2007 Legal Studies GA 3: Written examination

GENERAL COMMENTS

Students' responses to the 2007 Legal Studies examination demonstrated that many students had understood the key knowledge and applied it appropriately to the questions asked. It was clear that many students had referred to previous examinations and to relevant comments from past assessment reports as they considered particular sections of the study design. Familiarity with past exam papers and the *Legal Studies VCE Study Design* should enhance students' capacity to adapt the information they have learnt to the questions being asked.

Exam technique

Careful reading of the exam paper during reading time is crucial; the 15 minutes of reading time needs to be used constructively by students. When reading through the examination, students should think about what part of the study design is being reflected in the particular question and what strategies they can use to best present the relevant material in their answer. Students need to be flexible in the way they use material. It is important that they understand what material is required to answer a particular question and that their answer is not based on a question they expected to see based on a previous year's examination. Students need to give answers that provide relevant details (and examples where required) in a logical and legible way and that respond directly to the question; practise throughout the year can provide the necessary skills to produce answers of this type.

It is also important for students to manage their time well. Students may be tempted to write everything they know about a topic for a particular question, but it is very important that students do not spend more than the appropriate amount of time on each answer. The basic rule for determining how much time to spend on each question in the exam is simply to double the marks for the question. For example, a question worth four marks should have no more than eight minutes spent answering it. It may be tempting to spend a lot of time answering one, two and four mark questions; however, there is absolutely no advantage in providing more information than is asked for. For example, if one purpose of a criminal sanction is asked for, no further marks are awarded if two purposes are given. Generally there is not enough time in the Legal Studies examination for extensive plans and most students may only require a plan when answering the 10 mark question, and, even then, a plan will not be necessary at all for some students.

Responding to 'task' words

Examination questions generally have two components; that is, they ask for particular information and they require that information to be presented in a particular way – as indicated by the 'task' word. For example, Question 9 asked students to 'identify' and 'critically examine' two strengths of parliament as a law-maker. 'Identify' requires a brief description, 'critically examine' requires students to make a judgement based on a consideration of the strengths and weaknesses of parliament as a law-maker. It is important that students understand the requirements of different task words. Constant practise answering questions under exam conditions should develop this skill.

A question may also ask for a specified number of points to be made; for example, Question 8 asked for a discussion about **two** High Court cases that interpreted the Constitution. When asked for a specific number of points, students are clearly disadvantaged if they cannot meet this requirement; however, it is worth repeating that there is absolutely no advantage in providing more information than is asked for.

Organisation of answers

It is important for students to think about how they will present material in a way that is clearly relevant to the question being asked. Students should address the requirements of the question from the beginning of their answer; lengthy introductions are not necessary. A structure that uses clear topic sentences and paragraphs is worth practising prior to the exam. Answers presented in point form or as dot points cannot achieve full marks and students need to organise their time so that they can fulfil the requirements of the question adequately.

If students continue an answer(s) at the end of the booklet they should clearly state that the answer is continued and give the page number where the remainder of the answer can be found. The continuation of the answer should also be clearly labelled with the relevant question number.

SPECIFIC INFORMATION

Note: Student responses reproduced in italics herein have not been corrected for grammar, spelling or factual information. Unless otherwise stated, the samples provided are examples of good student responses.

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

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Question 1

Marks	0	1	Average
%	19	81	**0.8**

This question was handled well. Most students stated that the key role of the lower house is to debate and pass bills, and some identified that its role is to determine which party will form the government. Many students knew that the lower house is the House of Representatives.

Question 2

Marks	0	1	2	Average
%	36	36	28	**0.9**

'Responsible government' is one of the principles of the Australian parliamentary system listed in Area of Study 1 in Unit 3. Some students confused this with the principle of 'representative government'.

Following is an example of a good answer.

> *Responsible government refers to the government being accountable to the parliament and the people. It must answer questions and clear up concerns of parliament and the people when the need arises. It also refers to ministers being accountable to parliament and must be able to answer questions in relation to their departments. If the government loses the confidence of parliament it must resign.*

Question 3

Marks	0	1	2	Average
%	23	31	45	**1.2**

This question drew on Area of Study 1 in Unit 3. The emphasis was on the 'role played' by the formal law reform body. The 'role' of the body is its function or activities that assess 'the need for change in the law'.

The role of formal law reform bodies in assessing the need for change is:
- reviewing the current law
- finding out how the law is operating in practice
- discovering any problems or omissions
- consulting the public and interested parties and groups
- formulating a report.

The law reform body can use a variety of strategies including internal research; contributions from the public, community organisations, academics, lawyers, government and private sector organisations; calling for submissions from these groups; holding face to face consultations in rural and metropolitan areas; preparing issues and discussion papers; and preparing final reports.

An important point to note is that the law reform body researches and recommends – it cannot actually change the law. Whether its recommendations are accepted is a decision for the government, which can then present a Bill to parliament to implement the recommendations.

Question 4a.

Marks	0	1	2	Average
%	29	37	34	**1.1**

The purpose of a committal hearing is to determine whether there is sufficient evidence to support a conviction. Many students only mentioned that the committal hearing's purpose is to establish if there is a '*prima facie* case' against the accused; this was not sufficient for full marks.

Following is an example of a good answer.

> *Committal hearings are meant to establish a prima facie case. This means that the case has sufficient evidence to support a conviction at trial. This is done so as to be sure that the trial is not a waste of time and money.*

Question 4b.

Marks	0	1	Average
%	7	93	**1.0**

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This question was handled well by students who most commonly said that bail can be refused if a person is likely to be a danger to society or if they are likely to abscond. Some students thought that bail can be refused if a person cannot meet any of the financial conditions of bail; however, this is not accurate because bail has actually been granted and the person is unable to meet the condition of bail.

Question 4c.

Marks	0	1	Average
%	18	82	**0.8**

This question was also answered correctly by most students. A correct answer could be expressed in the following way.

One criminal sanction that could be imposed on James is imprisonment. The purpose of imprisonment is to deter the offender from re-offending and to deter others from committing the same offence.

Question 5

Marks	0	1	2	Average
%	22	31	48	**1.3**

This question related to Area of Study 3 of Unit 3 and is one of the key knowledge dot points. Some students struggled to answer this question with two features.

The following material could have been used to answer this question.

- Courts may need to interpret the meanings of words in statutes where there is ambiguity or a lack of clarity.
- Parliament can legislate to codify an area of common law. The primary source of that area of law then becomes the relevant statute, as subsequently interpreted by the courts.
- Parliament can override a particular common law rule by enacting legislation relating to that rule. For example, the common law defence of provocation in relation to a murder charge has recently been amended by parliament.
- Where the courts have interpreted a provision of a statute in a particular way, and parliament is dissatisfied with this interpretation, parliament can override the courts' interpretation by amending the statute. The amended statute can change the wording of that provision and indicate how parliament wants the provision interpreted by the courts.
- The courts can declare that a statute is invalid on the grounds that it was beyond the powers of parliament to pass such a law (*ultra vires*). For example, the High Court can declare a Commonwealth statute invalid on the grounds that there was no constitutional head of power under which the statute could be passed, or because the statute infringed the separation of powers doctrine. State legislation can be declared inoperative where it is in conflict with validly made Commonwealth law (s.109 of the Constitution), or it can be declared invalid where it concerns an area of exclusive Commonwealth power.
- Judges can criticise obsolete law.
- Parliament can establish courts and alter their jurisdiction.
- The Commonwealth and State Acts Interpretation Acts set guidelines for courts on how to interpret statutes.

Following is an example of a good answer.

One relationship between parliament and the courts is that parliament can codify the common law made by the superior courts. This means that parliament puts into statute form the common law. Another relationship is that the courts interpret the legislation passed by parliament. This means that the courts give meaning to the words in statutes in the course of resolving disputes.

Question 6

Marks	0	1	2	3	Average
%	55	21	16	8	**0.8**

Many students struggled with this question and many did not seem to have taken the time to read carefully and understand the instructions. In this question students were given a scenario and asked if they agreed with the advice that had been given.

One piece of advice was that the case 'could be tried in another court' if the person charged (Bruce) wanted to. Bruce had decided to have his case heard in the Magistrate's Court; however, because he committed a burglary, which is an indictable offence triable summarily (Schedule 4 of the *Magistrates' Court Act 1989* lists the indictable offences that can be heard by the Magistrates' Court), he can choose to have his case heard by a judge and jury in the County Court.

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Therefore the advice Bruce was given is correct, he could have chosen not to have his case heard in the Magistrates' Court and instead gone to the County Court.

Although Bruce's age was given as 18 there is no choice available to have his matter heard in the Children's Court. The Children's Court does not offer any options to juvenile defendants about where their trials will be heard. If Bruce had been eligible to have his matter heard in the Children's Court it would have been heard there, and Bruce would have no choice.

The other piece of advice that Bruce was given was that there 'is more than one possible appeal available to him' if he was convicted in the Magistrates' Court. This advice was also correct because from the Magistrates' Court there are two avenues of appeal – one to the County Court on conviction or sentence and one to the Supreme Court on a point of law.

Question 7

Marks	0	1	2	3	4	Average
%	22	11	22	18	27	**2.2**

This question was generally well answered; however, some students provided changes to specific laws rather than changes that have a more direct impact on the operation of the legal system. Many good answers referred to the development of the Koori Court and a Children's Koori Court and explained how this court enhanced the operation of the legal system by reflecting the human rights of indigenous people specifically. Other recent changes that were mentioned included the increase to the jurisdiction of the Magistrates' Court and the impact that this will have on access to dispute resolution methods and timely dispute resolution.

Many recommendations for change referred to changes that could be made to the jury system or adversarial procedures. These were generally quite well justified through the use of the elements of an effective legal system.

Question 8

Marks	0	1	2	3	4	Average
%	32	16	25	12	15	**1.7**

This question asked for an indication of the impact that **two** High Court cases have had on the law-making powers of the State and Commonwealth Parliaments. Students were required to give a brief discussion of two cases, which reflects the change in this area of the study design, and it was disappointing that many students were only able to present one case in their answers. The most popular cases used were the Franklin River dam case and Brislan's case. Good answers put clear emphasis on the **impact** of the cases on the law-making powers of the parliaments. The impact had to be explained succinctly because there were only four marks allocated to this question and students who spent too much time on the facts of the case wasted time.

Some students used the 'studded belt case', the 'Kevin and Jennifer case', Mabo or *Donoghue v Stevenson* to answer this question. These cases do not involve interpretation of the Constitution and no marks were awarded for reference to these cases.

Following is an extract from an answer that explains the material well. This answer clearly stated what the impact of the case was, rather than just describing the facts of the case.

> *One High Court case that involved interpreting the Constitution in a way that impacted on the law-making powers of the State and Commonwealth Parliaments was the Tasmanian Dam case. This case resulted in the Commonwealth Parliament's law-making powers being increased at the expense of the states. This case means that when the Commonwealth Parliament is legislating to enact obligations under an international treaty to which Australia is a signatory, they can legislate in residual areas of power as well as exclusive or concurrent areas of power. This clearly erodes the powers of the states who traditionally are the only parliaments able to make laws in residual areas.*

Question 9

Marks	0	1	2	3	4	5	6	Average
%	12	9	13	16	18	15	17	**3.3**

Most students were well prepared for this question on parliament as a law-maker; however, it is important that students understand the demands of task words such as 'critically examine'. This instruction requires students to consider the pros and cons of a suggested point. In answer to this question it was necessary to state two strengths of parliament as a law-maker and then discuss how these points are strengths as well as the problems associated with the strengths.

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Following are some of the points that could have been made in response to this question.

Strengths
- Parliament can investigate the whole topic and make a comprehensive set of laws.
- Parliament has access to expert information and is therefore better able to keep up with changes in society.
- Parliament provides an arena for debate.
- Parliament can delegate its power to make law to expert bodies.
- Parliament is able to involve the public in law-making.
- Parliament can change the law as the need arises
- Parliament can make law *in futuro*.
- Parliament is democratically elected. This means that, in theory, its members reflect the feelings, attitudes and values of the community. Members eventually face re-election, and this is an incentive to ensure that they continue to reflect the community's views and do not act in an unaccountable manner.

Weaknesses
- Investigation and implementation of new laws is time consuming and parliament is not always able to keep up with changes in society.
- Members of parliament might be more influenced by political considerations, rather than the community good, when considering what attitude to adopt towards a Bill.
- The process of passing a Bill is time consuming.
- Delegated authorities are not all elected by the people and there may be too many bodies making laws.
- It is not always possible to change the law in accordance with changing values in society, or to reach a compromise where there are conflicting values in society.

Following is an extract that examines one strength of parliament as a law-maker.

One strength of parliament as a law-maker is that it is able to delegate some of its law-making powers to expert bodies such as statutory corporations. This delegation of power saves Parliament time as well as ensuring that laws are made by those with particular expertise in an area. However, some people argue that by delegating law-making powers Parliament is allowing unelected bodies make laws. Although this is true, most bodies that make delegated legislation are not elected (with the exception of local councils), nevertheless, Parliament scrutinises the whole process of delegation as well as ensuring that delegated legislation is reviewed, this ensures that Parliament remains representative of the people's views and values and responsible for the laws that are made.

Question 10

Marks	0	1	2	3	4	5	6	Average
%	18	5	9	14	19	20	15	**3.3**

Students had a good knowledge of the key features of the adversarial process of dispute resolution. The most popular feature discussed was the role of the judge.

Many students argued that the jury is a key feature of the adversary system; however, this is not case – most cases are determined without a jury in our system of dispute resolution. A few students did not answer the second part of this question, which required them to discuss whether the adversary system would be improved by adopting a feature of the inquisitorial system. It is important for students to read questions carefully and check that they have met the demands of the question.

The following information could have been used to answer this question. The details of the inquisitorial system vary from country to country, but the general features are outlined below.

Features of the adversary system
- The role of the parties: Each party is responsible for presenting their case. This means the parties decide which factual and legal issues should be raised and what evidence should be presented to prove the alleged facts. Through this process, the system assumes that the stronger case will emerge, and that is likely to reveal what happened.
- The role of the judge: The judge is an impartial arbitrator, ensures that the trial is conducted in accordance with the rules of evidence and procedure and is not involved in the presentation of evidence or the cross-examination of witnesses.

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- Strict rules of evidence and procedure: These ensure that only relevant and reliable evidence is presented; the same rules apply to each party to ensure that the parties have the same opportunity to present their case. The trial is a single continuous event based on the presentation of oral evidence which is subject to cross-examination.
- Standard and burden of proof: The burden of proof is on the party making the allegation. The standard of proof is beyond reasonable doubt in a criminal case and on the balance of probabilities in a civil case. The party with the burden of proof wins the case if they are able to satisfy the standard of proof.
- The need for legal representation: The emphasis on the presentation of the case being in the hands of the parties means that there is a need for legal representation. The complexity of the evidence and procedures make it difficult for a party to have a full opportunity to present their case without legal representation. Success can be influenced greatly by the skill of the legal team.

Features of the inquisitorial system
- The judge is much more active than the adversary system judge, and is involved in decisions about which evidence is to be presented, the legal issues raised at the trial and the examination of witnesses.
- The involvement of the judge in the presentation of evidence means that, in contrast to the adversary system, the parties do not have control over whether a particular piece of evidence is presented or a particular witness is called. The parties cannot prevent evidence being called which is damaging to their case.
- The strict rules of evidence and procedure do not apply. For example, the court can consider hearsay evidence, and evidence gathered before the trial. This sort of evidence is not subject to cross-examination.
- The hearing takes the form of an enquiry into the truth. The court conducts the enquiry until it is satisfied that it has found the truth. Under the adversary system, the court's function is not to find the truth, but to determine whether the party with the stronger case has met the standard of proof.

Question 11

Marks	**0**	**1**	**2**	**3**	**4**	**5**	**6**	**7**	**8**	**Average**
%	16	8	11	12	15	13	13	7	5	**3.6**

Students generally provided well-prepared answers to this question. It is important that students are able to compare the 'approach' that is used to protect human and democratic rights in Australia and one of: the United Kingdom, the United States of American, Canada, New Zealand or South Africa. In this question students also had to be able to evaluate how effective the Commonwealth of Australia's Constitution is in protecting democratic and human rights.

The 2006 Legal Studies Assessment Report contains further information that is helpful for questions of this type. The following material could also be used when making comparisons between the approach in Australia and the selected country.

Australia
The Australian Constitution contains expressly protected rights and, currently, one implied right.

1. Freedom of Religion
Section 116 provides that no law may establish a state religion, impose any religious observance, prohibit the free exercise of any religion, or require a religious test as a requirement for Commonwealth office. Section 116 also protects non-believers by indirectly providing for the 'right of a man to have no religion'. However, the section prohibits only Commonwealth laws from restricting religious freedom in these ways; it does not to apply to state laws.

2. Interstate Trade and Commerce
Section 92 states that interstate trade and commerce is to be free. This right is more a structural underpinning of the economy to prevent parochial restrictions on economic activity, rather than a fundamental democratic or human right.

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

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

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

- most indictable offences are crimes under state law, and s.80 only applies to Commonwealth offences
- the High Court has ruled that 'indictable' means 'crimes tried on indictment'. Hence, the government can avoid a jury trial for a particular offence by legislating for the offence to be a summary offence.

The High Court has found that the Constitution contains an implied right to free political communication. As our Constitution established a system of representative government, free political communication is necessary for that system to operate properly. The court has not found that a general right to free speech is implied by the Constitution, but only a right in regard to matters which can be described as "political communications".

USA

- The protection of democratic and human rights is contained in a Bill of Rights that takes the form of a series of amendments to the US Constitution.
- The Bill of Rights contains a comprehensive or extensive list of rights. Students could use examples to illustrate this or refer to specific cases, such as the *Roe v Wade* abortion case.
- The rights are fully enforceable. This means that legislation that infringes any of those rights can be declared invalid by the US federal courts.
- The rights are entrenched, which means that a right can only be abolished if the Constitution is amended. This is a more complex process than is used in Australia, involving separate referenda being held in each state.
- The list of protected rights can be added to through constitutional amendment (for example, slavery was abolished after the Civil War and the vote introduced for 18 year olds in 1971).
- It includes implied rights; for example, a right to privacy has been implied. In *Roe v Wade* (1973) this right was extended to cover the relationship between patient and doctor, and hence make it unlawful to interfere in doctor-patient issues on matters such as abortion.

Canada

- Protection is contained in the Charter of Rights which was adopted in 1982.
- The Charter contains a comprehensive set of rights. Students could refer to examples or specific cases as evidence of this point.
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended. Procedures for amending the Constitution are similar to the procedures in Australia.
- The rights are fully enforceable, which means that legislation that infringes any of the rights can be declared invalid by the Canadian Supreme Court.
- Certain rights can never be overridden by parliament (for example, the right to vote). However, some rights can be overridden – parliament can respond to a Supreme Court declaration of invalidity by passing legislation again and indicating that it is to override the Charter. This legislation has a five year sunset clause, and will lapse at the end of five years unless parliament passes it again and indicates that it is to override the Charter.
- The Supreme Court can give an opinion on whether proposed legislation will infringe the Charter (the Supreme Court did this recently in regard to a Bill to legalise gay marriage).
- Rights can be limited where it is 'necessary in a free and democratic society'.
- The courts can read down the impact of legislation (that is, interpret the legislation narrowly) to bring its operation within the boundaries set by the Charter.
- The courts can make another appropriate remedy, such as an award of damages – s. 24(1).
- A court can exclude evidence that has been obtained in violation of the Charter – s. 24(2).

UK

- As a member of the European Union, the UK is expected to comply with the European Convention on Human Rights.
- The UK *Human Rights Act 1998* (HRA) incorporates those rights into British law.
- The Act provides a comprehensive list of rights.
- These rights are not entrenched. The *Human Rights Act 1998* can be amended by parliament. However, if Parliament abolished a right, and that right is still protected by the European Convention on Human Rights, the aggrieved person could still seek to have the right adjudicated on by the European Court.
- Courts cannot declare legislation invalid if it infringes the HRA, but can declare it to be incompatible. This puts pressure on the government to respond and, if it does not, the complainant can turn to the European Court of Human Rights.
- Courts are expected to interpret legislation in accordance with the HRA.

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- Public authorities must act in a way that is consistent with the HRA. If they fail to, the court can order damages.
- All Bills are scrutinised for compliance with the HRA.
- Courts are to act consistently with the HRA when developing common law.

South Africa

- The Bill of Rights was introduced 1996.
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended.
- The rights are fully enforceable, which means that legislation that infringes any of the rights can be declared invalid by the Constitutional Court.
- It contains a comprehensive list of rights. Students could use examples and specific cases to illustrate this point.
- A special feature of the South African Bill of Rights is its inclusion of economic, social and cultural rights.
- Courts are required to interpret statutes in accordance with the Bill of Rights.
- The courts are to develop the common law in accordance with the Bill of Rights.
- Rights can be limited where justified in a free and democratic society.

New Zealand

- The *Bill of Rights Act* (BORA) was passed in 1990.
- It contains a comprehensive list of rights.
- It is not constitutionally entrenched, so parliament can abolish rights by amending the BORA.
- The rights are not fully enforceable by the courts; that is, the courts **cannot** declare legislation invalid if it infringes the BORA.
- Courts are required to interpret legislation in accordance with the BORA.
- The Attorney-General scrutinises all Bills and advises parliament if there is any infringement of the BORA.
- While not fully enforceable, it has affected the political culture in that governments are expected to comply with it.

Question 12

Marks	0	1	2	3	4	5	6	7	8	Average
%	11	6	11	14	17	14	13	8	6	**3.9**

This question asked students to make a connection between problems associated with civil pre-trial procedures and alternative dispute resolution methods and bodies. Many answers were too general and did not deal with any civil pre-trial procedures or the problems they may cause. General answers that suggested that the cost in time and money meant that tribunals and alternative methods of dispute resolution were better than litigation were on the right track; however, better answers engaged in some discussion of specific pre-trial procedures, such as pleadings and discovery, and explained that the detailed information collected by these procedures can be very time consuming and require the expertise of lawyers which can be very expensive.

Following is an example of a good beginning to an answer to this question.

> *Two problems with civil pre-trial procedures involve the complexity associated with procedures such as pleadings and discovery. The complexity of these procedures means that they can take a long time to complete and they require legal advice in order to ensure that they are done properly. Legal advice is very expensive and this can often mean that ordinary members of society cannot afford to take civil action because of the time involved and the costs associated with the collection of evidence. In some instances these problems can be overcome by parties going to a tribunal such as the Victorian Civil and Administrative Tribunal where costs are much less and legal representation may not be necessary.*

Question 13

Question chosen	none	a.	b.
%	4	39	57

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	7	7	10	11	13	12	12	11	9	5	4	**4.8**

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Question 13a.
Students who chose this question were required to 'critically evaluate' the effectiveness of the law-making process of the courts. Critical evaluation requires looking at both sides of a point and then making an evaluation as to which is the stronger argument. Better answers structured relevant material for this answer by making a statement about the effectiveness of the law-making process used by courts and then discussing the process in a way that supported the initial contention.

Following is a list of some material that could have been used to answer this question.

Strengths
- The doctrine of precedent requires the courts to follow binding precedents where the material facts of the precedent are similar to the material facts in the case before the court. This provides for certainty and consistency in the law, and these are important characteristics of justice.
- The doctrine of precedent allows for some flexibility. The law can be expressed as a general principle (for example, the 'neighbour test'), allowing the courts to adapt it to fit the circumstances before the court.
- The law is prevented from being too rigid by:
  - distinguishing: a judge can avoid following a precedent if the case can be distinguished on the facts
  - overruling and reversing previous decisions: the High Court can overrule its own decisions
  - disapproving of a decision (for example, a decision from another jurisdiction): a higher court can indicate to the lower courts that a decision should no longer be regarded as good law.
- Judicial decisions are free from outside pressure.
- The doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions.
- The system provides for two ways which mistakes in law-making can be corrected:
  - the appeals process allows for the review of decisions
  - parliament can override court-made law where the common law has become outdated.
- Courts can fill the gaps in the law by making a decision on a matter when it arises.

Weaknesses
- Courts cannot determine what the law is unless a case is brought before the court. Thus, if there has not been a decision on a particular point of law from a court of high authority, there is uncertainty surrounding that area of law.
- Courts may be bound by an old precedent which could lead to unjust results.
- Changes in the law are *ex poste facto.* This can lead to uncertainty and injustice.
- Determining the law this way can be very expensive for the parties involved.
- Some judges are very conservative and could be reluctant to change bad laws.
- Judges are not elected and judges tend to be drawn from narrow socioeconomic backgrounds (though this is changing).
- It can be difficult to determine the *ratio* of a case, especially where the judges have given differing reasons for their decision. This can make the law uncertain.
- It is a slow way of making law – it takes time for a case to work its way though the pre-trial, trial and appeal processes to get to the stage where a court of high authority can rule on the matter.
- The courts can only establish a binding precedent when a dispute has been brought before them for resolution. They have to wait for this opportunity.
- Courts cannot comprehensively research and review the law and make sweeping changes to it. They can only make rulings on the legal issues relevant to the case before them.
- For these reasons, it has been described as an ad hoc way of making law.

Following is an example of a good beginning to this question.

The law-making process used by courts is generally referred to as the doctrine of precedent. This process has been well established in common law countries like Australia and it is very effective as a law-making system.

The doctrine of precedent is very effective because it ensures that consistency is a feature of the law-making by the courts. Because of the principle of stare decisis (to stand by the decision), judges will treat like cases alike and this means that there is consistency in the approach to law-making. Judges will consider the facts of a case and if the facts of a new case are so similar that they cannot be distinguished the judge will follow the precedent, if it comes from a higher court. This also means that parties to a dispute can make a judgement about whether or not they should risk going to court at all based on whether or not their case is like others that have been heard in the past. Of course, judges can distinguish the facts of cases in order not to be bound by precedents and this allows for some flexibility in law-making. This can be a problem with law-making by courts, it is up to judges, who are not elected, to follow precedents or distinguish (if the facts are different). However, there have been examples of

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cases where judges have made controversial law in areas that the parliament has not because parliamentarians were not prepared to risk alienating some parts of the community by introducing controversial law; the law relating to abortion in Victoria is an example of this.

Question 13b.
This question was more popular that Question 13a. and answers showed a good knowledge of the effectiveness of the jury system. Good answers showed that students had considered the strengths and weaknesses of the jury system and come to a well-supported conclusion.

Following are some points which could have been raised in the evaluation of the jury system of trial.

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

Disadvantages/weaknesses
- Jury deliberations are kept secret and reasons do not have to be given.
- Juries may not be a true cross-section of the community as people are able to be challenged or excused for a good reason.
- A jury can add to the cost and length of a trial.
- There is some doubt as to whether juries understand, and recall, evidence that can be complex and technical.
- Jurors may be influenced by things other than the facts before them (for example, rhetoric of counsel), or they may be influenced by bias and prejudice.
- Juries have been criticised because of their high acquittal rate.
- There can be difficulty in reaching a decision, even though majority verdicts have been introduced in Victoria in all cases but murder and treason.

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