illustrate this, or referred to cases (for example, the *Roe v Wade* abortion case). Australia's Constitution does not contain a comprehensive list of protected rights, just the five express rights mentioned above, and the implied right.
- The rights are fully enforceable. This means that legislation which infringes any of those rights can be declared invalid by the US federal courts. Similarly, Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court (for example, *Australian Capital Television v The Commonwealth* mentioned above).
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended. This is a much more complex process than used in Australia, and involves separate referenda being held in states. The five express rights are also entrenched in Australia and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to free speech depends on how the High Court interprets the right. The right was further refined in *Lange*, mentioned above.
- The list of protected rights can be added to through constitutional amendment (for example, slavery was abolished after the Civil War and the vote introduced for 18 year olds in 1971). Similarly, in Australia we could add to the list by amending the Constitution.
- It includes implied rights; for example, a right to privacy has been implied. In *Roe v Wade* (1973) this right was extended to cover the relationship between patient and doctor, hence making it unlawful to interfere in



doctor–patient issues on matters such as abortion. Similarly, Australia has an implied right – the right to free political communication mentioned above.

Canada

- Contained in the Charter of Rights which was adopted in 1982. Australia does not have a constitutionally protected Bill of Rights.
- The Charter contains a comprehensive set of rights. Australia's Constitution does not contain a comprehensive list of protected rights, just the five express rights mentioned above, and the implied right.
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended. Procedures for amending the Constitution are similar to Australia's procedures. The five express rights are also entrenched in Australia and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to free speech depends on how the High Court interprets the right. The right was further refined in *Lange*, mentioned above.
- The rights are fully enforceable. This means that legislation which infringes any of those rights can be declared invalid by the Canadian Supreme Court. Similarly, Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court; for example, *Australian Capital Television v The Commonwealth*, mentioned above.
- Certain rights can never be overridden by parliament (for example, the right to vote). However, some rights can be overridden – parliament can respond to a Supreme Court declaration of invalidity by passing legislation again and indicating that it is to override the Charter. This legislation has a five-year sunset clause, and will therefore lapse at the end of five years, unless the parliament passes it again indicating that it is to override the Charter. Australia does not have a similar procedure to allow parliament to override a High Court declaration of invalidity.
- The Supreme Court can give an opinion on whether proposed legislation will infringe the Charter (the Supreme Court did this recently in regard to a Bill to legalise gay marriage). This, and the ability of the parliament to override certain rights (mentioned above), assists in developing a 'dialogue' between the legislature and the judiciary on rights. In Australia, the High Court cannot give advisory opinions. It can only express a view as part of a judgement which is given to resolve a case argued before it by parties in dispute.
- Rights can be limited where it is 'necessary in a free and democratic society'. Australia does not have a Bill of Rights containing such a provision.
- The courts can read down the impact of legislation (that is, interpret the legislation narrowly) to bring its operation within the boundaries set by the Charter. Again, Australia does not have a Bill of Rights endorsing this approach, and this approach has not been evident yet in the High Court decisions relating to the expressly protected rights.
- The courts can make another appropriate remedy, such as an award of damages – s.24(1). In Australia, the High Court's power is restricted to declaring legislation invalid where it contravenes one of the rights.
- A court can exclude evidence which has been obtained in violation of the Charter – s. 24(2). This is not a right recognised by the Australian Constitution.

UK

- As a member of the European Union, the UK is expected to comply with the European Convention on Human Rights. Australia is not a member of a body similar to the European Union, so is not subject to such a treaty.
- In the UK the *Human Rights Act (HRA)* incorporates those rights into British law. Australia does not have a Bill of Rights, either constitutionally protected as in the US, Canada and South Africa, or based on an Act of Parliament as in the UK and New Zealand. This UK Act is similar to the new Victorian and ACT Charters, but those Charters do not come within the scope of the current study design. However, students could have illustrated the nature of the UK *Human Rights Act* by pointing out its similarities to the new Victorian Charter.
- The Act provides a comprehensive list of rights. Australia's Constitution does not contain a comprehensive list of protected rights, just the five express rights mentioned above, and the implied right, and we do not have a Commonwealth statute equivalent to the UK *Human Rights Act*.
- These rights are not entrenched – the *Human Rights Act* can be amended by parliament. However, if parliament abolished a right, and that right is still protected by the European Convention on Human Rights, the aggrieved person could still seek to have the right adjudicated upon by the European Court. In Australia, the five express rights are entrenched and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to free speech depends on how the High Court interprets the right. The right was further refined in *Lange*, mentioned above.
- Courts cannot declare legislation invalid if it infringes the *Human Rights Act*, but can declare it to be incompatible. This puts pressure on the government to respond and if it does not, the complainant can turn to



the European Court of Human Rights. Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court (for example, *Australian Capital Television v The Commonwealth*, mentioned above).

- Courts are expected to interpret legislation in accordance with the *Human Rights Act*. While Australia has had examples where High Court judges have referred to international human rights standards when developing the common law (for example, in *Mabo*), this has not been an approach generally adopted by the court, particularly the current court.
- Public authorities must act in a way that is consistent with the *Human Rights Act*. If they fail to, the court can order damages. In Australia, legislation which infringes a protected right can be declared invalid. Courts cannot order damages for a breach of rights. Expecting public officials to comply with human rights standards is currently not the approach favoured by the High Court, as can be seen from asylum seeker cases.
- All Bills are scrutinised for compliance with the *Human Rights Act*. This does not happen in Australia.
- Courts are required to act consistently with the *Human Rights Act* when developing common law. This is not required under Australian law.

South Africa

- The Bill of Rights was introduced 1996. Australia does not have a constitutionally protected Bill of Rights.
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended. In Australia, the five express rights are also entrenched and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to free speech depends on how the High Court interprets the right. The right was further refined in *Lange*, mentioned above.
- The rights are fully enforceable. This means that legislation which infringes any of those rights can be declared invalid by the Constitutional Court. Similarly, Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court (for example, *Australian Capital Television v The Commonwealth*, mentioned above).
- It contains a comprehensive list of rights. Students could have used examples and cases in their responses. Australia's Constitution does not contain a comprehensive list of protected rights, just the five express rights and the implied right mentioned above.
- A special feature of the South African Bill of Rights is its inclusion of economic, social and cultural rights. Australia's protected rights do not include these sorts of rights, although it might be argued that s.92 amounts to the protection of an economic right.
- Courts are required to interpret statutes in accordance with the Bill of Rights. While Australia has had examples where High Court judges have referred to international human rights standards when developing the common law (for example, in *Mabo*), this has not been an approach generally adopted by the court, particularly the current court.
- The courts are to develop the common law in accordance with the Bill of Rights. This is not required under Australian law.
- Rights can be limited where justified in free and democratic society. In Australia, there is no Bill of Rights containing such a provision.
- Actions may be brought in the public interest. Australians require standing to bring an action.

New Zealand

- The *Bill of Rights Act* (BORA) was passed in 1990. Australia does not have a Bill of Rights, either constitutionally protected as in the US, Canada and South Africa, or based on an Act of Parliament as in the UK and New Zealand. This New Zealand act is similar to the new Victorian and ACT Charters, but those Charters do not come within the scope of the current study design. However, students could have illustrated the nature of the New Zealand BORA by pointing out its similarities to the new Victorian Charter.
- It contains a comprehensive list of rights. Australia's Constitution does not contain a comprehensive list of protected rights, just the five express rights and the implied right mentioned above, and we do not have a Commonwealth statute equivalent to the New Zealand *Bill of Rights Act*.
- The BORA is not constitutionally entrenched, so parliament can abolish rights by amending the BORA. In Australia, the five express rights are entrenched and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to free speech depends on how the High Court interprets the right. The right was further refined in *Lange*, mentioned above.
- The rights are not fully enforceable by the courts – that is, the courts **cannot** declare legislation invalid if it infringes the BORA. Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court (for example, *Australian Capital Television v The Commonwealth*, mentioned above).

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- Courts are required to interpret legislation in accordance with the BORA. While Australia has had examples where High Court judges have referred to international human rights standards when developing the common law (for example, in *Mabo*), this has not been an approach generally adopted by the court, particularly the current court.
- The Attorney-General scrutinises all Bills and advises parliament if there is any infringement of the BORA. This does not happen in Australia.
- While it is not fully enforceable, the BORA has affected the political culture in New Zealand. If a government planned to act contrary to the BORA, it would be expected to explain and justify its actions to the electorate. In Australia, there is no similar comprehensive list of rights with which the Commonwealth Government is expected to comply.

Question 9

Marks	0	1	2	3	4	Average
%	19	10	20	21	30	2.4

Students had a good understanding of criminal pre-trial procedures and most discussed bail/remand and committal proceedings. Students generally related the information about the pre-trial procedures to the concept of justice and commented on how their chosen pre-trial procedures attempted to protect people from unjust treatment. The following is an example of a good answer.

One criminal pre-trial procedure is bail. This is releasing the accused into the community to await trial, on their undertaking to return rather than being held in custody (remand). Bail often includes conditions that ensure that the accused does not cause any problems while waiting trial. Bail protects a person from unjust treatment by promoting the presumption of innocence, because the accused isn't subjected to the emotional and financial trauma of custody without being proven guilty. Bail also provides an opportunity for the accused person to prepare their case, also ensuring a just hearing.

Question 10

Marks	0	1	2	3	4	Average
%	25	10	21	19	24	2.1

This question asked students to identify two recent changes to the legal system and then link that information to the legal system's effective operation. Although many students made this connection, some only identified the changes without providing the link to an effective legal system.

Some students suggested that committal proceedings, tribunals and the provision of legal aid were 'recent'; however, these processes have been a part of the legal system for many years. Better answers provided some recent examples as required by the question. Many of these answers mentioned the Koori Court, increased jurisdictions of courts and the introduction of *pro bono* schemes. Others suggested that judges play a more active role in judicial proceedings and some recommended that juries be required to provide reasons for their verdicts. These students showed a good awareness of the dynamic nature of the legal system and explained how these changes contributed to fair and unbiased hearings, timely resolution of disputes, access to dispute resolution and recognition of values. A small number of students identified changes to the law, such as changes to speed laws; however, this limited their answers because it was difficult to draw a connection to an effective legal system. Following is an excerpt from a good answer.

One recent change that has been made to the legal system is the introduction of the Koori Court at both Magistrates and Children's Court level. The Koori Court is a sentencing court that has a more informal atmosphere compared with a traditional court. For indigenous offenders the Koori Court offers a sentencing court (it is not a trial court) that recognises the cultural differences between indigenous Australians and the remainder of the population. By recognising these cultural differences the Koori Court aims to reduce the statistics of indigenous Australians in jail. This should increase the effectiveness of the legal system as it tries to recognise the human rights of this cultural group and ensure that the sentencing process is fair.

Question 11

Marks	0	1	2	3	4	5	6	7	8	Average
%	17	7	9	12	13	12	13	9	7	3.7

The doctrine of precedent is the set of rules that requires courts to follow precedents in order to determine the rules of the common law. This doctrine also directs the courts regarding how these precedents are to be followed and directs courts regarding following precedents relating to statutory interpretation. The main points are:

- similar cases are decided in similar ways
- decisions of courts higher in the court hierarchy are binding on lower courts (doctrine of *stare decisis*)
- the *ratio decidendi* is the part of the judgement which is binding on lower courts



- 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 be given considered respect
- precedents from another hierarchy are not binding but are 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 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 and encourage an appeal to a superior court.

The doctrine of precedent is a challenging part of the Legal Studies course and many answers indicated that students do not understand how this theory works in practice. Too many students argued that the doctrine ensures that sentences or remedies are consistent, a fundamental error which must be addressed in the classroom. In many answers, students included long descriptions of cases that have created famous precedents (such as the 'snail in the bottle case'); however, in many instances these examples did not contribute to the answer. Students must consider carefully when to use an example to best effect.

The second part of the question required students to **evaluate** the strengths of the doctrine of precedent. They needed to identify **two** strengths and look critically at these strengths, then make a judgement about whether they are actually strengths. When looking critically at the strengths, students may have contrasted the strength with a weakness of that method of law-making. This part of the question proved difficult for students and further highlighted the necessity for more work developing evaluation skills.

The strengths of the doctrine of precedent include:

- a court can change a law quickly if a relevant case is brought before it
- the doctrine of precedent allows for some predictability
- courts can fill gaps in the law by making a decision on a matter when it arises
- the law is prevented from being too rigid by distinguishing, overruling and reversing previous decisions
- the law can be expressed as a general principle (for example, the 'neighbour test'), allowing the courts to adapt it to fit the circumstances before the court
- judicial decisions are free from outside pressure
- the doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions
- the appeals process allows for the review of decisions
- parliament can override court-made law in the interests of representative and responsible government.

The weaknesses of the doctrine of precedent include:

- courts cannot determine what the law is 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 are *ex poste facto*
- determining the law this way can be very expensive for the parties involved
- some judges are very conservative and could be reluctant to change bad laws
- judges are not elected and judges tend to be drawn from narrow socioeconomic backgrounds (though this is changing).

The following is an introduction to a good answer.

The doctrine of precedent follows the principle of 'stare decisis' – to stand by what has been decided. Precedent is a reason for a decision in the judgment of a court that sets a principle of law that must be followed by lower courts in the same hierarchy unless the material facts of the case are so different they can be distinguished. There are two types of precedent, binding and persuasive...

2006 Assessment Report



Question 12

Marks	0	1	2	3	4	5	6	7	8	Average
%	6	8	12	13	14	12	16	8	11	4.3

Some strengths of the jury system are that:

- decisions reflect the views of the common person/community
- juries are independent and impartial
- juries are a cross-section of the community and reflect prevailing community attitudes
- it ensures the law/system remains intelligible to the ordinary person and involves the community
- decision-making is spread across a number of people
- there is less likelihood of a wrong decision being handed down
- it provides a trial which is free from political interference
- juries can act as a social conscience
- it ensures that hearing of evidence is conducted in open forum
- it has stood the 'test of time' and has historical significance.

Some weaknesses of the jury system of trial are:

- jury deliberations are kept secret and reasons do not have to be given
- juries may not be a true cross section of the community as people are able to be challenged or excused for a good reason
- juries can add to the cost and length of a trial
- there is some question whether juries understand, and recall, evidence that can be complex and technical
- jurors may be influenced by things other than the facts before them (for example, the rhetoric of counsel)
- juries have been criticised because of their high acquittal rate
- it may be difficult to reach a decision, even though majority verdicts have been introduced in Victoria in all cases except murder and treason.

The jury system was well understood by students, although some seemed to believe that juries always determine the sanction to be applied in criminal cases. Most answers indicated a good knowledge of some of the key features of the jury system; however, once again, the evaluation of material needs further work. The following is an example of a good evaluation of one of the strengths.

The jury system gives ordinary members of the community a chance to participate in the legal system. Members of the community are able to gain a better knowledge of the workings of the criminal justice system and scrutinise the interpretation and application of the law by unelected judges. The jury system ensures that the legal system isn't solely the domain of those who have a vested interest in the legal system, such as judges, lawyers and the police. It also ensures that the language used in the court room is understandable to the ordinary person, which should make the accused person able to understand proceedings as well. However, it is debateable whether people with little or no understanding of courtroom procedure are able to play such an important role in criminal trials. The choice of jurors means that many are excluded by challenge or the original selection process and therefore participation by ordinary people is in effect limited. Nevertheless, the jury system does contribute to just trials by providing an accused person with trial by a representative group from the community.

Question 13

Question chosen	none	a	b
%	4	55	42

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	10	8	9	9	10	11	11	10	9	6	8	4.9

It was very pleasing to see that students were able to follow the instructions for this question and there were very few students who began one answer and then changed their minds and chose the other option.

Question 13a.

Advantages of parliament as a law-maker include that it:

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



- can change the law as the need arises
- can make law *in futuro*
- is democratically elected.

Disadvantages of parliament as a law-maker include:

- investigation and implementation of 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 all 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 retrospectively, which can be unfair
- the 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 when the government controls both houses
- parliament's response to community views may not be adequate.

Most students made a good attempt at this 'traditional' examination question, which students were clearly well prepared for. Unfortunately, many students seemed to be expecting a question on the comparison of courts and parliament as law-makers and therefore included information about the courts that was not necessary. Careful reading of the question is crucial to ensure that the material provided in the answer is accurate and relevant.

Some students took this opportunity to describe the legislative process in great detail, which detracted from the quality of their answer. Although the process used by parliament to produce laws may enhance the effectiveness of parliament as a law-maker, students must be able to use the information they have to support an argument, rather than simply provide a list of points. A good strategy was to begin their answer with an explanation of whether the student agreed or disagreed with the statement provided, and then provide a discussion of reasons why the view was held. The following response does this well.

I agree that parliament is an effective law-maker, yet I feel that while it's effective in its primary role of legislating, there are some significant weaknesses.

Parliament is a body of elected members who represent the community's views in the laws they create. If the community is dissatisfied with their members of parliament they can vote them out of power. Therefore members of parliament are compelled to act both representatively and responsibly. This subsequently means that the law created by parliament is such that it satisfies the community and reflects the views and values of society.

There is a weakness however, and that is that parliament must create laws in a broad view to cover a variety of situations and therefore they may not be able to fully reflect the diverse views of the community. Also, parliament may become afraid of creating laws that protect particular groups for fear of voter backlash and therefore we see that the parliament was not the primary law-maker in areas such as abortion and indigenous land rights. Although parliament may not enter into controversial areas of law-making it is still a representative body and therefore an effective law-maker.

Question 13b.

Strengths of the adversary system of trial include:

- it is historical and has been tested over time
- the community has confidence in the system
- individuals are responsible for the conduct of their own cases/control their own case (fair and just)
- there are rules of evidence and procedure and both parties have equal footing
- those directly affected by the case bear the costs involved
- as individuals are responsible for presenting the best case to support their point of view, all relevant evidence will be presented
- there is a belief that the judge is independent and impartial, thus people are treated fairly (independent umpire)
- the trial is heard in one continuing hearing so continuity of the hearing is ensured
- parties can have legal representation/legal aid
- the emphasis on oral evidence and examination of witnesses allows witness statements to be tested to reach the truth and achieve a fair hearing.



Weaknesses of the adversary system of trial include:

- the parties are in charge of presenting the case, including gathering evidence, presenting and cross-examining in court, arguing legal points and addressing the jury. Accordingly, the success of the case can depend on the skills of a party's legal team, particularly the advocate in court. If one side is not as well-represented as the other, it will be at a disadvantage, which will introduce an element of unfairness
- good legal representation is expensive and funds for legal aid are limited, particularly where minor offences are involved
- an unrepresented party is at a considerable disadvantage
- as control of presenting the case is in the hands of the parties, one party might choose not to present relevant evidence, or not to raise particular legal issues, because it would be damaging for that party's case. This is in contrast with the inquisitorial system, where the judge can call for evidence and raise issues
- it aims to determine which party has the stronger case. However, for all the above reasons, it might not discover the truth.

Possible improvements to the adversary system of trial include:

- increased judicial involvement in proceedings
- simplification of the rules of evidence and procedure, generally or with specific examples
- encouragement of alternative methods of dispute resolution
- greater control over legal costs
- increased availability of legal aid to facilitate improved access to legal representation
- increased spending on the legal system (for example, more courts and judges).

This question was also handled well, although some students relied too much on points relating to the jury system, which is not a key feature of the adversary system. Some students mentioned the inquisitorial system's features when discussing improvements. These were appropriate as long as the answer did not simply describe the inquisitorial system.

Once again, better answers began with an opinion and then presented a discussion of reasons for holding the opinion. Following is part of an excellent response which did this.

Our adversary system does work well, nevertheless, improvements could be made to some areas.

An aspect where little improvement is necessary is the strict rules of evidence and procedure that operate in the adversary system. These rules ensure that evidence that has been illegally obtained or is potentially unreliable is unable to be presented in court. Parties to a case are thereby protected from being unfairly disadvantaged by having misleading evidence presented against them. The rules of procedure ensure each party has an equal opportunity to present their version of the facts. The procedure of examination-in-chief and cross-examination allows for evidence to be tested and allows the court to see witnesses in person. However, a minor improvement that could be made here is to allow the witness to first present their evidence in narrative form prior to responding to questions from counsel. This could be less intimidating for witnesses who would be better able to express what they wanted to say as well as being easier for a jury (if present) to follow.