Insight Publications

INSIGHT

Trial Exam Paper

2007

LEGAL STUDIES

Written examination

Sample responses

This book presents:

- full and partial sample responses
- mark allocations
- tips and guidelines

Question 1

Contrast **one** role of the Senate with **one** role of the House of Representatives.

2 marks

Full sample response

The House of Representatives is supposed to be the People's House, representing the views of the Australian people as a whole. Each seat in the House represents an electorate which contains a roughly similar number of Australian voters. Each MHR was the preferred candidate of the voters in his or her electorate at the last election. This system ensures that the views of the majority of the Australian population prevail in the House of Representatives.

The Senate, on the other hand, was designed to represent the interests of States. Each State, regardless of its population, has the same number of Senators – currently twelve. The aim of this system is to ensure that the voices of the less-populated States are equal to those of States with a larger population, and that the laws made by the Commonwealth Parliament are good for the people of all States, not just for the residents of NSW and Victoria (the States with the greatest number of residents).

Mark allocation

- 1 mark for reference to one particular feature by which the two houses can be distinguished.
- 1 mark for a clear discussion of that feature and an indication of the difference between the houses.

Tips

- *This question contains a very particular task word. "Contrast" forces students to focus on differences between things only, not similarities. Because this question is worth only two marks, students should determine quickly that it allows for a discussion of one key point of difference only. The sample answer deals with the issue of whose interests are represented by each house of parliament.*
- *Other possible responses can deal with:*
    - *The role of the House of Representatives as the seat of Government, whereas the Government rarely controls the Senate (the current situation being only the second time this has happened in thirty years).*
    - *The role of the House of Representatives as the house which can introduce money bills (in order to allow the Government funds to spend on its programs), while the role of the Senate in relation to money bills is limited to passing or rejecting them. The Senate may not introduce or amend money bills (s.53 of the Constitution) as it is the House of Representatives that controls the "purse strings" of the Commonwealth Government.*
    - *When compared to the Senate, the House of Representatives allows for a much more thorough scrutiny of the Government by MPs during Question Time (reflecting the notion of responsible government). Far more Ministers are MHRs than are Senators, and the House of Representatives generally has a large number of Shadow Ministers as well.*
    - *The Senate, on the other hand, allows for much tougher scrutiny of Government action during Senate committee inquiries than that which takes place in the House of Representatives (although such committees seem to be less effective when the Government has a Senate majority). The House of Representatives is, of course, controlled by the Government.*

Question 2

The separation of powers doctrine states that a modern legal system requires the exercise of three distinct functions. What is the executive function and who performs it in the Australian parliamentary system?

2 marks

Full sample response

The executive function is the act of bringing to life the laws made by the legislature. Without special people or institutions to give effect to parliament's laws, we would not gain any benefit from the existence of those laws. In our system, the Ministers of the Crown, at both State and Commonwealth level, are the people who exercise the executive function. Ministers are Government members of parliament who hold a particular area of government responsibility – a portfolio. The federal Minister for Transport, for example, is the head of the Department of Transport and has the task of implementing and carrying out federal laws pertaining to transport. This means he or she organises and manages the public servants who work in his or her department. They, in turn, give life to the laws and policies which deal with transport around Australia.

Mark allocation

- 1 mark for a clear definition of the executive function.
- 1 mark for detailed reference to and/or example of the tasks of Ministers.

Tips

- *This answer can be completed as a globally marked answer (that is, the two issues raised in the question can be integrated into a single response). Alternatively, students can attempt to define the executive function in order to gain the first mark, and describe the job of a Minister for the second mark. Whatever approach is taken, the answer requires quite a lot of detail considering students have up to four minutes to complete it.*

Question 3

What is the difference between concurrent and residual law-making powers under the Australian Constitution? Explain.

2 marks

Full sample response

The Commonwealth Constitution gives some law-making powers to the Commonwealth Parliament but does not prohibit State Parliaments from also legislating on these topics. Consequently, these are the concurrent powers. For example, both State and Commonwealth Parliaments can make laws relating to taxes. If there are any inconsistencies between State and Commonwealth laws, the Commonwealth law prevails due to s.109.

However, those law-making powers not given by the Commonwealth Constitution to the Commonwealth Parliament at Federation – that is, any topics not falling under any specific powers – remain the sole domain of the State Parliaments. These powers are called residual powers. As a result, the Commonwealth Parliament has no right to make laws (directly) in areas such as education and crime. Only the State Parliaments have the right to make laws on these topics.

Mark allocation

- 1 mark for a clear explanation of concurrent powers.
- 1 mark for a clear explanation of residual powers.
- NB: Only 1 mark should be awarded if the point of difference is not spelt out well.

Tips

- *Students must be extremely careful when discussing the division of law-making powers under the Commonwealth Constitution. It is imperative for the words "Commonwealth" and "State" to be used every time when combined with "Parliament" (and "Government"). It is easy to confuse the assessors if a student does not clearly identify which body makes which laws. Relatively easy questions such as this one require good comprehension – students must always address the question being asked.*

Question 4

4a. The Australian Constitution protects only a handful of democratic and/or human rights of Australian citizens expressly. One of them is the right to receive adequate compensation whenever the Commonwealth Government makes a compulsory acquisition of private property. Outline **two** other constitutional rights.

2 marks

Full sample response

One human right found in the Commonwealth Constitution is the right to a trial by jury. People charged with an indictable offence under Commonwealth law have the right to have their guilt determined by a jury of their peers. This right is found in s.80 of the Constitution.

Another human right afforded to us by the Commonwealth Constitution is the right to freedom of religion. Section 116 states that no religion or religious observance can be forced upon us by Commonwealth law, nor can the free exercise of any religion be prohibited by Commonwealth law. A person need not profess a particular religion to work for the Commonwealth public service.

Mark allocation

- 1 mark for each right.

Tips

- *Many students, in the rush to put down an answer they are familiar with, overlook the fact that a particular part of the topic has already been stated in the question itself and is no longer available to them as part of their answer. This problem is far too common. Only effective reading and annotating of the question (during writing time) will prevent students from mentioning compulsory acquisition in their answer to this question.*
- *A good rule of thumb for students is that one mark on the exam requires at least two sentences, even if short. Providing one sentence to obtain one mark is too brief at this stage of secondary education.*
- *Students need to formulate their answers to reflect the question being asked at all times. Here, the Study Design, and the question also, is asking for an overview of "rights". The answers should therefore explain the sections of the Constitution as "rights". Two other express rights which would have been suitable as an answer are:*
    - *s.92: the right of citizens to move freely across State borders*
    - *s.117: the right to not be discriminated against on the grounds of being a non-resident of a particular State*
- *Although the Study Design refers explicitly to sections 109 and 128 of the Commonwealth Constitution only, students should remember the numbers of all the sections which may be required for the purposes of discussion. A handful of numbers will also give students a much better grasp of the flow of the Constitution. For example, the relevant sections dealing with States are found in sections 106, 107, 108, 109 and 114–117. Each of them reveals important facets of the State–Commonwealth relationship.*

4b. You have studied the constitution of another English-speaking country this year. How does the constitution of your chosen country treat democratic and/or human rights? In your opinion, which constitution protects the rights of citizens more effectively: Australia's or that of your chosen country?

4 marks

Partial sample response

(The paragraph below is worth 1 mark.)

The New Zealand *Bill of Rights Act 1990* (*BORA*) protects a wide range of democratic and human rights. While our Constitution protects only a handful of rights, such as the freedom of religion and the right to trial by jury, *BORA* spells out about fifty distinct rights, including the rights of those suspected of a crime, the right to practise religion, and the right to vote. In this sense, *BORA* is far more effective: it protects many more rights of citizens than our Constitution.

Mark allocation

- Full marks will be gained for a serious overview of the strengths and weaknesses inherent in each country's treatment of democratic and/or human rights through their respective constitutional documents. This is a global question but full marks can be awarded only if there is a suitable conclusion which attempts to address the question being asked: which country's document protects the rights of citizens more effectively?

Tips

- *Notice the strong topic sentence with which the sample answer commences. Legal Studies questions rarely require an introduction. Most of the time, a clear topic sentence is sufficient – and it will give the examiner an understanding of the answer that will follow.*
- *There is really no "correct" answer here. The quality of the discussion and the grasp of the documents being compared will be the determinants for this question. Points of comparison students may wish to draw upon include:*
    - *the number of rights protected*
    - *the types of rights protected*
    - *the effect of the existence of these rights on the relevant parliament as it makes laws*
    - *the ability of parliament to alter the document containing the rights*
    - *the ability of a citizen to challenge, in court, any laws which diminish these rights*
    - *the ability of judges to invalidate laws which seem to undermine these rights*
- *A comparative table which highlights these key features will be of great help to students during revision.*
- *Students will need to reach a conclusion to answer the question. Some may determine that Australia's Constitution is better at protecting citizens' rights than the comparison document, and some that it is worse. Some students may conclude that it is not possible to ascertain which country's citizens' rights are better protected simply because there are too many other factors at play. Very good students will be able to offer an opinion on the merits and shortcomings of the two documents being discussed at the end of every point they raise, as in the sample response. This approach demonstrates that the student is always conscious of the need to answer the question being asked. A brief overall conclusion will still be required.*

Question 5

In some cases, courts are asked to interpret legislation. Do they make law in this way?

2 marks

Full sample response

Courts are often asked to resolve disputes which centre on words, phrases, or even whole sections of legislation. Judges must determine the meaning of the words in issue in order to provide a resolution to the case. If this statutory interpretation takes place in a superior court of record, such as the Supreme Court of Victoria – Court of Appeal, then the new meaning of the statute in question will become part of the judgment of the court and consequently be captured in a law report. Such statements of judicial interpretation are law and are binding on lower courts in the same court hierarchy in similar fact cases. The legislation will need to be used in conjunction with the meaning given to it by the court until such time as the court's decision is reversed on appeal or overruled at a later time by a higher court, or until parliament amends the relevant part of the legislation.

Mark allocation

- 1 mark for a brief overview of statutory interpretation.
- 1 mark for a brief explanation of the doctrine of precedent.
- However, the question is best answered globally.

Tips

- *The sample answer contains precise phrases, as is the case with the topic of judge-made law in particular. Not always is quantity required in a Legal Studies exam. Padding is often merely that – fluff that does not gain the student any marks. Students must be confident in their ability to provide the best possible answer by using terms learned during the course with ease and accuracy.*

Question 6

Which step in the legislative process do you believe is more important: the Second Reading stage, the Committee of the Whole stage, or Royal Assent? Explain your views by describing each step with reference to the Victorian Parliament.

4 marks

Full sample response

The Second Reading stage is the first time that the members of the Legislative Assembly or Legislative Council learn about society's need for the bill and how it will improve society. This is done through the Second Reading speech. The debate which takes place afterwards is an important opportunity for all MPs to express their views, whether in favour or against the principles of the bill.

The Committee of the Whole stage allows for amendments to the bill to be made. Since 2006, the Legislative Council has not been controlled by the Government. This means that, unlike in the Legislative Assembly, changes to the contents of the bill can be introduced successfully if all non-Government MLCs support the amendment. This may prove important, as the amended bill will reflect the wider views of the Victorian voters, not just those of Government MPs.

Royal Assent is the formal transformation, by the Governor, of the bill into a Victorian law. The Queen's representative verifies that the bill has been passed, with the same wording, by both houses of the Victorian Parliament. The Governor gives his assent to the bill by signing the bill on the advice of the Executive Council. The law will come into effect on a date stated in the new Act.

The most important of these stages is Royal Assent. Despite gaining the approval of the majority of MPs in both houses, without the signature of the Governor, the law can never come into operation. Royal Assent is an integral part of the law-making process in our system as it confirms that all the required stages have been carried out and that the law is the best possible law for the State of Victoria according to its creators.

Mark allocation

- 1 mark for each of the three steps.
- 1 mark for a solid conclusion as to which step is the most important.

Tips

- *This question requires students to have thought deeply about the legislative process. What is it all for? What is the outcome of the process at the end? The conclusion reached here is one of three options only. As long as they argue effectively, students can decide that either one of the three steps is indeed the most significant.*
- *Given that the question asks for it, reference to the Victorian Parliament is mandatory throughout the answer. Insufficient detail, such as omitting the specifics of the Victorian Parliament, will detract from the overall quality of each paragraph and this is important when each paragraph relates to one mark.*

Question 7

Some people think that despite their drawbacks, the key strength of our parliaments as law-makers is that they are democratic.

Do you agree with this idea?

Are there other reasons why we should consider parliament to be an effective law-maker?

2 + 4 = 6 marks

Sample response

(Sample response for the first part of the question, worth 2 marks.)

In a bicameral system, parliament is not necessarily an effective law-maker simply because it is composed of representatives elected by the voters. A majority Government may have to deal with a hostile upper house. Alternatively, there may even be a minority Government in the lower house itself. These electoral outcomes tend to confuse the idea that legislation reflects the views of the majority of the population: who are the "majority" whose wishes should be espoused in legislation? During the legislative process, the two houses can clash over the nature of the bill under consideration and the final statute may not be to anyone's liking. This seems to have happened in the Commonwealth Parliament when the Democrats' negotiated with the Liberals over the GST bill in the late 1990s.

(Sample beginning of response to second part of the question, worth 1 mark.)

Parliament is the supreme law-maker in its jurisdiction. Relevant constitutional considerations aside, parliament can make laws to cover a whole area of life. For example, tobacco is now seen to be harmful to society. Parliament can make laws which ban the advertising and sale of tobacco, and prohibit smoking in public or confined areas. Parliament has legislative omnicompetence – if only it chooses to use it.

Mark allocation

- Two marks are awarded for a response to the suggestion that being a democratically elected law-maker is a strength of our parliament.
- The other 4 marks require students to justify why parliament is an effective law-making body.

Tips

- *For the first part, students must capture the essence of the question during reading time. "Do you agree?" offers students freedom to argue either way. A thorough grasp of the topic is required to allow students to argue whichever way the question indicates for them to argue (as in the second part of this question), or to provide their own, educated viewpoint.*
- *For the second part, students may choose to explain two issues in some detail or provide four different reasons in lesser detail. Either approach should test students' ability to write clearly. Points students may wish to explain include:*
    - *Parliament can abrogate law made by judges by passing an appropriate Act.*
    - *Parliament can, in effect, cancel delegated legislation (or simply dissolve statutory authorities or local councils).*
    - *Parliament can create laws which shape society's thinking and citizens' behaviour in order to prevent future problems (as opposed to courts, which resolve problems which already exist in society).*

Question 8

"Why can't we just have one level of courts?" asked a newspaper editorial recently. "We could save lots of money on administration costs if we centralised all the paperwork!" While this statement may be true, what is the most important reason, in your mind, as to why we need our courts to exist in a hierarchy?

2 marks

Full sample response

Without a court hierarchy, our system of precedent could not exist. The doctrine of precedent relies on courts lower in a court hierarchy following the legal reasoning of courts higher up in the same hierarchy when dealing with similar fact cases. Only the courts at the top of the hierarchy – superior courts of record – create precedent. Their judgments, usually on questions of law arising from the lower courts, are published in law reports which then serve as a written record of these legal principles. The Victorian Court of Appeal, for example, declares statements of law which are binding on all other (and lower) Victorian courts. Its judges can create new precedent by reversing the decisions of judges of the Supreme Court – Trial Division or by disapproving established Victorian precedent.

Mark allocation

- Full marks should be awarded for a thorough discussion of one justification for the court hierarchy.

Tips

- *Whatever reason students use to answer this question, the topic sentence and ensuing discussion needs to be clear so that the assessor understands the significance of the choice. Students need to practise such shorter questions in order to ensure that they can maintain focus throughout the answer.*
- *Students may wish to explore the idea that the different courts in the hierarchy have their own particular area of specialisation or expertise. Alternatively, they may focus on the fact that parties dissatisfied with the outcome of their case may wish to appeal a court's decision, and this would be impossible without splitting up the courts into different levels, with courts at higher levels reviewing the decisions made in lower courts.*

Question 9

Explain the civil jurisdiction of the Magistrates' Court of Victoria, the County Court of Victoria, and the Trial Division of the Supreme Court of Victoria.

3 marks

Full sample response

The Magistrates' Court has recently had its civil jurisdiction increased to $100,000. This means that it can now hear any type of civil dispute, whether relating to motor vehicle accidents, contractual matters, or personal injury, where the amount sought by the plaintiff is no greater than $100,000. (If both parties agree, the court can hear a claim for a debt or damages of any amount.)

Similarly, the County Court has also had its civil jurisdiction increased. It can now hear any type of civil dispute, for personal or non-personal injuries, regardless of the amount being claimed. Usually, this court hears building and commercial disputes as well as medical negligence cases (sometimes using a jury of six to determine liability and damages).

The Supreme Court of Victoria – Trial Division can determine civil matters of any amount. Personal injury claims in this court usually relate to severe injuries caused by the defendant's negligence (with the option of a jury trial) while other civil cases in this court deal with complex commercial and contractual disputes.

Mark allocation

- A brief overview of each court's civil jurisdiction is required for each mark. Students must not be tempted into giving one-line answers; they are expected to fill up the time allocated for each question with worthwhile, not superficial responses.

Tips

- *Too often, students know only the monetary limit of a court's civil jurisdiction. However, this is far too brief an answer. Students must become acquainted with the various types of disputes that are most often heard by each level of court. In civil matters, the level of complexity of the matter generally increases with the level of court.*

Question 10

10a. John has been charged with murder and is about to have a bail hearing. Explain the **two** main outcomes that he can expect at the conclusion of this hearing.

Which outcome would he prefer?

Which outcome is he likely to get, and why?

3 marks

Full sample response

John would prefer to be granted bail. This means that he will be released from custody if he promises the court that he will attend court at his next court date. This undertaking would generally be accompanied by conditions such as John checking in with his local police station, giving up his passport, or finding a surety who would guarantee his appearance by promising to give up valuable property or cash to the court if John fails to attend. Whilst on bail, John could plan his defence with his legal advisors without the constraints of being in jail.

Alternatively, John could be denied bail and be remanded in custody. This means that he will effectively be in jail even before he has been found guilty of any crime. This will make it quite difficult for him to mount his defence, as well as depriving him of liberty, which is the most severe sanction for those who *are* convicted of an offence.

It is unlikely that John will be released on bail as he has been accused of murder. The *Bail Act* specifically states that those charged with murder will not be granted bail unless they can prove that exceptional circumstances exist for their release.

Mark allocation

- 1 mark for an explanation of bail.
- 1 mark for an explanation of remand.
- 1 mark for answering the question as asked: which option John would prefer and the reasons why. This necessitates mention of the legislative presumption given in the legislation against bail for those accused of murder.
- This question may be answered globally.

Tips

- *Students must not rush through this type of seemingly straightforward answer. Great care and completeness in all answers will guarantee a higher level of success. Students need to use the entire six minutes allocated to this question in order to show their knowledge in full.*

10b. Ahmed has been found guilty of assault. Explain **two** of the sanctions that the judge can now consider for Ahmed. What would be the purpose or purposes of **each**?

4 marks

Partial sample response

(The answer below should gain the first 2 marks.)

Ahmed can be sentenced to a community-based order (CBO). This will require that Ahmed undertake up to 500 hours of unpaid work in the community under the supervision of Community Corrections Officers. There can also be a requirement for drug or alcohol counselling, or even an anger management program.

One aim of a CBO is to punish the offender. This is because in our society work is generally rewarded by some sort of remuneration; this is not the case with a CBO. Another purpose is rehabilitation. By working for the community, Ahmed can become more aware of the needs of other members of the community, and learn not to engage in anti-social behaviour such as assault.

Mark allocation

- 1 mark for each sanction described.
- 1 mark for the purpose/s of each sanction.

Tips

- *This question requires students to have a good grasp of the types of sanctions available and the reasons why they are used by our courts. It is beneficial to learn about both the sanctions and their aims simultaneously.*
- *Students may choose any two from the wide range of sanctions available. The purposes of sanctions students could refer to are:*
    - *the protection of the community*
    - *punishment of the offender*
    - *rehabilitation of the offender*
    - *deterrence of the offender (and others) in the future*
    - *denunciation of the offending behaviour by the court*

Question 11

In your opinion, which stage of civil proceedings is more important – pleadings or discovery?

2 marks

Full sample response

Although pleadings allow each party to learn of the nature of the dispute, pleadings are less important than the discovery stage. The plaintiff's statement of claim and the defendant's response to it – the defence – are the main pleadings documents. Their purpose is to simply outline the factual position of the two sides to the dispute. However, without the discovery stage, the parties will not know if there is any evidence to back up the other's position. Discovery of documents and answers to interrogatories will give the parties greater awareness of the evidentiary strength of each other's cases. Thus, the parties will be able to engage in better informed pre-trial negotiations and, should those fail, a speedier trial. Discovery is therefore much more important in the lead-up to a civil trial than pleadings.

Mark allocation

- This question is marked globally. A summary of both stages must be included as part of an answer which clearly answers the question – concluding that one stage is more important than the other.

Tips

- *Students should take note that the writ itself is not part of the pleadings stage (and is no longer called a "writ of summons"). This point is now clear in the Study Design. The writ merely commences the civil action and is a type of originating process. An alternative document to the writ is an originating motion. The statement of claim is part of the pleadings stage, as it actually outlines the facts on which the plaintiff relies to prove the defendant's wrongdoing. All pleadings documents contain facts which deal with the case.*
- *Either pleadings or discovery can be successfully argued to be the most important stage of civil procedure. The quality of the arguments given, as well as the depth of the knowledge shown about each of these stages, will determine the marks. Nevertheless, students must not be tempted to write too much given the marks available for, and consequent time limits of this question.*

Question 12

"Mediation is a much better option for resolving civil disputes than a trial before a judge."

Compare these **two** types of dispute resolution and state whether you agree with the statement above.

6 marks

Partial sample response

(The paragraph below is worth 2 marks.)

Mediation is a popular form of alternative dispute resolution and there are good reasons why it enjoys such popularity. Cost is a major factor in favour of mediation. Some mediation sessions, such as those offered by the Dispute Settlement Centre of Victoria in non-commercial matters, attract no cost at all. Others, even if the mediator is a specialist lawyer, are relatively cheap at a cost of no more than a couple of thousand dollars per day. This is good value when compared to the huge costs of a trial: court fees, the costs of barristers and instructing solicitors, as well as the costs of all the documents that were prepared prior to the parties getting into the courtroom. Mediation incurs only a fraction of these costs and in this way is better than court.

Mark allocation

- This question may be tackled in a global sense. Alternatively, students may aim to obtain two marks for each of three points argued, as long as each point has its own conclusion which answers the question asked. The sample response is an example of the latter approach.

Tips

- *This type of comparative question must not be answered with a listing of the features of one method followed by a listing of the features of the other. Side-by-side comparisons are much more effective in that they show that a student can make links between the two methods under consideration. Whatever approach is taken, students must answer the question being asked.*
- *Furthermore, students must explain all points they raise so as to achieve the depth necessary for full marks. A good rule of thumb is to provide at least two sentences for each point. Students should practise such questions using lines spaced as in the actual end-of-year paper in order to see if they can fill up all the lines allocated to the answer with meaningful statements.*
- *Other factors which students might wish to explore include:*
    - *Mediation allows the parties to have input into the final decision whereas the judge is the only person who makes the final decision at the conclusion of the trial (note that the question precludes any discussion of a civil jury trial).*
    - *Mediation can result in a win–win situation, whereas a trial will end with one party losing the case.*
    - *Because of its non-legalistic nature, mediation may allow the parties to remain on amicable terms, and their personal or business relationship may survive and continue following the resolution of their dispute.*

Question 13

What do you think is the best feature of the adversarial trial?

What is the worst aspect of the inquisitorial trial?

4 marks

Partial sample response

(The paragraph below should gain 2 marks for discussing a strength of the adversarial trial.)

One worthwhile feature of the adversary system of trial is that, essentially, the parties themselves run their case from start to finish. The party which feels it has been aggrieved in some way – the plaintiff in civil cases, or the prosecutor (representing society) in criminal matters – has the option of whether or not to initiate the case in court. The plaintiff or prosecutor needs to determine the best venue in which to commence the matter. They and the defendants need to investigate the relevant law and determine how best to present their evidence at trial, for instance by finding appropriate witnesses and other types of evidence. When a party wins in an adversarial trial, they can enjoy the satisfaction of knowing that their efforts have paid off.

(The paragraph below should gain 2 marks for discussing a weakness of the inquisitorial trial.)

One inherent flaw of the inquisitorial system is that the trial judge has the power to question witnesses. The judge has the ultimate power in adducing evidence in the inquisitorial courtroom. The judge can handpick the witnesses required to attend court and can ask them any questions the judge believes are warranted. Although the parties' lawyers can ask witnesses questions, their examination comes after that of the judge and, in some jurisdictions, may take place only after the judge grants permission. Essentially, the parties in an inquisitorial trial are at the mercy of the judge. They are not able to test the evidence as vigorously as they could in our system of trial simply because the judge is asking questions from one perspective and not from two competing perspectives.

Mark allocation

- Students must provide a solid overview of each strength and weakness in order to get full marks.

Tips

- *This is a challenging question as it requires students to not only know strengths and weakness of each mode of trial, but to also explain why they are presenting each point as either a strength or a weakness. This level of analysis is the highest required of students of this subject and only sufficient practice with a variety of similar questions will allow students the necessary confidence for this question.*
- *Any of the features of either system of trial can be used as a strength or a weakness. Students must explain clearly whether the feature they have chosen is a disadvantage (to the parties or to the legal system on the whole, for example) or an advantage instead.*
- *For example, students may choose to include the following as strengths of the adversary trial:*
    - *The judge remains impartial at all times and allows the parties freedom to do their best within the confines of the rules of evidence and procedure.*
    - *There is a prescribed burden and standard of proof so that both parties know their function in the courtroom.*
- *Students may choose to include the following as weaknesses of the inquisitorial system:*
    - *There is greater reliance on written or documentary evidence; the veracity of the creators of these documents cannot be tested by any oral-examination if the judge decides not to question these witnesses at trial.*
    - *There are no strict rules of evidence, which means that potentially prejudicial evidence can be heard, putting one of the parties at a great disadvantage.*

Question 14

14a. In our legal system, parliaments and courts are related in a variety of ways.

Explain the connections between these law-makers, using illustrations where appropriate. In your answer, identify the way or ways in which parliament can prevail over courts as a law-making body.

12 marks

Partial sample response

(The answer below is worth 2 marks.)

One of the most fundamental links between courts and parliaments is that courts derive their existence and operational capacity from legislation – laws created by parliament. For example, the Magistrates' Court of Victoria owes its existence to the *Magistrates' Court Act 1989*. This means that, in general, parliaments can create a court or dissolve a court as well as change the jurisdiction of a court at any time. The Commonwealth Parliament created both the Family Court and the Federal Court in the mid-1970s. On the whole, parliaments are clearly stronger than courts; courts exist and operate because parliaments allow them to do so. (The only courts that are constitutionally protected against the whims of parliamentarians are the High Court and the Supreme Court of Victoria, which are established and protected by relevant constitutions.)

Mark allocation

- This essay question is marked globally and allows for significant in-depth discussion. In Legal Studies, assessors do not take marks off, but neither should students believe that irrelevant, pointless, or confused sentences will contribute to the marks of a globally marked answer. Furthermore, answers which are correct but too short will not gain full marks. Students should strive to fill up at least three out of the four pages available for the essay answer with clear and focussed discussion using short and focussed paragraphs. An answer which is less comprehensive than this would be unlikely to gain full marks.

Tips

- *Only a dedicated student can tackle this sort of question with ease. This topic requires a profound understanding of the operation of parliaments and courts as well as knowledge of examples which will bolster the explanation offered.*
- *Students should know to underline all names of legislation and court cases. This will make the names stand out in the answer and draw the eye of the assessor to what should hopefully be a pertinent example.*
- *There are many links between courts and parliaments explored in all the textbooks. Whatever points a student raises, the second part of the question must not be overlooked at any time in the answer. For example, if a student explains that courts can interpret legislations, the discussion should conclude with mention of the fact that parliament can pass legislation to abrogate all judge-made law (apart from the High Court's interpretation of the Constitution).*

OR

14b. The method of choosing jurors for criminal trials has been criticised in recent years.

What is the method by which a person gets to serve on a jury in a criminal case?

What are some of the problems involved in this process?

Once in the jury box, what is the task of the juror compared to that of the judge?

12 marks

Partial sample response

(The paragraph below should gain 1 mark for answering the first part of the question.)

The jury selection process commences with the Juries Commissioner obtaining a list of names randomly from the electoral roll. The Commissioner then sends a jury service questionnaire to the people whose names now appear on the list to determine if they are able to participate on a jury in due course. People who receive the questionnaire must tell the truth on this form or face a penalty.

(The paragraph below should gain 1 mark for answering the second part of the question.)

One of the problems involved with this process is that not all citizens have their names on the electoral roll. Some people try their best to avoid all civic duties, such as voting and jury service, and thus the electoral roll is not a document which contains all the names of suitable citizens. This problem is avoided by making it a crime for citizens to not be enrolled or to not update their details on the electoral roll.

(The paragraph below should gain 1 mark for answering the third part of the question.)

While the task of the jurors is to take in the evidence and to determine whether the crime occurred, it is the task of the judge to ensure that the courtroom runs according to the law. For example, the judge determines the validity of all objections to questions during the examination of witnesses, and ensures that witnesses are not treated adversely by counsel.

Mark allocation

- Given that there is no breakdown of marks indicated, students should assume that each part of the question has an equal weighting of 4 marks.

Tips

- *Note that for this question only the criminal jury need be discussed. Students must be aware of the parameters of each question at all times. This is a challenging question and requires students to draw on a range of factual knowledge about the criminal jury in Victoria.*
- *This question is made more complicated in that its three distinct parts place different demands on the student. The first part is best answered globally as it asks for an overview of the process. The second part requires evaluation of the process, and given that it is worth 4 marks, students may wish to address four separate ideas briefly or expand on two ideas in depth.*
- *Some issues students may wish to explore for the second part of the question include:*
    - *Peremptory challenges allow the defendant to attempt to create a jury panel more likely to be favourable to his case. This detracts from the impartiality of the jury.*
    - *It is old-fashioned and even unnerving for the potential juror to have to walk past the defendant on the way to the jury box. There is no need for such a personal approach nowadays. In modern courts, defendants can observe the jurors quite well from the dock at all times.*
    - *There is no need for the court to know a juror's profession, which is read out by the associate along with the juror's name and/or number. A jury of one's peers means that all members of society are the peers of the defendant. Any bias arising from a juror's profession should be extinguished through that juror's interaction with eleven unbiased jurors.*
    - *Members of the jury pool can sit idle all day waiting to be picked for a jury. This is a waste of their time. Jury selection can happen at the opening time of the court or just before it closes. Some people are not required to be selected or will be unsuitable for jury service in trials starting that day. This creates a negative view of the workings of the courts in the mind of the members of the public who attend to serve on a jury.*
- *The third part of the question is also best attempted as a globally marked answer. As with question 14a, comparisons should be handled side by side instead of students listing the roles of the judge and then listing the role of the jury.*

END OF SAMPLE RESPONSES