



2008

Legal Studies GA 3: Written examination

GENERAL COMMENTS

This year's paper was handled well by the majority of students. Areas of strength included material related to individual rights and the powers of police, as well as criminal procedure. These are areas of interest to students and it is clear that this interest translates well into examination answers. Another area of strength was methods of dispute resolution.

The doctrine of precedent is an area of study that many students find challenging and this was evident in answers to Question 10. Law-making by judges is a fundamental part of the Legal Studies course and it requires greater emphasis in the classroom.

The *VCE Legal Studies Study Design* is a vital part of student preparation for the examination. It contains material on which the examination is based and provides relevant headings for the organisation of notes. It also uses vocabulary that Legal Studies students are expected to know and should be able to use correctly, for example, terms such as 'precedent' and 'court hierarchy', as well as the functions and jurisdictions of the courts that are listed in the study design. Students should also be able to accurately spell words that are particularly relevant to this study, such as 'trial', 'petition' 'legislation', and 'parliament'.

Good examination technique can be developed through practise of past examination questions and by using the study design to create questions that could appear on the examination. This may help students to be prepared for questions on the examination that ask for information in a different way or with a different emphasis.

The examination booklet provides lined spaces for answers. The lines for each question provide guidance about how much information is expected in the response.

The majority of students completed the examination within the allocated time; this is a sign of good time management. To ensure that they make best use of their reading time, students should practise reading and thinking for fifteen minutes without making notes or highlighting information. Teachers should also incorporate the development of this skill into their teaching practice.

It was clear from some answers that students had referred to past Assessment Reports; however, students need to ensure that they do not provide answers to questions that they expect or hope to see on the examination. It is very important that students' answers relate directly to the question asked and all material should be relevant to the 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.

Characteristics of good responses

Good responses indicated that students had read the questions carefully, made appropriate choices and were able to answer questions with accurate and relevant information. All question parts were responded to and writing was legible, in dark blue or black pen. Students are advised not to write their answers in pencil as it is difficult to read during the assessment process. Spelling of 'legal' words was accurate and there was excellent use of detail and examples to demonstrate a thorough knowledge of the material. Good answers also indicated that students had divided their time appropriately, spending less time answering questions worth only one, two or four marks than questions worth eight or ten marks. Responses to questions worth fewer than five marks did not have lengthy introductions, but addressed the question immediately by providing factual detail. In answers to questions worth more than five marks, information was carefully presented in paragraphs that were introduced by a clear topic sentence. Good paragraphing ensures that material is presented in a logical way that enhances the quality of the answer. Where a student used the extra space for responses at the back of the examination booklet, it was clearly indicated that the answer was continued on the appropriate page. Better responses did not use dot points or tables to present information. When asked to 'critically examine' or 'evaluate', students provided a clear statement of opinion supported by evidence.



SPECIFIC INFORMATION

Note: Student responses reproduced in *italics* herein have not been corrected for grammar, spelling or factual information.

For each question, an outline answer (or answers) is provided. In some cases the answer given is not the only answer that could have been awarded marks.

Question 1

Marks	0	1	2	3	4	5	Average
%	1	3	7	14	27	49	4.1

Question 1a.

The Crown, via the Queen's representative at state and federal level, gives (or withholds) royal assent to bills passed through parliament.

For a one mark question, one sentence should be adequate to provide an accurate response. 'Royal assent' was the key phrase required; it was not sufficient to say that the Crown 'signs off' on legislation passed by parliament.

Most students responded correctly.

Question 1b.

Possible reasons included:

- changes in community attitudes
- changes in the social, political, economic and moral values of society
- community awareness and increased importance of issues
- the nature of business and the advancement of technology
- government and bureaucratic needs
- expectations of the legal system.

Examples were also required to illustrate the change that was explained. Examples included (but were not limited to):

- laws required for cameras on mobile phones (technology)
- laws in relation to same sex couples, abortion and euthanasia (morals and attitudes)
- native title land (increased importance of issues)
- human rights
- IVF (technology)
- cloning (technology)
- protection of consumers (nature of business).

Question 1c.

On the whole students answered this question well; however, many students did not 'explain' the method they identified for Sally to participate in influencing a change in the law. Although not exhaustive, the following methods are ways in which Sally could participate in influencing a change in the law:

- taking part in opinion polls
- writing letters to Ministers for Parliament (MP) 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.

The following is an example of a good answer.

Sally can influence change in the law through submitting a petition to a member of parliament or a formal law reform body. A petition is a collection of signatures that shows support for an issue, those with more signatures are generally more successful.

Question 2

Marks	0	1	2	3	Average
%	10	23	35	32	1.9

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Question 2a.

Some acceptable reasons included:

- wording of the statute, or definition of some words provided in the Act, may be vague, complex or unclear
- a word may have more than one meaning or the meaning may differ in different contexts and circumstances
- the meanings of some words may change over a period of time
- the statute may not cover all possible future applications of the statute
- the statute may be outdated and inappropriate for the current legal dispute before the court.

Answers were required to provide an outline of two reasons why statutes may need to be interpreted; simply stating 'ambiguity' was not enough to gain a mark. Some students suggested that statutes are interpreted so that 'David' could understand the verdict; however, while this may be an outcome of statutory interpretation, it is not a reason for interpretation.

Question 2b.

Appeal division of the Supreme Court of Victoria (the Court of Appeal)

Unfortunately many students are not familiar with the jurisdictions of the courts prescribed in the study design and were therefore not able to provide the correct answer. 'Court of Appeal' was also acceptable. A student received no marks if they gave two courts, for example, 'The Supreme Court or the Court of Appeal'.

Question 3

Marks	0	1	2	Average
%	19	49	32	1.2

One function of the Coroner's Court is to investigate suspicious fires. The Court investigates the way the fire was started and considers other technical issues associated with fires that may provide suggestions for improvements in the future.

Students' lack of knowledge about court functions and jurisdictions was evident in answers to this question.

The following is an example of a good answer that described another function of the Coroner's Court.

Investigating reportable deaths in order to determine their causes. Reportable deaths are those that are sudden, traumatic or unexplained or where the identity of the deceased is unknown. The Coroner's Court investigates the way these deaths occurred in order to determine a cause of death, by doing this society can be made safer by the court suggesting ways to prevent some types of deaths, for example, cot deaths.

Question 4

Marks	0	1	2	3	4	Average
%	1	6	24	28	41	3

Students responded well to this question. Most were familiar with the rights of those involved with the criminal justice system. Examples of individual rights that could have been explained include:

- be informed by the police of the charge
- be informed by the police of his rights
- remain silent – although Tony must provide his name and address if asked
- an interpreter
- refuse to accompany a police officer to the station, unless he has been arrested
- refuse to supply voice prints
- refuse to participate in an identification parade
- refuse to participate in the reconstruction of a crime
- communicate with lawyers, family and friends before police questioning (this right can be lost if the police reasonably believe that this could lead to an escape, the destruction of evidence or an endangerment of the lives of others)
- see and read any written statements recorded during the police interview
- ask a police officer for their name, rank, identification number and station
- be released unconditionally or on bail
- refuse to have body samples or photographs taken (although a court order can be obtained allowing this, or a senior police officer can authorise non-intimate compulsory procedures)

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- refuse to allow a search of property unless police have a warrant.

Examples of police powers that could have been explained include:

- demand the name and address of a person who is suspected of committing an offence or could assist in the investigation of a serious offence
- question Tony for a reasonable amount of time
- ask Tony to accompany them to a police station
- take Tony's fingerprints
- take blood samples if consent or a court order is obtained
- arrest Tony with a warrant (the information provided makes it unlikely that this is a situation where Tony can be arrested without a warrant)
- use listening devices or tap telephones, provided official permission has been given
- hold identification parades if Tony agrees to participate.

Question 5

Marks	0	1	2	3	4	Average
%	15	11	22	20	32	2.5

The material tested by this question is the most recent inclusion in the study design and students had a reasonably strong command of the information. All countries provided for comparison were present in student responses; however, the most popular countries were Canada and South Africa. It is important that students use the information in the way required by the question, as many students simply listed the ways that rights are protected in Australia and in their chosen country of comparison. Better answers explained Australia's approach to the constitutional protection of rights and then drew a comparison or contrast with their chosen country. The emphasis needed to be on how rights are protected or the approach that is used to protect rights, rather than the rights in a specific sense.

The following is an extract from a good answer.

The Commonwealth Constitution of Australia differs in its approach to the protection of rights from Canada in that the Australian Constitution has only five express rights that are entrenched, for example the right to freedom of religion (s116). Canada is different in that it has an entrenched bill of rights through the Canadian Charter of Rights (1982) that expressly protects a significant number of democratic, mobility, legal and language rights.

The following information could also have been used when answering this question.

Canada

- Protection is contained in the Charter of Rights which was adopted in 1982. (Australia instead has a Constitution adopted in 1901 which contains no express Bill or Charter of Rights.)
- The Charter contains a comprehensive set of rights. Students could refer to examples or specific cases as evidence of this point. (In comparison, Australia does not have a comprehensive set of rights.)
- 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 the referendum process in Australia.)
- The rights are fully enforceable, which means that legislation that infringes any of those rights can be declared invalid by the Canadian Supreme Court. (The High Court of Australia can also declare legislation as *ultra vires* if it infringes anything expressed in the Constitution.)
- 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 lapse at the end of five years unless parliament passes it again and indicates that it is to override the Charter. (Parliament can never change any wording of the Constitution in Australia; this can only be done through s. 128 – referendum.)
- 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.)
- Rights can be limited where it is 'necessary in a free and democratic society'. (Australia has limited rights.)
- 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.
- The courts can make another appropriate remedy, such as an award of damages — s. 24(1).
- A court can exclude evidence that has been obtained in violation of the Charter — s. 24(2).



United States of America

- The protection of democratic and human rights is contained in a Bill of Rights that takes the form of series of amendments to US Constitution. (Australia has no Bill of Rights.)
- The Bill of Rights contains a comprehensive or extensive list of rights. Students could use examples to illustrate this, or refer to specific cases such as *Roe v Wade* (an abortion case). (Australia does not have an extensive list of rights.)
- The rights are fully enforceable. This means that legislation that infringes any of those rights can be declared invalid by the US federal courts. (In Australia, the High Court can declare legislation invalid if it is outside its powers.)
- The rights are entrenched, which means that a right can only be abolished if the Constitution is amended. (Although similar, this is a much more complex process than we use in Australia, involving separate referenda being held in states.)
- The list of protected rights can be added to through constitutional amendment, for example, slavery was abolished after the Civil War and the vote was introduced for 18 year olds in 1971. (In Australia, rights can only be expressly added through the referendum process.)
- 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, and hence make it unlawful to interfere in doctor-patient issues on matters such as abortion. (Australia also has at least one implied right, which is the right to political communication as discussed in *Lange v ABC*.)

United Kingdom

- As a member of the European Union, the UK is expected to comply with the European Convention on Human Rights. (Australia, although a party to many international treaties on human rights, is not bound to comply with them.)
- The UK *Human Rights Act 1998* (HRA) incorporates those rights into British law.
- The Act provides a comprehensive list of rights. (Australia does not have a comprehensive set of rights.)
- These rights are not entrenched. The *Human Rights Act 1998* 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. (Parliament cannot amend the constitution in Australia.)
- Courts cannot declare legislation invalid if it infringes the HRA, 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. (The Australian High Court can declare legislation as *ultra vires*.)
- Courts are expected to interpret legislation in accordance with the HRA.
- Public authorities must act in a way that is consistent with the HRA. If they fail to, the court can order damages.
- All Bills are scrutinised for compliance with the HRA.
- Courts are to act consistently with the HRA when developing common law.

South Africa

- The Bill of Rights was introduced in 1996. (There is no Bill of Rights in Australia.)
- The rights are entrenched, which means that a right can only be abolished if the constitution is amended. (As in Australia, any section of the Constitution can only be amended through the referendum process.)
- The rights are fully enforceable, which means that legislation which infringes any of those rights can be declared invalid by the Constitutional Court (This is similar to Australia.)
- It contains a comprehensive list of rights. Students could use examples and specific cases to illustrate this point. (Australia's constitutional protection of rights is not comprehensive and is limited to five express rights.)
- A special feature of the South African Bill of Rights is its inclusion of economic, social and cultural rights. (As above, Australia's constitutional protection of rights is limited to five express rights.)
- Courts are required to interpret statutes in accordance with the Bill of Rights. (Australia does not have a Bill of Rights.)
- The courts are to develop the common law in accordance with the Bill of Rights.
- Rights can be limited where justified in a free and democratic society.

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New Zealand

- The *Bill of Rights Act* (BORA) was passed in 1990 and contains a comprehensive set of rights. (Australia does not have a Bill of Rights.)
- It is not constitutionally entrenched, so parliament can abolish rights by amending the BORA. (The Australian Parliament cannot abolish anything in the Constitution – s. 128.)
- The rights are not fully enforceable by the courts, that is, the courts **cannot** declare legislation invalid if it infringes the BORA. (This is different from Australia where the High Court can interpret the Constitution, particularly with regards to s. 109 and law-making powers.)
- Courts are required to interpret legislation in accordance with the BORA.
- The Attorney-General scrutinises all Bills and advises parliament if there is any infringement of the BORA.
- While not fully enforceable, it has affected the political culture in that governments are expected to comply with it.

Question 6

Marks	0	1	2	3	4	5	6	Average
%	1	4	7	10	16	23	38	4.6

The scenario provided in the stimulus material for this question contained errors in relation to criminal procedure. Most students were able to identify three errors. Errors that could have been identified included the following.

Error	Correct procedure
Anna's trial went directly to the Supreme Court	As Anna was charged with murder, the case would most commonly be directed to the Magistrates' Court for a committal hearing, which will determine whether or not the case should go to trial.
A Magistrate presided in the Supreme Court	A Magistrate does not preside over proceedings in the Supreme Court. Only a registered Judge of the Supreme Court may conduct proceedings in this Court.
A majority verdict was reached in a murder trial	A majority verdict is not accepted in murder trials. If the jury were to find the defendant guilty (or not guilty), a unanimous verdict of 12 is required.
The jury sentenced Anna	The jury's role is limited to determining the guilt of the defendant. It does not extend to sentencing. A sentence will be handed down by the presiding judge at a later date during the sentencing hearing if the defendant is found guilty.
A juror knew Anna's brother	Under s. 32 of the <i>Juries Act 2000</i> (Vic), a potential juror should ask to be excused from the jury if they are unable to act impartially (particularly if they knew the accused's brother). This juror should have done so once they knew the name of the accused (information which is provided to potential jurors once they have been called from the jury pool). Alternatively, as soon as the juror became aware that he or she knew Anna's brother, he or she should have notified the court as to a potential problem with remaining impartial.

Some students did not explain the correct process or procedure which should have occurred. It is important that students check that their answers are a complete response to the question.

Question 7

Marks	0	1	2	3	4	5	6	Average
%	3	9	14	12	18	16	28	4

Question 7a.

Some students did not know that the plaintiff, or the person making the complaint (James in this scenario), is the one who carries the burden of proof. Some students used the language of criminal procedure and said that the prosecution has the burden of proof, which is not true in a civil matter.

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Question 7b.

The judge:

- presides over proceedings to ensure rules of procedure are followed
- may ask a witness to clarify part of his or her statement
- can call a new witness with the permission of both parties
- is responsible for deciding the admissibility of evidence and deciding questions of law
- decides whether or not the defendant is liable on the balance of probabilities
- will decide on the remedy if the defendant is liable
- may order costs against either party
- must act as an impartial umpire and not favour either side.

This question was well answered and it was evident that students were familiar with the role of the judge in civil adversarial procedures.

Question 7c.

Appropriate pre-trial procedures include:

- letter of demand
- writ of notice or originating motion
- statement of claim
- interrogatories
- defence to counterclaim (if the restaurant decides to counterclaim)
- discovery
- interlocutory order
- pre-trial conference
- directions hearings.

It was also possible for students to use broad headings such as pleadings and discovery and explain their purpose in a general sense.

Some answers to this question referred to criminal pre-trial procedures rather than civil ones. Once again, it is important for students to take care when reading questions and determining what material is relevant. For example, committal proceedings are a criminal pre-trial procedure, not a civil one.

The purposes of civil pre-trial procedures could have been described generally or be related particularly to the example used. Generally, procedures:

- provide for the exchange of documents and information
- inform the defendant that legal action is being taken
- set out the precise nature of the claim and remedy sought
- enhance the opportunity for settling out of court
- give each side some knowledge of the opposing case
- allow issues to be clarified before going to court
- allow parties to fully prepare their cases for court
- documents prepared during pre-trial stages are used by the court as a written record of issues relevant to the action
- facilitate a settlement prior to the court case.

Question 8

Marks	0	1	2	3	4	5	6	Average
%	4	4	11	17	21	21	21	4

It was evident that students were very familiar with the methods of dispute resolution that are an alternative to litigation. However, the skill of 'critically evaluating' material requires further work. This skill requires using 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.

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The following is an example of a good answer.

Alternative dispute resolution methods, such as mediation, are the best way to resolve civil disputes. 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 the best 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 mediation as the best method of resolving civil disputes, nevertheless, its benefits far outweigh the disadvantages and it is still a much better alternative to litigation.

Following are some other strengths and weaknesses that could have been used to make a critical evaluation.

Strengths of Alternative dispute resolution (ADR)

- Alternative dispute resolution is usually seen as a **voluntary** process compared to a formal court hearing, which could be described as compulsory dispute settlement.
- If a third party is used, for example, a mediator/conciliator, their role is to assist the parties with the discussion. They try to bring out the issues and assist the parties to explore the possible solutions to the dispute.
- Strict rules of evidence and procedure, as in a formal court hearing, do not apply in ADR, therefore the intimidation factor decreases.
- 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 with a 'winner' and a 'loser'. Whereas through ADR, if the parties reach a settlement, an agreement can be drawn up that incorporates the terms of the settlement and this would become a binding contract. However, a party cannot be forced to consent to an agreement with which he/she is not happy.
- ADR is usually a cheaper alternative to a formal court hearing due to the parties often not requiring legal representation.
- ADR allows a decision to be made more speedily compared with a formal court hearing due to the lack of rules of evidence and procedure.

Weaknesses of Alternative dispute resolution (ADR)

- One party might not wish to resolve the conflict and might use ADR to waste time in order delay a resolution of the conflict, or to increase the expense for the other party.
- Mediation is less likely to be successful where there is a power imbalance between the parties, or in marital disputes where there has been violence.
- A mediated agreement is not binding and enforceable by the courts unless the agreement has been incorporated into a court order, or amounts to a new contractual agreement.
- Arbitration can still be quite expensive and adversarial (considering that many parties still use legal representation).

Question 9

Marks	0	1	2	3	4	5	6	Average
%	8	8	13	16	20	19	16	3.6

The following points could have been used to develop an evaluation of the strengths noted in the question.

Makes laws which reflect views of the community

Strengths

- Parliament is democratically elected and therefore is considered to be able to make laws which reflect their own region/area.
- 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 powers to bodies such as local councils which are considered to be more in tune with the needs of their communities.

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- Parliament is able to involve the public in law-making.

Weaknesses

- Investigation and implementation of new laws is time consuming and parliament is not always able to keep up with changes in society.
- 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 can make laws retrospectively, which can be unfair.
- 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.

Makes laws whenever the need arises

Strengths

- Parliament can make law *in futuro*, which means they can make laws even before the need arises.
- Parliament can investigate the whole topic and make a comprehensive set of laws.
- Parliament can delegate its power to make law to expert bodies, which can make the regulations much faster than parliament.
- Parliament is able to involve the public in law-making.
- Parliament can change the law as the need arises (in comparison to courts).

Weaknesses

- Investigation and implementation of new laws 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.
- 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.
- The division of law-making powers between the federal and state parliaments is in dispute from time to time, therefore often a law may be 'put on hold'.
- Parliament's Upper House can 'rubber stamp' or deliberately obstruct legislation.
- The government of the day might decide for political reasons that they do not wish to make a law, even though there may be a need for it.

Following is an extract that critically examines two strengths of parliamentary law-making, as required by the question.

It is true that parliament can create informed laws that reflect the views of the community because it is able to consult with the public through speaking with voters and also examining the opinion of voters through investigations conducted by formal law reform bodies such as the ALRC. However, members of parliament may not legislate on controversial issues such as euthanasia because they fear voter backlash. Thus, this can limit the law-making ability of parliament to truly represent the views of the entire community. The political nature of parliament, whereby there are two distinct parties controlling most of the seats can also limit the ability of parliament to reflect the views of the community because MPs will almost always vote on party lines, often preventing law reform that reflects the views of the community.

Question 10

Marks	0	1	2	3	4	5	6	7	8	Average
%	15	9	12	13	15	12	12	7	5	3.5

The doctrine of precedent is a challenging part of the Legal Studies course and some students did not attempt this question. Many students suggested that the doctrine contributes to sentences or remedies, a fundamental error that must be addressed in the classroom. In many answers, students included long descriptions of cases that have created change in the law (such as the 'snail in the bottle case'). In many instances these examples did not contribute to the answer and students must consider carefully when to use an example to the best effect.

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 regarding the following of precedents relating to statutory interpretation. The question asked for an evaluation of the doctrine ability to allow courts to change the law. Students needed to use the key points to show how change is allowed or



impeded by the doctrine. Unfortunately, many students simply listed the key points without explaining how they contribute to or inhibit change in the law.

The main points showing that change is possible are:

- the courts can change a law quickly if a relevant case is brought before them
- the doctrine of precedent allows for **some** flexibility. The law can be expressed as a general principle (for example, the 'neighbour test') allowing the courts to adapt the law to fit the circumstances before the court.
- courts can fill the 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
- 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
- if a party has a valid point regarding the law, the appeal process allows for the highest court, the High Court, to change the law as it is not bound by any precedent.

The main points showing that change is inhibited by the doctrine are:

- courts may be bound by an old precedent, which could lead to unjust results
- some judges are very conservative and could be reluctant to change bad laws
- courts cannot determine what the law is unless a case is brought before the court
- changes in the law are *ex poste facto*
- determining the law this way may be too expensive for the parties involved
- judges are not elected by the people and are not required to reflect changing attitudes and values.

The following is an example of a good answer. This answer presented a clear point of view in the introduction and used the points to look critically at the capacity of the doctrine to allow for change in the law. The answer went on to discuss how the doctrine both allows and restricts change. Examples, such as Menhennitt's ruling in Davidson's case, were used in the answer to illustrate the way courts have contributed to law-making.

The doctrine of precedent operates on the principle of stare decisis (to stand by what is decided). This principle ensures consistency and predictability but fundamentally works against courts changing the law. This means that the doctrine does limit the courts as law-makers, however, there is no doubt that some of our most controversial areas of law have been made by the courts, thus showing that the doctrine of precedent does allow for change in the law.

The heart of the doctrine of precedent is the 'ratio decidendi', or reason for the decision given by the judge in a superior court. This ratio is binding on lower courts in the same hierarchy where the case being decided is so similar in facts that there can be no distinguishing if the judge does not think that the precedent should be followed. This idea of being 'bound' by previous decisions allows for consistency and reduces the likelihood of judges changing the law. However, judges who are bound by decisions may still be able to change the law by distinguishing their case from the binding one. This allows a judge to make a new precedent and thus allows for development or change in the area of law.

Question 11a.

Question chosen	None	a.	b.
%	4	43	53

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	8	5	7	8	9	11	13	12	11	7	9	5.4

There were many excellent answers to this question and the structure of these responses was very pleasing. Students generally explained how the powers are divided and then discussed the difficulty of changing this division of power. An area that requires some further work is in 'specific' powers, as students often neglected to mention the specified or enumerated powers of s. 51.

Following are the key points to mention about the division of power.

- Specific or enumerated powers – all powers of the Commonwealth Parliament (most are listed in s. 51 of the Constitution) and they can be:
 - o exclusive powers – law-making powers that are not shared with the states (s. 52)



- o 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 (s. 109).
- Residual powers – the states retain the power to make law in a number of areas not mentioned in the Constitution. The Constitution does not list residual powers but it does recognise the power of state parliaments (s. 107) and the validity of separate constitutions (s. 106).

The question required a discussion of the difficulty of changing the division of law-making power between the Commonwealth and State Parliaments. Most students discussed the High Court interpretation of the Constitution when a dispute arises and the (less successful) process of referendum as spelt out in s. 128. Some students also mentioned the referral of power from the States to the Commonwealth as a way of impacting on the division of powers. The following points could have been used to develop this part of the answer.

High Court interpretation

- The High Court was originally very conservative in their interpretation of the Constitution, using a more narrow approach. This has changed in recent years and the general trend at the moment is to use a broader interpretative approach, though the High Court is now taking a more conservative approach.
- The High Court is limited in interpreting the Constitution and cannot change the wording of it.
- The Court has to wait for a relevant case to arise in order to interpret the Constitution.
- Only a party with standing can apply to have the case heard.
- It is expensive to bring a case to the High Court.

Referendum process

- It is hard to get a 'yes' vote from the majority of electors in Australia and from the majority of voters in a majority of states (at least four out of six).
- Proposed changes are likely to receive a 'yes' vote if they are supported by most political parties or conversely, if a proposal is not supported by a major party, they may lobby against it and their supporters may vote against it.
- Voters may not understand the process of change and vote against it or conversely if they understand it they may relate to it more easily.
- Voters may not wish to increase the power of the Commonwealth, the focus of many referenda.

Question 11b.

This question gave students the opportunity to use two elements of an effective legal system to discuss the benefits and weaknesses of the adversary and jury systems. Once again there were some excellent answers that used key knowledge to present a thorough point of view about the capacity of our adversary and jury systems to contribute to an effective legal system. Most students discussed the capacity of these systems to provide fair and unbiased hearings and the recognition of prevailing values and basic human rights. Some students discussed the merits of the inquisitorial system at great length and their answer strayed from the major focus of the question. It is important that students make good judgments about what material is relevant and do not simply use everything they know.

The following relevant points could have provided the basis for an answer to this question.

Adversary system

- The system is historical, tested over time and the community has confidence in the system.
- Individuals are responsible for the conduct of their own cases and control their own case, making it fair and just.
- Rules of evidence and procedure are that 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.
- The judge is believed to be independent and impartial, thus people are treated fairly/the judge is considered an independent umpire.
- The trial is heard in one continuous hearing so continuity of the hearing is ensured.
- Parties can have legal representation/legal aid.
- There is an emphasis on oral evidence and the examination of witnesses allows witness statements to be tested to reach the truth and achieve a fair hearing.



- There are rules of evidence which aim to exclude unreliable or irrelevant evidence (for example, hearsay, illegally obtained evidence, prior convictions).
- The parties are in charge of the presentation of the case, including gathering evidence, presentation and cross-examination 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 party is not as well-represented as the other it will be at a disadvantage and this 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 the parties control the presentation of the case, 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 initiate the calling of evidence and the raising of issues.
- The adversarial system aims to determine which party has the stronger case. However, for all the above reasons, it might not discover the truth.

Jury system

- 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.
- The jury system ensures that the law/the 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.
- The system provides a trial which is free from political interference.
- Juries can act as a social conscience.
- The system ensures that the hearing of evidence is conducted in an open forum.
- The jury system has stood the 'test of time' and has historical significance.
- 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 excused for a good reason and the inclusion of certain people on a jury can be challenged.
- A jury can add to the cost and length of a trial.
- There is doubt as to whether juries understand, and recall, evidence that can be complex and technical.
- Jurors may be influenced by facts other than those put before them (for example, rhetoric of counsel).
- Juries have been criticised because of their high acquittal rate.
- Juries often have difficulty reaching a decision, even though majority verdicts have been introduced in Victoria in all cases but murder and treason.

The following is an example of a better answer. The answer went on to explain how the adversary and jury systems contribute to the reflection of values and rights. It also discussed the extent to which this was prevented by things such as a jury's inherent biases and the requirement for legal counsel to successfully navigate the adversarial processes.

The adversary system and jury system in Victorian criminal trials generally do contribute to an effective legal system by allowing for fair and unbiased hearings and reflecting prevailing values and basic human rights. However, there are some aspects of each of these systems that reduce their capacity to achieve these elements of an effective legal system.

The adversary system allows for fair and unbiased hearings by ensuring that the adjudicator or judge is an impartial third party who does not participate in the collection or presentation of evidence. Parties call their own evidence, regulated by strict rules of evidence and procedure, and each party has an equal opportunity to present the best evidence to support their case and the verdict is decided by an impartial judge or a group of 12 independent members of the community who make up a jury. Unfortunately, the complexity of the strict rules of evidence and procedure mean that legal counsel is required to understand these rules. This means that it is very expensive to take a case to court and may prevent some people from having access to this fair method of dispute resolution.