



2010 **Legal Studies GA 3: Written examination**

GENERAL COMMENTS

The standard of many of the student papers was very good. Many outstanding responses showed a strong understanding of the key knowledge and a good demonstration of skills required in VCE Legal Studies. Most students attempted all questions on the paper. Some students provided responses that did not address the question and relied on prepared responses.

Students should use the 15 minutes of reading time by reading each question carefully, thinking about responses to short answer questions and developing a plan for the extended answer question. Writing time should be managed appropriately. Students should spend an appropriate amount of time on each question. Some students continue to write far more than is required for short answer questions and then are unable to complete the paper.

The number of marks allocated and the space provided for responses are a guide to the length of the required response. If students continue their answers beyond the space allocated or at the end of the booklet they should clearly indicate this at the end of each page.

Students are encouraged to incorporate legal terminology in their answers where appropriate. It is also important that students are able to spell key legal terms, such as 'precedent' and 'parliament', correctly.

Students should be familiar with the requirements of the *VCE Legal Studies Study Design*. The study design specifies the course content, particularly the key knowledge and key skills.

Most students demonstrated knowledge relevant to the questions, but some struggled to provide the level of analysis required. This was particularly evident in Question 5, where many students were able to define mediation and arbitration but were unable to effectively compare the two methods of dispute resolution. Some students struggled to 'critically evaluate' in the final question.

Where asked, students should have provided their viewpoint; for example, in Questions 7 and 10. Students should have responded directly to these questions and provided a statement that gave evidence of their opinion or viewpoint, either at the commencement of the answer or incorporated within the response.

The way in which responses are presented and organised is important. For short answer questions, introductions and conclusions are not necessary; direct responses are sufficient. For extended answer questions, students are encouraged to use paragraphs to organise their answers, including using clear topic sentences.

Students should practise a range of different examination questions. They should refer to past examinations and Assessment Reports to gain an understanding of the types of questions asked and the strengths and weaknesses evident in past responses.

SPECIFIC INFORMATION

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

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

Question 1a.

Marks	0	1	2	Average
%	16	42	43	1.3

For full marks, students were required to specify that the structure of the Victorian Parliament consists of both the upper and lower houses, as well as the Queen's representative. Students were not required to name the houses of parliament or the number of members in each of the houses to gain full marks. Many students did not identify the Queen's representative (or Crown) as forming part of the structure.

Question 1b.

Marks	0	1	2	Average
%	5	46	50	1.5

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Methods that could have been used included:

- organising and signing petitions
- taking part in demonstrations
- taking part in opinion polls
- writing letters to ministers for parliament
- joining pressure groups and lobbying MPs
- deliberate defiance of the law
- deciding to run for local council or parliament
- preparing and submitting a submission to a law reform committee.

Petitions and demonstrations were the most popular methods given by students as ways Amelia could try to influence the Victorian Parliament to change the law. If students chose petitions, they were required to indicate that a petition is presented to a member of parliament for tabling in the Victorian Parliament – this was essential to describing how a petition works. Students were required to provide detail of the method chosen, perhaps by giving an example of the method or using points to describe it. Weaker students did not provide a sufficiently detailed description in order to be awarded full marks.

The following is an example of a high-scoring response.

One way Amelia could try and influence a change in the law is by organising a petition. A petition is a document that consists of various signatures supporting the change in the law. Amelia can then present the petition to a member of parliament which is then tabled in parliament in an attempt to influence a change in the law. The more signatures may have more of an influence on the members of parliament in considering whether the law needs to be changed.

Question 1c.

Marks	0	1	2	Average
%	1	16	82	1.8

Individual rights that could have been identified included a right to:

- remain silent
- an interpreter
- refuse to supply voice prints
- refuse to participate in an identification parade
- refuse to participate in a reconstruction of a crime
- communicate with lawyers, family and friends prior to police questioning.

Police powers that could have been identified included the power to:

- question the individual
- search and seize
- take fingerprints
- take blood samples if consent or a court order is obtained
- use listening devices or tap telephones, provided official permission has been given
- hold identification parades if the accused agrees to participate.

Students were required to state the right or power chosen; a full explanation was not required. Mentioning the power to arrest that individual did not gain marks. A wide range of police powers and individual rights could have been used to answer this question; the right to remain silent and the power to question the individual were popular choices.

Question 2a.

Marks	0	1	Average
%	1	99	1

Culpable driving is an indictable offence and is within the jurisdiction of the County Court. It cannot be heard summarily and therefore cannot be heard by the Magistrates' Court (which can hear other driving offences). Some students who may have studied the *R v Towle* culpable driving case wrote the Supreme Court (which did hear the culpable driving offence in that instance). The County Court was the most likely court that would have heard Carl's case. By reason of this all three courts were accepted as answers.

Question 2b.

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Marks	0	1	Average
%	24	76	0.8

Depending on the student's answer to Question 2a., either judge or magistrate was accepted. Therefore, if a student wrote 'Magistrates' Court' for 2a., only magistrate was accepted for 2b. If a student wrote 'County Court' or 'Supreme Court' for 2b., only judge (or justice) was accepted for 2b.

Question 2c.

Marks	0	1	2	3	Average
%	7	10	44	39	2.2

Sanctions that could have been used included:

- a fine
- licence suspension
- suspended sentence
- imprisonment
- home detention
- imposition of an interlock device
- intensive correction order.

The purposes of criminal sanctions are:

- retribution/punishment
- deterrence
- rehabilitation
- denunciation
- protection.

Students needed to address the question's three components for full marks. They were required to identify one criminal sanction (other than a community-based order or community service), describe it and explain one of its purposes. The most popular sanction chosen was imprisonment. When giving a description of imprisonment, students explained that it deprives a person of his or her liberty or removes him or her from society. Weaker responses described imprisonment as 'going to prison', which was an insufficient description. Other weak responses failed to clearly explain the purpose of the chosen sanction.

The following is an example of a high-scoring response.

Imprisonment could have been imposed on Carl, which involves physically removing Carl from society and putting him in a jail. One of the purposes of imprisonment is to specifically deter Carl; that is, trying to stop him from committing the same or similar offence, as well as deter others (known as general deterrence) from committing the same or similar offence.

Question 3

Marks	0	1	2	Average
%	28	30	43	1.2

Restrictions that could have been used to answer the question include:

- the acquisition of property on just terms (s. 51xxxii)
- trial by jury for indictable offences against Commonwealth law (s. 80)
- uniform duties of trade, commerce, customs and intercourse among states (s. 92)
- religion (s. 116)
- referendum process (s. 128)
- preferences to states in trade, commerce or revenue (s. 99)
- cannot legislate in areas of residual powers.

Many students used the restriction imposed by section 116 of the Commonwealth Constitution, which states that 'the Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.' Some responses were too vague or did not explain section 116 correctly, stating it in broad terms such as 'the Commonwealth cannot make any laws about religion' (which is not a correct reading of the section). Students were not required to use section numbers of the Constitution in their answer.

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The following is an example of a high-scoring response that clearly explains how the existence of residual powers restricts the Commonwealth Parliament's law-making powers.

The Commonwealth Constitution restricts the Commonwealth Parliament from legislating in areas of residual power. Residual powers are those powers left with the states at the time of federation. The Constitution ensures that the States' law-making powers are protected, and restricts the Commonwealth from acting in areas of State power.

Question 4

Marks	0	1	2	3	4	Average
%	4	4	12	20	60	3.3

- Error: Brendan claiming \$3000 in the Supreme Court. Correct process: If the claim was for this amount, it would most likely be heard in the Magistrates' Court (there was no need to identify arbitration)
- Error: Henry is identified as the plaintiff. Correct definition: Henry is the defendant (or, alternatively, that Brendan is the plaintiff).
- Error: Brendan proving his case beyond reasonable doubt. Correct procedure: Brendan will have to prove it on the balance of probabilities.
- Error: Brendan proving his case to the judge. Correct process: As the case would most likely be heard in the Magistrates' Court, it would be heard by a magistrate.

This question was well done. Students needed to present their answer clearly, perhaps by using separate paragraphs for each error so both the identification of the error and the correct definition, process or procedure was apparent. Poorly organised answers meant that some students did not identify the error clearly.

The following is an example of a high-scoring response with good use of paragraphs.

One of the errors in this extract is that Brendan's case is being heard in the Supreme Court, when he is claiming an amount of only \$3,000. This case would most likely be heard in the Magistrates' Court, as this court has a civil jurisdiction of up to \$100,000.

Another error in the above extract is that Brendan must prove his case beyond reasonable doubt. This is incorrect as because Brendan's case is a civil case, the standard of proof is on the balance of probabilities.

Question 5

Marks	0	1	2	3	4	Average
%	5	7	22	30	36	2.9

Similarities

- Both involve a third party who is appointed or engaged independently.
- The third party is independent and unbiased.
- Both are dispute resolution methods.
- Both are methods used by various courts, including the Magistrates' and Supreme Courts.
- Both may involve legal practitioners representing both sides.
- Both can result in a final decision that is binding, although the nature of the decision differs.

Differences

- The role of the third party – in mediation, the third party does not get involved in decision making, whereas in arbitration the third party makes the final decision.
- Evidence – evidence is normally presented at arbitration, whereas at mediation the parties can be selective in terms of the amount of information they proffer to the opposing side.
- Decision – in arbitration the decision is binding, whereas in mediation the decision is not binding unless the parties sign formal terms at its conclusion.
- Control – parties have control over the outcome in mediation, whereas in arbitration control of the final outcome remains with the third party.
- The outcome – at mediation, parties can explore various options to resolve the dispute, including options not necessarily contained in formal legal documents, whereas at arbitration the arbitrator is normally limited to those remedies/options confined within the issues as pleaded by the parties.

This question drew on Area of Study 1, Unit 4. Although students were familiar with the way mediation and arbitration work as dispute resolution methods, many did not make a direct comparison between the two methods and instead

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explained both methods. The ability to give a comparison is a key skill in this Area of Study. Some students confused these methods with conciliation and negotiation.

The discriminating factor in the marks awarded was the extent to which the similarities/differences were explained and the level of comparison made between the two methods.

The following is an example of a high-scoring response.

Mediation and arbitration both involve a third party to assist with resolving the dispute. Both methods are cheaper and less time-consuming as opposed to taking a matter to court as they do not involve pre-trial procedures and may not require legal representation.

One key difference is that the third party in mediation, called the mediator, cannot suggest any possible resolutions and cannot make a decision for the parties, whereas in arbitration the third party, called the arbitrator, makes the final decision for the parties after having heard both sides of the dispute.

The decision made during the mediation is not legally binding; however, the decision made by the arbitrator in the arbitration is legally binding on the parties.

Question 6

Marks	0	1	2	3	4	Average
%	27	12	20	23	18	1.9

This question asked for an explanation of the impact that a High Court case has had on the law-making powers of the State and Commonwealth Parliaments. The most popular cases used were the Tasmanian dam case and the Brislan case. It was pleasing to see many students using other notable cases such as the First Uniform Tax case and the Roads case. However, many students were only able to explain the facts of the case and did not make any attempt to answer the question – that is, by focusing on the impact of the cases on the law-making powers of both the State and Commonwealth Parliaments. Some students incorrectly recited the facts of the case in explaining the impact it has had on law-making powers, particularly the Tasmanian dam case. Students should be familiar with both the facts of the case and the impact it has had on law-making powers.

Some students used the ‘studded belt case’, the ‘Kevin and Jennifer case’, Mabo, *Donoghue v Stevenson* and the Roach case to answer this question; however, these cases did not shift the law-making powers of the State and Commonwealth Parliaments and, apart from the Roach case, did not involve interpretation of the Constitution. No marks were awarded for responses that used these cases.

The following is an example of a high-scoring response. Students should take note of the detail provided in the facts of the case in order to answer the question about the impact it has had on the law-making powers.

One case that demonstrates the impact of the High Court’s interpretation of the Constitution on the law-making powers of the State and Commonwealth Parliaments is the Tasmanian dam case. The Tasmanian Government contested that legislation passed by the Commonwealth that prohibited the construction of a dam in a World Heritage listed area in Tasmania was outside of the Commonwealth Parliament’s law-making powers. The Commonwealth argued that the legislation was valid as it enacted Australia’s obligations under an international treaty to which Australia was a signatory. The High Court found that the Commonwealth legislation was valid as it formed part of the Commonwealth’s powers regarding ‘external affairs’, therefore increasing the Commonwealth Parliament’s exclusive powers and eroding the powers of the states.

Question 7

Marks	0	1	2	3	4	5	Average
%	10	10	17	24	22	18	2.9

Depending on the stance taken by the student, some of the following points could have been made.

- Tribunals reduce expenses as they avoid using complex pre-trial procedures and legal jargon, have low application fees and often do not require legal representation, thus ensuring all socio-economic classes have access to the legal system.
- Tribunals are normally much quicker than courts in terms of the amount of time it takes to have a case heard, thereby ensuring people access the legal system effectively without having to wait too long to have their dispute resolved.
- The cheaper and quicker nature of tribunals ensures that litigants are less stressed and more confident in using the system.



- Tribunals are far less formal and do not follow strict rules of evidence and procedure, thereby ensuring people are more confident in accessing the legal system.
- VCAT has recently felt the impact of long delays and the necessity of particular pre-trial procedures in complex cases, such as discovery, thereby reducing people's ability to access the legal system.
- In some lists, parties use legal representation, often requiring an unrepresented litigant to obtain legal representation to have equal standing and therefore increasing costs.
- If a decision is made in VCAT, the appeal has to be brought to the Supreme Court or Court of Appeal, thus making it more difficult for people to ensure that the decision made was the right one as costs start to increase.
- VCAT sessional members do not necessarily have the expertise that County and Supreme Court judges have, thereby reducing the level of specialisation that litigants are afforded in these courts.

This question asked students to indicate to what extent they agreed that the existence of tribunals ensures that people have effective access to mechanisms for the resolution of disputes. Many students simply listed three or four strengths of tribunals without explaining those strengths in detail. Many students provided responses that stated 'tribunals are quicker, cheaper and more informal'; however, this did not answer the question, give any detail as to how tribunals are quicker, cheaper and more informal or relate it back to the statement of how these strengths allow people effective access to mechanisms to resolve their disputes.

Stronger responses stated to what extent the student agreed with the statement and provided detail of the strengths or weaknesses of tribunals, stating how each strength or weakness allowed or did not allow people effective access to mechanisms in order to resolve their disputes.

The following is an example of a high-scoring response.

I believe that tribunals do allow greater access to the mechanisms of dispute resolution to some extent, although they do still have some weaknesses.

The most important reason that ensures individuals have access to mechanisms of dispute resolution is the cost involved in taking a matter to a tribunal. An average lodgement fee to VCAT costs around \$37; furthermore, legal representation is not required as the language used is usually simple and understandable as opposed to courts. This ensures that individuals who struggle financially have the option to resolve their disputes and gain access to these mechanisms. However, some lists in VCAT allow legal representation to be used by parties, therefore one party may have an advantage over an unrepresented person, therefore it may decrease their access to tribunals to resolve their disputes as they may be deterred from pursuing their matter because of this factor.

As VCAT has specific lists that cater for certain types of cases, individuals are able to pursue their case and ensure that the tribunal members are specialised in hearing the case. This may increase their access to having the dispute resolved by a person who is familiar with that type of case, therefore increasing their ability to resolve disputes.

VCAT is generally seen to be much quicker than courts in resolving disputes as there are no pre-trial procedures involved, no rules of evidence and procedure and the trial procedures are generally not followed as strictly in tribunals, therefore increasing a person's access to having their dispute resolved quicker. However, in recent times VCAT has suffered significant delays in hearing disputes, therefore this may decrease a person's ability to have their dispute heard.

Overall, tribunals do allow greater access to people to resolve their dispute but there are some changes that need to be made to how they operate to overcome the weaknesses present.

Question 8

Marks	0	1	2	3	4	5	6	Average
%	14	9	12	16	19	18	11	3.2

Points that could have been made on the way that Australia protects democratic and human rights included:

- the Constitution contains a limited number of express rights, namely:
 - freedom of religion – Section 116 states 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
 - interstate trade and commerce – Section 92 states that interstate trade and commerce is to be free. However, this right is more in the nature of a structural underpinning of the economy to prevent parochial restrictions on economic activity rather than a fundamental democratic or human right
 - discrimination – Section 117 states that it is unlawful for State and Commonwealth Governments to discriminate against someone on the basis of that person's state residence



- just terms when acquiring property – the Commonwealth must provide ‘just terms’ when acquiring property Section 51 (xxxix). It does not apply to acquisitions of property by State Governments
- jury trial – Section 80 provides that there must be a jury trial for indictable Commonwealth offences. This by nature is a very limited right because most indictable offences are crimes under state law, and this section is restricted to Commonwealth offences.
- the High Court can imply rights from the Constitution – for example, the right to freedom of political communication
- there are some limitations on the scope of the express rights
- the rights are entrenched in the Constitution – they cannot be removed except by the referendum procedure established under Section 128 for amending the Constitution
- the rights are enforceable by the High Court – where the High Court can declare invalid legislation that contravenes one of the rights
- additional rights can be added through the s.128 referendum process. The High Court could also imply further rights
- the High Court does not give advisory opinions on the scope of the protection of rights. It will only rule on those matters (and any other matters) when a dispute is before the court and a judgment is required.

Depending on the country chosen by the student, the following are examples of differences that could have been used.

US

- The US has protected rights set out in the Bill of Rights that takes the form of a series of amendments to the US Constitution. Australia does not have a constitutionally protected Bill of Rights. The Bill of Rights contains a comprehensive or extensive list of rights. Students should have used examples to illustrate this or referred to cases (for example, the *Roe v Wade* abortion case). Australia’s Constitution does not contain a comprehensive list of protected rights
- The rights are entrenched. This means that a right can only be abolished if the Constitution is amended. This is a much more complex process than that used in Australia and involves separate referenda being held in states. The five express rights are also entrenched in Australia and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to freedom of political communication, for example, depends on how the High Court interprets the right. This right was further refined in the *Lange* case.

Canada

- Canada’s rights are comprehensive and contained in the Charter of Rights, which was adopted in 1982. Australia does not have a constitutionally protected Bill of Rights and its Constitution does not contain a comprehensive list of protected rights.
- 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 therefore lapse at the end of five years unless the parliament passes it again, indicating that it is to override the Charter. Australia does not have a similar procedure to allow parliament to override a High Court declaration of invalidity.
- 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). This, and the ability of the parliament to override certain rights, assists in developing a ‘dialogue’ between the legislature and the judiciary on rights. In Australia, the High Court cannot give advisory opinions. It can only express a view as part of a judgment that is given to resolve a case argued before it by parties in dispute.
- Rights can be limited where it is ‘necessary in a free and democratic society’. Australia does not have a Bill of Rights containing such a provision.
- Courts can interpret the legislation narrowly to bring its operation within the boundaries set by the Charter. Australia does not have a Bill of Rights endorsing this approach, and this approach has not yet been evident in High Court decisions relating to the expressly protected rights.
- Courts can make another appropriate remedy, such as an award of damages – Section 24(1). In Australia, the High Court’s power is restricted to declaring legislation invalid where it contravenes one of the rights.



UK

- As a member of the European Union, the UK is expected to comply with the European Convention on Human Rights. Australia is not a member of a body similar to the European Union, so it is not subject to such a treaty.
- In the UK, the *Human Rights Act 1998* (HRA) provides a comprehensive list of rights. Australia's Constitution does not contain a comprehensive list of protected rights, and Australia does not have a Commonwealth statute equivalent to the UK *Human Rights Act 1998*.
- These rights are not entrenched – the Act can be amended by parliament. However, if parliament abolished a right, and that right is still protected by the European Convention on Human Rights, the aggrieved person could still seek to have the right adjudicated upon by the European Court of Human Rights. In Australia, the five express rights are entrenched and can only be removed through a referendum to amend the Constitution. The existence and scope of any implied rights depends on how the High Court interprets the right
- 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. Australia's constitutionally protected rights are fully enforceable – any legislation which infringes one of the rights can be declared invalid by the High Court.
- Courts are expected to interpret legislation in accordance with the *Human Rights Act 1998*. While Australia has had examples where High Court judges have referred to international human rights standards when developing the common law (for example, *Mabo*), this has not been an approach generally adopted by the High Court.
- Public authorities must act in a way that is consistent with the *Human Rights Act 1998*. If they fail to, the court can order damages. In Australia, legislation which infringes a protected right can be declared invalid. Courts cannot order damages for a breach of rights.
- All Bills are scrutinised for compliance with the *Human Rights Act 1998*. This does not happen in Australia. Courts are also required to act consistently with the *Human Rights Act 1998* when developing common law. This is not required under Australian law.

South Africa

- The Bill of Rights was introduced 1996 and contains a comprehensive list of rights. Australia does not have a constitutionally protected Bill of Rights and its Constitution does not contain a comprehensive list of protected rights.
- A special feature of the South African Bill of Rights is its inclusion of economic, social and cultural rights. Australia's protected rights do not include these sorts of rights, although it might be argued that Section 92 of the Constitution amounts to the protection of an economic right.
- Courts are required to interpret statutes in accordance with the Bill of Rights. While Australia has had examples where High Court judges have referred to international human rights standards when developing the common law; this has not been an approach generally adopted by the High Court.
- The courts must develop the common law in accordance with the Bill of Rights. This is not required under Australian law.
- Rights can be limited where justified in free and democratic society. In Australia, there is no Bill of Rights containing such a provision.

New Zealand

- The *Bill of Rights Act 1990* (BORA) contains a comprehensive list of rights. Australia does not have a Bill of Rights and its Constitution does not contain a comprehensive list of protected rights. Furthermore, Australia does not have a Commonwealth statute equivalent to the BORA.
- The BORA is not constitutionally entrenched, so parliament can abolish rights by amending the BORA. In Australia, the five express rights are entrenched and can only be removed through a referendum to amend the Constitution. The existence and scope of the implied right to freedom of political communication depends on how the High Court interprets the right.
- The rights are not fully enforceable by the courts – that is, the courts cannot declare legislation invalid if it infringes the BORA. Australia's constitutionally protected rights are fully enforceable – any legislation that infringes one of the rights can be declared invalid by the High Court.
- Courts are required to interpret legislation in accordance with the BORA. This has not been an approach generally adopted by the High Court.
- The Attorney-General scrutinises all Bills and advises parliament if there is any infringement of the BORA. This process does not exist in Australia.
- While it is not fully enforceable, the BORA has affected the political culture in New Zealand. If a government planned to act contrary to the BORA, it would be expected to explain and justify its actions to the electorate. In

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Australia, there is no similar comprehensive list of rights with which the Commonwealth Government is expected to comply.

This question had two parts: the first part required an explanation of how the Constitution protects democratic and human rights, and the second part required an explanation of one difference in the approach adopted by Australia for the constitutional protection of rights and the approach adopted by one of the countries listed in the statement. Many students responded well to this question with a detailed explanation of how the Constitution protects rights, followed by one difference with their chosen country. Students chose a range of differences for the second part of the question, depending on their country chosen. The less successful students merely listed similarities and differences between the way Australia protects rights and the way their chosen country protects rights. Marks could only be provided for one difference.

Students should be reminded to consider the scope of the first part of the question – how the Constitution protects rights, not how Australia protects rights. Many students discussed the various legislation that exists in Australia (such as the *Racial Discrimination Act 1975*, the Victorian Charter of Human Rights and Responsibilities and other rights legislation) that protects rights. While this could be used as part of a broader evaluation of the protection of rights in Australia or as part of the difference with another country, it did not directly answer the question about how the Constitution protects rights.

The following is an example of a high-scoring response.

The Australian Constitution protects democratic and human rights through a number of methods. The rights in the Australian Constitution are entrenched, which means they are written into the Constitution. Australia has five expressly written rights. As these rights are entrenched, it is far more difficult to change them than if they were in statute.

An individual's rights can also be enforced by the courts. If an individual feels that their rights have been breached, they may go to the High Court to seek justice for the breach, as the High Court hears all cases involving the Constitution.

For a change to be made to an individual's entrenched rights, a referendum needs to occur as that is the only way for the Constitution to be changed. The process of a referendum is long and difficult for a change to occur as a double majority needs to be reached, therefore a stronger protection of those entrenched rights exists for Australians.

An individual's rights are not restricted by a Bill of Rights in Australia. There are only five entrenched rights and one implied right (freedom of political communication as interpreted by the High Court), therefore it could be said that the rights in Australia are not restricted or proscribed by the Constitution, therefore allowing for greater flexibility in entrenching further rights by way of a referendum process or allowing the High Court to find further implied rights if a case comes before them.

One difference between the way Australia protects rights and the way that South Africa protects rights is that South Africa's Bill of Rights contains a comprehensive list of rights that covers all rights including economic, social and cultural rights. In contrast, Australia's entrenched rights are limited to five and are by nature limited – such as the right to trial by jury for indictable offences against Commonwealth law only.

Question 9

Marks	0	1	2	3	4	5	6	Average
%	16	10	14	19	19	15	9	3

The doctrine of precedent allows for consistency

- The doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions.
- The doctrine of precedent allows some level of consistency in decision making; similar cases with similar circumstances need to follow precedents in higher cases, thereby ensuring appropriate legal advice can be given in some areas of law.
- Courts may be bound by an old precedent, which could lead to unjust results.
- Courts have ways to move around precedents (distinguishing, in particular), which may result in inconsistency.
- 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.

The doctrine of precedent allows for flexibility

- 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.
- Judges have some flexibility in avoiding precedent 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 court can indicate that a precedent should no longer be regarded as good law.
- These methods of avoiding precedent are limited by nature – disapproving does not change a bad precedent, and overruling and reversing are only available to higher courts such as the Supreme and High Courts.
- Judicial decisions are not elected and are therefore free from outside pressure, allowing them to make more objective assessments of the need for a change in the law. This may be considered as allowing them to be flexible by not making decisions based on their own political needs.
- Courts cannot determine what the law is until a case is brought before the court. If there has not been a decision on a particular point of law from a higher court, there is uncertainty surrounding that area of law.
- Judges can be conservative in their approach, resulting in fewer changes to the law.
- Flexibility could lend to an inconsistent approach to cases should judges choose to distinguish or overrule previous decisions, thus jeopardising the strength of consistency.

Given that the two strengths are so intertwined – in that, by judges being flexible they may be criticised for being inconsistent – students could have either tackled the two strengths together or separately. Stronger students planned their response, used clear paragraphs and made points about both consistency and flexibility, drawing out at least one weakness in both strengths (a requirement for an evaluation question).

Many students had difficulty structuring their response and gave a general description of the operation of precedent and a limited examination of how it provides for consistency and flexibility. Many students incorrectly suggested that precedent is about the verdict or punishment given in criminal cases. Some students attempted to use cases such as *Donoghue v Stevenson* to explain how precedent works; however, students who did so struggled to give a critical examination of consistency and flexibility as strengths of the doctrine of precedent. Similar to critical evaluation, a critical examination requires a discussion of the strengths and weaknesses of both consistency and flexibility. Weaker students did not provide much detail on the methods of avoiding a precedent (distinguishing, overruling, reversing and disapproving) and simply listed them without any attempt to explain them or examine how they are a strength or weakness for either consistency or flexibility.

The following is an example of a high-scoring response.

The doctrine of precedent refers to the process by which lower courts in the same hierarchy follow decisions of higher courts in similar cases with similar circumstances. This process provides for consistency and fairness by ensuring that similar cases are dealt with in a similar way by precedents set by higher courts being followed by lower courts. This level of consistency also allows for some predictability which enables legal practitioners to advise clients on possible outcomes of their case. The problem with consistency, however, is that if poor or bad precedents are set, then lower courts must follow them, thus causing injustice in cases as the precedents must be followed. Additionally, if courts are to change that precedent, then a higher court must wait for a case to come before them with similar circumstances in order for the precedent to be changed.

The courts, by avoiding this consistency in precedents, also have some flexibility in avoiding precedents which including reversing, overruling, distinguishing and disapproving. However, there are some limitations in these methods of flexibility. Disapproving of a precedent is normally used by a judge in a lower court and does not change the precedent; it just highlights their disapproval of it. Reversing is only available when the case in which a precedent was set or followed is at appeal and the higher court decides to overrule the decision. Overruling is only available to courts higher than the court that set the precedent, and even then judges are often conservative and may not decide to overrule a precedent. Furthermore, distinguishing can only be available where the facts are different enough for this method to be justified. Finally, although these methods are available to the courts, they can cause the doctrine of precedent to be inconsistent and unpredictable, therefore need to be used in the appropriate case.

Question 10

Marks	0	1	2	3	4	5	6	7	8	Average
%	4	6	12	14	17	15	14	11	8	4.3

A jury in a criminal trial:

- brings down a verdict in accordance with the evidence after being directed about the appropriate law by the judge
- can bring down a majority verdict (11 out of 12) after six hours of deliberation in all cases except treason, murder and Commonwealth offences, where the verdict must be unanimous
- is expected to be unbiased and attentive during the trial in order for deliberations to be fair
- determines guilt beyond reasonable doubt.

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Points that could have been made about whether the jury system should be retained, depending on the stance taken by the student, included:

- jury 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
- ensures laws/the legal 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
- provides a trial which is free from political interference
- juries can act as a social conscience
- ensures the hearing of evidence is conducted in an open forum
- it has stood the ‘test of time’ and has historical significance
- jury deliberations are kept secret and reasons for their decision do not have to be given
- juries may not be a true cross-section of the community as people are able to be challenged and excused for a good reason
- a jury can add to the cost and length of a trial
- do 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, the rhetoric of counsel
- juries have been criticised because of their high acquittal rate
- difficulty reaching a decision, even though majority verdicts have been introduced in Victoria in all cases bar murder and treason.

The first part of this question was generally well done by many students. Students needed to make a couple of points about the jury’s role in order to gain full marks, including that the jury deliberates on the guilt of the accused. The second part asked students whether or not they supported the retention of juries in Victoria – whether they thought juries should stay and for what reasons. It was evident that some students did not know the meaning of ‘retention’, thinking it meant to abolish juries. Weaker students seemed to use pre-prepared answers and began discussing possible reforms or alternatives to the jury system, which was not what the question asked. No marks were awarded for discussions about reforms or alternatives to the jury system.

It is important that students organise their responses well. Responses to this question should have included a paragraph about the role of the criminal jury, followed by a statement as to whether or not the student supported the retention of juries, then a paragraph for each of their reasons. Students could have either supported the retention or abolition of juries. Many students stated that they supported the retention of juries but acknowledged some of its weaknesses; this was appropriate as long as the question was answered and detailed reasons were provided.

Question 11

Question chosen	none	a.	b.
%	4	53	43

Marks	0	1	2	3	4	5	6	7	8	9	10	Average
%	10	6	8	8	10	10	11	11	10	8	8	5.1

Question 11a.

The following points could have been made about parliament as a law-maker.

Strengths of parliament

- can investigate the whole topic and make a comprehensive set of laws
- has access to expert information and is therefore better able to keep up with changes in society
- provides an arena for debate
- can delegate its power to make law to expert bodies
- is able to involve the public in law-making
- can change the law as the need arises
- can make law in future
- is democratically elected.

Weaknesses of parliament



- Investigation and implementation of 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.
- It is not always possible to change the law in accordance with changing values in society.
- 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.
- 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 where the government controls both houses.
- Parliament's response to community views may not be adequate.

The following points could have been used about the relationship between parliament and the courts.

- Courts can interpret statutes made by parliament in the course of determining a matter.
- 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 it wants the provision to be 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 Interpretation Acts set guidelines for courts on how to interpret statutes.

This question drew on Areas of Study 1 and 3 of Unit 3. Many students incorporated the second part of the question into the answer; others described one aspect of the relationship between parliament and courts at the commencement or conclusion of their answer. Any of these methods was acceptable, provided there was both a critical evaluation and a description of one aspect of the relationship.

It was evident that many students need to work on their skills of critically evaluating and practise this skill in examination conditions in the classroom. A critical evaluation required a detailed consideration of strengths and weaknesses, with a conclusion as to the value or worth of parliament as a law-maker. It was not necessary to go into detail about the steps of the process of law-making in parliament to answer the question.

The following is an example of a good beginning to a response.

Parliament is the supreme law-making body in Australia and is an effective law-maker, however, it does have some weaknesses in its law-making.

Parliament is elected by the people to create legislation. It is not bound by previous acts of parliament, and can abrogate or codify court-made law through legislation. In this way, parliament can ensure that the body of law developed by it and the courts is consistent with the prevailing views and values it is elected to represent.

Parliament is able to pass laws as the need arises. That is, if areas of law require swift amendments or new legislation, parliament has the mechanisms through which this can occur. However, this can often be jeopardised by the fact that parliament is not always sitting, and the law-making process in itself is very long and drawn out. This can impact on its ability to make those laws that are necessary to ensure the peace and order of the people.

Question 11b.



The following points could have been made about the adversary system of trial.

Strengths of the adversary system

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

Weaknesses of the adversary system

- The parties are in charge of presentation of the case, including gathering evidence, presentation and cross-examination in court, arguing legal points and their address to the jury. Accordingly, the success of the case can depend to a good deal on the skills of a party's legal team, particularly the advocate in court. Where one side is not as well represented as the other, that party will be at a disadvantage, and this will introduce an element of unfairness.
- Good legal representation is expensive, and funds for legal aid are limited, particularly where minor offences are involved.
- An unrepresented party is at a considerable disadvantage.
- As control of the presentation of the case is in the hands of the parties, one party might choose not to present relevant evidence, or not to raise particular legal issues, because it would be damaging for that party's case. Contrast with the inquisitorial system where the judge can initiate the calling of evidence and the raising of issues.
- The adversarial system aims to determine which party has the stronger case. However, for all of the reasons listed above, it might not discover the truth.

Possible improvements to the adversary system of trial include:

- increased judicial involvement in proceedings
- simplification of the rules of evidence and procedure, generally or with specific examples
- encouragement of alternative methods of dispute resolution
- greater control over legal costs
- increased availability of legal aid to facilitate improved access to legal representation
- increased spending on the legal system (for example, more courts and judges).

The comments made in Question 11a. with respect to critical evaluation also apply to this question as some students again struggled to address the key term on the question. Stronger students provided a good description of the strengths and weaknesses of the adversary system, coming to a conclusion as to whether it is a good or bad system or whether it needs improvement. The possible improvement was better addressed after a weakness was described or at the end of the answer. Other strong students used each of the five features of the adversary system to begin their paragraphs and discussed strengths and weaknesses of each. It was not necessary to give detail of the strengths and weaknesses of all of the five features to gain full marks; however, the more successful responses discussed at least three of these features.

Weaker students saw this as a question about a comparison with the inquisitorial system. Although the inquisitorial system could have been used in a discussion about the weaknesses or improvements to the adversary system, it was not necessary to score high marks. For the improvement, students needed to explain how that recommendation or suggestion would improve the adversary system; this could be done by explaining how it would address a certain weakness or perhaps how it may achieve one of the elements of an effective legal system.

Some weaker responses incorrectly referred to the jury system or pre-trial procedures, such as committal hearings, as features of the adversary system of trial. Features of the adversary system of trial are described in the study design.

The following is an example of a good beginning to a response.

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There are five features of the adversary system of trial, and each of these features have both strengths and weaknesses. One of the strengths of the role of the parties is the total control given to the parties to run their case. That means that the parties decide which evidence they are to call and how they will run their case, therefore ensuring they take responsibility of the case. However, this can lend itself to being a weakness as it means they can exclude certain witnesses from trial, or some unrepresented parties may not have a good handle of their case, thus causing the possibility of there not being a fair hearing.

The passive and impartial role of the judge is a strength because it ensures he or she is unbiased and does not take any sides, acting as a referee only and ensuring rules of evidence and procedure are followed. This, however, could be a weakness as the judge is the most experienced and specialised person in the trial room which is unutilised and hinders the possibility of a fairer trial should one party be on less of an equal footing than another party. One improvement that could be made to the adversary system is to increase the role of the judge in pre-trial procedures such as directions hearings. Judges could provide more guidance to parties about evidence to lead or law to be considered, thus ensuring a more fair outcome is achieved and that parties can be prepared for trial on a more equal footing.