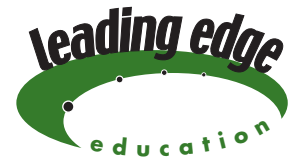


Legal Studies update



Legal Studies Trial HSC 2010 Answers

Question 16

- a. **Natural justice: 2 aspects: No bias rule and fair hearing rule**

No Bias rule: A person against whom a decision is made, administrative or judicial, has a right for a matter to be heard by an independent arbiter. That is, there must be no favour or discrimination shown. Bias apparent and actual should be absent (2 marks)

Fair hearing rule: A person should be given a fair hearing. Features of this are: time to prepare a case, a right to be heard (may be through legal representation from legal aid), a right to appeal and the right to be given reason(s) for the decision made. (2 marks)

- b. **International human rights issue:** people smuggling/human trafficking, child soldiers, child labour, and so forth. Students should define the problem and state where it occurs and how prevalent it is (2 marks).

Legal remedies: should refer to any treaty or Declaration made by the UN in respect of the issue (1 mark) and any legislative efforts made by the nation State (1 mark) examining the effect each of these has on the issue/problem.

Non-legal remedies: should refer to media (the means by which all non-legal remedies gain power to put pressure on legal measures), lobby groups, NGOs and others that have a particular view on how human rights issues should be addressed. Again the effectiveness needs to be clearly examined (2 marks)

Question 17 Crime

- a. **Situational crime prevention:** physical alteration to a site in order to create greater levels of safety (eg cameras, lighting, locks, police patrols, fences, warning signs, etc) (1 mark) **Social crime prevention:** efforts to improve the social outcomes of people through education and the offering of opportunities to increase social status (1 mark).
- b. **Education:** this aims to give people opportunities to learn to think about actions and outcomes and make positive decisions about income earning rather than turning to a life of crime. Education includes creating in people an awareness of how social disadvantage is reproduced and how the cycle can be broken. It also refers to the gaining of an education in order to maximise income earning and job opportunities. Improve life chances create social order. (2 marks)

Regulation: this is a reference to how things that are criminalised shape the behaviour of people who do not want to be punished. Articulation of what is wrong gives people a choice to comply with social values expressed through the law. Punishment, which is set under the regulations, sanction certain behaviours thus creating social order. (2 marks)

- c. **Post sentencing decisions:** there are three post-sentencing decisions including: security classification, protective custody and parole. Students need to outline each of these and make reference to how they relate to both criminal justice and punishment. Thus, incarceration for example, carries with it the need to address each of these decisions at some point. However, these decisions may not be relevant for others form of punishment. This then leads students to notions of criminal justice and how the range of punishments reflects criminal justice. (8 marks)
- b. A current criminal justice issue: A student can refer to any of the following:
- **Anti-bikie legislation and the effect of ‘contact’**
 - **The use of tasers instead of guns**
 - **Changes to the Jury eligibility**
 - **The independence and funding of the Office of the Director of Public Prosecutions) ODPP**
 - **Apprehended Violence Orders (AVOs)**
 - **Mental illness and incarceration rates**
 - **Double Jeopardy changes**
 - **The use of Continuing Detention Orders (CDOs)**
 - **The parole process**
 - **Minimum sentences and judicial discretion**
 - **Role of victims**
 - **Jury trials**

Here the independence and funding of the Office of the Director of Public Prosecutions (ODPP) is explored:

In NSW the body which undertakes prosecutions on behalf of the State is called the Office of the Director of Public Prosecutions (ODPP). The DPP carries out the following functions:

- Conducts prosecutions on behalf of the ‘Crown’ (the State) for indictable offences. These may be in the District or Supreme Court;
- Conduct committal hearings for indictable offences in the Local Court;
- To initiate and follow through appeals, on behalf of the State;
- To respond to appeals when a successful prosecution for an indictable matters is appealed to a higher Court.

Success of the Office of the DPP

In the year ended 30 June 2008, there were 15,123 cases dealt with by the office. 77% of these matters returned a verdict of guilt. The average number of days between arrest and committal for trial in 2007-2008 was 234 days. **Source: Office of the Director of Public Prosecutions, 2007-2008 Annual Report**

Life Tenure and the DPP

The NSW Director of Public Prosecutions is Nicholas Cowdery QC AM. This particular position attracts life tenure meaning that the office is held for life. The reason for this is to avoid conflicts of interest. If a person holding the office needed to reapply every few years then the position would become politicised. This means that the independence of the office could be compromised. The effect of life tenure means that the DPP can criticise government without fear.

Of course, the criticism should be reasonable and based on principles related to justice and the administration of the law. Note however, that the NSW government has recently passed into law that any future appointed DPP will not have life tenure.

The DPP and criticism of the State government

Nicholas Cowdery has been quite critical of the State government for a number of years. In his role as DPP has publically complained about the level of funding being given to the Office of the DPP. Some of the issues between the DPP and the State government are indicated in the 'Judgement and Criticism' textbox.

Judgement and Criticism

The State government has been critical of the Office of the DPP generally, and Nicholas Cowdery particularly, for many years. For his part, Nicholas Cowdery has been vocal and critical about various pieces of legislation and their effect on the administration of justice in NSW. Moreover he has also refused to allow the government to dictate which matters should be the subject of prosecution, sentencing or appeals. Politicians tend to turn issues of law and justice into an attempt to attract voters and implement policies through use of the media. However, the Office of the DPP is meant to be independent of the government.

Some issues of disagreement

For many years Nicholas Cowdery has criticised the State government for underfunding the Office of DPP. In seeking to effectively fund prosecutions and appeals, the DPP's office must make resourcing decisions about what cases will be pursued and which will not. In 2007 the DPP decided to proceed with a prosecution against Labor politician who had allegedly committed child sex and drug offences. This issue placed the State government under pressure. The government shortly afterwards passed legislation abolishing life tenure for future DPPs in NSW. It also audited the Office of DPP via the State Auditor-General. The A-G looked at the funding of the Office and decided to appoint a financial administrator to manage the \$100 million budget.

Criticism of anti-terrorism laws and anti-bikie laws

Nicholas Cowdery has said that the anti-terrorism laws are unfair and need to be amended to better reflect the balance between the rights of the individual and the rights of the community (community protection). He also believes that the new anti-bikie legislation breaches the rule of law. He states that they are disproportionately strong and provide the police with too much power. He said that "There are more effective ways of addressing the threats of violence and drug distribution than the bikie gangs pose". He believes that the already existing legislation in the *Crimes Act*, with its anti-gang criminal provisions is already strong enough to address the threat posed by bikies.

Is the Office of DPP necessary..??

Nicholas Cowdery has explained why the DPP's role is absolutely central to upholding the rule of law in a democracy. He did so at a Conference in late 2008 when he recounted the following story:

"At the beginning of the Seoul conference, as President of the IAP, I presented some awards to various prosecutors who were deserving of international recognition by reason of the special service they had rendered or the exceptional hardships they had encountered and resisted. One of those awards was to a team of prosecutors and investigators from the Central Investigation Department of the Korean Public Prosecutors' Office. The case for which they earned the award involved a political slush fund financed by businesses for the benefit of certain politicians and parties during a presidential election campaign (with the prospect, of course, of future corrupt financial advantage to those businesses if "their" candidates were elected). A fund of over USD\$70m had been accumulated illegally with the intention of its being used to influence the outcome of elections. The remarkable result of the work of the prosecutors was that 74 politicians (including 27 serving members of parliament) were implicated in the case and were successfully prosecuted.

The reason I tell this story is to highlight the serious challenges for the prosecutors that had to be overcome while achieving that result and the lessons to be learnt from that process. During the investigation the business community generally, initially drawing some support from the media, protested that the investigation was hampering their business activities. The political establishment also tried to use its combined influence to have the investigation stopped. Whenever a large deposit

of funds was discovered the political parties connected with it claimed that the investigation was biased and politically motivated. The campaign of interference was very strong, well resourced, very public and quite personal. Interestingly, the general community soon developed a different view and expressed it clearly. Korea has had a true democracy only since 1988 – before then there was autocratic rule of various forms – so comparatively recently won democratic rights and freedoms are still precious to the hearts and minds of 47 million Koreans. Among those treasures is the rule of law as we would also understand it.

The public, keen to foster and maintain a clean and transparent society, strongly supported the investigation and prosecution. Ordinary citizens even formed a fan club for the Prosecutor General Mr Song, Kwang-soo and the prosecutor in charge of the matter Mr Ahn, Dai-hee. Responding to this community pressure and abandoning their business allies, the media then swung behind the investigation and one of the leading newspapers even selected Mr Ahn as its Man of the Year in 2003”. There are some lessons to be learned from this story. These include:

- The need for prosecutors to remain resolute in the face of unprincipled attack;
- The capacity of a properly run criminal justice system to do justice, even in the face of adversity;
- The importance of the application of clearly defined powers in an orderly way in accordance with the rule of law.

Source: Nicholas Cowdery, “Independence of the Prosecution”, a paper delivered to the International Association of Prosecutors, Brisbane, 31.07.07

Assessing the role of the ODPP

The effectiveness and the efficiency of the NSW criminal justice system is certainly questioned in respect of the ODPP.

For individuals:

- **Equality:** equality is not afforded to those disadvantaged socio-economically due to limited funding of the body
- **Accessibility:** The most marginalised are most affected by underfunding of the ODPP which diminishes accessibility to the legal system
- **Enforceability:** The lack of funding compromises the capacity of the State to bring cases and also defend or appeal them
- **Resource efficiency:** The lack of funding creates a competition for resources meaning that some cases cannot be pursued – eg The Diane Brimble Case
- **Recognition of individual rights:** The lack of funding to the ODPP are a direct assault on individual rights in that they reduce the power of the individual to be protected with respect to the state.

For society:

- **Resource efficiency:** the resources applied are spent competing interests as budgetary constraints limit what can be done
- **Law as a reflection of community standards and expectations:** it is questionable whether the loss of funding reflects community standards and expectations. Indeed most people would want the ODPP to be appropriately funded in order that justice can better be served.
- **Opportunities for enforcement:** the opportunity for enforcement is reduced or limited by the lower funding given to the ODPP
- **Appeals and review:** there is lesser opportunity for appeal and review. Appeals to criminal cases go to the Supreme court which is less affordable for the state given chronic underfunding of the ODPP
- **Balance of individual rights and values and community rights and values:** the balance has gone both against the individual and also the criminal justice system. The reallocation of resources by the State government away from criminal justice (through removing funding from the ODPP) undermines the rights of individuals and favour the rights of the accused. This undermines criminal justice outcomes.

Optional Focus Studies

Question 18 (a) – 25 (a)

<ul style="list-style-type: none"> • With reference to the relevant focus study the student discusses commitment and compliance with the law • Student clearly articulates the relationship between community values and expectations and individual values and rights • Student synthesises relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a logical, sustained and well-structured response to the issues • Student integrates reference to the quote 	25 - 21
<ul style="list-style-type: none"> • With reference to the relevant focus study the student discusses commitment and compliance with the law • Student articulates the relationship between community values and expectations and individual values and rights • Student explains relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a logical, sustained and well-structured response to the issues • Student integrates reference to the quote 	20 - 16
<ul style="list-style-type: none"> • With reference to the relevant focus study the student describes commitment and compliance with the law • Student refers to the relationship between community values and expectations and individual values and rights • Student refers to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a sustained and structured response to the issues • Student may refer to the stimulus quote 	15 - 11
<ul style="list-style-type: none"> • With reference to the relevant focus study the student refers to commitment to, or compliance with the law • Student may refer to community values and expectations or individual values and rights • Student may refer to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a report which may refer to the quote 	10 - 6
<ul style="list-style-type: none"> • Student may refer to the law • Student may refer to legislation, the media, case(s) or other documents • Student presents a response to the question 	5 - 1

Question 18 (b) – 25 (b)

<ul style="list-style-type: none"> • With reference to the relevant focus study the student discusses in detail the nature of legal processes and institutions • Student clearly articulates how legal processes and institutions protect the rights of particular parties • Student synthesises relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a logical, sustained and well-structured response to the issues 	25 - 21
<ul style="list-style-type: none"> • With reference to the relevant focus study the student discusses the nature of legal processes and institutions • Student articulates how legal processes and institutions protect the rights of particular parties • Student explains relevant examples by reference to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) • Student presents a logical, sustained and well-structured response to the issues 	20 - 16
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<ul style="list-style-type: none"> • With reference to the relevant focus study the student refers to the nature of legal processes and/or institutions • Student may refer to how legal processes and/or institutions protect the rights of particular parties • Student may refer to legislation, media reports, cases, treaties or other documents (eg law reform commission reports) 	10 - 6
<ul style="list-style-type: none"> • Student may refer to the law • Student may refer to legislation, the media, case(s) or other documents • Student presents a response to the question 	5 - 1