# 2016 VCE Legal Studies examination report

## General comments

The 2016 Legal Studies examination was a challenge for some students. Students should respond to the question, use the stimulus material in their answers and should not use prepared answers to respond to questions.

There were two questions that were particularly challenging for students: Question 10 (implied rights) and Question 12 (precedent and adversary system). Students were better able to address questions on damages (Question 1a.), representative and responsible government (Question 2), sanctions (Question 7c.) and reasons for changes in the law (Question 9a.).

Students should ensure that they understand what the task word in the question is asking them to do. In Question 6, many students explained the roles of the criminal jury and civil jury without an attempt to draw out similarities and differences between the two.

Responses that are crossed out are not read or marked, and only the first example, method or reason in a question is marked if only one is requested. Structuring of extended responses is critical – students should use paragraphs and properly signpost their extended answers. Students should indicate when an answer is continued at the back of the book.

Finally, students are encouraged not to leave questions blank. Marks are not deducted for incorrect answers, and attempting a question may result in a student being awarded some marks.

## Specific information

**Note: Student responses reproduced in this report have not been corrected for grammar, spelling or factual information.**

This report provides sample answers or an indication of what the answers may have included. Unless otherwise stated, these are not intended to be exemplary or complete responses.

The statistics in this report may be subject to rounding resulting in a total more or less than 100 per cent.

**Question 1a.**

| Marks | 0 | 1 | 2 | Average |
|---|---|---|---|---|
| % | 6 | 40 | 53 | **1.5** |

This question was generally handled well. By far the most popular purpose given was that damages aims to place the plaintiff as far as possible back to the position they were in before the act or omission occurred.

Other possible purposes included:

- to make a point through awarding nominal damages that the plaintiff is legally in the right, but does not need a form of compensation
- to make a point, through contemptuous damages, that the plaintiff, while in the right, does not deserve to be paid any form of compensation
- by ordering the payment of exemplary damages, to punish the defendant for their behaviour because the conduct was violent, cruel, insolent or disregarded the plaintiff's rights.

Full marks were awarded for a comprehensive description of the purpose of damages (not a description of damages). An identification or brief description of a purpose may have received one mark. An example was a good way to provide a more comprehensive description, provided the example supplemented the purpose given. Where students provided more than one purpose, only the first one was assessed.

**Question 1b.**

| Marks | 0 | 1 | 2 | 3 | Average |
|---|---|---|---|---|---|
| % | 5 | 14 | 40 | 41 | 2.2 |

This question was marked globally, meaning that the response was assessed as a whole according to performance descriptors. A comprehensive explanation received full marks.

Students generally handled this question well, with the discriminating factor being the depth of the explanation. To gain full marks, responses needed to refer back to the court hierarchy to demonstrate how that hierarchy enabled the existence of appeals, specialisation, precedent or administrative convenience.

The following is an example of a possible response.

One reason for a court hierarchy in Victoria is appeals. If a party is not happy with a decision made by a court and wants to challenge it, the party may be able to appeal the decision to a higher court. The appeal process enables a higher court to consider the original decision and either leave it as is or change it. If there were no court hierarchy, appealing a decision to a higher court would not be available to the parties.

**Question 1c.**

| Marks | 0 | 1 | 2 | Average |
|---|---|---|---|---|
| % | 26 | 29 | 46 | 1.2 |

This question assessed students' knowledge of the original civil jurisdiction of the County and Supreme Courts, namely, that both courts have unlimited civil jurisdiction. This means that both courts have no upper or lower limit of the damages claims that they can hear (though there can be cost consequences if a party issues a claim in one of those courts where the claim could have been heard by the Magistrates' Court). Full marks were awarded if students identified both courts, and justified why they could hear this claim.

Many students did not take note of the words 'original jurisdiction' and claimed that other courts had appellate jurisdiction to hear this dispute; others stated that the statement was incorrect and that only the Magistrates' Court had jurisdiction to hear the claim. Neither of these responses was awarded marks.

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

> *This statement is correct because both the County Court and the Supreme Court (Trial Division) have unlimited jurisdiction on civil claims. This means that a claim of $90,000 in Nathan's civil*

*case falls in their original jurisdiction. Thus, Victorian courts other than the Magistrates' Court can hear this dispute.*

**Question 2**

| Marks | 0 | 1 | 2 | 3 | Average |
|---|---|---|---|---|---|
| % | 6 | 20 | 38 | 37 | 2.1 |

This question was marked globally. A full explanation was awarded three marks; a brief explanation was awarded two marks.

It was evident that many students had some level of understanding of these principles. Higher-scoring students were able to refer to the Commonwealth Constitution as embedding the principle of representative government, which requires that the houses of the Commonwealth Parliament be directly chosen by the people. Lower-scoring responses either did not provide a sufficient explanation or used the same words ('represent' and 'responsible') to explain the principles. This was not enough to gain full marks.

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

*Representative government ensures that the government acts in a way which is consistent with the views and beliefs of the majority of the people. If they fail to do so, they may be voted out at the next election.*

*Responsible government is the principle that the democratically elected government is accountable and answerable to the people for their actions. If they do not act with integrity, they may be forced to resign.*

**Question 3**

| Marks | 0 | 1 | 2 | 3 | Average |
|---|---|---|---|---|---|
| % | 14 | 16 | 18 | 51 | 2.1 |

To gain full marks, students had to say that this referendum would not have passed and give the reason why (in this case, because the second part of the double majority requirement – the need for the majority of voters in the majority of states to vote in favour – was not achieved).

Many students incorrectly stated the number of states in their answer. Because the number of states was directly relevant in determining the answer to the question, students could not be awarded full marks if they gave the incorrect number. Proper identification of the number of states (six) meant that students should have recognised that the double majority requirement was not satisfied because the majority of voters in only three states (Queensland, South Australia and Western Australia) voted in favour.

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

*No this referendum was not passed. The referendum process outlined in s128 of the Constitution stipulates that a referendum proposal must achieve the double majority provision. That is, a majority of all voters in Australia and a majority of voters in a majority of states (4 out of 6 states). In this referendum, the majority of Australian voters was achieved (56%) but it did not satisfy the majority of voters in a majority of states as 3 states voted against it. Thus, it was not passed as it did not satisfy the double majority provision.*

**Question 4**

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|---|---|---|---|---|---|---|
| % | 12 | 14 | 25 | 28 | 22 | 2.4 |

This question was marked globally. A full explanation, including both the similarities and differences between Australia's approach to protecting rights and the approach of another country, was awarded full marks. Given that the approaches are vastly different, a focus on only the similarities could not be awarded full marks.

Generally, most students were able to achieve some marks. Lower-scoring responses were vague or lacked depth (for example, mentioning that one country had more rights than the other, or that one had a Bill of Rights and the other did not), whereas higher-scoring responses provided more detail (such as mentioning the number of rights or the method of amending the rights).

Previous examination reports (including Question 7 in the 2013 examination report) provide significant detail on the similarities and differences between the approaches; students are encouraged to refer to those examination reports.

The following is an example of a possible response.

New Zealand's approach to the protection of rights is in part the same as that of Australia, and so some similarities can be drawn out. However, there is one key difference: New Zealand takes a statutory approach to protecting rights rather than a constitutional/entrenched approach. That is, its rights are protected in the Bill of Rights Act (BORA) that can be changed by an Act of parliament. Australia's rights in the Constitution, however, can only be changed by way of a referendum, a much harder process than changing a statute through parliament.

There are some similarities between the two approaches. Both Australia and New Zealand protect the separation of powers, and there is some similarity in rights protected such as the right to freedom of religion. However, the BORA protects more rights than Australia's Constitution does. Further, the BORA provides that rights can be limited in some circumstances; however, no such limitation applies in Australia.

**Question 5**

| Marks | 0 | 1 | 2 | 3 | 4 | Average |
|---|---|---|---|---|---|---|
| % | 15 | 15 | 28 | 27 | 15 | 2.1 |

This question was marked globally. At least two differences needed to be explained to gain full marks, and the response needed to show how the purposes (and not the procedures themselves) were different. Responses that explained or described the purposes without any attempt to draw out their differences may have been awarded some marks, depending on the strength of the answer, but could not be awarded full marks.

Many students struggled with structuring their responses, and with knowing what differences and purposes to focus on. Some focused on purposes that did not lend themselves to an explanation of their differences. Higher-scoring responses were able to identify those purposes that were different, and how the pre-trial procedures achieved those purposes.

Some of the differences that could have been drawn out were:

- one of the purposes of committal hearings is to establish that there is evidence of a sufficient weight to support a conviction at trial, whereas in civil proceedings, there is no such requirement on a plaintiff to establish this
- civil pre-trial procedures include stages such as discovery and pleadings, which require both parties, regardless of who has initiated the claim, to disclose claims, defences and relevant

documents; on the other hand, an accused in a criminal matter has no such obligation to disclose documents
- some criminal pre-trial procedures aim to ensure that the accused is innocent until proven guilty; on the other hand, there is no innocence that needs to be upheld in a civil proceeding.

The following is an example of a mid-range response. Some additional focus on the purposes of civil pre-trial procedures and whether they also require evidence to be of a particular weight was required in the second paragraph for it to be a high-scoring response.

*Most civil pre-trial procedures are intended to promote an out-of-court settlement. That is, they intend to settle the case before it goes to trial. This is especially true of the discovery process, when both parties disclose their evidence to their other side in what is called an 'affidavit of documents'. In doing so, parties may see the strength of the other case and decide to settle. On the other hand, criminal pre-trial procedures are more concerned with recognising the rights of the accused. For example, bail is when an accused is conditionally released back into society while awaiting trial. This upholds the presumption of innocence and protects their rights of being innocent until proven guilty.*

*Furthermore, committal proceedings, where only the prosecution discloses their evidence is also protecting the accused's rights by ensuring that the onus is on the prosecution to prove that their evidence is of sufficient weight to support a conviction at trial.*

**Question 6**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|---|---|---|---|---|---|---|---|
| % | 8 | 15 | 24 | 25 | 19 | 9 | **2.6** |

This question was marked globally. A full comparison, including both similarities and differences of the roles of the two juries (and not other aspects of the jury such as composition), was awarded full marks. Very good comparisons received three to four marks; a brief comparison received two marks.

Students struggled with two aspects of this question: first, the task word (many explained both roles, but did not compare them), and second, what they were comparing. With the latter, a significant number of students compared the size of the jury, or the number of challenges given to parties. Neither of these has anything to do with the role of the jury (unless in some way they were linked to the role – for example, by explaining that because there are fewer jurors in a civil proceeding, there are fewer who need to come to a verdict).

The following similarities could have been identified.

- The jury is the decider of facts, and will make a decision based on evidence presented in court.
- Jurors must make their decision based only on the evidence presented, and nothing else, meaning that they are unable to conduct their own research. This is the same in both a criminal and a civil trial.
- Unanimous verdicts are required, but in both civil and criminal trials a majority verdict may be accepted in certain circumstances.
- Jurors must be unbiased, listen to the evidence and listen to the directions given by the judge.

The following differences could have been identified.

- Jurors in a criminal case have no involvement in sentencing if the accused is found guilty. Jurors in a civil trial, however, may be required to undertake an assessment of damages.

- The standard of proof is different – in criminal, beyond reasonable doubt, and in civil, on the balance of probabilities.
- What they are deciding is different – guilt (criminal) or liability (civil).

The following is an example of a possible response.

Both criminal and civil juries have ultimately the same role. They are the decider of facts, and will need to come to a decision based on the evidence that is presented at trial. This will ultimately involve applying the law that is explained to them by the judge to the evidence to deliberate and come to a verdict.

There are, however, a number of differences. The decision that the juries come to is different: in criminal cases, jurors decide whether the accused is guilty, whereas in civil cases, they decide on liability. In criminal cases, the jury will never be asked to decide on a sanction, whereas in civil cases, the jury may be required to determine the amount of damages. Finally, the standard of proof differs in that criminal juries must decide beyond reasonable doubt, whereas civil juries must decide on the balance of probabilities.

**Question 7a.**

| Marks | 0 | 1 | 2 | Average |
|---|---|---|---|---|
| % | 15 | 31 | 54 | **1.4** |

One mark was awarded for the purpose (only the first purpose was marked), and one mark was awarded for referring to Sam's case. The reference to Sam's case needed to be relevant to the purpose.

While many students provided a purpose of bail, some did not refer to Sam's case in the answer. Others gave a definition of bail rather than outlining its purpose.

The main purpose that students used was that the granting of bail is consistent with upholding the presumption of innocence, and given Sam has not yet been convicted, allowing Sam freedom until the next hearing would uphold that presumption. Other acceptable purposes included ensuring the accused person's attendance in court (by imposing certain conditions on them), and allowing the accused's living and working arrangements to continue while preparing for trial.

**Question 7b.**

| Marks | 0 | 1 | 2 | 3 | Average |
|---|---|---|---|---|---|
| % | 16 | 18 | 34 | 31 | **1.8** |

This question was marked globally. A comprehensive description that explained the law-making process (namely, statutory interpretation) was awarded three marks. A good but brief description may have been awarded two marks, depending on the response.

Many students did not mention statutory interpretation in their answer; a key point that was required to get full marks. Others defined statutory interpretation, but made no mention of the process.

The following points could have been made.

- Statutory interpretation is the process by which a judge interprets the words or phrases in a statute to give the words or phrases meaning. In this instance, the words 'offensive weapon' require interpretation to determine whether it includes high-heeled shoes.
- The judge will use various methods to interpret the statute – using intrinsic and extrinsic materials such as the explanatory memorandum, the words of the statute, the long title of the statute, headings, schedules, dictionaries and other statutes.

- Although there is no precedent, a judge may consider other similar cases – for example, there may be a case that involves a different form of footwear where the judge's reasoning may assist in this case.

**Question 7c.**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|---|---|---|---|---|---|---|---|
| % | 7 | 4 | 16 | 31 | 26 | 16 | 3.1 |

This question was marked globally; however, one mark was awarded for the provision of the sanction and four marks were awarded for the discussion. For the discussion, students needed to focus on the ability of the sanction to achieve its purposes. At least two purposes needed to be considered.

This question was generally handled well, with most students able to achieve some marks for their response. Many students provided an explanation of the sanction, which was not required in this instance.

The discriminating factor was the depth of the discussion. Many students provided a description of the purposes and how the sanction achieves those purposes. A high-scoring response required more than this. For example, while imprisonment may protect the community, does it really do so if there is a chance the person will reoffend upon release? While a community correction order may provide opportunities for Sam to rehabilitate through programs, will this depend on Sam's commitment to those programs?

While imprisonment was by far the most popular sanction, other sanctions accepted included community correction orders, fines and court secure treatment orders. Suspended sentences, drug treatment orders, youth orders and home detention were not accepted as sanctions. Suspended sentences and home detentions are no longer available as sanctions, drug treatment orders can only be given in the Drug Court, and youth orders can only be given to young persons.

Students are encouraged to use stimulus material in their answers. There were two points made about Sam that were rich content to use in the response: first, that Sam had prior convictions, and second, that Sam had drug and alcohol addictions. Very few students used this material in their responses.

The following is an example of a mid-range response. Some more depth was required for the latter purposes discussed.

*One sanction that may be imposed is imprisonment. This is when an offender is held in custody; that is, prison, losing freedom and liberty.*

*Imprisonment is very effective at providing protection for the community. This is because the offender is kept out of society, and unable to inflict harm upon them.*

*It is also partially effective at achieving rehabilitation for the offender. Rehabilitative programs are offered to prisoners, which may change their attitudes and beliefs. However, often this is not very effective as they mix with other criminals and there is a high rate of recidivism for prisoners.*

*Imprisonment achieves its purpose of punishment to a large extent by removing an offender's liberty and freedom, although some suggest that the imprisonment process is more focused on punishment than rehabilitation. It achieves general deterrence effectively as the public do not wish to lose their freedom in this way and may achieve specific deterrence however is quite limited because they are mixing with other criminals and thus may continue committing crimes.*

*It can also achieve denouncement effectively if they imposed a long sentence by way of disapproval.*

**Question 8**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|---|---|---|---|---|---|---|---|
| % | 12 | 12 | 15 | 21 | 23 | 16 | **2.8** |

There were two parts to this question, which was marked globally.

The first part of the question required an understanding of concurrent law-making powers, and the fact that sometimes the use of those powers may mean that both the Victorian and the Commonwealth Parliaments make a law in the same area that is inconsistent with the other law. Many students provided examples of this, but students needed to ensure they use correct examples. For example, many used the High Court case of the inconsistency between marriage laws passed by the Australian Capital Territory and the Commonwealth as demonstrative of the operation of section 109. This was not a section 109 case, as it involved a law of a territory, and section 109 deals only with inconsistencies between state law and Commonwealth law.

The discriminating factor in the second part of the question was the level of detail, and the ability to understand how section 109 impacted on law, and not on law-making powers. This required a good understanding of the words of that section, and in particular an understanding that only those parts of the Victorian law that are inconsistent will be invalid, meaning that they will be of no force and effect as law in Victoria.

The following is an example of a possible response.

It is possible for a Victorian law to be in conflict with an existing Commonwealth law because of concurrent powers, which are law-making powers shared by both parliaments. That is, if both the Victorian Parliament and the Commonwealth Parliament have passed a law in an area of concurrent power (such as marriage), it is possible for those two laws to be in conflict with each other.

If the law is challenged in the High Court, the High Court has the power to determine whether the Victorian law is inconsistent with the Commonwealth law. If the Victorian law is deemed to be in conflict with the Commonwealth law, then section 109 provides that the law of the Commonwealth shall prevail and the state law, to the extent of the inconsistency, be deemed invalid. That means that the parts of the Victorian law, whether it is all of it, or part of it, which are inconsistent with the Commonwealth law, will have no validity, and will not be law in Victoria.

**Question 9a.**

| Marks | 0 | 1 | 2 | Average |
|---|---|---|---|---|
| % | 2 | 20 | 77 | **1.8** |

Two marks were awarded for a full description of a reason why a law may need to be changed. Identification of a reason only was awarded one mark. An example was a good way to provide a more comprehensive description. Only the first reason given was assessed.

This question was generally handled very well. Many students used changing values (referencing the push to change marriage laws to include same-sex marriages) and changes in technology as their reasons. Reasons such as protection of the community and clarifying laws were also used and were acceptable.

**Question 9b.**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | Average |
|---|---|---|---|---|---|---|---|
| % | 15 | 25 | 20 | 18 | 15 | 8 | 2.2 |

This question was marked globally using performance descriptors. A full and comprehensive discussion that considered strengths and weaknesses, or advantages and disadvantages, was awarded full marks.

Many students struggled with this question. A significant number of students simply went through the legislative process of a Bill. Many explained the structure of parliament without any attempt to discuss its role. Others focused on matters that showed they were talking about the Victorian Parliament.

Higher-scoring responses provided an in-depth understanding of how the Commonwealth Parliament performs as a law-maker, and more particularly its strengths and weaknesses, or perhaps the restraints on parliament that prevented it from being an effective law-maker (such as members being required to vote on party lines). High-scoring responses were able to make reference to contemporary matters that benefited or restrained the Commonwealth Parliament in law-making, such as the number of minority parties and independents in the Senate, the slim majority in the House of Representatives, and the requirement to vote on party lines on issues such as same-sex marriage.

The following is an example of a possible response.

The Commonwealth Parliament is the supreme law-making body. It is able to make laws as and when required, and has the power to abrogate common law and codify common law. Therefore, it can be very effective in passing laws when needed, and there have been instances where the Commonwealth Parliament has been able to pass laws quickly and as required (as can be seen by the swiftness of terrorism laws passed in previous years).

However, Commonwealth Parliament can be slow in passing the necessary laws. Not only is the passage of a Bill reliant on Parliament sitting at the appropriate times, but a Bill requires the support of both houses. In the current climate, particularly given the number of independents and minority parties in the Senate, this can result in delays in the passing of Bills.

However, the make-up of the Senate these days means that robust discussion and diverse opinions on laws are available, rather than the opposite situation of a ‘rubber-stamping Senate’, being a Senate controlled by the party in government. This ensures that Bills have input from a number of different parties and members and senators, rather than being simply being passed through without little or no debate or amendments.

Finally, the benefit of the Commonwealth Parliament is that it has access to resources, law reform bodies and parliamentary committees to ensure that it is equipped with up to date, current and valid information about the need for changes to laws, and the views of the majority of its people. Notwithstanding that, however, sometimes parliament is reluctant to change laws that are controversial, and therefore it can be the case that parliament’s law-making role is not reflective of society’s views on what laws should be made or changed.

**Question 10**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | Average |
|---|---|---|---|---|---|---|---|---|
| % | 23 | 18 | 18 | 16 | 12 | 9 | 5 | 2.2 |

This question was marked globally. A comprehensive evaluation that included strengths, weaknesses and an overall conclusion as to the extent to which implied rights protect the rights of Australians was awarded full marks. Such a comprehensive evaluation necessarily required a consideration of the factors that impact on the High Court in implying rights.

Many students struggled to do more than explain what implied rights are and provide a summary of the implied right to freedom of political communication. A significant number of students evaluated the protection of rights generally in Australia, which saw them discuss express rights and structural protection. This response was awarded very few marks.

Points that could have been made included:

- the High Court is free from political and democratic pressures in its interpretation of the Commonwealth Constitution
- the implied right of freedom of political communication is one that in part provides for freedom of speech – a right not otherwise expressly protected
- the ability to imply rights is not constrained by section 128
- the parliament cannot abrogate rights implied in the Constitution
- the High Court has limited ability to imply rights, because of factors such as standing and costs
- the ability to imply rights is constrained by the text and structures of the Constitution
- there is only one implied right and little suggestion that there are significantly more rights that could be implied.

Many students referenced *Lange v Australian Broadcasting Corporation* in their response. While the focus of the question was broadly on the means of implied rights protecting rights, and not the specific right to freedom of political communication, it was acceptable for students to note that that right is limited in scope.

The following is the beginning of a high-scoring response.

> *Implied rights are rights that are not specifically listed in the Constitution but inferred or suggested through its structure and text. An advantage of this is that the High Court can find rights that are implied in the constitution and thus provide more protections to the rights of Australians, even if they are not listed in the Constitution. However, in order for implied rights to be found, a case must come before the High Court and only then can they determine if an implied right exists. This relies on someone to have standing and bear the burden of high costs, which is very high in the High Court.*

**Question 11**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | Average |
|---|---|---|---|---|---|---|---|---|
| % | 3 | 5 | 13 | 22 | 25 | 18 | 13 | 3.7 |

This question was marked globally. A comprehensive and thorough discussion that addressed both strengths and weaknesses of mediation, by reference to the strengths and weaknesses of formal methods of dispute resolution, received full marks. Some students evaluated arbitration without reference to mediation. These responses received few marks.

This question was generally handled well. High-scoring responses were able to extrapolate the critical elements of mediation that showed that it was more often than not a better way to resolve disputes than a more formal method, having regard to the cost involved with formal methods, the

time it takes to have a dispute resolved formally, and the issues around risk, uncertainty and lack of control over the outcome.

Some common misconceptions remain about mediation and arbitration. First, it is not always the case that mediation is inappropriate for parties where there is animosity. Second, while mediation may not result in a formal binding order from the court, it is common for the parties to sign terms of settlement upon agreeing the outcome. Such terms may then create a binding contract between the parties, which would be enforceable if one of the parties later breached that contract.

Finally, students should recognise that arbitration is often not automatically available to parties in dispute. Other than arbitration in the Magistrates' Court for small claims, arbitration is normally used in commercial disputes where the parties have agreed by contract to resolve by arbitration any dispute that may arise.

The following points could have been made.

**Strengths of mediation**

- Mediation is far more informal (as the statement suggests), providing a much less intimidating forum in which the dispute can be resolved.
- Mediation enables a mediator to have some active dialogue with the parties, particularly when the parties separate following joint session, in an informal way that enables the parties to discuss with the mediator the issues in dispute.
- Mediation provides the parties with control of the outcome, and may involve an outcome that is not necessarily sought in the statement of claim (if there has been one filed).
- Mediation can happen at an early stage of the proceeding, thus saving costs.
- Mediation is much more cost effective overall – arbitration normally results in a resolution once evidence has been filed and the arbitrator has determined the dispute.
- There is far less risk and uncertainty in a resolution obtained at mediation.

**Weaknesses of mediation**

- Mediation can be a waste of time, particularly in circumstances where court involvement is required or where the parties desire a court determination.
- Mediation may not be appropriate for certain disputes.
- Terms of settlement agreed at mediation can be enforceable, whereas an arbitral award is automatically enforceable.
- If the parties are seeking a binding outcome that is enforceable, there can be some merit in some disputes having an arbitrator make a determination.

**Question 12**

| Marks | 0 | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | Average |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| % | 10 | 7 | 10 | 11 | 12 | 12 | 13 | 11 | 8 | 4 | 2 | 4.4 |

This question was marked globally. To obtain full marks, students needed to address the 'extent to which', and discuss both the adversary system and the doctrine of precedent in the context of the statement. That is, a discussion of both those systems needed to have regard to how both assisted or limited the judge in resolving disputes.

This question required a combination of knowledge from Unit 3 and Unit 4. Many students described the strengths and weaknesses of the adversary system and the doctrine of precedent without any reference back to the stimulus material. This was not a high-scoring response, and students are strongly discouraged from providing responses of this type.

Other students discussed possible reforms or alternatives, such as the inquisitorial system. These responses strayed too far from the question that was asked.

High-scoring responses were those that linked the strengths and weaknesses of the adversary system and precedent back to the statement, namely, how it was that they enabled, or did not enable, a judge to resolve disputes. Students could have discussed the statement in the context of civil or criminal cases, or both. While there didn't need to be a conclusion, the 'extent to which' part of the question needed to be addressed.

There still remains a misconception that judges in the adversary system are passive and have no involvement in the case. Students are urged to consider the significant powers of case management that judges have in resolving disputes.

The following points could have been made.

**Adversary system of trial**

Strengths

- An independent and unbiased adjudicator hears and determines the dispute.
- The judge has no involvement in determining the evidence to be used to determine the issues.
- The parties are in complete control and determine what evidence they want to lead, meaning the judge is free to hear and determine the case with an impartial mind.
- There are rules of evidence, which allows the judge to ensure that there is a level playing field.

Weaknesses

- The judge to some extent is limited by the operation of the adversary system – the judge takes no part in the gathering of evidence or the active questioning of witnesses and relies wholly on the parties having discovered all relevant documents and based their case on evidence that will enable the judge to properly make a decision.
- The parties may struggle with the system without any legal practitioners assisting them, and this may inhibit the judge somewhat in ensuring he or she has all the relevant evidence before him or her.
- Legal practitioner involvement can make matters very expensive, and there can be some argument that the experience and quality of the legal practitioner can have an impact on a party getting proper representation at trial.

**Doctrine of precedent**

Strengths

- The doctrine of precedent allows the judge some flexibility. The law can be expressed as a general principle (e.g. the 'neighbour test') allowing the courts to adapt it to fit the circumstances before the court.
- Judges can fill the gaps in the law by making a decision on a matter when it arises.
- The law is prevented from being too rigid, with judges distinguishing, overruling and reversing previous decisions.
- Judicial decisions are free from outside pressure.
- The doctrine of precedent limits the possibility of prejudices or bias influencing judicial decisions.

Weaknesses

- Judges cannot determine what the law is unless a case is brought before the court and only if the party has standing.
- The court system is very expensive, meaning that often old precedents or 'bad law' can subsist until such time that judges have an opportunity to provide judicial guidance or change the law.

- Judges may be bound by an old precedent, which could lead to unjust results.
- There may be a reluctance by some judges to change the law.

The following is the beginning of a high-scoring response.

*To some extent I agree with this statement, although in some cases the adversary system and the doctrine of precedent do not necessarily work well, and thus judges do not always resolve disputes effectively.*

*The judge's role in the adversary system is to act as an independent, impartial arbitrator who is not seen to favour one side. They merely decide upon the facts of the case (if a jury is not present) and ensure that the rules of evidence and procedure are being adhered to. The judge can call witnesses and ask questions but only to clear up any ambiguities on points already made. Thus, they remain unbiased and contribute to the fairness of a hearing. This is a major strength of the adversary system which leads to an fair and unbiased dispute resolution. However, the judge is arguably one of the most experienced in the legal profession and cannot use their knowledge and expertise to their fullest capacity due to its largely inactive role.*