ASSESSMENT REPORT 2021

LST315117 - LEGAL STUDIES

Question 1 – 28 responses

Explain 'rule of law' and 'separation of powers' in the Westminster system of government in **Australia. Evaluate, with reference to examples, the** effectiveness of 'rule of law' and 'separation of powers' in Australia.

- Analysis/evaluation in this question was very limited and many students demonstrated very limited knowledge about the rule of law and separation of powers.
- Very few students made connections between the two concepts (rule of law and separation of powers)
- Weaker responses only contained minimal use of examples
- It was disappointing that although an hour was allocated for the response to this question, many answers were only 1- 1½ pages in length.
- Very few students were able to meaningfully articulate how these features function in practice or evaluate their effectiveness.
- It is concerning that many students confused the concepts of Separation of Powers with the Division of Power and/or levels of government.

Question 2 – 55 responses

Explain the main features of the Westminster system of government as adopted by the Parliament of Australia. Evaluate the effectiveness of these features in the parliamentary system of Australia.

Generally speaking, explanation about each of the main features could be articulated but with little application of how each operated in reality.

Main features:

a. Constitutional Monarchy

b. Constitutional conventions including the head of Government, the PM and Cabinet which is responsible to the Lower House

c. Separation of Powers and Rule of Law

d. Representative and Responsible Government

e. Bicameral parliament-House of Representatives (peoples house), Senate (states' house and House of Review)

Better answers evaluated the effectiveness of each of the features and provided relevant examples to show effectiveness or otherwise.

a. Head of state is the Queen (outlined in the Cth of Australia Constitution Act, 1901). Her representative is the Gov General, David Hurley). Despite the Constitution stating that the Head (Gov Gen) has significant power, in reality the Gov General acts on the advice of the Govt. of the day. Also, the Gov General is appointed on the advice of the PM.

b. Constitutional conventions are critical to the Westminster system. The constitution suggests the Gov Gen has a great deal of power as Head of Exec Council; however, it is the PM and Federal Cabinet which wields the exec power (even though the PM is not mentioned in the Constitution).

   Other conventions:

   i. Gov General is Head of ADF only in theory - Chief of Defence Force has the actual power and he reports to the Minister of Defence.

   ii. In theory the Gov General can refuse Royal Assent, but this has never really happened

   iii. S62 states the Gov General can chooses Ministers; the PM chooses the Ministers

   iv. Reserve powers have only ever been used once (1975 dismissal of Whitlam by Sir John Kerr) and most likely never to be used again.

c. Separation of Powers-Australia doesn't have a true separation of powers as the executive is also part of the legislature (overlap between these two branches). However, the judiciary is independent (this is a crucial point).

d. Representative Govt: S7 and S28 require frequent, fair elections; S7 and S24 ensure members of Parlt are elected by the people (democratic elections)

   Responsible Govt: executive is chosen from the legislature and is accountable to it. As these two arms overlap, there is greater scrutiny and accountability. The executive is accountable to Parlt and must maintain the confidence of the House. They are also accountable to the voters through elections (as individuals and as a govt). Mention of Sports Rorts and Robodebt could be used as examples here.

   Question time is meant to keep the govt accountable; however, Dorothy Dixers, avoiding the question can sabotage this.

Bicameral nature of parlt (except QLD) keeps executive accountable (Senate-House of Review)

e. **Bicameral Parlt (2 Houses of Parliament)**

House of Reps-Lower House, Peoples House, 151 members (membership based on population with Tas having only 5 members), Govt (or coalition) is formed in the lower House.

Senate – Upper House, states House, 76 members (equal representation; 12 from each state and 2 each from ACT and NT) House of Review-can reject Bills. Deals are made with Independents or minor parties (control balance of power) and can negotiate deals for their respective state (Jacqui Lambie)

Question 3 – 169 responses

Explain the ways in which the Constitution has allowed the division of law-making power between the states and the Commonwealth to change over time.

Evaluate the High Court's role, **referral of powers and referendums in changing the division of power over time. As part of your answer, refer to two High Court cases that have significantly changed the division of power.**

Overall, the answers to this question were stronger than in previous years. Students were able to discuss the original division of powers between the Cth and the states and then refer back when investigating how this has changed over time. Very strong answers were able to name the relevant sections of the Constitution in their discussion and provide all the relevant examples to show how and where the changes had occurred. Better answers responded to the question by addressing the following in some detail:

1. **Explanation of the original division of powers:**

   - specified and unspecified powers (S51)
   - Exclusive and concurrent (S51) for the Cth and residual (S107) for states with prohibitions for both state (defence (114), coinage (115) and Cth (religion S116 and free trade S92).
   - The original intention of the founding fathers was to leave the majority of lawmaking powers to the states.

2. High Court's role: HC formed in 1903 - original jurisdiction under S75 and S76 of matters arising under any treaty, between states, arising under the Constitution or requiring

interpretation of the Constitution. (Excellent answers addressed most if not all of the following comprehensively even though only two cases were required):

a. Tas Dams Case S51 (xxix) external affairs power (2nd one of this nature since Koowarta 1982.) Good answers outlined the case, issue judgement, consequences/impacts of Australia's entry into international treaties. Croome v Tas Govt was also mentioned in some stronger answers.

b. Uniform Tax Cases 1942 – these along with S96 have Cth dominance in relation to finance (power of the purse). Details of the case in relation to consequences and judgement and the subsequent vertical fiscal imbalance between the states and the Cth.

c. Roads Case 1926 - HC ruled that Cth can dictate the spending when granting of money (tied grants). This also has a large impact on the Vertical fiscal imbalance.

d. Brislan 1935 - "postal, telegraphic and other like services". This had an impact on communication powers. Brislan judgement widened the scope of Section 51 (v), expanded the Cth's power in relation to electronic comms and set a precedent that saw the Cth controlling TV, Satellite communication, internet. (Jones v Cth 1965).

e. Work Choices 2006 – Corporations power; gave the Cth power of workplaces.

3. **Referral of Powers -S521(xxxvii)**
Generally, referral of powers results in uniformity across all states. Cth can pass legislation nationally, rather than waiting for individual states, without a referendum. Referrals tend to be practical, cooperative and necessary and less politically contentious. Examples provided included Family Law (Family Law Act 1975) Cth and ex nuptial children 1992, Criminal Code Amendment (terrorism) Act and The Murray Darling River. Better responses elaborated on the point that referrals are voluntary and are examples of cooperative federalism

4. **Referendums-S128** - difficulty of obtaining a referendum (only 8/44 successful since 1901) by a double majority. Most significant referendums mentioned in relation to Division of powers were:

a. State Debts (1910 & 1928); gave power to Cth over state borrowing

b. Social Services Referendum in 1946 which added S51(xxiiiA). Whilst this didn't take power from states, it added to the Cth's power.

c. 1967 Referendum-alteration of S51(xxvi) allowed the Cth to legislate on behalf of ATSI peoples which led to NT introducing Land Rights Act which led to Native Title Act 1993.

Stronger responses also:

- Answered the essay question, using the language of the question. Set the scene in the introduction, and ensured conclusion reiterated that three mechanisms have shifted power to the Commonwealth.
- Outlined how framers of Constitution initially set out the respective powers of the states and Commonwealth.
- Defined types of powers set out in Constitution (e.g., exclusive, concurrent) as well as residual powers
- Explored examples (e.g., of High Court cases or a particular referendum) in detail, without reciting facts but focusing on the legal significance of that example. Also able to relate to other cases or examples
- Ended each paragraph with a linking sentence emphasising how the mechanism in question shifted power to Commonwealth
- Retained a balanced perspective (for example why it has been important for power to shift to Commonwealth) and avoided emotive statements lacking evidentiary basis (for example, bias of High Court justices, sweeping statements about recent changes in light of National Cabinet and Covid-19)
- Used legal terminology (for example, if discussing Covid-19, relating back to cooperative versus coordinate federalism)

Weaker responses:

- Were rehearsed/prepared responses and in some cases, responded to the question from a previous exam paper! Some responses made clear references to 'governing effectively', a phrase used in the 2019 exam question on this topic
- Neglected to outline the original Division of Powers
- Neglected to make it clear that all of the mechanisms for altering the Division of Powers have a constitutional basis

Question 4 – 9 responses

Explain the legal status of the Aboriginal and Torres Strait Islander Peoples in the original Commonwealth of Australia Constitution and how the 1967 referendum changed their status. Evaluate these changes and any further reforms needed to improve the status of the First Nations Peoples in the Australian Constitution.

Students who did well on this essay included information and showed understanding that at the time of writing the Constitution, there was no Aboriginal voice in the Constitution and Aboriginal

Peoples were made a state responsibility. This meant that there were different laws in different states.

The original Constitution included:

- Section 25 recognized that the States could disqualify people from voting in the elections on account of their race (this still in the Constitution!).
- Section 51(xxvi) provided that the Commonwealth Parliament could legislate with respect to 'the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws. This was the so-called, 'race' power.
- Section 127 went further in providing: 'In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted'. Significantly, neither provision spoke of Indigenous peoples as people, but in the latter case as 'aboriginal natives'.
- Section 51(xxvi) was inserted into the Constitution to allow the Commonwealth to discriminate against sections of the community on account of their race. Aboriginal people were not originally subject to this section because it was thought that the Aboriginal issues were a matter for the States and not the federal government. (George Williams *https://www.aspg.org.au/wp-content/uploads/2017/09/Race-and-the-Australian-Constitution.pdf*)

Better responses evalulated, and showed knowledge and understanding of, developments since the 1967 Referendum that are needed to reform and improve the staus of ATSI people in the Constitution:

1967 Referendum: changed - s127 deleted and s51 (xxvi) race powers deleted ''other than Aboriginal''.

An important achievement of the 1967 referendum was to ensure that the federal parliament can pass laws for Indigenous peoples in areas like land rights, health and the protection of sacred sites. A continuing power should be available in such areas, but in a different form. (George Williams:

https://www.aspg.org.au/wp-content/uploads/2017/09/Race-and-the-Australian-Constitution.pdf)

- UN Declaration on the Rights of Indigenous Peoples endorsed in 2009, provides the right for Indigenous Peoples to participate in decision making affecting them and develop their own Indigenous institutions.
- Uluru Statement of the Heart- A constitutional convention bringing together over 250 Aboriginal and Torres Strait Islander leaders. The majority resolved, in the 'Uluru Statement from the Heart', to call for the establishment of a 'First Nations Voice' in the *Australian*

Constitution and a 'Makarrata Commission' to supervise a process of 'agreement-making' and 'truth-telling' between governments and Aboriginal and Torres Strait Islander peoples.

- The Federal Government have put this issue to The Joint Select Committee on Constitutional Recognition relating to Aboriginal and Torres Strait Islander Peoples, March 2018. The Committee presented its interim report on 30 July 2018 and presented its final report on 29 November 2018.
- Minister for Indigenous Affairs Ken Wyatt (an Aboriginal Elder from WA and the first Indigenous Minister), has set up the Voice Co-Design Senior Advisory Group, a recommendation of the Parliamentary Committee.

Question 5

Select one (1) of the following 2021 Topical Legal Issues (TLI) that relate to reforming the law.

- **Raising the age of criminal responsibility** OR
- **Voluntary Assisted Dying law reform in Tasmania** OR
- **Political Donations law reform in Tasmania** OR
- **Treaties with Aboriginal and Torres Strait Islander Peoples** OR
- Net Zero by 2050: Australia's international obligations and **legal responses to climate change** OR
- **Legal challenges investigating and prosecuting alleged Australian Defence Force (ADF) war crimes in Afghanistan.**

Briefly explain your chosen topical issue. Explain the relevant institutions and relevant processes involved to resolve the issue in the Australian legal system (including, if relevant, international law).

Evaluate how effective these processes and institutions have been in resolving the topical issue or changing the law.

Ensure that your answer includes institutions and processes (if it is relevant to the topic) from Part 3 of the Course: customary law, Australian statute law, Australian common law, Australian law reform and International law.

One note which is applicable to multiple Topical Legal Issue essays: responses across a number of topical issues stated that a criticism of statute law is that it is "costly and timely". Costly is correct given the huge cost of maintaining and operating parliament. "Timely" does not mean that something takes lots of time. "Timely" means that something occurs at an opportune time. These

students were actually arguing that the statute law process is costly and time consuming which is a fair criticism of that source of law.

Topical Issue – Raising the age of criminal responsibility – 91 responses

Strong essays addressed most or all of the following:

- Evaluated relevant international institutions and processes such as the role of the UN Committee on the Rights of the Child (UNCRC) in monitoring and reviewing state parties such as Australia. The issues with enforceability of the Convention on the Right of the Child (Articles 3, 37 and 40) - which Australia has ratified. Reference to the 2021 Universal Periodic Review whereby 31 UN members questioned Australia about its human rights record and recommended that Australia raise the age of criminal responsibility RACR to the UN international benchmark of 14.
- Devoted more time to evaluating rather than describing the relevant institutions and processes involved in raising the age of criminal responsibility (RACR). For example, when evaluating the legislative process, students evaluated the various attempts from Members of parliament, such as Tasmania's independent MP Meg Webb's motion (2021), ACT's commitment (not bill) to RACR in 2022 as well as Rebekha Sharkie's private member's bill (2019) to legislate for 14 as the minimum age. Students also discussed the strengths and barriers of Parliament to legislate for change, such as certain governments' reluctance to endorse controversial issues for fear of electoral repercussion, especially when they have a 'tough on crime' mandate.
- Discussed and evaluated an array of relevant law reform institutions (formal and informal), including Council of Attorneys-General (Report leaked this year), pressure groups such as Raise the Age campaign and petition, AMA, Law Council of Australia, Commissioner for Children and Young People (Tas), Amnesty International, role of media and its influence on the commissioning of the Royal Commission into the Protection and Detention of Children in the Northern Territory.
- Addressed opposing views such as former Attorney General Christina Porter's 'tough on crime' stance and the Victorian Police and Police Union against RACR.
- Discussed alternative solutions focussed approaches and preventative programs recommended by various organisations such as Amnesty International and North Australian Aboriginal Justice Agency. Referred to customary law playing a more integral role in supporting Aboriginal youth.
- Relevant and current evidence, such as First Nations peoples are overrepresented in detention centres. For example, "Although about 6% of young people in Australia aged 10–17 are Indigenous, over half (53% or 500) of all young people in detention on an average night in the June quarter of 2019 were Indigenous Australians" (Australian Institute of Health and Welfare (2021).

- Closing down of Ashley Youth Detention centre and suggestion for alternative rehabilitative model.

Weaker responses:

- Placed too much emphasis on medical/neuroscience justification for RACR.
- Made generalisations without providing specific relevant statistics - see above.
- Neglected to address the international law element - students needed to refer to CRC and UNCRC.
- Spent too long on explaining the legislative process (three reading stages etc) without referring specifically to RACR. A topical issue essay must be a coherent analytical essay that discusses law reform with RACR as the focal point.

Topical Issue – Voluntary Assisted Dying – 63 responses

Voluntary Assisted Dying (VAD) as a topical issue essay gave students ample scope to address all three criteria: 2,5 & 7. Strong responses outlined the national and international context within which the 2021 Tasmanian reform occurred, linking the previous failed attempts both in Tas and in other States and Territories to the successful passage of the *End of Life Choices (Voluntary Assisted Dying) Act 2021* through the Tasmanian Parliament. They were able to articulate competing points of view, outlining the role of lobby groups supporting and opposing reform and the critical role played by the UTAS Independent Review of the *End of Life Choices (Voluntary Assisted Dying) Bill 2020.* It was clear that the numerous presentations the initiator of the reform, Mike Gaffney MLC, gave to Legal Studies classes across the State, elevated student understanding of how and why this bill succeeded where others had failed.

Many responses lacked enough discussion on barriers to law reform. Too many responses didn't discuss barriers at all. Barriers to law reform should be discussed in past tense when a bill has already been passed.

There was some confusion regarding the implementation phase of bills. Some students claimed all legislation requires an 18 month implementation period after royal assent! This implementation period is unique to VAD legislation.

Too many responses spent too long detailing the history of VAD bills in Tasmania and elsewhere. Multiple responses referred to "Tasmania's Governor General" providing Royal assent to the VAD bill. Royal assent in states is provided by the governor of each state. Multiple responses referred to the ACT and NT as states which are led by premiers. This is not the case. The NT and ACT are territories, led by chief ministers.

Topical Issue – Political donations – 7 responses

Only seven students completed an essay on the issue of Political Donations Law reform in Tasmania. One issue for the responses on this topic was that some spent a substantial amount of time (sometimes more than half a page) explaining why International Law was not relevant. If there is no link between the topical issue and an area of Australian and International Law, then that area should simply be left out of the essay. The question clearly states that students only need to address the **relevant** parts of criterion 2 in the Topical Legal Issue essay.

Stronger responses:

- Demonstrated a clear understanding of the wide range of views on the topic of political donations
- Clearly outlined the law as it currently stands in Tasmania including limits on campaign spending, especially those which apply to Tasmanian Legislative Council elections
- Clearly outlined examples of previous elections where powerful lobby groups are believed to have impacted the outcome of said elections through campaigning and substantial donations to a political party or parties
- Clearly outlined the difference between formal and informal law reform pressure and which individuals and groups can apply such pressure
- Clearly evaluated the effectiveness of individuals and/or groups to influence reform of the law
- Had clear links to the statute law and law reform elements of criterion 2
- Discussed barriers to law reform and how these may be overcome

Weaker responses:

- Did not have clear links to the relevant elements of criterion 2
- Showed some confusion regarding what it was that was being evaluated i.e. trying to evaluate the ability of every relevant institution (including parliament) to influence law reform.
- Made statements like "there are no links to International Law in this issue". If this is the case, then it can simply be left out.
- Spend too long simply running through the history of political donations and listing facts about donation laws. These responses did not leave enough time to provide analysis of their issue.

Topical Issue – Treaties – 15 responses

This was a complex topic and required a good understanding and knowledge of Aboriginal and Torres Strait Islander history, events and issues.

Stronger responses mentioned the importance of the Uluru Statement of the Heart, International law UN obligations, Parliament, pressure groups and individuals, in working towards treaty. They were able to explain the treaty process that is happening in Tasmania, Victoria, WA and NT and some of the complex issues and barriers that exist to negotiate a treaty.

Topical Issue – Net Zero 2050 – 32 responses

The issue lent itself to an evaluation of the processes and institutions that bring about law reform such as international law obligations, the parliamentary system and cabinet, litigation in the courts, pressure and lobby groups, the media, and the function of law.

Many students provided a significant number of facts, statistics and domestic policy relating to net zero, but did not demonstrate an independent argument or evaluation.

Most students could describe the current situation around global warming and the necessity for legislation to support net zero emissions. Students were familiar with the Paris agreement and the recent COP26 in Glasgow.

Strong essays contained reference to the following:

- evaluated the Kyoto and Paris agreements at a high standard, demonstrating sound understanding of the impact of international law on domestic Australian law. These essays had a clear and objective understanding of enforcement issues surrounding the Paris Agreement and how this relates domestically.
- evaluated and explained the Morrison governments' climate policy and the negotiation that was required with the National Party to reach an agreement for COP 26,
- the push for litigation in the courts (Sharma case 2021)
- the impact of interest/pressure/lobby groups in influencing the public and politicians. Answers that evaluated the methods used by these groups/institutions tended to be most effective.
- made connections with the function of law and the number of Australians interested in having a strong net zero policy.

Weaker responses spent too much time on describing the world climate situation and net zero technologies and ways to address net zero. In reference to criterion 2, many students only addressed and evaluated the International law obligations and referred only briefly, if at all, to the

other elements of criterion 2 that are pushing for law reform. The LawFest 2021 presentation was an excellent resource that could have helped with understanding climate litigation.

Topical Issue – Alleged ADF war crimes – 52 responses

This was a challenging question with regard to addressing Criterion 2 as there were no proposals to change the substantive law on a domestic or international level; the pressure for reform was on an institutional level-reform of the SAS as a result of war crimes allegations revealed by investigative journalists, a military sociologist and more extensively by the Brereton Report at the end of 2020.

There were some outstanding responses which seamlessly integrated the relevant international law - the Geneva Conventions 1 & 3 & the Rome Statute primarily and the domestic legislation ratifying Australia's International Humanitarian Law obligations such as Division 268 of the *Criminal Code Act 1995* and the *International Criminal Court Act 2002*. They also outlined the numerous challenges involved in investigating and prosecuting these allegations, especially after the fall of Kabul to the Taliban and the importance of ensuring the trial process is fair to all parties. In addition, there was excellent coverage of the groups involved in the investigation process and the barriers they face.

Students should be aiming to deal explicitly with the International Law elements of criterion 2. Element 6 requires students to explain difference between Australian domestic law and IL. Element 7 requires students to explain why states obey IL with reference to institutions and instruments of IL.

Statute law was not relevant to this topical and students who attempted to make it relevant should have instead been focusing on the relevant elements of criterion 2.

Question 6 – 84 responses

Explain 'party control' and the 'role of the impartial adjudicator' in criminal cases. Evaluate the **advantages and limitations of these two (2) features in the adversarial dispute resolution system.**

Stronger responses:

1. Read the question and discussed these features as they apply in criminal cases.
2. Explained party control in terms of:

    - whether to initiate legal action or defend the accusation
    - deciding on the evidence to present and witnesses to call

- choosing to have a lawyer or to self-represent
- deciding on tactics and strategy.

3. **Evaluated party control:**

Advantages included:

- Having a strong motivation to put forward the best case possible
- Parties realising they have a major influence on the outcome of the case and therefore more likely to be satisfied with the outcome, win or lose.

Limitations included:

- Parties may withhold evidence that does not support their case but is crucial to establishing the truth.
- An unrepresented litigant is at a substantial disadvantage and the contest becomes imbalanced.
- Even if both sides are represented, financial issues might mean one party has inferior representation to the other.
- The state has more resources available to mount their case.
- The availability, or lack of Legal Aid and its funding are important issues.
- The desire of lawyers to win the case, rather than an altruistic desire to find the truth.

4. **Explained Impartial Adjudicator in terms of:**

- Ensures strict rules of evidence and procedure are adhered to
- Rules on the admissibility of evidence (voir dire)
- Oversees the empanelment of the jury and directs them on matters of law
- Determines the verdict if no jury is present
- Sentences the defendant if the jury finds them guilty, beyond reasonable doubt.

5. **Evaluated Impartial adjudicator**

Advantages included:

- Each party is treated fairly
- The judge is independent of the prosecution and investigation and therefore impartial

Limitations Included:

- The expertise of the judge may not be fully utilised. Compare with the Inquisitorial system where the judge plays a more active role.
- The judge cannot help an unrepresented party.

Cases and programs used by students for supporting evidence included:

- Andrew Mallard: wrongful conviction
- Tim Ellis: Director of Public prosecutions, judge brought from Victoria for sentencing
- Nicola Gobbo: Barrister who acted as police informant
- Kelli Lane: Some believe wrongfully convicted
- Annie Dookhan: Falsification of evidence
- DIY Law: Private Lives: Judge assisting an unrepresented party
- Dietrich v the Queen: establishment of Legal Aid in Australia

The best responses were clearly expressed by students using succinct language and logically organising material into paragraphs with a clear topic sentence. This is a short answer question, so when case examples are used, the **essence** of the case to support a point is preferable to telling the story of the case.

Question 7 – 175 responses

Explain one Australian Dispute Resolution (ADR) process from the list below and whether it addresses limitations of the adversary system. Evaluate the effectiveness of your chosen ADR as a dispute resolution process.

- **Negotiation and settlement**
- **Mediation**
- **Tribunals**
- **Conciliation and arbitration**
- **Restorative justice**
- **Ombudsman**

This question, whilst slightly different to previous years, was quite straightforward and should not have caused students any difficulty. However, in general it was not well-answered.

The main difficulty that students seemed to face was a failure to accurately appreciate the question – which this year was only looking for a single ADR process to be explained and evaluated in terms of how well it overcame the limitations of the adversary system. A disappointingly high number of students completely failed to read the question and instead discussed two ADR processes (both briefly), with minimal detail acknowledging limitations of the adversary system. This indicated that many responses were pre-prepared answers that students chose not to deviate from when faced with a different question. Whilst this was acceptable for conciliation and arbitration (which our syllabus considers to be one ADR process), this was not acceptable for any other combination of ADR processes which was not what the question was asking. The question was really asking students to demonstrate understanding of an ADR process to a high level of specificity and detail – in particular including a case to demonstrate features of the ADR process was a very effective was to demonstrate strong understanding.

Successful responses included reference to specific cases and the most successful responses utilised these cases to highlight how the chosen ADR overcame the limitations of the adversary system. Reference to legislation was good, as long as it was relevant and also correct. Discussions which unpacked the context in which the chosen ADR was more successful than adversary were very useful and demonstrated a strong point of view.

Question 8 – 66 responses

Explain 'preliminary proceedings' and one (1) other safeguard for a person who is accused of **a serious crime in Tasmania. Explain one (1) feature that protects the victim. Evaluate the effectiveness of these features in the criminal justice system in Tasmania.**

Overall, a range of good responses to this question. Some students explained a number of safeguards for the accused, rather than explicitly addressing what the question asked of them. There was a lack of understanding of the preliminary proceedings safeguard. Given that this is just a dot point in the syllabus, students would not have expected a question where explanation of this feature was a requirement.

Students who name relevant acts of parliament should ensure that they know the year of that act (especially for 'A' standard responses).

A Victim Impact Statements can be used by the judge in sentencing. This is a key point which was missed in many responses.

More clarity is needed in the use of cases used to support points, though it was good to see many students did use cases to support their points.

More explanation and clarity are needed regarding:

- the need for the accused to be protected and the recent trends that have seen some protections watered down e.g., double jeopardy, the right to remain silent
- the importance of balancing the rights of the accused with the rights of victims

Question 9 – 195 responses

Select and explain one (1) sentencing option available in Tasmania from the list below. Evaluate the extent to which it fulfils the aims of punishment.

- **Imprisonment**
- **Suspended sentence**
- **Home detention**
- **Correction Order**
- **Diversionary process**

This question was problematic as it didn't ask students to discuss or explain the sentencing process, merely one of the options on the list. So it was discussed and agreed at the meeting that a student could still get an 'A' if they evaluated the selected option without explaining the sentencing process explicitly. That said, those who did explain the process provided more evidence to satisfy both standards of Criterion 4 and therefore made it easier for themselves to achieve a high rating.
The most widely accepted 'list' of aims of sentencing (punishment) is the following:

- Just punishment (see SAC report Guide to Sentencing 2020 https://www.sentencingcouncil.tas.gov.au/__data/assets/pdf_file/0004/576139/A-Guide-to-Sentencing-in-Tasmania-July-2020.pdf
- Deterrence (specific and general)
- Rehabilitation
- Denunciation (verb is denounce, not denunciate)

The last 3 are expressly mentioned in s3 of the Sentencing Act 1997 (Tas). That section also states that community protection is 'a primary consideration' of sentencing. Incapacitation has historically also been listed as one of the 5 aims (see 'You be the Judge' by former Supreme Ct Chief Justice Peter Underwood).

It's not accurate to include reparation/restoration and restitution as aims of sentencing generally, although they are primary aims of restorative justice procedures. Some students also included recognising interests of victims but this is not given the same priority in section 3 of the Act as the above-mentioned aims.

The vast majority of students chose imprisonment as their option.

Stronger responses

- Systematically evaluated how their selected option fulfils EACH of the aims
- Presented alternative perspectives on sentencing such as 'jailing is failing'' v 'tough on crime'
- Pointed out more nuanced connections between relevant data and fulfilment of aims e.g. imprisonment/incarceration (prison) is too effective at denunciation as the associated stigma and shame lasts beyond the term of imprisonment, or, high recidivism rates show that prison is not effective as punishment for those who re-offend as they are obviously not deterred from re-offending.
- Accepted and discussed how prison is mixed in its effectiveness as it clearly incapacitates, is a serious punishment and denunciation of criminal behaviour and probably effective as a general deterrent, but fails in both specific deterrence and rehabilitation as shown by high recidivism rates.
- Provided a range of accurate and sourced evidence for their arguments

Weaker responses

- Claimed prison was completely ineffective ('jailing is failing') without actually analysing whether it met each of the aims
- Claimed prison was the most common sentencing option used in Tasmania (fines are most common by far)
- Used the Justice Reform Initiative as their only source of evidence for their analysis/evaluation
- Usually provided inaccurate and unsourced data, including wildly variable recidivism rates.
- Made claims such as prison being 'criminogenic' without providing evidence e.g. research findings, or that the delay in matters going to trial and offenders being sentenced meant that the punishment was somehow ineffective (no evidence provided and logic suggests an offender is in no doubt as to why they are being punished even with a long delay. We're not talking about toddlers or pets here, who require immediate consequences!)
- Were confused in their use of vocabulary e.g. principles of sentencing (parsimony etc) were aims, or aims were in fact options such as imprisonment

General points

Evaluation means making an informed judgement, and that judgement must be supported by evidence. Students often let themselves down by either providing little/no evidence and/or providing inaccurate or unsourced data.

Often the interpretation of the data was either insufficient or inconsistent e.g. students claimed that high recidivism rates demonstrated that prison fails to effectively rehabilitate offenders (true) while it fulfils the aim of deterrence! The latter claim usually reflected a failure to distinguish between specific and general deterrence, as high recidivism rates clearly demonstrate ineffective specific deterrence.

Student interpretation of sentencing data could be improved by higher statistical literacy e.g. a recidivism rate of 47% within 2 years of release is clearly very high but the other side of this is that 53% of offenders don't seriously re-offend in that time. When this figure is compared to the often-quoted stat of DTO's having a 57% success rate, it demonstrates there's not as much difference between the effectiveness of the 2 options as claimed.

It's also important that data be accurate.

Some students made the claim that the increase in the rate of imprisonment therefore meant that prison wasn't meeting general deterrence, but this fails to acknowledge that other factors such as changes in sentencing practices, legislation and government policy can affect that rate.

It is also worth pointing out that mandatory v discretionary sentencing was only discussed in the higher-level responses and not that often.