VICTORIAN CURRICULUM AND ASSESSMENT AUTHORITY

2005 Legal Studies GA 3: Written examination

GENERAL COMMENTS

In 2006 the Legal Studies examination will follow a different format from the 2005 paper. Students and teachers are reminded that there is a sample examination on the VCAA website (www.vcaa.vic.edu.au) which shows the format and the style of questions that can be expected on the 2006 examination. This sample examination should be used for any examination preparation.

The *Legal Studies VCE Study Design* underwent some changes for reaccreditation from 2006 and these changes should also be noted when preparing for the 2006 examination. The Study Design is a vital part of any student's preparation for the examination. The Study Design provides the material on which the examination is based, gives relevant headings that can be used to organise notes, and uses the vocabulary that Legal Studies students should be able to use correctly. Students are expected to know terms such as 'statutory interpretation', 'sanction', 'precedent', 'court hierarchy', 'remedy' and so on. It is also desirable that students are able to spell the words that are particularly relevant to this study, such as 'trial', 'petition' 'legislation' and 'Parliament', amongst others.

Good examination techniques can be developed through practising on past examination questions and by using the Study Design to create questions that could appear on the examination. This should prepare students for questions that may ask for information in a different way than they are used to, or with a different emphasis.

Good responses to the examination indicated that students had read the questions carefully, made appropriate choices and responded with accurate and relevant information. All parts of the question were responded to and writing was legible, in dark blue or black pen; students are advised not to write their answers in pencil as it is not as easy for assessors to read. The spelling of 'legal' words was accurate and there was excellent use of details and examples to demonstrate a thorough knowledge of the material. Good answers also indicated that students had allocated their time appropriately, spending less time answering questions worth only two or four marks than those that were worth 10 or 12 marks. These responses did not use lengthy introductions, but addressed the question immediately by providing factual details. Information was carefully presented in paragraphs, which were introduced by a clear topic sentence. Good paragraphing ensured that material was presented in a logical way that enhanced the quality of the answer. High-scoring students left some space between their answers and ensured that answers were clearly labelled with the appropriate question number.

SPECIFIC INFORMATION

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

Section A

Question 1

Marks	0	1	2	Average
%	12	17	71	**1.6**

Laws that are effective generally remain constant in society and do not require constant change. Change in the law may be required because laws are ineffective. This ineffectiveness may be because:

- details of laws are not known to members of society
- laws are inaccessible
- laws are not easily understood
- laws are not acceptable to the majority of the members of society
- laws are not enforceable.

Some students wasted time by providing an explanation of more than one characteristic of an effective law, while others misread this question and provided information about an element of an effective legal system. Careful reading of questions is an essential part of good examination technique.

Question 2

Marks	0	1	2	Average
%	6	20	74	**1.7**

For the Constitution to change more than half the voters in Australia must vote 'yes' **and** more than half the voters in more than half the states must vote 'yes'. In the scenario posed in the question the referendum would fail because the 'double majority' requirement had not been fulfilled.

There was still some confusion about the requirements for a successful referendum in Australia. Students need to be clear about the explanation of the 'double majority' rule and the number of states and territories in Australia.

Question 3

Marks	0	1	2	3	Average
%	18	31	28	23	**1.6**

This question was worth three marks and students were expected to provide some detail in their answer for full marks. Answers that simply said 'The Upper House is a house of review and the states' house' could not achieve more than one mark. For full marks students should have explained what is meant by the terms 'house of review' and 'states' house'. Some students mentioned correctly that the Upper House can also introduce legislation, with the exception of money Bills. Better responses made a connection between the current composition of the Senate and its theoretical role as a checking mechanism on the Lower House and government initiated legislation.

Question 4

Marks	0	1	2	3	4	Average
%	36	10	16	19	19	**1.8**

Although this part of the course has been consistently examined, students were still unsure of the way in which the law-making powers of the states have been affected by High Court interpretation of the Constitution. Many students mentioned cases that are not relevant (for example, the 'studded belt' case), or, when they did use a relevant case (such as the Franklin River dam, Bislan's case, the First Uniform Taxation case, or Hammond's case) failed to explain how the states' powers have been impacted on. The Franklin River case is an interesting example of the High Court's ability to impact on the division of powers because of its potential to allow the Commonwealth to intervene in any area of residual power affected by an International Treaty to which Australia is a signatory, including human rights. The Constitutional protection of rights has been included in the reaccredited Study Design and students should refer to the new Study Design for further information.

Question 5

Marks	0	1	2	3	4	Average
%	3	7	17	25	48	**3.1**

This question was generally well answered, although some answers were too brief. Just providing a sentence such as 'tribunals are cheaper and quicker than courts' was an insufficient explanation – more is expected of students at this level of study.

Question 6

Marks	0	1	2	Average
%	17	43	40	**1.3**

This question provided problems for many students. It is clear that the jurisdictions of specialised courts are not being given enough attention in class and it is important that students are aware of the court jurisdictions that they are required to know. These are listed in the newly accredited Study Design. It is important that jurisdictions are learnt in the context of the cases heard by the court, not just as one-word dot points.

Question 7

Marks	0	1	2	3	Average
%	20	11	37	32	**1.8**

Far too many students did not understand the word 'sanction' and therefore were unable to provide accurate answers. A good answer to this question explained that:

> *One sanction is imprisonment. This is when a convicted offender has his/her liberty taken away by being held in custody for a specified period of time. This sanction fulfils the purposes of protecting the community by removing the offender from society and also acts as a deterrent to others who may not commit an offence because they fear that they will be punished by being sent to jail.*

Section B

Question Chosen	0	8	9
%	1	43	56

Part a.

Marks	0	1	2	3	4	5	6	7	8	Average
%	3	3	6	8	11	15	19	19	16	**5.3**

Part b.

Marks	0	1	2	3	4	5	6	7	8	9	10	11	12	Average
%	7	8	9	9	9	9	9	8	8	6	7	4	6	**5.6**

Question 8a.

ai.

There were some excellent explanations of the division of power under the Commonwealth Constitution, although the concept of 'specific' powers still needs further explanation in the classroom. Better students were able to use their knowledge to address the particular requirements of the question by explaining the way the Constitution divides the law-making powers and concluding with an explanation of how the states and the Commonwealth are sometimes able to make laws in the same area because many of the enumerated or specified powers of the Commonwealth are concurrent; that is, they are shared with the states. If laws are made in concurrent areas by both state and Commonwealth parliaments and there is an inconsistency, the Commonwealth's law will prevail.

aii.

Generally students had a good understanding of the restrictions imposed by the Constitution. These include s51(xxxi) (acquiring property), s80 (trial by jury), ss92 and 96 (trade), s99 (preference), s116 (religion), s117 (state discrimination), ss106, 107 and 108 (state powers) and s109 (priority provision).

Question 8b.

Students needed to explain the process of law making by the courts by explaining that the doctrine of precedent is based on the common law, which is developed through court decisions. Answers should also have mentioned that courts make law through statutory interpretation (giving meaning to the words in Acts of Parliament). Students were then required to discuss the statement given, which commented on the complementary role of the courts and parliament as law makers.

Better students provided an explanation of the way in which courts make law and then clearly stated their agreement or disagreement with the statement and gave a fully supported justification. The following points provide information that could be used in an answer to this question.

Doctrine of precedent

- Similar cases are decided in similar ways.
- Decisions of courts higher in the court hierarchy are binding on lower courts (doctrine of *stare decisis*).
- The *ratio decidendi* is the part of the judgement that is binding on lower courts.
- A decision of a superior court remains law until it is overruled by a higher court or altered by an Act of Parliament.
- A higher court is able to overrule the decision of a lower court in the same hierarchy.
- The High Court can overrule its own decisions.
- A single judge is not bound by the decision of a single judge of the same court, although such decisions will be given considered respect.
- Precedents from another hierarchy are not binding but are treated as a valuable source of legal reasoning; how persuasive they are depends on the status of the court.
- Precedents from lower in the court hierarchy can be persuasive precedents.
- Statements made by the judge that are not directly relevant to the point of law in question (*obiter dictum*) can be persuasive.
- A decision is no longer binding if it is reversed on appeal.
- A minority judgement of a higher court is not binding.
- A judge can avoid following a precedent if the case can be distinguished on the facts.

- Through disapproving a decision, a higher court can indicate to lower courts that a decision should no longer be regarded as good law.

Statutory interpretation by superior courts

- Statutory interpretation can set a precedent that will be either binding or persuasive on other judges.
- A wide interpretation extends the law to cover a new situation or new area of law.
- A narrow interpretation may restrict the law to cover only certain situations.
- Statutory interpretation does not amend or modify the actual words in the Act.
- The given interpretation or definition of a particular word is only valid for the statute interpreted.

Advantages of law-making by Parliament

- 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 law-making power 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.

Disadvantages of law-making by Parliament

- The investigation and implementation of a new law is time consuming and parliament is not always able to keep up with changes in society.
- The process of passing a Bill is time consuming.
- Delegated authorities are not all elected by the people and there may be too many bodies making laws.
- Parliament is not always sitting, so changes in the law may have to wait some time.
- Changes in the law may involve financial outlay, which may not be economically viable at the time.
- Parliament can make laws retrospectively, which can be unfair.
- The division of law-making powers between the federal and state parliaments is in dispute from time to time.
- Parliament's Upper House can 'rubber stamp' or deliberately obstruct legislation.
- Cabinet's legislative proposals may dominate law-making by parliament, particularly when the government controls both houses.
- Parliament's response to the community's views may not be adequate.

Advantages of law-making by the Courts

- Courts can keep the law from becoming too rigid by distinguishing, overruling and reversing previous decisions and giving meanings to words in statutes.
- Courts can fill the gaps in the law by making a decision on a matter when it arises.
- Judicial decisions are free from outside pressure.
- The doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions.
- The appeals process allows for the review of decisions.

Disadvantages of law-making by the Courts

- Courts cannot change a law unless a case is brought before the court.
- Courts may be bound by an old precedent, which could lead to unjust results.
- Changes in the law through the courts are *ex poste facto*.
- Change through the courts can be very expensive for the parties involved.
- Parliament can override court-made law.
- Some judges are very conservative and could be reluctant to change bad laws.
- Judges are not elected.

Question 9a.

ai.

The most popular methods of influencing the law chosen by students were petitions and defiance of the law, and many students were able to explain how these methods attempt to influence change. A good answer suggested that:

A petition can be an effective way to influence change in the law. A petition includes a statement about what the law should be and is followed by as many signatures (often with the address of the person signing) as possible. The petition should be presented

to a member of parliament or the Minister responsible for the portfolio that includes the law. If a petition includes enough signatures demanding a change in the law then the MP or the Minister may act on the demand. This is because parliament is representative of the people's needs and wants and is responsible to the community who elected it to power. If petitions aren't acknowledged by parliament then it may be that the community will not vote for the same members of parliament at the next election. Defiance of the law can also be effective in generating change in the law. When members of the public defy the law it can achieve a lot of publicity and if the community supports the person who is defying the law then parliament may act to change the law. This happened when Frank Penhallurik opened his hardware store on a Sunday. So many people shopped during the Sunday that it became clear that shop trading hours should be extended to include Sunday and the law was changed to allow this.

aii.
Answers to this question generally provided accurate information; however, some students did not address the second part of the question. Once again, careful reading of the question is a vital part of good examination technique.

Students were familiar with the relationship between parliament and subordinate authorities and this was evident in some very good responses.

Question 9b.
This question presented similar problems to Question 8b. Students' organisation of material requires careful thought when responding to this type of question and clear topic sentences and well-developed paragraphs can help to make an answer fluent and relevant. The beginning of one good answer suggested that '*Parliament should not be the only lawmaker in Australia. We have inherited from Britain a system where the courts contribute common law to our system of laws and this system, supported by the doctrine of the separation of powers, has worked so well that there is no need to remove the courts as lawmakers.*' The student went on to justify this position by using the advantages and disadvantages of the courts and parliaments as lawmakers (see the material provided in Question 8b.).

SECTION C

Question Chosen	0	10	11
%	1	54	45

Part a.

Marks	0	1	2	3	4	5	6	7	8	9	10	11	12	Average
%	3	4	5	6	7	8	9	9	10	10	10	9	9	**7.0**

Part b.

Marks	0	1	2	3	4	5	6	7	8	Average
%	6	6	10	12	15	14	15	11	11	**4.5**

Question 10a.
Generally, responses to this question showed a good knowledge of the appropriate material; however, some students confused the 'remedy' with its purpose. An example of a remedy is monetary damages. The purpose is to restore the plaintiff to the position he or she was in prior to the act or omission of the defendant, as well as compensating the plaintiff for harm done. Material that could have been used to answer this question follows.

ai.
This case is most likely to have been heard in the County Court.

aii.
Remedies sought by Stephanie could have been:

- damages – an amount of money ordered to be paid to the plaintiff, by the defendant, to generally compensate the plaintiff for injury, impairment or damage suffered
- an order for specific performance – this means that the defendant must fulfil parts of a contract.

aiii.
There are a range of civil pre-trial procedures which could be used, including:

- letter of demand
- pre-trial negotiation
- writ of notice or originating motion
- notice of appearance

- statement of claim
- statement of defence
- counter-claim
- interrogatories
- discovery of documents
- interlocutory order
- pre-trial conference
- certificate of readiness for trial
- directions hearings.

Pre-trial civil procedures are generally used to:

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

aiv.

Most students described an alternative method of dispute resolution such as negotiation, conciliation, mediation or arbitration. A small number of students suggested that Stephanie would go to a tribunal and described the method of dispute resolution used there.

Negotiation

- A process where two parties come together to work through their differences, often without a third person being involved.
- Takes place between two parties or through their legal representatives, and generally means talking things over to try and reach a suitable outcome.
- Can occur face to face, over the phone or by letter.

Mediation

- A cooperative method of resolving a dispute where the parties are assisted by a mediator (a third party).
- An informal process in which an independent and impartial person is appointed by the parties in conflict to facilitate a discussion of the issues and the needs of those concerned without prejudging their legal rights.
- The mediator does not interfere but allows the parties to control the proceedings, explore their options and attempt to reach a resolution through an agreement that satisfies their needs.
- The mediator is non-judgemental and hasn't any power to make a decision. Rather, their role is to assist the parties to reach a settlement.
- There are several recognised methods of mediation – the important thing is that the parties talk face to face.
- Parties can choose to have their mediated agreement made legally binding.

Conciliation

- An impartial third party tries to get the disputing parties to reach an agreement.
- The conciliator listens to the facts, makes suggestions and helps the parties to make their own decisions, but does not force an answer.
- A conciliator can be more directive and take a more active role in the process than a mediator.
- Sometimes the parties will not be present and a third party will act as a go-between.

Arbitration

- A third party listens to the facts in the case and makes a decision on behalf of the parties, which the parties have previously agreed to abide by.
- It is more formalised that the other forms of alternative dispute resolution (ADR) but not as formal as a court hearing.

- The outcome is binding on the parties

Reasons why Stephanie may have found another method of dispute resolution more satisfactory than using the adversary system of trial through a formal court system include:

- ADR is usually seen as a voluntary process compared to a formal court hearing, which could be described as a compulsory dispute settlement
- ADR involves the parties getting together, making contact or meeting to discuss the issues; this can be through or in the presence of a neutral third party, such as a mediator, with a view to reaching an out of court settlement
- if a third party such as a mediator or conciliator is used, their role is to assist the parties with the discussion – they try to bring out the issues and assist the parties to explore the possible solutions to the dispute
- strict rules of evidence and procedure, as in a formal court hearing, do not apply in ADR
- in a court hearing, the judge or magistrate (and jury if relevant) hears the evidence put forward by each party and then makes a decision which is binding on both parties with a 'winner' and a 'loser', whereas through ADR if parties reach a settlement, an agreement can be drawn up incorporating the terms of the settlement. This would become a binding contract; however, a party cannot be forced to consent to an agreement with which she or he is not happy
- ADR is usually a cheaper alternative to a formal court hearing
- ADR allows a decision to be made more speedily compared to a formal court hearing.

Question 10b.
Material relating to juries is traditionally handled very well by students and there were some excellent answers to this question. Once again it was important that clear topic sentences and well-developed paragraphs were used in order to present a logical discussion.

Many students argued that the criminal justice system would be compromised without a jury, not acknowledging that most criminal trials are heard in the Magistrates' Court without a jury. Some students wrote that all judges are biased and that juries are a counter balance to this prejudice. Generalisations like this need greater thought and they diminish the impact of a discussion. A small number of students discussed the civil jury instead of the criminal jury, and therefore scored no marks.

There were also some students who neglected to evaluate two arguments for retaining the jury and were therefore unable to achieve full marks, even though they had provided some excellent reasons for the abolition of the jury. One good answer began with the statement '*Criminal juries provide an opportunity for the community to participate in the justice system. Although a judge alone could find a defendant guilty or not guilty, the community would have greater faith in the result if the decision was made by 12 people rather than that single judge.*' This answer went on to argue that criminal juries should be retained by discussing the advantages of the jury and by rebutting the arguments for the abolition of the jury.

The following points provide information that could be used in an answer to this question.

Advantages of juries in criminal trails

- Juries' decisions reflect the views of the community.
- Juries are a cross-section of the community and reflect prevailing community attitudes.
- Juries ensure the law/system remains intelligible to the ordinary person.
- Decision-making is spread across a number of people.
- Juries provide a trial that is free from political interference.
- Juries have considerable flexibility (they are not bound by precedent).
- They are a safeguard of personal freedoms as juries not bound to apply perceptions of 'bad law'.
- Juries act as a social conscience.
- Juries ensure that the hearing of evidence is conducted in open forum.
- Juries have stood the 'test of time' and have historical significance.
- Juries provide an educational function for the community.

Limitations or disadvantages with juries in criminal trails

- Juries may not be fully representative of the community.
- Juries may make 'wrong decisions' – acquittal rates may be too high.
- Juries can be time consuming, costly and lengthen criminal trials.

- 'Ordinary people' may not really understand complex evidence and court procedures (for example, complex fraud cases).
- Juries may be influenced by emotional bias and rhetoric.
- Juries do not have to give reasons for their decisions.

Question 11a.
The greatest weaknesses in answers to this question were in response to part ii. The appellate jurisdictions of the courts are specified in the Study Design and are required knowledge, and students are reminded that all areas of the Study Design are examinable. Some students used civil pre-trial procedures and were awarded no marks for this part of their answer. Relevant material that could have been used in answers follows.

ai.
A jury would have determined Owen's guilt.

aii.
The Court of Appeal of the Supreme Court of Victoria would hear the appeal.

aiii.
A range of criminal pre-trial procedures are appropriate, including:

- bail
- remand
- committal proceedings
- police collection of evidence, search and seizure
- police questioning
- arrest, with or without a warrant
- fingerprinting
- blood and body sampling
- the right to contact another person
- the right to an interpreter if needed
- directions hearing.

While the overall purpose of criminal pre-trial procedures is to allow the investigation of crimes while protecting the rights of the individual, specific purposes would depend on the procedure chosen.

aiv.
In answering this question students needed to consider the adversary system of trial in terms of the accused getting a fair trial. This could also be seen as looking at the adversary system in terms of its advantages and strengths in promoting a fair trial. In a general way, some of these strengths are:

- it is historical, tested over time, and the community has confidence in the system
- individuals are responsible for the conduct of their own cases – it is fair and just
- there are rules of evidence and procedure, and both parties have equal footing
- those directly affected by the case bear the costs involved
- as individuals are responsible for presenting the best case to support their point of view, all relevant evidence will be presented
- there is a belief that the judge is independent and impartial, thus people are treated fairly by an independent umpire
- the trial is heard in one continuing hearing so that continuity of the hearing is ensured
- the parties can have legal representation/legal aid
- there is an emphasis on oral evidence and the examination of witnesses, which allows witness statements to be tested to reach the truth and achieve a fair hearing
- the standard burden of proof is on the prosecution – Owen was innocent until proven guilty
- a jury would be used to determine guilt or innocence (strengths of the jury system)
- Owen has a system and avenue of appeal.

Question 11b.
Better responses to this question were very specific and provided very detailed information that was relevant and up-to-date. A good answer suggested that:

One problem with the Australian legal system is the reliance on the adversarial procedure in our court system. This problem is a financial restraint for those who cannot afford the costs associated with litigation in an adversarial manner. The adversary system relies on complex rules of evidence and procedure and therefore legal counsel is vital if parties to a dispute are to be able to navigate their way around these rules. Because the judge is unable to actively participate in adversarial disputes parties cannot rely on the judge to help them and therefore solicitors and barristers are an essential expense. Unfortunately, because of the fees charged by barristers and solicitors many people are unable to afford to go to court and therefore are not able to protect their legal rights or defend themselves against actions by others.

This answer went on to explain that another problem with the legal system is a cultural one that disadvantages our indigenous population, who are over-represented in our prison system.

In part ii. this student commented on the use of the Koori Court as a sentencing court for indigenous people in Victoria and also recommended that some aspects of the Inquisitorial system of trial be adopted to ensure a more efficient trial process. The answer provided the necessary detail and the recommendation was very specific and relevant.

Although the Koori Court was mentioned by the majority of students who chose this question, very few acknowledged that it is a sentencing court only and therefore has some limitations.