



EXAMINERS' REPORT ON 2001 TERTIARY ENTRANCE EXAMINATION

SUBJECT: POLITICAL AND LEGAL STUDIES

STATISTICS

Year	Number Who Sat	Non-Examination Candidates	Did Not Sit
2001	1034	22	61
2000	868	14	77
1999	914	24	61

The Examiners' Report is written by the Chief Examiner (or another examiner on their behalf) to comment on matters relating to the Tertiary Entrance Examination in their subject. The opinions and recommendations expressed in this report are those of the Chief Examiner and not necessarily representative of or endorsed by the Curriculum Council.

The Marking Guide provided at the end of this report was prepared for markers and substantially amplified by discussions held in the pre-marking meeting. It is not intended as a set of model answers, and is not exhaustive as regards alternative answers. Some of the answers are less than perfect, but represent a standard of response that the examiners deemed sufficient to earn full marks. Teachers who use this guide should do so with its original purpose in mind.

SUMMARY/ABSTRACT

The examination followed a similar format to recent years and there was a range of questions from all sections of the course. Candidates, as expected, did better in Part A where less analysis is needed. Candidates still have a tendency to talk in generalities and as intimated in comments in the full report it is expected that specific reference to particular sections of the Constitution can be made. Evidence is still lacking in many responses and too many candidates are ignorant of key concepts and issues. Problems were posed by the wording of Questions 8 and 9 and Question 11 seemed to draw on work covered in Year 11. Overall the types of questions being asked in both Parts of the examination allow for better candidates to show what they know as well as argue a premise. Certain questions did score more highly and it is important that parity be achieved between questions in terms of difficulty and what is required to attain high/full marks.

GENERAL COMMENTS

More candidates than ever before (1034) sat the examination this year and the overall standard of responses was much the same as last year although there were more candidates achieving at the upper end of the spectrum.

The examination followed the established format of previous years with Part A (Short Answers) requiring the candidates to answer five questions out of seven and Part B (Essays) answering two out of five. Some questions proved problematic this year, such as Question 8 where the wording caused some confusion; Question 9 that seemed to be beyond the realm of many candidates' understanding and Question 11 where information related more to the Year 11 Course needed to be used. Once again I iterate the points made last year where I emphasised the need for candidates to read the whole question in both parts of the paper and address all issues raised by the question and not just what suits them. It is not mandatory to agree with the premise in its entirety or at all. Key terms related to questions need to be fully understood. These terms include 'differentiate'; 'evaluate' and 'assess'. Specificity of knowledge also needs to be emphasised especially in terms of key terms. I have made more reference to these points in the comments on specific questions.

It is very important that there is parity between question types and in this respect 7(a) could be considered far too easy compared to other (a) questions. Also 3(c) was too large compared to other (c) questions.

The examining panel is to be commended for the types of questions asked throughout the paper as it is increasingly apparent that more able candidates can clearly show what they know and understand and the questions allow for analysis.

It could be argued that Section 1 of the syllabus, which is the foundation of all other sections, was a little underweight in the examination and it should be noted that Section 2's emphasis is meant to be concerned with participation and change in the law making process. This seems to have been forgotten in questions pertaining to Section 2 of the syllabus.

Sincere appreciation is extended to the Examining Panel of Dr Harry Phillips; Ms Jan Fleming and Dr Gail Lugten; Ms Janice Dudley, the Examination Checker, and Mr Cam Rielly, the Reviewer, as well as Dr Bob Peck, Mr Neil Wilson and Ms Kerry Tarrant at Curriculum Council.

COMMENT ON SPECIFIC SECTIONS/QUESTIONS

PART A SHORT ANSWERS (Attempt 5 questions. Each 10 marks)

Question 1

- (a) **What is a “legislature”?**
(Attempted: 678; Mean: 1.20)

There was great confusion between “legislation” as opposed to “legislature”. Far too many candidates wrote about a bill or act and the processes involved rather than the institution itself.

- (b) **State two ways in which, according to the Australian Constitution, the House of Representatives and the Senate differ.**
(Attempted: 689; Mean: 2.05)

This was well done in terms of aspects of the Constitution although some candidates chose to write about conventions. It is important that candidates know particular sections of the Constitution and in future this would be a criteria for full marks in this type of question.

- (c) **Present one major argument for High Court “judicial activism” and one major argument against.**
(Attempted: 665; Mean: 2.48)

As long as candidates understood the phrase “judicial activism” they generally could provide broad arguments. Far too many candidates were unfamiliar with the phrase itself. It was essential that judgements or issues surrounding the status of the Court or Judges (as opposed to Parliament and the parliamentarians) were raised in the discussion. This was lacking in many responses.

Question 2

This was the most popular short answer question and overall was done well by many candidates.

- (a) **In Parliament, what is a “private member’s bill”?**
(Attempted: 918; Mean: 1.23)

Most candidates were familiar with the phrase but too many excluded the Shadow Ministry and/or the Senate from their response. It should be noted that such bills are not the sole prerogative of government backbenchers.

(b) Which three important roles does the Opposition play in the Federal Parliament?

(Attempted: 937; Mean: 2.04)

It was essential for candidates to clearly outline three separate and important roles played by the Opposition in the Federal Parliament. Most candidates could cite one or two roles but struggled for a third role.

(c) Give one argument for and one argument against the view that the Federal Parliament broadly reflects the will of the Australian people.

(Attempted: 934; Mean: 2.52)

Far too many candidates thought of the Parliament purely in terms of the House of Representatives and ignored the Senate and in this question it worked to their detriment. It was necessary to give substantial arguments with supporting evidence to achieve full marks.

Question 3

(a) In a statutory interpretation, what is meant by the term “ejusdem generis”?

(Attempted: 473; Mean: 1.21)

Candidates either knew the answer or did not. It was necessary to write more than a translation of the phrase to achieve full marks. It is essential that key terms such as this are taught alongside statutory interpretation.

(b) Distinguish between “original” and “appellate” jurisdictions.

(Attempted: 490; Mean: 2.05)

The word ‘jurisdictions’ tended to be ignored by many candidates. Most knew the difference between ‘original’ and ‘appellate’ and give an example rather than explain the ability of the respective courts to hear cases in the first instance or cases on appeal.

(c) Describe two criticisms of the doctrine of precedent.

(Attempted: 494; Mean: 2.69)

Most candidates could describe particular criticisms of the doctrine of precedent but there were too many who ignored the second aspect of the question which was to evaluate each of the criticisms. Evaluation of an argument/criticism is an essential aspect of the course and allows for a full understanding of the issues and concepts.

Question 4

(a) What is meant by “direct action” as a pressure group strategy?

(Attempted: 664; Mean: 1.35)

Most candidates were familiar with the phrase and could give an example. Too many candidates assumed that ‘lobbying’ equated with ‘direct action’. Overall it was answered well.

(b) Indicate three important roles played by the mass media in the Australian political and legal systems.

(Attempted: 667; Mean: 2.04)

Like Question 2(b), many candidates knew one or two distinct roles but really struggled to find a third role.

(c) The Australian Labor Party (ALP) is often described as a “trade union party”. Give one main argument to support this description and one main argument against it.

(Attempted: 645; Mean: 2.22)

This question, although very topical, was very poorly answered. Responses tended to be quite superficial. It was essential that candidates showed an understanding of the structure and/or policies of the ALP to achieve full marks.

Question 5

- (a) **What is “cabinet solidarity”?**
(Attempted: 738; Mean: 1.48)

Most candidates knew this although there was a tendency for many to restrict their answer to just cabinet secrecy.

- (b) **Describe three ways in which public service departments assist their ministers in undertaking their portfolio responsibilities.**
(Attempted: 747; Mean: 1.91)

The answers tended to be limited to the advisory/policy formulation role of the public service departments. Departments also have an administrative/discretionary role including their role related to delegated legislation. It was necessary to describe the ways assistance was provided rather than just list ways to achieve full marks.

- (c) **In recent years, the issue of individual ministerial responsibility has been keenly debated. Discuss two important reasons for this.**
(Attempted: 741; Mean: 2.44)

Although a popular question it was poorly answered. It was essential to give full explanations including relevant topical information to achieve full marks. It was not enough to merely explain a resignation or non-resignation. It was also necessary to show why this caused debate. Too many candidates ignored Howard’s Ministerial Code of Conduct.

Question 6

- (a) **What is meant by “quota” in a Senate election count?**
(Attempted: 761; Mean: 1.37)

To achieve full marks, candidates needed to explain what the ‘quota’ actually was in terms of the general formula and the percentage of valid votes. Many had one or other but often not both.

- (b) **Distinguish between “malapportionment” and “gerrymandering”.**
(Attempted: 728; Mean: 1.96)

Most candidates were familiar with ‘malapportionment’ but not with ‘gerrymander’. It is essential in a question asking candidates to differentiate between concepts or issues that they explain what is similar and different between these. A definition of each concept is insufficient to achieve full marks.

- (c) **Provide two explanations to account for critics seeking change to the House of Representatives’ voting system.**
(Attempted: 756; Mean: 2.67)

This was a question dealing with the ‘mechanics’ of the compulsory preferential voting system and/or the outcome achieved by this system as well as possibly compulsory voting itself. It was necessary to discuss what is actually ‘wrong’ and not merely list a criticism. For example, many candidates stated that it gave rise to the ‘donkey vote’. Candidates needed to actually provide some evidence to show the possible impact of ballot placement and the ‘donkey vote’ such as in Eden-Monaro in the last two elections.

Question 7

Overall this was the second most popular Part A question.

- (a) What is the “presumption of innocence”?

(Attempted: 839; Mean: 1.79)

This question was well done and is reflected in the relatively high mean.

- (b) List three ways in which public attitudes to law enforcement can impact up on the effectiveness of the legal system.

(Attempted: 828; Mean: 1.30)

This was not answered well although it is directly related to a particular aspect of the syllabus. Candidates tended to be far too general and repetitive in their response and the question was marked with some flexibility. In terms of the question it should have been restricted to police/city rangers but it was extended to law administrators such as Judges.

- (c) Describe one factor that limits the effectiveness of criminal trial proceedings and evaluate a proposal for reform.

(Attempted: 826; Mean: 2.54)

Most candidates had no difficulty describing a factor that limits the effectiveness of the criminal trial proceedings but again it was apparent that candidates are not being taught to evaluate propositions. It is essential that candidates are encouraged to go beyond mere description and reflect on the virtues or otherwise of particular proposals. In terms of this question the limitation did not have to be connected to the proposal for reform.

SECTION B (ESSAYS - Two: Each 25 marks)

Question 8

During 2001 Australia is celebrating its century as a federation. Evaluate the apparent benefits and defects of this constitutional arrangement.

(Attempted: 365; Mean: 10.55)

What was expected from this question was a discussion of the benefits and defects of ‘federation’ ie the federal structure and processes. This was not what candidates wrote about. There was tendency for candidates to discuss the history of federation leading up to 1901 whilst others talked about the ‘constitutional arrangement’ – that is a general discussion of the constitution including the republic. There were a few essays purely on High Court interpretation that was quite removed from the topic. The question was marked with some flexibility although to achieve high marks there was a need to write in accordance with expectations.

Question 9

“Australian voters’ loyalty to the traditional two party system is declining as support for minor parties and affiliations to sectional interest groups are increasing”.

Assess the accuracy of this claim.

(Attempted: 258; Mean: 10.31)

This essay posed the most difficulties for candidates. It was expected that candidates would use information from both Sections 2 and 3 of the Syllabus. There was little factual knowledge evident in most essays and the ‘best’ information was drawn from the recent 2001 election. As a result the aspect of the question dealing with ‘affiliations to sectional interest groups’ tended to be ignored. It was expected that candidates would be looking at the ‘bases of support’ of the major and minor parties and the extent of their electoral support in both the House of Representatives and Senate as well as looking at how and to what extent sectional interest groups have grown.

Question 10

“Although Prime Ministers of Australia are regarded as being extremely powerful actors in the nation’s political system, there are also limitations on this power”.

Comment.

(Attempted: 593; Mean: 13.03)

This was a very popular question that was attempted by more than half the candidates. It was done well in a general sense but there were two major shortcomings in many responses. Firstly there was far too little reference to particular Prime Ministers of Australia and how they operate. This type of information is fundamental in a study of Prime Minister and Cabinet and it was all too apparent that it is not being covered adequately. Secondly, there were two aspects to the statement that needed to be addressed (i) ‘extremely powerful actors’ and (ii) ‘limitations of this power’. Many candidates addressed only one of these aspects including better candidates who had made in depth reference to particular Prime Ministers.

Question 11

“The growing use of alternative dispute resolution techniques reflects the need for reform in the civil trial process.”

Assess the validity of this statement.

(Attempted: 266; Mean: 10.63)

It was expected that candidates evaluate the growing use of alternative dispute resolution techniques as well as the need for reform in the civil trial process. Overall the essays were weak. Although it could be argued that alternative dispute resolution techniques is more in keeping with the Year 11 course. The biggest problem was that candidates did not seem to be fully conversant with the civil trial process both at the pre trial and trial phase. There was a tendency to talk in vague generalities. It did call for very specific information that, on the whole, was not forthcoming.

Question 12

It is claimed by many, including those who advocate a bill of rights, that the Australian legal system is unable to effectively safeguard human rights.

Discuss the accuracy of this statement.

(Attempted: 561; Mean: 12.52)

This, like question 10, was a very popular question and one in which there were more better answers. As long as candidates took a comprehensive look at the Australian legal system and how and what human rights are protected they would have scored well. A further evaluation bringing into focus the relative effectiveness or otherwise of the system would have further enhanced marks. It is still disappointing to see candidates turn this type of question into an ‘access and equity’ essay. Examination questions vary greatly and learnt responses to particular essays is not the way to prepare for the examination.

POINTS FOR CONSIDERATION BY THE SYLLABUS COMMITTEE

Nil

Eril-Jane Reid
December 2001

2001 Examining Panel

Chief Examiner: Dr Harry Phillips

Deputy: Ms Jan Fleming

Third Member: Dr Gail Lugten

Chief Marker: Ms Eril-Jane Reid

MARKERS' EXAMINATION GUIDELINES

Note: The Markers' Examination Guidelines are not model answers. In some instances additional information has been provided for the benefit of the markers and future publication. Jurisdiction for the marking of papers remains with the Chief Marker.

QUESTION 1

(a) What is a "legislature"?

The institution of government invested with the power of formulating, amending and repealing statutes for the peace, order and government of the political community. In Australia the national legislature consists of the House of Representatives and the Senate. At federation the constitutional founders decided upon a fully elected legislature which was not in accordance with the Westminster, Canadian or United States constitutional models.

(b) State two ways in which, according to the Australian Constitution, the House of Representatives and the Senate differ.

One key constitutional difference is the different representational formula. For the Senate each of the original six States were granted an equal number of Senators (currently 12). On the other hand for the House of Representatives representation is on the basis of population (save a minimum of five seats for each original State). The 'nexus' clause (section 24) provides that the membership of the House of Representatives (150 for the 40th Parliament) shall be 'as nearly as practical twice the number of senators'.

Another key constitutional difference pertains to the powers of each house. The Senate has equal power with the House of Representatives in respect of all proposed laws except that proposed laws appropriating revenue or moneys, or imposing taxation shall not originate in the Senate. Moreover, the Senate may not amend any proposed laws imposing taxation, or proposed charge or burden on the people.

Other differences include: casting vote of Speaker and deliberative vote of President; methods of issuing writs for elections; procedures to fill vacancies; fixed terms for Senators (save double dissolution) whereas House of Representatives may be dissolved earlier; different maximum terms (three for House of Representatives as compared with six for Senate), with the Senate having staggered terms.

(c) Present one major argument for High Court 'judicial activism' and one major argument against.

Those who argue for 'judicial activism' claim that the Constitution and legislation inevitably contain ambiguities, parliament often fails to bring the law up to date or resolve legal questions and appropriate common law precedents often do not exist. Judges have always 'made law' through the common law. It is important for the courts and the law to reflect fundamental democratic principles, values and objectives and changing community understandings. If parliament is concerned about the direction of the judicial interpretations it can legislate to overturn the judicial decisions or move to amend the Constitution.

On the other hand critics suggest the separation of powers doctrine means that parliament makes laws and the High Court merely interprets the Constitution or the laws. Parliament must be fully sovereign to all matters committed to it by the Constitution. Any limitation on that sovereignty is a limitation on the democratic control by the community on the whole of its affairs. It is not the role of the High Court to frustrate the purpose of the Constitution or Acts of Parliament. Some of the implied rights decisions of the High Court in the early 1990s were seen to have reduced the sovereignty of the Parliament and withdrawn from the community its heretofore democratic control of its liberties. As the High Court is not elected and not representative of the community it should not assume an activist role.

QUESTION 2

(a) In Parliament, what is a 'private member's bill'?

Bills sponsored or introduced before either the Senate or House of Representatives by one or more of its Members who are not members of the Ministry; Bills not sponsored by government. In the history of the Commonwealth Parliament few Private Members Bills have been introduced and fewer passed. Two notable

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Private Members' Bills have been the Commonwealth Electoral (Compulsory Voting) Bill of 1924 and the 1997 Euthanasia Laws Act.

(b) What three important roles does the Opposition play in the Federal Parliament?

The Opposition comprises the members of the largest party or combination of parties in Parliament which oppose the government of the day. The Opposition's role has been sustained by the convention derived from the Westminster system of government and by statute, in payment of salaries to Opposition leaders and by the dignity of its formal title 'Her Majesty's Loyal Opposition. Important roles include:

- Using parliamentary standing orders and procedures such as Question Time, to act as a watchdog on the government of the day and constructively criticising government legislation.
- Formulating alternative policies and being regarded as an alternative government with a 'shadow ministry'.
- Developing a relationship with groups outside the formal political process who seek electoral support.
- Channel public opinion in pursuit of better legislation.
- Seeking to bring down the government (i.e., the executive) by winning a vote of no-confidence against it in the parliament, leading to the resignation of the government.

(c) Give one argument for and one against the view that the Federal Parliament broadly reflects the will of the Australian people.

'The will of the Australian people' is a widely used expression, although it is difficult concept to define. Some schools of Australian democracy posit an ideal parliament open to multiple sources of ideas and legislation. This perspective regards the bicameral Federal Parliament as an institution that provides for representative, open and accountable processes of democratic decision making. It achieves the twin principles of majoritarianism in the House of Representatives and the voices of minorities in the Senate. Compulsory enrolment and obligatory voting greatly enhances Parliament reflecting the will of the people. On the other hand it is contended that the Federal Parliament does not reflect the will of the Australian people. In particular the House of Representatives, through the operation of the party system is procedurally dominated by the Cabinet. Almost all Bills considered in the Parliament are developed by the party, or coalition, in government through the Cabinet. The Senate, in some instances, is able to modify or reject government legislation, but generally Parliament fails to adequately scrutinise legislation. Of course it has been regularly claimed the Senate has often engaged in denying the government its mandate. This is sometimes depicted as denying the 'will of the people'. In fact some argue that Parliament's real role, although giving the voter's a voice, is merely to pass government Bills.

QUESTION 3

(a) In statutory interpretation, what is meant by the term "ejusdem generis"?

The words "*ejusdem generis*" translate from the Latin to mean "of the same kind". The term refers to a presumption in statutory interpretation law that general words in a statute should be interpreted in accordance with the more specific words that precede them.

Eg. "Homes, apartments, and other buildings."

The general words "and other buildings" would be interpreted *ejusdem generis* to mean residential buildings. The words "dogs, cats and other animals" would be interpreted *ejusdem generis* to mean other "domestic" animals.

MORE SPECIFIC INFORMATION THAT MAY BE SUPPLIED, BUT IS NOT NECESSARY FOR A 2 MARK QUESTION INCLUDES THE FOLLOWING:

For the presumption to operate there must be two or more specific words before the general words. Thus the phrases "any house or other building" or "theatres and other places of public entertainment" would not attract the operation of the principle.

It is also important that all the specific words must form a class. For example "any house, flat, factory, aviary or other building" would not form a class.

(b) Distinguish between 'original' and 'appellate' jurisdictions.

Within the state or federal court hierarchies, courts may be vested with either original or appellate jurisdiction or both.

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Original jurisdiction refers to a court's ability to hear cases at first instance or for the first time. For eg. From S.75 of the Constitution, the High Court of Australia has original jurisdiction in (*inter alia*) all matters arising from any treaty.

Appellate jurisdiction refers to a court's ability to hear cases on appeal from a court lower in the hierarchy.

Thus, cases are heard for a second or later occasion. For example: From S. 73 of the Constitution, the High Court of Australia has jurisdiction to hear appeals from (*inter alia*) any Federal Court, Supreme Court of any State, or matters heard in first instance original jurisdiction by the High Court itself.

(c) Describe and evaluate two criticisms of the doctrine of precedent.

Precedent refers to a judgment that is authority for a case of similar fact. To ensure certainty in the law, and equality before the law, judges follow the legal rulings in previously decided cases of similar facts. Precedent maybe 'persuasive' or not bound to be followed, but worthy of consideration. Or precedent maybe 'binding' and authoritative and must be followed.

Criticisms of the doctrine of precedent include the following:

- Only a case *ratio decidendi* is precedent. *Obiter Dicta* is not precedent. But sometimes it is difficult to distinguish between what case material is *obiter dicta* and what is *ratio decidendi*.
- Precedent is not always followed. Later cases of similar fact may be distinguished, reversed, disapproved, or overruled. This creates flexibility but also diminishes the certainty provided by the doctrine.
- Strict adherence to the doctrine of precedent does not encourage the creation of new laws that reflect (*inter alia*) social and/or technological change, or changes in public policy.
- Where precedent case law includes dissenting judgements, less weight may be given to the case as an authority.
- As a research based method of arguing law, the process of the lawyer finding and applying precedents, can be time-consuming and subsequently expensive.
- From Willmott and Dowse: "decisions are always retrospective as they deal with past actions in specific cases and thus do not provide clear direction as to the law in a rapidly changing society." This should be contrasted to legislation as a method of law-making, which is essentially forward looking.

QUESTION 4

(a) What is meant by 'direct action' as a pressure group strategy?

Direct action as a pressure group strategy usually refers to some type of personal or collective confrontation to achieve the group's demands. Direct action may be a strike, black ban, march, public meeting, blockade picket, sit-in, letter, fax or email campaigns or sabotaging of plant and equipment. Direct action usually indicates that the group has not been able to achieve its demands through other avenues of pressure group action, such as lobbying.

(b) Indicate three roles played by the mass media in the Australian political and legal systems.

It is a **forum** for debate (providing discussion, commentary, explanation, analysis and interpretation) on issues that may need new legislation or repeal of old legislation.

The media **educates** the public on political and legal issues and also raises public concerns about the way the political and judicial system operates.

The media **reports** on daily and special political and legal events, eg election campaigns, trials, judge's decisions, and cross media ownership rules.

The media acts as a voice for **whistleblowers** exposing areas of incorrect procedure, incompetence, unlawful actions, corruption etc. (various television current affairs programs, newspaper lead stories, editorials and talkback radio programs specialise in these exposes).

The media often plays an **investigative** journalism role exposing wrong-doing.

The media **reflects** vocal community values and concerns and acts as a conduit, of these ideas and values, back to the politicians.

There have to be questions raised about "the impact of the commercial media, especially television and radio, on the quality of political information. Can the info-tainment of commercial television 'current affairs' and talkback radio provide the information the public need for decision-making?" John Willmott & Julian Dowse, *Process & Participation Political and Legal Studies in Australia*, 2000, Perth

(c) The Australian Labor Party (ALP) is often described as a 'trade union party'? Give one main argument to support this description and one main argument against it.

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FOR: The ALP continues to be a trade union party because a large proportion of its support comes from the trade union movement, with two of its main factions still union-based, ie the Left Faction and the Right Faction. Union delegates continue to dominate party conferences and executive positions and many of these people subsequently move on to become politicians, eg Bob Hawke, Martin Ferguson, Bob McMullen and Jenny George. The link, stemming back to the late nineteenth century is clear and strong. The 'trade union tag' has sufficient currency for the Coalition in the 2001 election campaign to warn voters of union dominance of the ALP.

AGAINST: it is true to say, 'traditionally' the ALP was a 'trade union party', however it has moved away from democratic socialism in recent years as it embraced the competitive, globalised, capitalist economy. The ALP, with a more 'white collar' administrative arm, is now keen to be regarded as capable of 'responsible economic management' rather than 'increased social welfare spending' (eg Paul Keating had at one time even promoted the idea of a consumption tax, similar to the GST). In establishing pay and conditions the ALP has moved from a centralised arbitration system to a legislative acceptance of enterprise bargaining. The ALPs policies have shifted dramatically to the 'right' (eg. privatisation of the Commonwealth Bank) in the last two decades. The party has sought support from a broader cross-section of electors including professionals and the so called "big end of town".

QUESTION 5

(a) What is 'cabinet solidarity'?

Cabinet solidarity is the public show of unity by all members of Cabinet. Ministers keep proceedings secret and present a united front to Parliament and the public. Ministers may disagree in Cabinet meetings, but must not reveal their individual views outside the Cabinet room. Traditionally, an inability to uphold Cabinet solidarity would lead to resignation from Cabinet. The expectation is not always fulfilled. Long periods of Coalition government have helped to lessen the strict upholding of Cabinet solidarity.

(b) List three ways in which public service departments assist their ministers in undertaking their portfolio responsibilities.

They serve the minister by administering the legislation relevant to their department.

They inform the minister of issues in his department that are relevant to the minister's portfolio.

The public servants should be the experts in matters pertaining to the minister's portfolio and therefore should advise the minister on policy, appropriate actions, suggested legislative changes or future directions for the department. Traditionally it is expected that such advice be 'neutral'.

They administer the daily operations of the minister's portfolio.

(c) In recent years, the issue of individual ministerial responsibility has been keenly debated. Discuss three important reasons for this.

- Individual ministerial responsibility has been keenly debated because of the number of ministers who have been forced to resign in recent years while conversely there have also been a significant number who haven't resigned. Resignations of ministers resulted from behaviours such as: corrupt usage of electoral funds and travel allowances; politically corrupt expenditure in marginal seats; failure to disclose shareholdings and, finally, conflict of interest. Some ministers affected by these disclosures have been: Ros Kelly (ALP), Alan Griffiths (ALP), Graham Richardson (ALP), John Sharp (LIB), Geoff Prosser (LIB), Jim Short (LIB), and Brian Gibson (LIB).
- The Prime Minister, not the parliament, enforces individual ministerial responsibility. It can therefore be a subjectively imposed convention. Not all ministers have resigned as the result of allegations. Warwick Parer and Michael Woolridge both survived conflict of interest accusations. Prime Ministers have supported their ministers, eg in 1999 Warren Entsch, a Parliamentary Secretary (equivalent to a junior minister) who was politically important to the Liberal Party, was not asked to resign when it was revealed that he broke the Prime Minister's Code of Conduct. Resources Minister, Warwick Parer apparently survived despite breaching the Code (he was accused of non-disclosure of family shareholdings in a resources company) because he enjoys a close personal friendship with John Howard and he was the Liberal Party's most senior executive in Queensland. The increasing politicisation of the Public Service, at senior bureaucrat level, has led to the removal of government heads rather than ministers. The debacle surrounding the Collins Class

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submarines left John Moore (Defence Minister) relatively unscathed, but resulted in the ‘savaging’ of his Defence Department Secretary, Paul Barrett. There is, therefore, a cost to the government and society as expertise is lost through this process.

- The “Travel Rorts Affair” raised the issue of the cost to governments of enforcing IMR. In 1997 the government lost three ministers in two weeks (McGauran, Sharp and Jull). These actions cause disruptions to the ministry and departmental infrastructure. The change of minister would possibly result in reduced services and staff insecurity as change will usually have staffing repercussions.
- The Prime Minister will generally support ministers at times of concentrated Opposition attack, but will then remove them into less sensitive portfolio areas once the issue has subsided, especially (but not exclusively) when the issue relates to departmental, rather than personal misdemeanours. It is the role of the Opposition to prove that a minister should resign, but this has become more and more difficult. Whereas the Westminster convention was designed to assign accountability to ministers for the actions of their departments, the modern interpretation is to make them answerable instead (this is largely the result of the increased complexity of departments and the number of ministerial positions that ministers may occupy during their careers.). Government members act collectively when a minister is under attack, as they view it as an attack on “the team”.
- It has been argued that the size and complexity of modern government make it unrealistic and inappropriate for Ministers to resign over matters for which they could not reasonably be expected to have known about or have control over.
- The privatisation and outsourcing of government responsibilities over the past two decades blur responsibility of Ministers for outcomes in privatised or outsourced activities. Also issues of commercial confidentiality often make ministerial responsibility difficult to sustain.

QUESTION 6

(a) What is meant by a “quota” in a Senate election count?

Election to the Senate requires a candidate to obtain a quota. A Senate quota is calculated by dividing the total number of valid votes by the number of Senate vacancies to be filled, plus one, then adding one more vote. For a normal half Senate election for six Senate seats in each State the quota is about 14.3 percent of the valid vote. For double dissolution election the quota is about 7.7 per cent of the valid vote.

(b) Distinguish between ‘malapportionment’ and ‘gerrymandering’.

Malapportionment is the term used to describe an electoral system which incorporates a bias in favour of some voters and against others. It has a long established tradition in Australia where electoral districts in rural areas have often contained far fewer electors than those in urban areas. On the other hand gerrymandering is the manipulation of electoral boundaries to gain electoral advantage. Especially since the establishment of the independent Australian Electoral Commission, the drawing of electoral boundaries has not been subject to deliberate gerrymandering. However, a version of malapportionment prevails in the Senate with equal representation of the original States regardless of the number of electors. In the House of Representatives each original State (nowadays Tasmania) is guaranteed five members regardless of the population features.

(c) Provide two explanations to account for critics seeking change to the House of Representatives’ voting system.

In recent years criticism of the preference voting system, introduced in 1918 for the House of Representatives, has escalated. The main thrust of the criticisms have stemmed from;

- the increase in candidates nominating for seats in House of Representatives divisions. The past typical pattern of three or four candidates, mainly from the major parties, has been overtaken by several minor parties and Independents standing for a division. Electors complain that it is necessary to allocate all preferences in order to record a valid vote but they either have no knowledge of the range of candidates or do not wish to support most of the candidates. Hence, in many circles there has been a quest for optional preference voting.
- A view that the system ‘virtually’ ensures dominance of the Parliament by the major parties. The Australian Democrats and the Greens seek proportional representation as they are not satisfied with merely exercising an indirect say in which major party will win each divisional seat.
- The fact that second, third, fourth etc. preferences, have the same value as a first preference. This is artificial and should not be the core element of a formula.

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- The system being discredited by the haggling for preferences by party leaders and party officials. This has created levels of intrigue between the parties with the distribution of 'how to vote cards' often not complying with the original negotiated understandings.
- The lack of public understanding of the mechanism means that it produces results which may not be fully intended by the electorate.
- The formula fostering 'nark' politics with parties such as One Nation suggesting that preferences be directed against the incumbent government.
- The formula giving full impact to 'donkey votes' although such votes are difficult to distinguish from informed preferences.

QUESTION 7

(a) What is the 'presumption of innocence'?

A presumption is an inference in law that can be defeated or rebutted by successful argument to the contrary. The presumption of innocence is an inference of the criminal law that every person is presumed innocent of a criminal charge until proven guilty. The presumption can only be rebutted if the prosecution discharges the general burden of proving guilt beyond reasonable doubt.

(b) List three ways in which public attitudes to law enforcement can impact upon the effectiveness of the legal system.

Note this answer distinguishes between law enforcers as Police/City Rangers, and Law Administrators as Court Officials and Judges.

Public perceptions over the efficiency of law enforcement or law and order are a topical electoral issue in many jurisdictions. Such perceptions can hinder the effectiveness of "law enforcement" within the legal system. From Willmott and Dowse,

"Given that the community delegates the prosecution of criminal matters to the police force, it is vital that the community displays a confidence in the police and its procedures."

Public attitudes towards Police, and/or City Rangers as law enforcers can limit the effectiveness of the legal system in that people may not report crimes due to:

- concerns and suspicions about police biases and attitudes;
- concern that Police practices may be excessive or corrupt;
- community perceptions that Police can do nothing as they are under-resourced;
- concerns that local Police Stations are understaffed in critical night hours and the perception that any available Police officers would have to travel for too long and too far to be of assistance;
- perceptions that Police are not capable of successfully prosecuting outstanding crimes;
- concern that complaints will be redirected to City Rangers;
- perceptions that City Rangers have insufficient authority to deal with offences;
- fear of retribution from the subjects of complaint.

(c) Describe one factor that limits the effectiveness of criminal trial proceedings and evaluate a proposal for reform.

The question specifically requires discussion of "criminal" (as distinct from civil trials) and "trial proceedings" (as distinct from Pre-trial or Post-trial limitations).

Accordingly, from Willmott and Dowse, six limitations to an effective criminal trial process may be noted:

- (i) selection of the jury process may be flawed – inappropriate personnel may be selected, too many appropriate people may be excluded from service;
- (ii) the law requires juries for too many criminal cases;
- (iii) the need for unanimous jury verdicts arguably leads to excessive rates of acquittal;
- (iv) rules of evidence, especially hearsay, corroboration, relevance and the right of the accused to remain silent, may obscure the discovery of truth;
- (v) the adversarial system of questioning can deter and intimidate witnesses;
- (vi) that there are inconsistencies in sentencing decisions.

Further criticisms of the jury process are noted by Beresford, Macmaster and Phillips:

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- (vii) Jurors may not always understand the judge's ruling on matters of law. If they make this known, valuable time is used in explanation. If they do not make it known, they are proceeding with faulty information.
- (viii) Modern forensic methods are complicated and require technical expertise which most jurors do not have. The jury may find the evidence so complicated that they make decisions based on incorrect assumptions.
- (ix) Jurors bring their own prejudices and thoughts to the trial – possibly affected by recent events, such as a rise in certain acts of crime.
- (x) Something as mundane as wanting to get home and have the trial over, may influence members of the jury to come to a hurried decision, not giving the evidence enough weight.

In addition to identifying one factor that limits the effectiveness of criminal trial proceedings, students are required to evaluate one proposal for reform of the criminal trial process. The proposal for reform does not necessarily have to follow-on or complement the identified criminal trial limitation. An evaluation of the proposal for reform should include a description of how the proposal would address current limitations within the system, plus the likelihood of the reform being implemented. Examples may be generic eg. Reform of the complexity of trial proceedings, reform of the law of evidence or reform of the jury system, or answers maybe more specific, pointing to particular reforms. Examples include:

- (i) The laws of evidence were originally designed to promote reliability and truthfulness, but today they are so technical that the laws are seen as frustrating for both witnesses and lawyers in relaying the facts of a particular case. This is well demonstrated by the number of specialist courts and tribunals which exclude the laws of evidence. Reform of the laws of evidence include:
 - (a) Exclusionary rules of evidence, such as the hearsay rule, may prevent the presentation of unfair evidence, but they also result in only part of the relevant evidence being placed before the Court. Accordingly evidence reformists may support the abolition of the rules of evidence relating to hearsay and the use of relevance as the sole criterion for admission of evidence;
 - (b) There is an almost exclusive reliance on court oral evidence. Apart from whiteboards for diagrams, all visual aids, (such as computer simulations,) to support evidence, (such as expert testimony,) are rarely used. There are inconsistent rules regarding admissibility of documentary evidence for computer evidence. If the original document only is to be tended, does this apply to computers, discs, or printouts? At the current time, Evidence legislation is being reinterpreted rather than rewritten. There is a need for comprehensive reform of admissibility of documentary and non-oral evidence. This includes written witness statements.
 - (c) Lack of uniformity between the States, and between the States *vis a vis* the Commonwealth, results in a varied collection of rules. There is a Commonwealth Evidence Act which was designed to implement the findings of the 1987 Australian Law Reform Commission Report No.37 entitled "Evidence". The Commonwealth would like to see all States adopt this law.
- (ii) Other suggestions for reforms of the criminal trial process relate to the use of juries, and reform of state Jury Acts:
 - (a) introduction of majority verdicts for juries. Unanimous verdicts may result in hung juries, dismissal and re-trial. This is time-consuming and expensive;
 - (b) greater role for the judge to explain questions of law and matters of testimony to the jury. Jurors may find judicial rulings on law, and matters relating to testimony, so complicated that they make decisions based on incorrect assumptions.

The likelihood of reform of the criminal trial process is hindered by factors such as:

- the inherent conservatism of the legal profession,
- the lack of resources given to the reform process. The public is more concerned with issues such as preventing crime and maintaining law and order, than specific redress given to addressing reform in the criminal trial process,
- issues of states' rights, whereby states wish to maintain their own legal system rather than comply with procedures from other states or the federal government.

QUESTION 8

During 2001 Australia is celebrating its century as a federation. Evaluate the apparent benefits and defects of this constitutional arrangement for Australia.

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A federation (according to G. Stevenson (1979), *Unfulfilled Union: Canadian Federation and National Union*, Toronto: University of Toronto Press, p. 13) is a political system in which most or all of the structural elements of the state (executive, legislature and bureaucracy, army and police, and machinery for levying taxation) are duplicated at two levels, with both sets of structures exercising effective control over the same territory and population. Furthermore, neither set of structures (or level of government) should be able to abolish the other's jurisdiction over the territory and population which both have in common. As a corollary of this, relations between the two levels of government will tend to be characterised by bargaining, since neither level can fully impose its will on the other.

Some of the apparent benefits include: (see Willmott and Dowse, 2000, pp. 67-68)

- State governments are 'close to the people' and more responsive to community needs for delivering services such as health, education and roads.
- National free trade zone.
- Scope for experimentation or innovation in legislation at the state level.
- Compromise and co-operation are fostered (and necessary).
- A framework that incorporates adherence to checks and balances which is conducive to liberal democratic ideals.
- More entry points to the legal system and multiple access points to political power being provided.
- A policy of horizontal balance for the nation being adopted.
- Without the adoption of a federal constitution Australia would possibly never have created a nation state with a common defence and unity. The Australian continent may have remained a collection of colonies or independent States.

Some of the apparent defects include:

- Growth of Commonwealth financial dominance.
- Severe vertical imbalance with the 'GST' impact unknown at this juncture.
- 'Over government' including unnecessary duplication of bureaucracies.
- Divergent codes, regulations and standards.
- Rarely are there formal or constitutionally established co-ordinating institutions for arranging the affairs of the two tiers of government.
- Excessive legalism in constitutional affairs.
- Policy vacuums especially in areas such as transport and the environment.
- Lack of accountability (with much 'buckpassing') in many policy areas.
- Federalism can encourage inefficiencies and conflict within the private sector as well as within government.
- Existing State boundaries are historical relics, not necessarily meaningful to present social and economic circumstances.
- Equal representation of the States in Senate and Ministerial Councils defies majoritarian principles.

On balance, Australian federalism is dynamic and evolving. The federal relationship is contested and negotiations are robust, with the relationship best befitting the description of co-operative federalism.

QUESTION 9

'Australian voters' loyalty to the traditional two party style is declining as support for minor parties and affiliations to sectional interest groups are increasing'. Assess the accuracy of this claim.

"Since the 1970s Australians have been living through an age of uncertainty or, perhaps more positively, an age of redefinition. Primarily what has been lost has been the faith in the identity that has sustained modern Australia since the turn of the century.... For all its faults, that identity had satisfied the needs of Australians for dignity and self worth. When the culture that sustained that identity slowly began decaying and dissolving, and the policies that had provided its most tangible expression were renounced, many Australians found themselves forced to re-examine and reconsider the nature of their identity.... This is why the 1990s have seen such a revival of the identity question in Australia."

Gregory Melleuish (1998), *The Packaging of Australia: Politics and Culture Wars*, University of NSW Press

There are two strong trends in Australian politics in this new century. There is the trend towards the cultural transformation of Australia and the nostalgic view that wants to go back to the 'best of 1950s Australia'. The nostalgic view is also about resistance to change.

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As the policy gap between the ALP and Liberal National Party Coalition has narrowed, the popularity and strength of the minor parties and some independent members has grown. In recent elections people have generally expressed their disillusionment with the major parties by using their Senate vote as a protest vote. As a result the Democrats, the Greens and Independents have had an expanded presence that has given them a balance of power and an ability to force the government into making compromise changes to legislation.

To varying degrees, both major parties have supported policies that look favourably at multiculturalism, economic rationalisation, globalisation, environmentalism, indigenous land rights, etc. and this convergence and the nature of the policies has encouraged the growth of right-wing sectional groups. There has been an amalgamation of some of these interest groups into political parties, as they align themselves behind people like Pauline Hanson and the One Nation party. "Hanson appeals to an element of the Australian people who are looking for simple populist solutions".

It can be suggested that political voting and party support is now more likely to be divided on issue-group divisions (like environmentalism) than on social-group divisions (like class).

Papadakis has argued that there has been a 'shift in the social bases of support for political parties' and that environmentalism, in particular, may be the reason for much of the weakening of traditional divisions.

Papadakis, E. (1993), *Politics and the Environment*, Sydney: Allen and Unwin

Currently there are approximately 36 different political parties registered in Australia (not counting the state and territory branches of these parties). This large number of minor parties is not a new or unique situation. At each Australian election there have always been several smaller parties, many of whom are hastily formed in time for that particular election. Many of these are formed from sectional groups and are therefore 'single interest' parties that provide opportunities for protest voting.

Sectional groups fuel 'larger', more permanent minor parties like the Democrats and the Greens. The Greens, for example, have harnessed the environmentalist, anti-logging, anti-uranium mining vote. As these single issues have eaten into their voter support, the major parties have revised and 'greened' up their policies in these areas, but not sufficiently or quickly enough for many voters. Other voters see their changes as 'knee jerk' reactions to lost votes, rather than a genuine attempt to save trees, stop the uranium mining or prevent nuclear waste dumping, etc. In response, many voters have increased the consideration given to the allocation of their preferences, and at the House of Representatives level that has caused a drop in the number of first preferences directed to the ALP and the Liberal Party. (The first preference votes have dropped from 81.69% in 1993, to 77.44% in 1996, to 73.99% in 1998.) Some of those votes were directed to Hanson's One Nation in 1998 (8.43%). At the same time the rise of Independents should not be ignored. Many have challenged the party system and the adversary practices of Westminster type parliaments.

In 1996 Robert Manne wrote about Paul Keating's attempts to marry economic rationalism and the contemporary social movements of the 'left'. He said they appealed to city-based elites and the intelligentsia. Although these policies did not perturb Labor's working class supporters in traditional areas, they did alienate the new and economically dynamic working class supporters in Queensland and Western Australia. The 1996 election greatly reduced the Labor Party's presence on 'the electoral map', apart from inside the 'triangle' formed by Sydney, Melbourne and Canberra. Since then John Howard has had to balance between 'liberal' reform and economic rationalism reform.

Other factors, apart from issues, that skew the levels of support for parties, from one election to the next, are the popularity of party leaders, the different voting patterns based on gender and age. The feminist movement and the indigenous rights movement need to be considered in this context. Moreover, support will often flow across to parties when a popular leader of a sectional group makes the transition to party politics. People like Bob Brown and Bob Hawke were each able to add many votes to their respective parties as a result of personal popularity.

The 2001 Federal Budget revealed the government's sensitivity to issues and the pressure from sectional groups. The emphasis of the budget was on trying to keep retirees and small business 'happy'. It came in response to the electorate's overwhelmingly negative response to Coalition Governments in three state elections and a Federal by-election. In a Federal election year the Treasurer has tried to win back some of the Coalition's traditional support. While 'some' of that support has gone to the minor parties, much of it went directly to the ALP in protest at the Government's failure to accurately gauge the depth of voter discontent, particularly in regional electorates, over their legislative initiatives, such as the GST or the privatising of Telstra.

So, a failure to read the electorate's mood can be very costly. That sense of loyalty to the party of your parents, grandparents etc is still a very real part of the electorate, but it is now paralleled by the attitude to repay the party

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that is loyal to you. As a direct result the swinging voter and/or the totally uncommitted voter is now a 'wild card' factor in most Australian elections.

As the ALP and the Liberal National Party Coalition have, in turn, moved their policy directions away from their traditional support bases, so has the electorate turned on them. Likewise, if the parties have been unresponsive or too slow to respond to the 'new' issues, that interest and engage the electorate, then they have witnessed voter disenchantment and defection to the opposition, minor parties or sectional groups. The level of informal votes cast for the House of Representatives was 3.8% at the 1998 election, which is the highest that it had been since the 1987 vote. It can be 'suggested' that some of these votes would represent a level of protest voting.

As the 2001 election loomed we witnessed Afghanistan becoming a 'local' issue as did the fate of the asylum seekers on the 'high seas', with both major parties vying for a news headline over the issues. They both attempted desperately to 'read' the electorate's mood on these topical events.

QUESTION 10

'Although Prime Ministers of Australia are regarded as being extremely powerful actors in the nation's political system, there are also limitations on this power.'

Comment. (It is suggested that quality answers will provide good contemporary examples of many of the factors mentioned below).

The office of Prime Minister is not mentioned in the Australian Constitution. However, so powerful is the office that it is not uncommon to speak of 'Prime Ministerial Government'.

The main factors which contribute to the power of the office of Prime Minister, enabling that actor's will to prevail include:

- Control over the administrative structure of government and control over the administration of government.
- The ability to select, or have a major voice in the selection of the Cabinet and Ministry. In addition the powers of political patronage.
- The capacity to set the agenda of Cabinet and determine its consensus.
- The resources available through the Department of Prime Minister and political advisors.
- The role of recommending to the Governor-General the date of elections.
- Leadership of the party of government with party discipline ensuring control of the procedures of the House of Representatives.
- Access to the media with the statements of the Prime Minister being regarded as the most authoritative.
- The spokesperson for the government and nation on international affairs, very important in times of international uncertainty.
- Electoral wins and mandates.
- Personality and charisma.

Some of the limitations on the power, or ability of the Prime Minister to impose his/her will include:

- A perceived failure to effectively utilise the resources of the office.
- Poor leadership performance, can make the incumbent liable to party challenge for the leadership. Leadership is applicable in the public, party or parliamentary setting. Upholding of ministerial standards is also expected.
- The electorate's mood, particularly as expressed through opinion polls towards the leader and party, pose a restraint on the Prime Minister.
- The constitutional power of the Senate can limit the power of the Prime Minister if his/her party is denied a Senate majority.
- The Constitution gives the Governor General the power to remove the Prime Minister as occurred in 1975.
- Australia's federal structure provides the States, and their Premiers, with powers and influence to check a Prime Minister's agenda.
- The High Court can find governmental legislation *ultra vires* and pose limits on a Prime Minister's policy options.
- In the Coalition the agreement between the parties may impose restraints upon the Prime Minister. For the Labor Party its organisational links with union movement can also limit the scope of the Prime Minister's power.
- In today's globalised economy the influence of international markets can restrict a Prime Minister's policy options.
- Ultimately, in Westminster type parliaments, a Prime Minister (and his/her government, may lose a vote of no confidence in the House of Representatives.

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QUESTION 11

"The growing use of alternative dispute resolution techniques reflects the need for reform in the civil trial process." Assess the validity of this claim.

This essay question is in two parts. It looks at both the growth of alternative dispute resolution, and the need for reform of the civil trial process. Perceived imperfections of the civil trial process operate at the pre-trial, trial and post trial levels.

From Willmott and Dowse, such perceived imperfections that are worthy of reform in civil litigation include:

Pre-trial

- Potential plaintiffs are forced to consider the time and expense of an action before proceeding.
- Excessive pre-trial questioning and procedures lengthens the time and expense of an action.
- Lack of strictly enforced time limits for pre-trial procedures aggravates delay.
- Adversarial system favours the party to an action with greater legal resources and knowledge.
- Lack of alternative forums of dispute resolution especially for more minor matters.

Trial

- Because of the adversarial system trials take place months, sometimes years after events in dispute affecting reliability of evidence.
- Trials adversely affected by restrictive rules of evidence.
- Trials can be used by either plaintiff or defendant as a battle of attrition to exhaust resources of one party, rather than as a search for truth.
- Inconsistencies between judge and jury decisions on damages.
- Excessive legal costs encourage the worst processes of the adversarial system.

Post Trial

- Difficulties in recovery of damages that can often require further legal action to be commenced.
- Large costs are incurred by successful party that can not be recovered.

Most of these criticisms could be addressed by an increased use, or compulsory use, of alternative dispute resolution.

The Alternative Dispute Resolution Association of Australia has defined ADR as meaning "dispute resolution by processes:

- (a) which encourage disputants to reach their own solution and
- (b) in which the primary role of the third party neutral is to facilitate the disputants to do so."

Thus, ADR refers to the decision making process whereby matters are resolved outside the usual court based litigation model. The aim of ADR is to encourage parties in conflict to arrive at compromise solutions with the assistance of a neutral person. Various models of ADR include mediation and arbitration.

Mediation involves helping people to decide for themselves, whilst arbitration is much more akin to litigation in that it helps people by deciding disputes between them.

Mediators aim to gain solutions by agreement, they do not identify a right or wrong litigant. They also do not apportion blame. Instead, the mediator aims to sow the seeds of doubt about the impregnability of each side's case, and to leave each disputant with the impression that he or she is not entirely in the right. The mediator aims to bring about a commitment in the parties to abide by an agreement which emanates from their own negotiations.

Arbitration refers to the private process (as distinct from the public court process) whereby an arbitrator, who is acceptable to both of the disputants, acts in a judicial fashion to resolve the dispute. Arbitrators may abide by the rules of equity and good conscience, but they quite often exclude legal technicalities and the law of evidence from the proceedings. The laws and norms that will be used, are those that have been agreed to by the disputant parties.

There are many advantages of the ADR process over the civil litigation process. These include:

- Financial advantages for the Western Australian public. Mediation and/or arbitration fees are paid by the parties, not by the tax payers. Furthermore, the venue for mediation or arbitration proceedings is either supplied by the parties or rented by them. This reduces the court infrastructure costs.

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- As the ADR process is less formal and quicker than court litigation, it is accordingly less expensive for the disputants. Furthermore, parties can decide in advance whether or not to use lawyers. Non-use of legal practitioners may significantly reduce the time and costs of resolution.
- As ADR does not occur within the adversarial arena, disputants will often acknowledge that compromise is a necessary part of the proceedings. Such an attitude allows for less hostility, and the possibility of carrying on after the dispute with essential social relationships – such as business transactions, neighbourhood relations, and parenting responsibilities in the case of divorced couples.
- There is an avoidance of the publicity that can attach to court proceedings and their publicly reported decisions.
- Technical experts can be employed to assist the mediator or arbitrator in explaining complex matters of fact.
- The disputants are empowered to retain some control over both the procedures used and the outcome reached by the ADR process. For example, the complex laws of evidence may be fully or partially used, or not used. This contrasts significantly with the rule from above in the litigation process.
- There are no lengthy delays in bringing the dispute before an arbitrator or mediator, whereas litigation disputes may take years to come before the courts.

In recent years there has been an increase in the use of ADR to resolve matters relating to small claims tribunals, neighbourhood mediation centres, family law mediation, and issues involving human rights or discrimination law. However, there has simultaneously been a general decrease in commercial arbitration in Australia. Empirical research suggests that this is due to reservations of some commercial entities to submit to a process in which they have doubts. Ideally, governments, law societies, and the legal profession would work together to promote the use and spread of ADR, but bearing in mind the vested interests of the legal profession in maintaining the status quo of civil litigation, the promotion of ADR is unlikely to become reality.

QUESTION 12

It is claimed by many, including those who advocate a bill of rights, that the Australian legal system is unable to effectively safeguard human rights. Discuss the accuracy of this statement.

This question is in two parts and requires discussion plus evaluation on whether the Australian legal system fails to effectively safeguard human rights, plus consideration of whether a Bill of Rights would adequately perform the function. This should not be interpreted as a general question on access and equity of disadvantaged groups, to the Australian legal system.

First, against the arguments for an Australian Bill of Rights, is the current good reputation that Australia has in world terms as an effective protector of the human rights of its citizens. Of course the recent emergence of issues such as mandatory sentencing and the mandatory detention of asylum seekers have questioned the standing of this reputation.

In contrast, countries such as the United States (which has a Bill of Rights as a series of amendments to the Constitution,) experience constant legal challenges to the meaning and status of the Rights. Such challenges effectively weaken the scope and meaning of the provisions.

It is also suggested that a formal Australian Bill of Rights is not necessary as there are both express and implied safeguards for the protection of human rights already existing in the legal system. These are described below:

Some express rights are protected by the Commonwealth Constitution:

- just terms for acquisition of property (S. 51 xxxi)
- freedom of religion (S.116)
- protection against discrimination on the grounds of which state you live in (S.117)
- freedom of trade (S.92)
- the right to vote, if granted at State level (S.41)
- trial by jury (Federal Law) (S.80)

Other rights have been interpreted by the Australian High Court as being implied, contained in the Commonwealth Constitution. This trend was particularly prevalent in the 1980s and 1990s under the leadership of former HC Chief Justice Anthony Mason. For example the Common Law right of free speech (political communication) was

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recognised in *Australian Capital Television P/L v Commonwealth* (1992) 177 CLR 106. The decision in *Dietrich v The Queen* (1992) 177 CLR 292 saw the High Court extend the Constitutional right to a fair trial to include the right to legal representation in a criminal trial.

A significant difficulty with reliance on implied rights is that as the High Court is not self-bound, it can change its mind on such pronouncements. Thus, the achievement of Dietrich's case in 1992, was undermined in the 1997 decision of *Frugtniet v Victoria* (1997) 71 ALJR 1598 where due process rights, (such as the right to representation) were held to be incapable of status as implied constitutional rights.

Other means for the protection of human rights in the contemporary Australian legal system include statutory law developments by Commonwealth and State legislatures. Such legislation includes:

- Racial Discrimination Act (1975);
- Sex Discrimination Act (1984);
- Human Rights and Equal Opportunity Act (1986); and
- Disability Discrimination Act (1992).

Finally the principles of common law, (particularly through the Law of Evidence and the Criminal Law), offer some fundamental protections to the individual facing trial proceedings:

- The presumption of innocence until proven guilty beyond reasonable doubt;
- Rejection of illegally obtained evidence;
- The inadmissibility of confessions obtained through duress and coercion;
- The right of the accused to remain silent;
- The exclusion of hearsay evidence.

Ironically, many of these evidentiary principles are highly criticised and have become the subject of possible law reform.

Advocates of an Australian Bill of Rights question whether the above listed existing rights sufficiently comply with basic international standards of inalienable human rights.

In international law, the phrase "human rights" is used commonly to refer to those intrinsic or inalienable rights which are "basic and essential to the existence of the human being". As "intrinsic", they are rights which should not be denied to any person, and as such, they should be explicitly contained in an Australian Charter or Bill of Rights.

They include:

- the right to life, liberty and security of person,
- the right to a family,
- the right to free speech,
- the right to not be subjected to arbitrary arrest, detention, or exile,
- the right to a fair trial
- the right to a nationality, etc.
- the right to a reasonable quality of life (a "second generation right" or positive freedom)

As human rights are rights for all humanity, it is appropriate and logical that they are recognised in international law. As early as 1948, the United Nations adopted the Universal Declaration of Human Rights. In 1966, this was followed with the adoption of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Today these two covenants, together with the Universal Declaration, make up what is frequently referred to as the International Bill of Rights. Australia is a party to these international conventions, but has no Charter or Bill which explicitly enunciates or incorporates such rights into domestic legislation.

Furthermore, it should be noted that the trend of cases in the early 1980s, such as *Commonwealth v Tasmania* (Franklin Dams Case) (1983) 158 CLR 1, and *Koowarta v Bjelke Petersen* (1982) 153 CLR 168 opened up the possibility of far-reaching federal government legislative powers in order to comply with Australia's public international law responsibilities for human rights. In this period, the creation of an Australian Bill of Rights that would comply with the above mentioned International law instruments, would have been possible – even without a S.128 Referendum. However, the more conservative federal governments and High Court benches that have been in place since the mid 1990s, have made such unilateral Australian Bill of Rights action, remote. Note for example *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 128 ALR 353. Following this High Court judgement, the then Minister for Foreign Affairs Gareth Evans, and Federal Attorney General Michael Lavarch, released a joint statement to the effect that Australia's acceptance of an international treaty is no reason for raising expectations that the government will act in accordance with that treaty if the provisions of that treaty have not been explicitly enacted into Australian domestic legislation. (Canberra, 10 May, 1995 – Joint Statement No. M44).

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From Willmott and Dowse, arguments for an Australian Bill of Rights include:

- that the current blend of Constitutional, statutory, treaty and common law is an inadequate and piecemeal approach to the protection of human rights;
- the absence of a Bill of Rights limits the awareness of human rights within the community, and the ability of the legal system to protect them;
- the responsibility for protecting human rights is left to a legal system that is itself riddled with structural problems – such as lack of legal aid funding, perceptions of gender and socio-economic bias.

Students should come to some conclusion as to whether the current Australian legal system does/or does not, effectively safeguard human rights.