



GENERAL COMMENTS

The 2012 Legal Studies examination was challenging for many students.

Many common misunderstandings about various aspects of the legal system were evident in responses to the examination. Few students were able to demonstrate knowledge of a directions hearing. Incorrect cases were used as examples of the High Court protecting rights. In Question 3a, few students correctly identified that the Court of Appeal was higher than the Supreme Court (Trial Division) in the court hierarchy. Many students had a limited understanding of the operation of section 109 of the Constitution and struggled to provide a thorough response to Question 3b. Students should become familiar with the study design throughout the year.

Students are expected to demonstrate the ability to discuss, explain and evaluate. Students' ability to evaluate requires more attention.

Students should not rely on rote-learned or pre-prepared answers as they will rarely address the question.

Time management was an issue in this examination, with many students writing lengthy responses to questions that only required a shorter response, therefore not allowing enough time for longer questions. A shorter question that asks for an outline (for example, Question 1a.) requires no more than one or two sentences in response.

Good examination technique is essential and students should practise their technique throughout the year. If students continue their answers at the back of the booklet, they should indicate that they have done so (for example, by writing 'PTO' or 'continued in extra space'). Black or blue pen should be used. Students are encouraged to use paragraphs, use legal terminology and ensure their handwriting is legible.

SPECIFIC INFORMATION

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

This report provides sample answers or an indication of what the answers may have included. Unless otherwise stated, these are not intended to be exemplary or complete responses.

Question 1a.

Marks	0	1	2	Average
%	23	17	60	1.4

Full marks were awarded for a correct identification of the law-making process (that is, royal assent) and an outline of that process. Students were required to specify that royal assent is the process whereby the Queen's representative approves an Act of Parliament, thus making it a law.

This question required little more than one or two sentences for two marks. Students were awarded only one mark if they identified the term 'royal assent' but did not provide further information. Some students simply used the same words; for example, 'Royal assent is where assent is given'. Words other than the term being outlined (such as 'approval') should have been used as part of the response.

The following is an example of a good answer.

The stage referred to is royal assent. This is when the Queen's representative, in this case the Governor-General, provides formal approval for an act passed by parliament to become law.

Question 1b.

Marks	0	1	2	Average
%	5	19	76	1.7

This question was handled well. Most students were able to identify one reason other than technology for changes in the law. Full marks were awarded for a thorough explanation or a brief explanation with an example. One mark was given for a brief explanation with limited details or without an example.

2012 Assessment Report



Common reasons included

- changes in social, political, economic or moral values of society (some students used one type of value and expanded on it and this was acceptable)
- ambiguous law that requires expansion or simplification
- community awareness
- protection of rights in the community
- providing greater access to the law.

The following is an example of a good answer.

One other reason why a law may need to be changed is to provide greater access to the law. Sometimes a new law is introduced to allow for more people to gain access to the legal system. For example, changes to the County Court civil jurisdiction to an unlimited amount means that plaintiffs can use the County Court rather than the Supreme Court for claims over \$200,000 (the County Court's previous civil jurisdiction).

Question 2

Marks	0	1	2	Average
%	28	25	47	1.2

This question required an understanding of the State Parliament's ability to refer powers to the Commonwealth Parliament. Students are expected to understand the nature of referral of powers as part of Unit 3, Area of Study 2. Many students found it difficult to respond to this question, often providing general or brief answers.

High-scoring students were able to provide a strong explanation of a reason for the referral of law-making powers. Other students provided a good explanation and an example of when a state parliament had referred its powers. Both approaches were acceptable.

Reasons that could have been used included

- the states believe it is necessary to expand a power already retained by the Commonwealth, such as the laws regarding terrorism
- it is often difficult to get the states to pass uniform laws, therefore it is often easier to refer the power rather than pass those laws
- it is often too difficult for a power to be referred by way of a referendum, therefore the referral of powers overcomes this process.

Some of the more common examples included the enactment of laws regarding terrorist acts, de facto couples and workplace relations.

The following is an example of a good answer.

One reason why a state parliament may decide to refer its powers to the Commonwealth parliament is because it believes it is in the greater interests of Australia as a whole to have the same laws applied consistently across the country. For example, in 2003 the states referred powers to the Commonwealth Parliament to enable it to make laws regarding terrorist acts.

Question 3a.

Marks	0	1	2	Average
%	63	7	30	0.7

This question was not handled well. Many students incorrectly assumed that the Court of Appeal was on the same level as, or lower than, the Supreme Court (Trial Division). The concept of the Victorian court hierarchy and where each court sits on that hierarchy forms the foundation for understanding other aspects of the legal system, such as the operation of the doctrine of precedent, therefore it was surprising to see many students provide incorrect responses to this question.

As the Supreme Court (Trial Division) sits below the Supreme Court (Court of Appeal), the response that 'the precedent is only persuasive' (which was the most common incorrect response) was not accepted. Some students tried to argue that the Trial Division could disapprove the precedent and therefore not have to follow it. This demonstrates an incorrect understanding of how the disapproving method works. Disapproving a precedent does not change it; it merely demonstrates a negative view of the precedent, but the judge is still bound to follow it.

2012 Assessment Report



The following were acceptable responses.

- Distinguishing method: the Trial Division may find that some of the material facts in the case before it are distinguishable from the facts in the precedent case. The Trial Division may therefore determine that it is not a similar facts case and is therefore not bound by the precedent.
- Not a similar fact situation: the Trial Division may not have a case that is a similar facts situation. It may be a case that has a different focus or is on a different area of law and is therefore not bound by the rules of precedent.
- Abrogation: the Victorian Parliament may have subsequently abrogated the precedent established in the Court of Appeal after it was handed down and will therefore no longer be 'good law'. (The statement in the question provided no temporal context as to when the precedent was created, so this was a sufficient response.)
- The precedent has already been reversed: the High Court may have subsequently reversed the precedent established in the Court of Appeal and is therefore no longer 'good law'. (The statement in the question provided no temporal context, so this was a sufficient response).

The following is an example of a good answer.

One reason why the Trial Division of the Supreme Court may not have to follow a precedent established in the Court of Appeal is through the distinguishing method. The justice presiding over the case in the Trial Division may find that some of the facts in the case are materially different from those in the precedent and therefore it is not a similar facts case and therefore is not bound by the precedent.

Question 3b.

Marks	0	1	2	3	Average
%	16	18	29	37	1.9

Full marks were awarded for a response that provided a correct explanation of the term 'original jurisdiction', and then provided the original civil and criminal jurisdiction of the Magistrates' Court.

The most common error seen in responses was an inadequate explanation of the term 'original jurisdiction'. Many students simply defined 'jurisdiction'; for example, writing an answer such as 'original jurisdiction is the power given to the court to hear a case'. This explanation may define 'jurisdiction' but does not define 'original jurisdiction'. Original jurisdiction is the power given to a court to hear a case the first time it comes to court.

Weaker responses provided the civil jurisdiction of the Magistrates' Court but not the criminal jurisdiction (or vice versa). While students were not required to mention that the Magistrates' Court also hears warrant and bail applications and committal hearings, many students mentioned this and clearly had a strong grasp of the Magistrates' Court's powers.

Students need to be careful when saying that the Magistrates' Court hears cases claiming an amount of \$10 000 to \$100 000, with claims lower than \$10 000 proceeding to arbitration. Claims less than \$10 000 are still filed in the Magistrates' Court; the Court simply has the power to refer that complaint to arbitration. However, if the Court refers the complaint to arbitration, that arbitration is still conducted under the jurisdiction of the Court.

The following three points needed to be made to gain full marks.

- Original jurisdiction: refers to the power or authority given to the courts to hear cases in the first instance.
- Civil jurisdiction: hears claims up to \$100 000.
- Criminal jurisdiction: hears all summary offences.

The following is an example of a good answer.

When a court has 'original jurisdiction', it means it has power to hear a case when it first comes to court (that is, at first instance). For example, the Magistrates' Court can hear civil cases where the plaintiff is claiming up to \$100,000. The Magistrates' Court also hears at first instance all summary criminal offences (that is, minor offences).

Question 4a.

Marks	0	1	2	Average
%	16	25	59	1.5

This question was generally handled very well. Students clearly had a good grasp of law-making powers and were able to provide an example of concurrent powers. Students should ensure that they provide full definitions when asked to;

2012 Assessment Report



for example, some students simply stated ‘concurrent powers are shared powers’ but did not state who shares those powers (the Commonwealth and State Parliaments).

The most common examples given by students were taxation, marriage and bankruptcy.

The following answer received full marks.

Concurrent powers are those law-making powers that are shared by the state and federal parliaments. An example of a concurrent power is marriage.

Question 4b.

Marks	0	1	2	3	4	Average
%	23	14	31	23	10	1.8

This question required an understanding of the nature and operation of section 109, and how it may operate as a restriction on the State Parliaments. Students were expected to know what section 109 says. It was clear that, while most students had a general understanding of section 109, that understanding was often too broad. For example, many students incorrectly stated that section 109 means that the whole of a state law will be deemed invalid if it is inconsistent with a Commonwealth law. However, section 109 will affect only those parts of the state law that are considered inconsistent. Many students assumed that section 109 operates automatically as soon as a state law is deemed inconsistent. Rather, a party with standing (normally the Commonwealth) will need to bring the case to court, seeking an order that those parts of the state law are inconsistent.

Students should have made it clear to what extent they agreed or disagreed with the statement. There was not a single correct position. The discriminating factor was the points made to support the discussion.

Many students simply explained the contents of section 109.

The following points could have been made.

- Section 109 states that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail and the former shall, to the extent of the inconsistency, be invalid. This means that if a state has made a law in an area of concurrent powers, that is inconsistent with the Commonwealth law and that law is challenged in the High Court, those parts of the state law that are inconsistent will be invalid or declared void.
- This may act as a restriction because it means that in areas of concurrent power, the state may not make laws where the Commonwealth has already established a law as it will risk being declared invalid.
- It could act as a restriction because, if the law is challenged in the High Court, and those sections of the state Act are declared void, the state will no longer be able to expand on those sections of the Act.
- However, section 109 impacts on only those laws in areas of concurrent powers. Section 109 has no impact on laws made in areas of residual powers; therefore, the states are free to make laws in those areas.
- Students could have argued that section 109 will act only as a restriction if the law is challenged, and thus the states are free to make laws even if the Commonwealth has a law already in place.

Stronger students made several of these points, showing a good understanding of section 109. Weaker students reiterated what section 109 says and provided an example of a case. While providing an example of a case may have been useful in demonstrating a student’s knowledge of section 109, and how in the past this section has acted as a restriction on a state parliament, a mere description of a case with no reference to the statement was not sufficient for full marks.

The following is an example of a good answer.

I agree to some extent that section 109 acts a restriction on the state parliaments. Section 109 states that where a state law is inconsistent with a Commonwealth law, the Commonwealth law shall prevail and those parts of the state law which are deemed inconsistent will be considered invalid.

Section 109 acts as a restriction because, should the state make a law that is inconsistent, and the Commonwealth challenges that law, then parts of the law may be deemed invalid. The state will therefore not be able to make laws in that particular area and thus section 109 restricts its law-making powers. It may also act as a restriction as the state may be reluctant to make laws in areas already governed by Commonwealth laws, with the risk that parts of its own laws will be declared invalid.

2012 Assessment Report



However, to some extent section 109 doesn't act as a restriction on the states. The states are still free to make laws in areas of concurrent powers, as section 109 doesn't act as a 'bar' to the state making laws. Also, the states are still free to make any laws they wish in relation to residual powers, as the Commonwealth has no law-making powers in residual areas.

Question 5a.

Marks	0	1	2	3	Average
%	4	12	38	47	2.3

Remand and bail are two criminal pre-trial procedures that students are expected to learn as part of Unit 4, Area of Study 2. Many students had an adequate understanding of remand and bail. However, two issues were prevalent in responses.

- Students struggled to explain the difference between remand and bail, and simply described the two procedures. A question asking for differences has a slightly different focus than a question asking for an explanation. Words such as 'whereas', 'on the other hand' or 'however' are useful indicators to demonstrate that differences are being identified.
- There is a common misconception among students that bail means the 'handing over of money'. This is not a correct understanding of bail.

The crucial difference that needed to be identified was that remand is where the accused is kept in custody until the trial or the next court hearing, while bail allows the accused to be released into society instead of being held in custody. Another difference that could have been identified was that remand has no conditions (that is, the accused is simply held in custody), whereas bail may have various conditions such as the accused being required to hand in his or her passport.

The following is an example of a good answer. Students should take note of the description of bail.

Remand is when an accused who is awaiting trial or a court hearing (such as a committal hearing) is required to remain in custody; that is, held in prison (such as the remand centre). On the other hand, bail does not mean that the accused is held in custody. Rather, bail means that the accused is released back into society or allowed to remain in society while awaiting trial (or the next court hearing or the appeal) on a condition that they will appear at court on a later date.

Question 5b.

Marks	0	1	2	Average
%	5	13	81	1.8

This question was generally handled well. It was clear that students have a good understanding of sanctions, and the majority of responses identified imprisonment as one sanction that may be imposed.

Students should be mindful of the sanctions that can be used in responses to questions such as this, given the recent changes made to the *Sentencing Act 1991*. Home detention has been abolished. Suspended sentences can only be given in limited circumstances and not for serious offences (such as murder or manslaughter) or significant offences (such as arson causing death). 'Community correction orders' (CCO) is now the correct term, as opposed to 'community-based orders' or 'intensive correction orders'.

Weaker students identified but did not describe the purpose of the sanction. A description required students to give detail of the purpose. For example, if rehabilitation was used as the purpose, a description about rehabilitation involving the treatment of Jane was required.

Possible purposes are retribution, deterrence, rehabilitation, protection and denunciation. Students could have used one or a number of these, but the description was the discriminating factor.

The following is an example of a good answer.

One sanction that could have been imposed on Jane is imprisonment. The main purpose of imprisonment is to protect the community by removing the offender from society.

2012 Assessment Report



Question 6a.

Marks	0	1	2	Average
%	43	29	28	0.9

Directions hearings in civil proceedings are listed as key knowledge (as part of pre-trial procedures) in Unit 4, Area of Study 2. Despite this, few students were able to describe a purpose of a directions hearing. Many responses were too broad and general, such as 'it is when directions are given in a proceeding' or 'encourages an out-of-court settlement', without identifying how a directions hearing may do so.

For this type of question, students should ask themselves the following: what is a directions hearing, what happens at a directions hearing and, therefore, why would they exist? By following this process, students will avoid rote-learned answers (such as 'promotes out-of-court settlement') and will be able to demonstrate actual knowledge of a directions hearing.

Some of the purposes of a directions hearing are to

- set a timetable for the parties to complete future pre-trial procedures such as discovery, attendance at mediation or serving interrogatories
- allocate a date for trial
- set a time for when the parties are to attend mediation
- establish orders to be made in the proceeding
- hear any applications made by the parties prior to the trial of the proceeding.

An alternative approach was to provide a more general purpose such as 'speeds up the time it takes for a matter to go to trial' but this purpose needed to be explained, showing how a directions hearing does that (for example by touching on one of the points above).

The following is an example of a good answer, while it starts with purpose it also provides details of a directions hearing to support that purpose.

One purpose of a directions hearing is to clarify the issues in dispute. A directions hearing involves two parties coming together before a judge (or associate judge), where normally orders are made for steps to be undertaken before trial. One order that may be made is that the parties are required to file a 'statement of facts' or a 'statement of key issues'. These sorts of documents may actually clarify between the parties and for the judge what actual issues are disputed by the parties, and which issues or facts are agreed.

Question 6b.

Marks	0	1	2	3	4	Average
%	2	8	26	32	32	2.9

This question required an understanding of the operation of both VCAT and the courts in the way they resolve disputes, and how the use of VCAT in resolving a civil dispute may be more advantageous than the use of the courts. To answer this question, students needed to appreciate the strengths of VCAT, which may counteract the weaknesses of the courts as dispute resolvers. Students needed to make reference to the court (perhaps in relation to weaknesses of the court) for each advantage.

Weaker responses provided advantages of dispute resolution methods (such as mediation, conciliation and judicial arbitration) as opposed to VCAT, but this was incorrect and did not score any marks. Students are reminded to read the question carefully to ascertain what institution or method is being identified.

Other misunderstandings included

- VCAT hearings are not private: VCAT hearings, like court hearings, are normally open to the public.
- stating that VCAT uses mediation and conciliation, and courts use arbitration and judicial determination: this sort of response was focusing on dispute resolution methods as opposed to the institution (VCAT and courts) and was misguided. Courts also use mediation and conciliation as dispute resolution methods.



Other students' explanations of advantages were too brief, such as saying that VCAT is 'cheaper', 'quicker' or 'more informal'. However, students should have explained how or why VCAT is cheaper (for example, there is no need for legal representation or lower fees), quicker (for example, shorter waiting periods for a hearing to be determined) or more informal (for example, there is normally no need for rules of evidence and procedure).

Some of the advantages of VCAT are

- quicker: normally, the waiting time to have a matter heard in VCAT is less than for a court. Some of the lists take 2–4 weeks to have a matter heard from the time an application is filed. This is opposed to the court system, which often takes weeks, months or even years to have a matter heard, as parties need to undertake pre-trial steps and wait for a time when the matter can be heard
- more informal: VCAT hearings normally dispense with rules of evidence of procedure, which are used strictly by the courts, thus allowing the parties to feel more at ease
- cheaper: with a low application fee for most matters, the lack of necessity to undertake pre-trial procedures and the non-requirement of legal representation in many lists, parties usually spend less money in VCAT than in court, thus allowing VCAT to be more accessible to more people
- expertise: with the designation of cases to lists, sometimes VCAT members have expertise in an area of law which may not otherwise be available in the court system, particularly in the Magistrates' Court.

The following is an example of a good answer.

One advantage of having a dispute resolved by VCAT as opposed to a court is the nature of the court hearing. Normally, VCAT does not use rules of evidence and procedure when it hears a case, as opposed to a court which has strict rules of evidence and procedure. This often adds to the stress involved and the formality of the hearing, therefore this helps the parties to feel more at ease during the hearing.

Another advantage is the expense involved. Most cases heard at VCAT are small matters and the administration fee involved in filing the application is very small. Legal representation is often not needed with having a matter heard by VCAT. This is opposed to a court which normally requires legal representation for civil hearings (as it is too hard for an individual to understand the rules of procedure without a lawyer), which makes it more expensive, and the admin fees are much higher.

Question 7

Marks	0	1	2	3	4	Average
%	13	11	19	28	29	2.5

This question was generally well done. Many students were able to explain two features of the adversary system with reference to the given statement. The more commonly used features were the role of the judge, and the rules of evidence and procedure. However, students could have used any of the five features of the adversary system of trial, identified in the study design as the role of the judge, the role of the parties, the need for legal representation, the burden and standard of proof, and the need for rules of evidence and procedure.

Some students referred to the jury system as a feature of the adversary system; however, the jury system is not a feature and is a separate system. Weaker students made no reference to the given statement.

The following is an example of a good answer.

One feature of the adversary system is the role of the parties. The adversary system adopts a process whereby each party has complete control of their own case and decides which evidence to use when defending or prosecuting the case. This supports the idea of independence – it means that the court is not involved at all in how a case is conducted and is left up to the party to decide how to present the case. This also supports the idea of fairness because it means that every party is on a 'level playing field' in terms of choosing how to go about the case.

Another feature of the adversary system is the role of the judge. The judge in an adversary trial is required to act impartially, as an unbiased independent umpire who does not get involved in the way the parties present their case. This supports the idea of independence (as the judge takes no sides), fairness (as it means that the parties are being 'umpired' and are bound by the same rules) and impartiality (as there is no biased umpire).

2012 Assessment Report



Question 8

Marks	0	1	2	3	4	Average
%	9	13	27	29	22	2.5

This question required students to consider ‘the extent to which damages achieve this purpose’; therefore, do damages achieve to a great extent the restoration of a plaintiff to the position he or she was in before the wrong occurred? Or do damages achieve this purpose in some circumstances but not in others? Most students identified that damages cannot fully address some issues, such as the loss of a limb or the destruction of a reputation. Stronger students identified that other remedies, such as an injunction, are more useful in restoring the plaintiff in some circumstances, such as where the defendant has not fulfilled a promise.

Weaker students simply discussed the different types of damages without making reference to how those damages achieve (or do not achieve) the purpose identified in the statement.

Some of the points that could have been made were

- damages normally cannot ‘restore the plaintiff’ if the plaintiff has suffered loss or injuries other than pure economic loss: such as reputation, physical limbs, the loss of a loved one, mental anxiety or illness. Therefore, damages can only provide a sum that is considered to be compensation for the type of loss that is non-economic
- for economic loss (loss of money), particularly for cases where there is a debt owing or there is a specific amount such as loss of wages, damages is normally adequate in restoring the plaintiff
- damages do not compensate for the time, inconvenience, stress and cost of having to take a matter to court, therefore the plaintiff will normally have to seek additional orders for costs and interest, which even then may not fully compensate him or her
- some Acts such as the Wrongs Act place restrictions on the amounts that can be obtained, and therefore in some circumstances may not fully compensate the plaintiff
- other remedies such as injunctions are better placed for compensating a plaintiff; for example, in situations where the conduct of parties are affected
- sometimes the defendant is not able to pay the damages that are awarded to the plaintiff, therefore the order by the court to pay damages may be futile. (Few students were able to identify this.)

The following is an example of a good answer.

Damages is one of the most popular remedies sought in a civil proceeding, mainly because in many circumstances it achieves the purpose of restoring the plaintiff to the position he or she was in before the wrong occurred. In cases where the plaintiff has lost money, or a good that can be replaced by money (for example, a dodgy boat), damages is a very appropriate remedy. However, in some circumstances does not adequately achieve the purpose of restoring the plaintiff to his or her original position. Where the plaintiff has lost something that is ‘irreplaceable’ – for example, a reputation, a limb, damages can only provide compensation which is considered ‘equal’ to that which is lost. Also, some things like pain and suffering or embarrassment, which is compensated by general damages, is difficult to estimate in terms of money. Finally, often damages is not enough to compensate the plaintiff for the time, inconvenience, cost and stress of having to go through a court hearing.

Therefore, whilst damages to some extent and in some circumstances restores the plaintiff to the position that he or she was in before the wrong occurred, sometimes damages is inadequate to achieve this purpose.



Question 9

Marks	0	1	2	3	4	5	Average
%	5	6	14	24	37	15	3.3

Mediation is one of the more commonly used dispute resolution methods in the legal system and is a part of Unit 4, Area of Study 1. Many students demonstrated sound knowledge of mediation and how it operates. Stronger students were able to provide succinct evaluations.

An evaluation of mediation involved consideration of strengths and weaknesses, and coming to an overall judgment as to its worth. When asked to 'evaluate', some students merely dedicated each paragraph to a strength or a weakness without really weighing them up. For example, one strength of mediation may outweigh any other strength or weakness, therefore making it a valuable dispute resolution method. Or the weaknesses may be so trivial that mediation in general can be seen as a fundamental part of our legal system.

Some students presented a very simplistic view of mediation, and few recognised that many Supreme Court cases are resolved in mediation. Others saw mediation as being only for smaller matters, but mediation has been a successful dispute resolution method for many large-scale matters.

Most students who adequately evaluated mediation concluded that mediation is an essential dispute resolution method, mainly because of its flexible nature and the ability of parties to resolve a dispute without having to go through a full trial. Some of the points that could have been made were as follows.

Strengths

- Cheaper: mediation is normally conducted before court proceedings have commenced, or as a pre-trial procedure. It means, therefore, that parties will have spent less money by the time the matter goes to mediation rather than having a full trial.
- Flexible: the parties will be able to explore options as to how to resolve the dispute, as opposed to being restricted to the relief sought in a statement of claim (if one has been filed).
- Confidential: most mediations are confidential and therefore, particularly for those parties conscious of media attention, can be handled in a discreet manner.
- Informal: rules of evidence and procedure are dispensed with and the parties can be free to speak as they wish.
- Reduces court burdens: if settled, the case avoids being dragged through the court system and therefore frees up the court and judges to hear other cases.
- Certainty: it means that the plaintiff and the defendant do not have to go through the court system, which is risky and unpredictable in the outcome, the parties know the outcome and can be involved in the decision-making.
- Third party: the third party has much more flexibility in mediation than a judge or magistrate. That is, the third party is able to talk freely with the parties about the case, and is able to talk with each of the parties separately and jointly. This often puts a party at ease.

Weaknesses

- Not binding: unless the parties enter into a binding agreement or terms of settlement at the end of the mediation, the decision is not binding, thus risking one party reneging on their promise.
- Time and cost: mediation takes time and it may be a waste of time if one party does not wish to make any offers or is unreasonable, thus meaning that the parties have wasted money and time in attending mediation.
- Intimidation: one party may be more intimidated in the process and be forced into an outcome that he or she may not be happy with.
- Dissatisfaction: a party may be forced into settling at this stage, but may be dissatisfied with not having his or her 'day in court' or has not had the benefit of the court determining the outcome. A party may also be required to compromise too much of his or her claim for the sake of settling early.
- Not suitable for some matters: there are some matters where mediation is not appropriate. This is particularly so for long-running disputes and disputes where there is significant animosity between the parties.

The following is an example of a good answer.

Mediation involves the use of a third party to resolve a dispute outside of court.

One of the main and most important strength of mediation is that it is flexible. This means that the parties can explore options amongst themselves and with each other during the mediation process about how the dispute can be resolved. That is, the parties

2012 Assessment Report



are not limited to only what is sought by the plaintiff – they can be flexible and go beyond what is sought in court. In contrast, if the matter was to go to court, the parties are bound by what the judge orders. This is an important strength of mediation.

In addition to flexibility, if settled at mediation, the parties are certain about what happens going forward, particularly if terms of settlement are signed and the parties are bound by what they decide. That means that the parties do not have to go through the courts to find out what happens. There is certainty in who ‘wins’.

However, sometimes mediation can add to the time and cost of resolving a dispute. These days, the courts often order parties to go to mediation before trial to try and resolve it. If one party is disinterested in resolving the dispute at mediation, it can therefore be a waste of time and be very costly. However, given this depends on the circumstances, mediation is still worthwhile if the parties are keen to resolve it.

Another weakness is that mediation may not be suitable for some matters, such as where there is huge animosity between the parties or if there is a hateful family dispute. However, again, this weakness depends on the circumstances of the case and therefore can still be valuable for many other disputes.

Overall, given mediation allows for flexibility and certainty not available in the court system, it is a very valuable dispute resolution for most types of disputes.

Question 10

Marks	0	1	2	3	4	5	6	Average
%	17	14	21	20	15	8	5	2.5

The focus of this question was the role of the courts in law-making, and more particularly the ability of courts in that law-making role to change the law. The stimulus material focused on the idea that judges are able to change the laws, which is true in many circumstances; however, students were expected to identify the limitations of this ability.

Many student responses were unfocused, devoting much of the response to a discussion about a case (such as the ‘studded belt case’) rather than addressing the question. If students use cases as examples, they must be relevant and they must be applied to the question. Other students provided only a brief discussion about ‘RODD’ (reversing, overruling, distinguishing and disapproving) without any discussion about whether those methods actually change the law.

More focus is required on the doctrine of precedent and statutory interpretation, and the role of courts generally, as the responses to this question were limited in scope and demonstrated a lack of understanding of the nature of courts.

Some of the points that could have been made are listed below. The more successful students touched on a number of these points.

Where courts can change law

- Courts are able to interpret statutes when the need arises, and are able to change the meaning of words or phrases not otherwise intended by parliament.
- Courts can change law through statutory interpretation; courts may also expand or narrow the law and thus change the focus of the law.
- Courts are able to establish precedent in areas where there is no statute or no common law, such as developing laws relating to negligence against manufacturers.
- Courts are able to expand on precedent and develop common law in certain areas.
- The higher courts, particularly the Supreme and High Courts, are able to avoid following precedent as it is not binding on them and thus can create a new precedent. The higher courts can also overrule precedents on appeal.
- Courts are able to declare a law ultra vires or void if it is outside the law-making powers of the parliament that is making the law. Therefore, in those situations, the law is ultimately ‘changed’, with those parts of the law being struck out or declared invalid.
- Courts (as opposed to parliament) are free from political influences or from the threat of not being reappointed, and therefore are free to expand on areas of law or narrow/expand the meaning of a law.

Where courts can’t change law

- Lower courts are bound by precedent and are unable to change the law, but may be able to note their disapproval.



- Courts have to wait until cases come before them: they are unable to change laws at their will like parliament can.
- Common law may eventually be abrogated by parliament, thus restricting the court's control over common law remaining 'good law'.
- The courts are limited to interpreting the law or creating common law based on the case that comes before them, although they can make comments in obiter dictum that may influence courts in future cases.
- Statutory interpretation is limited to interpretation of the words in the statute. While that may change the meaning of the words, the courts cannot change the words or amend statute.

The following is the beginning of a high-scoring answer.

The courts' primary role is to resolve disputes, not to make or change laws. Therefore, the ability of the courts to change the law is ancillary to its role as a dispute resolver and therefore its ability is limited.

The courts can change the law only when a case comes before them, and only if that case requires a 'change' in the law. Many cases do not create precedent or do not involve the interpretation of statute, therefore the court's role as a law-maker is not invoked. In addition, given the courts have to wait for a case to come before them, it cannot just change a law as and when required, like parliament.

The higher courts have a greater ability than the lower courts to change the law. The higher courts, such as the High Court or the Supreme Court, can overrule or reverse precedents, and the High Court is able to change the Constitution if required. However, the lower courts are bound by precedent and therefore have a limited ability to change the law.

Question 11

Marks	0	1	2	3	4	5	6	Average
%	7	7	14	16	23	23	10	3.5

Students generally responded well to this question, showing a good understanding of the jury system. This question required students to evaluate two features of the jury system. Again, an evaluation required a judgment about each feature, taking into consideration the strengths/weaknesses raised by the student.

The less successful students struggled with the notion of 'peers', making no mention of the idea that a jury involves members of the community being part of the panel. Other responses failed to provide a judgment. Some students explained the two features but made no attempt to evaluate them.

Stronger students provided a comprehensive and detailed evaluation of the features, drawing on a number of points and considering the weaknesses of each feature, and provided an overall conclusion.

It is important for students to use paragraphs in this type of question as it signposts the points being made.

Some of the points that could have been made for each feature are as follows.

Judged by your peers

Strengths

- allows the public to be involved in the decision-making process in a criminal trial
- ensures responsibility is shared among 12 members of the public
- allows for 12 people from different walks of life and who have different attitudes, values and considerations to come together and judge an accused, as opposed to a single person who may have preconceived biases

Weaknesses

- members of the public normally have no legal expertise or knowledge of court processes, the law or the elements that need to be proved, thus providing some doubt as to whether they have understood the evidence and what is required to prove guilt
- peers may have preconceived biases about the accused or the crime
- peers may have, despite provisions of the Juries Act preventing them from doing so, accessed information or been privy to previous media attention on the crime, which may affect their impartiality

2012 Assessment Report



Cross-section

Strengths

- jurors are selected at random through the electoral roll, meaning that they come from all walks of life, areas of Victoria and from different occupations
- they can provide different views on the crime, the accused or the evidence, depending on their background and experiences
- as opposed to other systems, where a specialist jury may be appointed, the jurors have limited or no experience in juries, thus ensuring an objective view of the process

Weaknesses

- the provisions of the Juries Act mean that many people may be ineligible for appointment to the jury panel. These include judges, lawyers, bail justices, some members of the public sector, police officers, therefore reducing the amount of people who have some knowledge of the law and the legal system from taking part in the jury system
- many people are determined to be disqualified, including some former prisoners, thus again reducing the people available to be part of the panel
- some people are excused, depending on the circumstances
- challenges by either party may again reduce the amount of people who may take part, thus therefore reducing the ability of a panel to remain as a cross-section of the community

The following is the beginning of a good answer.

One feature of the jury system is being judged by your peers. This is an advantage because it is ordinary members of the public, the peers of the accused, rather than an expert, who is coming to a judgment about whether or not the accused is guilty. The peers will come from different parts of society, and perhaps different races and religions, and therefore will provide a broad view of the facts of the case. This is a real strength and is one of the greatest aspects of our jury system: ordinary members of the public being involved in the decision of one person's fate.

However, coupled with this feature are some difficulties. First, many people have little or any experience with the legal system and may become overwhelmed with the trial or with the mechanics of the case. Also, some peers may have pre-conceived biases about a particular crime or situation and may bring those biases into the case. However, this may not happen at all and therefore the strengths of these features far outweigh any possible weaknesses.

Question 12

Marks	0	1	2	3	4	5	6	7	Average
%	12	11	17	24	17	9	5	3	2.9

This question asked for the student's opinion on the extent to which they agreed or disagreed with the statement and to provide reasons for that opinion. The statement made two general assumptions: that the Victorian Parliament was not able to make laws that reflected society's values, and that the Victorian Law Reform Commission (VLRC) was able to assist the Victorian Parliament to do so. Therefore, students were expected to consider and break down both of those assumptions.

Many students saw this question as simply asking for a description of the role of the VLRC and gave little thought to the statement. Most students disregarded the reference to the Victorian Parliament and made few, if any, points about whether or not the Victorian Parliament was able to make laws that reflected society's values.

To gain full marks, the following needed to be evident in the response.

- an indication of the extent to which the student agreed or disagreed with the statement
- references to the VLRC and how it may or may not assist the Victorian Parliament to make laws that reflect society's values (depending on the opinion of the student)
- a consideration of the ability of the Victorian Parliament to make laws that reflect society's values – that is, the strengths or weaknesses of Parliament to do so (depending on the opinion of the student)

2012 Assessment Report



Some of the points that could have been made are as follows.

VLRC

- Consult with the community, including
 - asking questions of the community
 - inviting written submissions from the public and other organisations
 - undertaking consultations through discussion groups or forums
 - publishing draft reports for public comment.
- After consulting with the community and experts, makes recommendations to the Victorian Parliament.
- If the public has given notice to the VLRC about changes that should be made to a law in relation to minor issues and the VLRC has not been provided with terms of reference, the VLRC is able to recommend changes to the law.
- On major issues, the VLRC is able to suggest to the Attorney-General that terms of reference be provided after having consulted with the community.

These roles enable the VLRC to be in touch with the values of society and therefore take those into consideration when it provides its final report.

Victorian Parliament

- It is elected by the people and is considered to be both responsible and representative of the people. Many parliamentarians consult with their constituent to gauge their views and values.
- Parliament is able to investigate a topic extensively and is able to consider society's values in those investigations.
- It is able to delegate its law-making power to those bodies that are 'closer' to people's values, such as councils and statutory authorities.
- Parliament is open to debate and the public is able to access their members of parliament through their electorate or even through processes such as petitions, which may alert parliament to values held by society.
- Parliament is often reluctant to change laws that are controversial, even though society's values may differ from those laws.
- Because of the many conflicting values in society, parliament is not necessarily able to make laws that 'reflect society's values', as those values differ.
- The Victorian Parliament may be reluctant to change controversial laws to avoid not being re-elected.

The following is the beginning of a good answer.

I agree partly with this statement. I agree that the role of the VLRC is crucial to the Victorian Parliament, and I agree that the Victorian Parliament is often not in touch with society's values, however I do also believe that the Victorian Parliament is able to make laws that reflect society's values without the assistance of the VLRC.

The Victorian Parliament is elected by the people. It is meant to be representative of the people. Given that members of parliament could be voted out at the next election if the people feel that it is not representative of them, usually the members of the Parliament will consult with their local areas to determine their views on various issues. This does not require the assistance of the VLRC.

However, many people would say that despite members of parliament doing this, that Parliament itself is often reluctant to change laws, despite the values of the community, because they are afraid that they will be elected out on controversial issues. Therefore, in some respects, Parliament is not able to make laws that reflect society's values because of its own concerns about the consequences of that.

Question 13

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	17	8	11	10	10	10	9	9	7	5	4	4.1

The focus of this question was on the protection of rights by the Commonwealth Parliament. Again, this question asked for the student's opinion – whether they disagreed or agreed with the statement.

To gain full marks, the following aspects needed to be covered.

- an indication of the extent to which the student agreed or disagreed with the statement
- discussion of the protection of rights by the Commonwealth Constitution, and in particular whether or not they are well protected



- whether or not section 128 protects rights in Australia
- an explanation of the significance of one High Court case related to the constitution protection of rights

Weaker students provided lengthy descriptions of how the Constitution protects rights, but gave little discussion about the effectiveness of that protection. Other responses were vague and brief, stating that Australia doesn't have many rights and other countries have more rights. Some students saw this as a 'comparison' question, comparing the protection of rights in Australia to another country such as South Africa. These responses were misguided and did not address the question. Other responses merely explained the referendum process, which again did not address the question and was not needed for full marks.

Many incorrect High Court cases were used, such as the Franklin Dam case, Mabo, *R v. Brislan* and the 'studded belt case'. The more popular correct High Court cases included the Roach case and the Lange case. Other cases used included *ACT v. Commonwealth*, the Dogs case and *Coleman v. Power*. The discriminating factor was the explanation of the significance of the case.

Stronger students used paragraphs to structure their answer, explained the significance of a High Court case and methodically discussed the protection of rights in Australia, as well as the role of section 128 in that protection, providing both strengths and weaknesses to that protection. It was pleasing to see that many students understood what was required for this question. For example, stronger students did not go through the section 128 process as this was not required; many students identified the three types of protection (structural, implied rights, express rights) in their response.

The following points could have been made.

- The five express rights can only be removed by amending the Constitution using s.128 – this is a difficult process, making it unlikely that these rights will be removed easily.
- The High Court has the ability to imply rights; this is noted in the implied right to political communication.
- The rights are fully enforceable by the High Court – that is, the High Court may declare legislation invalid if it contravenes one of these rights.
- Additional rights can be added through the s.128 process. The High Court can also imply further rights but needs to wait for a case to come before them.
- Rights are defined by parliament, which can be done more easily and ensures confidence in the legislatures.
- Rights are protected by legislation and common law – this ensures they can be added to continually and amended to keep with changing values.
- None of the protected rights can be overridden by parliament.
- The Constitution contains structural mechanisms and protections – such as the separation of powers, representative and responsible government and ss.7 and 24 to protect rights.
- The Constitution contains a limited number of express rights. The list is not comprehensive.
- There are some limitations on the scope of the express rights and the implied right. For example, the just terms and interstate trade and commerce rights are more operational/economic. Right to jury is limited to indictable Commonwealth offences.
- The High Court has to wait for a case to come before it to be able to imply rights.
- Given the limited nature of s.128 in changing the Constitution, legislation is normally used to protect rights in Australia. This, however, does not have the protection the Constitution provides (that is, the difficult nature of changing the Constitution) and thus rights protected by legislation can be easily amended.

The following is a start of a good answer.

While the structure of the Commonwealth Constitution ensures that the rights already in the Constitution are well protected, I do not believe that there are an extensive amount of rights well protected by the Commonwealth, and I believe that section 128 acts as both a hindrance and a benefit to rights protection in Australia.

There are only a limited amount of rights expressly written in the Constitution. Those rights, five of them, are well protected by the Constitution because it is very difficult to change the words of the Constitution (as discussed below). However, many of those rights are limited in nature. For example, the right to a trial by jury is only for indictable Commonwealth offences. Further, these are rights that would not be seen as general human rights such as the right to liberty or freedom of speech – some of them are economical rights such as the right to interstate trade.

However, as stated, section 128 ensures those rights cannot be easily changed. The referendum process has been proven to be very difficult to have the Constitution changed. While this is seen as a benefit to constitutional protection of rights, it's also a

2012 Assessment Report



hindrance. It means that if Australia wanted to express further rights in the Constitution, it would have to do so by way of a referendum process. Given the poor success rate of referendums in the past, unless the referendum is one that is popular in the eyes of the public, it is unlikely to succeed.